

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2746
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

O. DEAN COUCH, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-91-0172-1)

(November 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

O. Dean Couch, Jr., appeals his convictions for aiding and abetting bank fraud and making false statements to a federally insured bank, contending, *inter alia*, that the district court erred in finding him competent to stand trial. We **AFFIRM**.

I.

Pursuant to a 16-count indictment, Couch was convicted by a jury of aiding and abetting bank fraud and making false statements to a federally insured bank, in violation of 18 U.S.C. §§ 2, 1014,

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

and 1344. He was sentenced to a one-year term of incarceration, seven concurrent suspended five-year terms of incarceration, eight concurrent suspended two-year terms of incarceration, and 15 concurrent five-year terms of probation to run consecutive to the one-year term of incarceration, and was ordered to pay restitution of \$24,989,905, and a special assessment of \$800.

II.

A.

Couch contends that the district court erred in finding him competent to stand trial. To decide whether a defendant is competent to stand trial, "a district court must determine whether the defendant is presently 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". **United States v. Dockins**, 986 F.2d 888, 890 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 149 (1993) (quoting 18 U.S.C. 4241(d)); see also **Dusky v. United States**, 362 U.S. 402, 402 (1960) (internal quotation omitted) (a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him").

The "district court's determination of competency to stand trial may not be set aside on review unless it is clearly arbitrary or unwarranted", but we must "take a hard look at the trial judge's ultimate conclusion and not allow the talisman of clearly erroneous

to substitute for thoroughgoing appellate review of quasi-legal issues". *Dockins*, 986 F.2d at 890 (internal quotation marks and citations omitted). The Government bears the burden of demonstrating, by a preponderance of the evidence, a defendant's competency. *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987).

The district court conducted a competency hearing on February 14 and March 13, 1992. Couch offered the report of Dr. Largen, which contained a clinical neuropsychological evaluation, and of Dr. Altschuler. The Government offered a psychological evaluation of Couch conducted by Dr. Hays, as well as a competency evaluation conducted by Dr. Stone. All four doctors testified at the February hearing. At the March hearing, three of Couch's attorneys testified as to his inability to assist them.

Dr. Largen's report concluded that Couch suffered from a "dementing disorder" compatible with Alzheimer's Disease and certain types of small stroke disease. In Largen's opinion, based upon a clinical interview, neuropsychological testing, personal observations, reviewer-provided records, and interviews with Couch's spouse and attorneys, Couch was not competent to stand trial. At the hearing, Largen testified that he performed a complete neuropsychological evaluation of Couch, which entailed testing of Couch's intellectual and memory functions, ability to abstract, perceptual ability, motor and visual ability, ability to think flexibly, and language, reading, writing, and arithmetic functioning. Largen testified that Couch took longer to complete

the tests than anticipated, and that he tended to ramble on matters tangential to specific questions. Largen found Couch's I.Q. to be average, but determined that he was weak in the area of "abstraction".

Consistent with his report, Largen also testified that Couch was suffering from a "dementing disorder" such as Alzheimer's or stroke injury. Couch also showed signs of "senile dementia", which Largen defined as "loss of memory, loss of intellectual ability, and loss of other higher-thinking type of functions which the usual understanding is it's due to an organic or brain disorder". Largen concluded that Couch was not capable of assisting his counsel and had reservations concerning Couch's ability to fully understand the legal proceedings.

The district court questioned Largen about the relevancy of Couch's difficulty in remembering personal items such as his social security number, his wife's birthday, medical conditions for which he was being treated, the year he married his current wife, and the year he was divorced from his previous wife, stating that "those are the same things I can't remember, except I can remember my social security number". In response to the court's questions, Largen admitted that Couch probably could identify people who had worked for him, although he might not be able to remember their relationship to the business. On cross-examination, Largen acknowledged Couch's capacity to shop and to drive a vehicle throughout Houston, both during the day and at night. Largen also

acknowledged that Couch's tendency to ramble was evident in his younger days.

Dr. Altschuler testified (opined) that Couch was not competent to stand trial, because he could not assist his lawyers in the preparation of his defense. His testimony corroborated his written report, which, based on a psychiatric evaluation and neuropsychological testing, concluded that Couch could understand the nature of the charges and proceedings, but not their consequences, and was incompetent to aid his attorneys. Altschuler further noted in his report that the current evaluation "was particularly striking when ... compared to an evaluation performed approximately five years [earlier, when] there were no cognitive disturbances".

Altschuler testified that he premised his conclusion on Couch's inability to do abstract thinking. The district court asked Dr. Altschuler whether Couch's inability to remember and understand certain things was similar to the position of a defendant who is merely "stupid". Altschuler agreed. On cross-examination, Altschuler acknowledged that Couch had the ability to perform ordinary tasks such as driving and shopping.

The Government's psychiatrist, Dr. Stone, submitted a report detailing the results of his competency evaluation of Couch, and opined that Couch was competent to stand trial. Stone specifically stated that Couch asserted that he was

competent to stand trial. [Couch] expressed the view that it was his attorney's idea to have him declared incompetent as a way to avoid a trial. Mr. Couch stated that his family felt he should

support this plan. Mr. Couch stated repeatedly that he fully underst[ood] the facts of the case and the possible consequences of going to trial. [Couch] stated he is innocent of all allegations and would like to prove that in court knowing that he [risked] going to jail.

Stone noted "some memory loss, both long and short term, some decreased concentration and ability to focus fully on a given topic and some loss in abstracting ability". Stone also noted, however, that Couch had "excellent recall of relevant details needed to assist in his defense".

At the February hearing, Stone agreed that Couch exhibited some loss in functioning, but opined that the ability to abstract was "a very minor measure of [Couch's] cognitive function in terms of competency to stand trial". In response to questioning by the district court, Stone stated that, despite the complexity of the case, Couch had an understanding of the basic information sufficient to assist his counsel in preparing his defense.

Dr. Hays prepared a psychological evaluation of Couch for the Government, opining that he was competent to stand trial. This evaluation was based, in part, on a number of psychological tests and personal interviews. Although Hays noted that Couch "appear[ed] to have suffered some decrement in his cognitive functioning", it was "primarily a function of aging".

Hays testified that Couch was competent to stand trial. He testified that Couch's ability to use factual information was above average; and, although he acknowledged that Couch "suffered some detriment in his cognitive functioning", he testified that Couch had "considerable mental ability".

Three of Couch's attorneys testified at the March hearing; each, that Couch was unable to assist them in his own defense. On cross-examination, one of Couch's civil attorneys, Thomas Kirkendall, testified that he did not make "any sort of a competency motion in the context of [Couch's] bankruptcy case". Testimony at the March hearing also established that Couch was representing himself in a civil matter, with the assistance of attorneys who prepared various documents and pleadings which Couch then signed. Couch also submitted affidavits from two of his lawyers, both of whom averred that Couch's mental capacity had deteriorated seriously.

The district court, having "analyzed the reports of the psychologists and the lay testimony very, very carefully", noted that "Couch is a difficult client", but found that he had "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and that [Couch had] a rational and factual understanding of the proceedings against him". The district court stated that it was not basing its decision on the fact that the doctors who testified that Couch was incompetent failed to specifically state the legal standard for incompetency; rather, it did not "think that [Couch's experts'] finding[s] [were] supported by the facts" and "would give more credence to the Government's psychologist [and] psychiatrist". The district court also stated that it believed that "the facts of [the] case and the testimony of the Government's psychiatrist were much more to the point and ... much closer to the legal standard", and that it was

"convinced by Dr. Stone and Dr. Hays ... with regard to [Couch's] competence to stand trial".

Pursuant to our review of this conflicting evidence, we cannot conclude that the district court's ruling was clearly arbitrary or unwarranted.

B.

Couch contends that the enactment of 18 U.S.C. § 3293, extending the applicable statute of limitations from five to ten years, violates the constitutional prohibition against *ex post facto* laws. U.S. Const. art. I, § 9, cl. 3.² This contention is foreclosed by our court's recent decision in **United States v. Brechtel**, 997 F.2d 1108 (5th Cir. 1993), which held that the "extension of the limitations period neither criminalizes previously innocent conduct nor enhances the punishment for an existing crime ... [and does] not deprive [a defendant] of a defense within the meaning of the *ex post facto* clause". **Id.** at 1113.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

² At the time Couch completed the offense conduct in 1986, the limitations period was five years. 18 U.S.C. § 3282. In 1989, before that period had expired, Congress increased it to ten years. 18 U.S.C. § 3293. Couch was indicted in October 1991 (after the five-year period had expired).