

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v.

ROBERT JAMES MCCABE,

Defendant.

Criminal No. 2:19cr171-01

ORDER

Pending before the Court is Defendant Robert James McCabe's Motion for Psychiatric Exam to Determine Competency. ECF No. 192. For the following reasons, Defendant's Motion is **DENIED**.

I. BACKGROUND

Defendant Robert James McCabe ("Defendant" or "Mr. McCabe") was charged with multiple counts related to fraud and money laundering. Mr. McCabe's conduct in the offenses has been documented at length by this Court elsewhere. The Court assumes familiarity with those facts and proceeds to recount relevant facts for the purposes of this Motion.

After a three-week jury trial, Mr. McCabe was found guilty of Counts One through Eleven. Redacted Jury Verdict, ECF No. 144. Counts One and Two charged Defendant with Conspiracy to Commit Honest Services Mail Fraud, in violation of 18 U.S.C. § 1349. *Id.* Counts Three through Seven charged him with Honest Services Mail Fraud, in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2. *Id.* Counts Eight and Nine charged him with Conspiracy to Obtain Property Under Color of Official Right,

in violation of 18 U.S.C. § 1951. *Id.* Count Ten charged him with Obtaining Property Under Color of Official Right, in violation of 18 U.S.C. § 1951. *Id.* Count Eleven charged him with Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. § 1956(h). *Id.*

Defendant never raised the issue of competency or any other related issues during trial. Conversely, he testified extensively and in detail at trial and was observed to be competent by this Court. He was aware of the sequence of events, facts as alleged by the Government, and the relevance of them in relation to his charges. At the end of trial, this Court remanded Mr. McCabe into custody pending sentencing. He has remained in solitary confinement at Pamunkey Regional Jail and will remain in custody until his sentencing hearing scheduled for May 20, 2022. Mot. to Determine Competency at 1, ECF No. 192.

Mr. McCabe filed the instant Motion for a hearing to determine his competency on January 14, 2022. ECF No. 192. He argues that he was diagnosed with early-onset Alzheimer's disease. *Id.* at 2. Defendant recounts an assessment conducted by Dr. Sridhar Bhat which showed the Alzheimer's diagnosis, vertigo, dizziness, and sensory neural loss. *Id.* Mr. McCabe argues that his memory loss from Alzheimer's has accelerated due to his confinement conditions. *Id.* Defense counsel observes that Mr. McCabe may "be suffering from mental disease or defect that renders him mentally incompetent to such a degree that he is no longer able to properly assist in his own defense" and seeks a medical examination to determine his competency pursuant to 18 U.S.C. § 4241(b). *Id.* Mr. McCabe does not contest his competency at the trial itself.

Id. The Government opposes the Motion. Resp. in Opp’n, ECF No. 198. This matter is fully briefed and ripe for resolution.

II. LEGAL STANDARDS

A defendant in criminal proceedings is competent if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (196). Trial courts are tasked with conducting competency hearings under specific circumstances as codified in 18 U.S.C. § 4241.¹

Under 18 U.S.C. § 4241(a),

[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, . . . the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion . . . if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Subsection (b) provides that the Court may order that a psychiatric or psychological examination be conducted prior to the hearing. 18 U.S.C. § 4241(b). At such a hearing or thereafter, the court must find “by a preponderance of the evidence” that the

¹ The title of Section 4241 expressly refers to determination of mental competency to stand *trial*. However, the text of the statute applies more broadly to “any time . . . prior to the sentencing.” 18 U.S.C. § 4241(a); see *United States v. Torres*, 869 F.3d 291, 321–23 (4th Cir. 2017) (explaining that competency evaluation and hearing under 18 U.S.C. § 4241 may occur at any time prior to sentencing even if it is post-verdict); see also *United States v. Byrd*, 838 F. App’x 762, 764 (4th Cir. 2021) (analyzing defendant’s motion for pre-sentence mental evaluation under 18 U.S.C. § 4241).

defendant is not competent. *United States v. Alley*, 731 F. App'x 220, 220 (4th Cir. 2018) (quoting *United States v. Basham*, 789 F.3d 358, 379 (4th Cir. 2015)).

The assessment of reasonable cause to hold a hearing is left to the discretion of the trial court. *United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995). A variety of types of evidence can establish reasonable cause. *Id.* at 1290. This can include “evidence of irrational behavior, the defendant’s demeanor at trial, and medical opinions concerning the defendant’s competence.” *Id.* However, a defendant’s “low intelligence” or “mental disorders” do not “automatically render him incompetent.” *United States v. Williams*, 778 F. App'x 239, 241 (4th Cir. 2019) (quoting *United States v. Robinson*, 404 F.3d 850, 858 (4th Cir. 2005)) (internal quotation marks omitted).

III. ANALYSIS

Mr. McCabe has not established reasonable cause to believe that he may be suffering from a mental disease to such an extent that he is unable to understand the proceedings against him or assist counsel in his defense. The Court bases its conclusion on a combination of evidence, which it addresses in turn below.

First, Defendant’s demeanor at trial demonstrated competence and awareness of the proceedings against him. *See Walton v. Angelone*, 321 F.3d 442, 460 (4th Cir. 2003) (finding “no doubt” that defendant was competent based in part on his extensive colloquy during various court proceedings, which demonstrated that he had sophisticated understanding of proceedings). Mr. McCabe voluntarily testified for approximately two full days during trial. He was asked in-depth questions about the series of events—dating back to 1994 and spanning 20 years—surrounding Norfolk

City Jail and contracts he awarded for it. He was asked about minute contractual details, asked to recall different events and transactions that were seen as the basis of a *quid pro quo* relationship, and questioned about various sums of money. At no point during these two days, or at other points during the three-week trial, did the Court observe Mr. McCabe to show any signs of incompetence. The Court observed the exact opposite. Mr. McCabe was alert and spoke assertively. He recalled all facts in detail. Furthermore, he did not notify the Court at any point that he did not understand advice of counsel or his rights. This Court must conclude that Mr. McCabe exercised his constitutional right to proceed to trial and did so with full knowledge of the nature of the proceedings that took place against him.

In addition, Defendant's new information regarding his Alzheimer's diagnosis is insufficient to show reasonable cause for a competency hearing. He claims that he was previously diagnosed with early-onset Alzheimer's disease and that, in combination with his solitary confinement, the disease has accelerated and caused his cognitive decline. Mot. to Determine Competency at 2, ECF No. 192. Defense counsel states in the Motion that "he has reasonable cause to believe that Mr. McCabe may presently be suffering from a mental disease or defect that renders him mentally incompetent." *Id.* This conclusory statement by counsel, however, is insufficient to show reasonable cause.

Nor does Mr. McCabe's alleged Alzheimer's diagnosis by itself show reasonable cause for a competency hearing. For a mental disease to satisfy the "reasonable cause" standard, a party must show that the symptoms associated with the mental disease

“impair [his] reasonable understanding of the proceedings” and “ability to assist in his own defense.” *United States v. Batayneh*, No. 12-20303, 2018 WL 10419332, *6 (E.D. Mich. Nov. 5, 2018) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)); see also *United States v. Liberatore*, 856 F. Supp. 358, 360 (N.D. Ohio 1994) (citing *Dusky*, 362 U.S. at 402)). There is no evidence that Mr. McCabe’s diagnosis has risen to this level. He does not describe challenges he may currently be facing that impede his ability to assist his counsel as the sentencing date approaches. Instead, the Motion contains plain conclusory statements that he has been diagnosed and has had an initial assessment at Pamunkey Jail by Dr. Sridhar Bhat. Mot. to Determine Competency at 2, ECF No. 192. There is no discussion of the potential impact of any memory loss or other symptoms he may be suffering on his ability to understand the proceedings against him or to assist his counsel in his defense. Mere forgetfulness or “minor defects in cognitive abilities” do not rise to the level of incompetence. *United States v. Hogan*, 986 F.1d 1364, 1373 (11th Cir. 1993) (affirming that person with dementia was competent because he could render assistance to his attorney).

Dr. Bhat’s report does not provide an additional showing that Mr. McCabe’s Alzheimer’s diagnosis—or any other pre-existing condition—weakens his understanding of the proceedings or his ability to assist in his own defense. From Dr. Bhat’s most recent assessment of Mr. McCabe on November 23, 2021, it is evident that he has a diagnosis of early onset Alzheimer’s disease. Sealed Medical R. at 2, ECF No. 204. Contrary to what is asserted in the Motion, however, Dr. Bhat nevertheless reported that Mr. McCabe’s prior neurological examination was normal and that he

suffered mild cognitive impairment. *Id.* This does not establish reasonable cause to believe that Mr. McCabe's alleged cognitive deterioration is at such a level that he does not understand what is at stake in these proceedings. The same is true for Mr. McCabe's other symptoms. He argues that his symptoms of "dizziness, elevated PSA count, episodes of falling, unsteady gait, and use of a walker" suggest he may be incompetent to be sentenced. Def. Reply at 1–2, ECF No. 203. Again, however, nothing in Mr. Bhat's report suggests that these alleged symptoms are related to his Alzheimer's diagnosis or impede his mental functioning at such a level as to render him incompetent. Dr. Bhat has not described any symptoms, diagnoses, or medical opinions that provide reasonable cause to conclude that Mr. McCabe cannot understand the action against him or assist his counsel.

Furthermore, this Court notes that Dr. Bhat's early onset Alzheimer's diagnosis appears to be based on Mr. McCabe's self-reported symptoms and the diagnosis of a previous treating doctor in Virginia Beach. Sealed Medical R. at 2, ECF No. 204. Mr. McCabe stopped obtaining treatment from this doctor in 2017. *Id.* Again, aside from the bare fact of the Alzheimer's diagnosis and self-reported symptoms related to dizziness and unsteadiness on his feet, Mr. McCabe makes no showing that he does not understand the nature of the proceedings such as his upcoming sentencing. Nowhere does Dr. Bhat draw any conclusion regarding Mr. McCabe's competence or diminished cognitive state. For these reasons, the Court finds that Defendant has not

established reasonable cause to conduct a competency hearing or the necessity of a psychiatric or psychological evaluation.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Determine Competency (ECF No. 192) is **DENIED**. The Clerk is **REQUESTED** to forward a copy of this Order to Mr. McCabe, defense counsel for Mr. McCabe, and the Assistant United States Attorney.

IT IS SO ORDERED.

February 16, 2022
Norfolk, Virginia

/s/
Arenda L. Wright Allen
United States District Judge