RENDERED: JULY 6, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000106-MR

BARNEY CLARK — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE WILLIAM CAIN, SPECIAL JUDGE
ACTION NOS. 03-CR-00151 AND 03-CR-00228

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Barney Clark, was convicted in the Wayne Circuit Court of second-degree assault and sentenced to ten years' imprisonment. He appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant's conviction stems from events that occurred on July 13, 2003. Appellant had evidently been drinking whiskey throughout the day, and at some point had fired his shotgun at a nearby trailer that was, at the time, occupied by Appellant's neighbors, Leslie West, Judy Wombles, and Womble's son. Later the same day,

Appellant confronted a six-year-old girl with his shotgun and accused her of throwing rocks at his house. A neighbor who witnessed the latter incident called 911.

Officer Sheridan Wright of the Monticello City Police, who was dispatched following the 911 call, arrived at Appellant's residence around 10:15 in the evening. As Officer Wright approached the rear of the house, Appellant appeared with the shotgun at his waist and told Officer Wright to put down his gun. Officer Wright responded, "Barney, I'm the police. We don't do that." Officer Wright ordered Appellant to put his gun on the ground. When Appellant did not comply, Officer Wright began unholstering his service revolver as he moved toward a tree for cover. Officer Wright gave Appellant another command to drop his weapon and Appellant responded, "I am going to kill you, you son of a bitch." While there is some dispute as to who actually fired the first shot, the end result was that Appellant fired his shotgun, striking Officer Wright in the face, and Officer Wright shot Appellant in the arm.

A neighbor thereafter came to Officer Wright's assistance as Appellant reloaded his shotgun and ran into the house. Eventually, Appellant surrendered to police. Officer Wright was subsequently flown to University of Kentucky Medical Center. The shotgun blast left thirty-seven pellets in his face and resulted in the loss of his right eye.

In July 2003, Appellant was indicted by a Wayne County Grand Jury for attempted murder[1] and first-degree assault arising from the shooting of Officer Wright.

[1] The attempted murder charge was dismissed as the Commonwealth elected to try the first-degree assault charge.

Appellant was later indicted on three counts of first-degree wanton endangerment for shooting at the trailer where his neighbors were located.

Following the indictments, defense counsel filed a motion pursuant to KRS 504.100 and RCr 8.06 to have Appellant evaluated by his own expert, Dr. C. Christopher Allen, to determine his mental status at the time of the crimes and his competency to stand trial. Appellant was evaluated by Dr. Allen in November and December of 2003. In January 2004, trial court ordered Appellant to undergo an in-house mental evaluation at Kentucky Correctional Psychiatric Center (hereinafter "KCPC") in LaGrange, Kentucky.

During a November 5, 2004, competency hearing, Dr. Allen testified that Appellant's full scale I.Q. was 54. Dr. Allen noted that Appellant had an understanding of the events in question and knew that his actions were illegal. However, Dr. Allen opined that although Appellant had a very basic understanding of the legal system, he was not competent to stand trial because his poor verbal and memory skills would prevent him from assisting in his own defense.

Dr. Candace Walker, a staff psychiatrist at KCPC testified that Appellant was admitted to KCPC for five to six weeks beginning in May 2004. Dr. Walker stated that Appellant was determined to have an I.Q. of 58 based upon the Wechsler Adult Intelligence Scale (WAIS). However, Dr. Walker noted that on the Test of Non-Verbal Intelligence-Revision III (TONI-III) Appellant scored an I.Q. of 69. Dr. Walker explained that the TONI-III assessment, which took into account cultural and educational

deprivation, was significant because Appellant was basically illiterate as a result of being educationally deprived. Regarding his competency to stand trial, Dr. Walker determined that Appellant met the minimum standards of competency as he was able to understand and appreciate the nature and consequences of his actions and the legal proceedings and could assist in his own defense despite his substandard range of intellectual ability and minimal literacy skills. However, Dr. Walker did note that the scope and duration of the proceedings were important and that Appellant would require additional support and explanation of the legal terms by his attorney.[2]

By order entered April 12, 2005, the trial court declared Appellant competent to stand trial. The order provided, in part,

> Dr. Walker's opinion was the result of testing in May 2004, some 4-5 months after the testing of Dr. Allen. The Defendant has been incarcerated and has been sober and, as a result, his intellectual functioning has improved.
>
> [T]he Court finds the Defendant, Barney Clark, is competent to stand trial. During the trial, the Court will take necessary steps to allow the Defense Attorney time to explain the proceedings to him and to take such breaks as may be required for this, all as set forth in the report of Dr. Candace Walker.

Following a three-day trial in October 2005, the jury found Appellant guilty of second-degree assault and not guilty on the three wanton endangerment charges. The jury was unable to reach a recommendation on sentencing, and the trial court thereafter imposed a ten year sentence. This appeal ensued.

[2] Dr. Allen agreed with Dr. Walker regarding the need for accommodations in the courtroom. Dr. Allen stated that if someone explained a witness's testimony, Appellant could remember it and respond to the testimony.

The sole issue on appeal is whether the trial court erred in determining that Appellant was competent to stand trial. Appellant argues that KRS 504.090 provides that a defendant is either competent or incompetent, and does not contain a standard for being found "conditionally competent," or for being made competent during trial. The Commonwealth defends that the trial court's determination was based on substantial evidence.

It is well-established that a defendant cannot be tried for the commission of an offense if he is incompetent. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). *See* KRS 504.090. In *Godinez v. Moran,* 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993), the United States Supreme Court defined the standard for competence to stand trial as "whether the defendant 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.'" (*Quoting Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curium)).

In Kentucky, the standard of competency is whether the defendant has the substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate rationally in his defense. *Bishop v. Caudill,* 118 S.W.3d 159 (Ky. 2003); KRS 504.060(4). The burden is on the defendant to prove that he is incompetent by a preponderance of the evidence. *Jacobs v. Commonwealth*, 58 S.W.3d 435 (Ky. 2001); *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004), *cert. denied,*

545 U.S. 1142 (2005). A trial court's decision on competency must be based on findings of fact that are supported by substantial evidence. *Thompson, supra,* at 33; *Fugate v. Commonwealth*, 62 S.W.3d 15, 18 (Ky. 2001); *Jacobs, supra,* at 441. And the trial court's finding on the issue of competency will not be set aside on appellate review unless it is clearly erroneous.

We conclude that the trial court's decision herein was supported by substantial evidence. Dr. Walker determined that Appellant met the minimum standards for competency despite his impaired intellectual ability and minimal literacy skills. Although Dr. Allen opined that Appellant was not competent to stand trial, he acknowledged that Appellant could understand and participate in the proceedings if such were thoroughly explained to him. Simply because the expert's opinions as to Appellant's competence differed does not render the trial court's decision erroneous. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). *See also Alley v. Commonwealth,* 160 S.W.3d 736, 739 (Ky. 2005) ("The mere fact that the trial judge accepted the testimony of one of the doctors as more credible than the other, has been found to be permissible and allows the judge to make a finding regarding competency.")

Nor do we agree with Appellant that the trial court effectively created a new "conditional competency" standard. The extra accommodations and support ordered by the trial court were intended to enhance Appellant's understanding of the trial proceedings

as well as his ability to participate in his own defense. There is no question that Appellant's intellectual ability and literacy skills are impaired; however, this fact in itself did not require the trial court to conclude that he was unfit to stand trial. We agree with the Ninth Circuit's assertion in *United States v. Glover*, 596 F.2d 857, 867 (9th Cir. 1979), *cert. denied*, 444 U.S. 860 (1979), "The fact that a defendant might not understand the proceedings unless they are explained to him in simple language would put an additional burden on counsel, but certainly does not establish that the defendant is incompetent to stand trial."

Finally, we find no merit in Appellant's claim that the trial court failed to ensure that the extra accommodations were put into place. The record indicates that at least one co-counsel and one assistant remained with Appellant throughout the trial. It appears that there was only one occasion that counsel requested additional time to explain something to Appellant, and the trial court accommodated such request. Thus, "any contention that the court should have . . . slow[ed] down the proceedings is moot because no complaint was ever made about the pace of the proceedings." *Hardy v. State,* 716 So.2d 761, 763-64 (Fla. 1998).

We conclude that substantial evidence supported the finding that Appellant was competent to stand trial. As such, the trial court's decision was not clearly erroneous. *See Fugate, supra; Plumb v. Commonwealth*, 490 S.W.2d 729 (Ky. 1973).

The judgment and sentence of the Wayne Circuit Court are affirmed.

ALL CONCUR.

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