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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002118-MR

JOSHUA ROSCOE MARCUM — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
INDICTMENT NO. 06-CR-000064

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Joshua Roscoe Marcum appeals from his conviction of receiving stolen property over $300.00 and being a persistent felony offender in the second degree. He contends that his statutory and constitutional rights were violated by the trial court's failure to address his competency through a competency hearing. After careful review, we affirm.

[1]Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

Bobby Ray Smith owned an old tannery building behind the property on which Marcum's parents lived. In the tannery, Smith stored trucks and equipment, including fuel tanks. Smith's fiancée, Carolyn Short, and her sister, Pamela Witt, took care of two stray dogs, which they kept at the tannery. While feeding and watering the dogs on February 1, 2006, Carolyn noticed that six tanks were missing. The police were notified, and Officer Joe Holder answered the call to the tannery.

Officer Holder observed drag marks on the floor and a piece of yellow rope. He followed the drag marks to the back of the house owned by Marcum's parents, Teresa and Robert Sowders, where he also found pieces of the yellow rope. Robert informed the officer that he knew nothing about the tanks. Thereafter, Officer Holder spoke with Geraldine Gambrel at Spider's Recycling and learned that she had issued two checks to Marcum for tanks matching the description of those stolen from the tannery. Officer Holder and Officer Joshua Pratt thereafter proceeded to Marcum's residence. In the backyard, the officers observed a pile of scrap metal, including parts reportedly stolen from Bobby Ray Smith.

At all times, Marcum maintained that he did not know the tanks were stolen. He claimed that he found the tanks while in the woods on his property. Given the option of throwing them away or recycling them, Marcum took them to Spider's recycling, where he received $34.24 for the first two tanks and $45 for the second two tanks.

On March 31, 2006, the Bell Circuit Court Grand Jury indicted Marcum with receiving stolen property (over $300) and being a persistent felony offender in the second degree. A jury trial was held on August 15, 2006, and a verdict of guilty was returned. Marcum was subsequently sentenced to five years' imprisonment. This appeal followed.

Marcum first argues that the trial court abused its discretion in not holding a competency hearing. We disagree.

A trial court has broad discretion in determining whether a defendant has the ability to participate in his defense. *Hopewell v. Commonwealth*, 641 S.W.2d 744, 748 (Ky. 1982). The Kentucky Supreme Court clarified both the responsibilities of the trial court in this situation and the standard of review on the issue of competency:

> the standard of review when the trial court fails to hold a competency hearing is, "whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983)... "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" facts for a court to consider. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

Bray v. Commonwealth, 177 S.W.3d 741, 750 (Ky. 2005). Therefore, the issue in this case is whether the trial court had reasonable grounds to believe Marcum was incompetent to stand trial. *See* RCr 8.06.

The record does reflect that the trial court was on notice that Marcum was receiving $545.00 of benefits from Social Security Disability. It is also true that defense counsel referred to Marcum as "mildly retarded" and a "slow learner" at trial. However, the record additionally reveals that at arraignment Marcum listened to and answered all questions from the judge without hesitation, including that he understood what stolen property was and that he did not steal anything. Furthermore, the court was also on notice that Marcum had a history with court proceedings and no prior competency hearings had been needed.

In all cases there is a presumption that a defendant is competent to stand trial, and it is up to the defendant to contest this presumption. *Gabbard v. Commonwealth*, 887 S.W.2d 547, 551 (Ky. 1994). In *Matthews v. Commonwealth*, 468 S.W.2d 313, 314 (Ky. 1971), the Kentucky Supreme Court stated:

> A hearing for the purpose of determining the mental capacity of a defendant is required under this rule only in a situation where there are reasonable grounds to believe that the defendant is insane. The reasonable grounds for such a belief must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them.

Marcum failed to bring to the court's attention the need for a competency hearing, and there is nothing in the record to indicate anything "so obvious" that it was error for the trial court to "fail to be aware" of the need for a hearing.

Marcum next argues that the court erred in denying his motion for a directed verdict based on failure of the Commonwealth to prove the element of *mens rea*. We find

this issue unpreserved, and therefore deny review because we do not find there to be palpable error pursuant to RCr 10.26.

Marcum finally contends that the court erred in denying his motion for directed verdict on the grounds that the value of the tanks was inadequately proven at trial. The Supreme Court of Kentucky, however, has held that the testimony of the owner of stolen property is competent evidence as to the value of the property. *Poteet v. Commonwealth,* 556 S.W.2d 893, 896 (Ky. 1977). Smith, the owner, testified that the tanks were 125 gallon tanks, valued at $4.00 per gallon. Moreover, the value of the tanks under either Smith's or Marcum's interpretation of the value assessment exceeds $500.00, which was above the criminal valuation with which Marcum was charged. Therefore, we again find no error.

Accordingly, we affirm the judgment of the Bell Circuit Court.

DIXON, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT.

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