

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001355-MR

JAMES CLARK

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 08-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

MOORE, JUDGE: James Clark appeals the judgment of the Cumberland Circuit Court concerning his conviction for third-degree burglary. After a careful review of the record, we affirm the court's denial of Clark's motion to withdraw his guilty

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

plea on the basis of his alleged actual innocence. However, we reverse the court's order denying Clark's motion for a competency evaluation and a competency hearing, and we remand the case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the uniform citation that was issued following the events in question, an officer received a telephone call that a burglary was in progress at the residence of Keen Grant. The citation continued, as follows:

Upon entry through front door [the officer] heard several people upstairs. Made contact with 2 juveniles coming down front steps. 3 more juvenile females came back downstairs. [James Clark] was hiding in attic. [The officer] spoke to homeowner on phone who is in Boston who advised no one is to be inside the house. He wants all prosecuted. 2 juvenile females had been drinking from a bottle of whiskey – 1 female juvenile is 13 years old. [James Clark] was upset at the situation and used loud offense language as well as cursed the situation. . . . All juveniles except 1 had been drinking.

(Capitalization changed).

In the offense report that was subsequently written, it was reported that, upon being caught at the house, Clark told the officer that he had permission to be there. The officer asked dispatch to obtain the homeowner's telephone number. The officer then spoke with the homeowner, who was in Boston, over the telephone. The homeowner informed the officer that "no one was supposed to be in the residence and he did not give anyone permission."

Clark was indicted on the charges of: (1) burglary in the second degree, a violation of KRS² 511.030; (2) unlawful transactions with a minor in the third degree, a violation of KRS 530.070; and (3) disorderly conduct in the second degree, a violation of KRS 525.060.

Clark filed various motions on his behalf, including a motion for a bill of particulars; a motion for bond reduction; a motion for a speedy trial; a motion to exclude prior bad acts evidence, pursuant to KRE³ 404(b), unless a hearing is first held concerning such bad acts; a motion for discovery pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and a motion to act as his own legal counsel.

At his arraignment, Clark initially appeared without counsel. He informed the court that he and the attorney from the Department of Public Advocacy (DPA) who had been assigned to him did not agree with each other. Thus, Clark asked that he be permitted to proceed *pro se*. The DPA attorney informed the court that it is the DPA's policy not to obtain conflict counsel for a defendant simply because the defendant did not like the attorney who had been assigned to him. The DPA attorney then proceeded to represent Clark for purposes of the arraignment only. Clark entered a plea of not guilty. The court scheduled a pretrial conference for a later date, at which time the court stated it would also conduct a hearing to determine whether Clark could proceed *pro se*. The court

² Kentucky Revised Statute(s).

³ Kentucky Rule(s) of Evidence.

stated that any motions, including one for bond reduction, would be heard at that hearing.

Ultimately, the court appointed an attorney to represent Clark. In exchange for Clark's guilty plea, the Commonwealth offered to dismiss the charges of third-degree unlawful transaction with a minor and second-degree disorderly conduct. The Commonwealth also offered to amend the second-degree burglary charge to third-degree burglary. The Commonwealth's plea offer provided that, "[u]pon a plea of guilty to Burglary 3rd Degree, the Defendant shall receive a sentence of one and one-half (1 1/2) years pretrial diverted for three (3) years. Diversion is to be supervised. The Defendant shall receive credit for time served (102 days)." Clark moved to enter a guilty plea in accordance with the Commonwealth's offer on a plea of guilty. Clark's motion to enter a guilty plea included the following statement: "I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed and I understand my charges and any possible defenses to them." Clark also moved for pretrial diversion, and he withdrew his prior motion to proceed *pro se*.

The circuit court entered an order noting that Clark pled guilty and granting Clark's motion for pretrial diversion. The court ordered Clark's pretrial diversion period to be three years in length. Clark was ordered to, *inter alia*, "obey all rules and regulations imposed by Probation and Parole." The court's order noted that, pursuant to KRS 533.030(1), Clark was required not to "commit

another offense during the period of the Pretrial Diversion. Specifically, the defendant shall have no violation of the Penal Code or the Controlled Substances Act.”

Approximately seven months later, the Commonwealth moved to revoke Clark’s pretrial diversion on the bases that: (1) Clark had been charged with theft by unlawful taking under \$300 in Warren County, Kentucky, and he had been ordered to appear in Warren District Court on a particular date, but he did not appear in court that day; and (2) Clark had absconded from probation by not reporting to his probation officer nor responding to the correspondence or messages left by his probation officer for several months.

A hearing was held on the Commonwealth’s motion, in which his probation officer testified that Clark was charged with shoplifting in Warren County and he failed to report it to his probation officer until his probation officer confronted him with the charge. The probation officer also attested that Clark had failed to appear in court when required, and he also did not report back to his probation officer when required. Clark presented no evidence at the hearing. In summation, Clark’s counsel argued that, pursuant to the presentence report, Clark had not graduated from high school, and when he was in school, he was in special education classes. Clark’s counsel also asserted that Clark could not read and write to the point of understanding the conditions of his probation. Following the hearing, the circuit court entered an order voiding Clark’s pretrial diversion for the reasons set forth in the Commonwealth’s motion to revoke pretrial diversion.

Clark's counsel, who also represented Clark during the guilty plea proceedings, moved on Clark's behalf for a competency determination. The bases for the motion were: (1) that Clark could "show that reasonable cause exists to believe [he] may not be competent to stand trial"; (2) that Clark's "ability to communicate with his attorney regarding formulating a defense and understanding the consequences of his case is limited"; and (3) that "counsel feels that [Clark] is not able, at the present time, to fully appreciate the nature of the proceedings against him, and/or assist counsel adequately in preparing his defense or consider alternative courses of action that may or may not be more appropriate for [him]."

Counsel also moved, on Clark's behalf, to withdraw his guilty plea on the following bases: (1) Clark previously received psychiatric treatment and he lacked the capacity to fully appreciate the severity of the charges; and (2) Clark "recently advised Counsel that he had an affirmative defense of consent to the felony charge of Burglary. [Counsel then spoke] with the property owner who . . . advised that he never wanted to pursue charges against [Clark] and that [Clark] had consent to be inside the residence."

A hearing was held, in which Clark's counsel argued that Clark did not enter his guilty plea intelligently. Counsel also informed the court that Clark had psychiatric problems and that he, in fact, had recently been placed in segregation in jail because he had made a suicide attempt. Thus, counsel contended that Clark should be evaluated for competency to determine whether he

was competent to plead guilty. The Commonwealth responded by informing the court that it was not opposed to Clark being evaluated for competency.

However, the court stated that it was not going to order a competency evaluation because Clark never appeared to have any emotional or psychiatric problems. The court noted that Clark filed various *pro se* motions, he had excellent handwriting, he seemed to understand the nature of the charges against him, and he filed motions that the court believed were better than it had seen from some lawyers. The court stated that Clark had not previously raised his defense of consent to enter the premises and he did not exercise due diligence in bringing forth this evidence, despite knowing about this all along. The court noted that such a showing is essential, citing *Spradlin v. Commonwealth*, 473 S.W.2d 818 (Ky. 1971). Therefore, the circuit court denied both motions and proceeded to sentencing.

The court entered its judgment finding Clark guilty of second-degree burglary and sentencing him to a term of one and one-half years of imprisonment, with credit for 141 days of jail time served. The court also entered an order, pursuant to the plea agreement, dismissing the charges of third-degree unlawful transaction with a minor and second-degree disorderly conduct.

Clark now appeals, contending that: (a) his statutory and constitutional rights were violated when the circuit court failed to have his competency evaluated and failed to hold a competency hearing; and (b) the circuit

court abused its discretion in denying his motion to withdraw his guilty plea despite compelling evidence of his actual innocence.

III. ANALYSIS

A. CLAIM REGARDING CLARK'S COMPETENCY

Clark first contends that his rights were violated when the circuit court failed to have his competency evaluated and failed to hold a competency hearing.

Pursuant to KRS 504.090, “[n]o defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues.”

Additionally, KRS 504.100(1) provides: “If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant’s mental condition.”

The standard of review in a case where the circuit court failed 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.” *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999) (internal quotation marks omitted).

An incompetency hearing is only required when the trial judge is presented with sufficient evidence of reasonable doubt of competency to stand trial. If no reasonable grounds exist for doubting a defendant's competency, no error occurred in not holding a hearing. Reasonable grounds must be called to the attention of the trial court

or must be so obvious that the trial judge cannot fail to be aware of them.

Lear v. Commonwealth, 884 S.W.2d 657, 659 (Ky. 1994) (internal citations omitted).

In *Bishop v. Caudill*, 118 S.W.3d 159 (Ky. 2003), the Kentucky Supreme Court noted that 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 held that a defendant is competent if he can “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.” The Court noted that a competent defendant can make a “reasoned choice” among the alternatives available to him when confronted with such crucial questions as whether he should testify, waive a jury trial, cross-examine witnesses, put on a defense, etc.

Bishop, 118 S.W.3d at 162-63 (quoting *Godinez*, 509 U.S. at 397-98, 113 S. Ct. at 2686).

In a competency determination, there are two matters for a court to examine:

(1) whether the defendant is sufficiently coherent to provide his counsel with information necessary or relevant to constructing a defense; and

(2) whether he is able to comprehend the significance of the trial and his relation to it. The defendant must have an ability to confer intelligently, to testify coherently, and to follow the evidence presented. It is necessary that the defendant have a rational as well as a factual understanding of the proceedings.

Would defendant recognize false testimony by a witness and would he know to advise counsel of that fact? Does he understand the roles of trial participants (i.e. that the prosecutor is his adversary, that the judge decides his fate, that his counsel acts in his best interest, etc.)? Does he understand that convictions will result in sanctions? The inquiry is a factual one that necessarily depends upon the peculiar facts and circumstances of the case.

Id. at 163 (internal quotation marks omitted).

In the present case, Clark made a failed suicide attempt while he was incarcerated. Clark moved for a competency evaluation, and the Commonwealth did not oppose the motion. Based on the attempted suicide, there were reasonable grounds for the circuit court to doubt Clark's competency. Therefore, pursuant to KRS 504.100(1), the court erred in failing to order a competency evaluation.

B. CLAIM REGARDING WITHDRAWAL OF GUILTY PLEA

Clark next asserts that the circuit court abused its discretion in denying his motion to withdraw his guilty plea despite compelling evidence of his actual innocence. Specifically, Clark contends that he had permission to be in the residence and, therefore, he could not be guilty of burglarizing the home.

After pleading guilty, a criminal defendant

may move the trial court to withdraw the guilty plea, pursuant to RCr^[4] 8.10. If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. A decision which is supported by substantial evidence is not clearly erroneous. If, however, the trial court

⁴ Kentucky Rule(s) of Criminal Procedure.

determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles.

Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal quotation marks and citations omitted).

Further,

[p]ursuant to KRS 533.250, pre-trial diversion essentially delays the final adjudication of a criminal complaint against a defendant. Our Supreme Court has described pre-trial diversion as an interruption of prosecution prior to final disposition. Thus, withdrawal of a guilty plea pursuant to RCr 8.10 remains a viable possibility in cases where pre-trial diversion has been granted since by definition those cases have not been finally adjudicated.

Commonwealth v. Lopez, 267 S.W.3d 685, 689-90 (Ky. App. 2008) (internal quotation marks and citation omitted).

During his plea colloquy, Clark told the court that he and his counsel had discussed any and all defenses he had to the charge against him. Clark's motion to enter a guilty plea also stated that his guilty plea was being entered "freely, knowingly, intelligently and voluntarily." The offense report written by the arresting officer following Clark's arrest on the burglary charge stated that Clark claimed he had permission to be in the house, but the homeowner denied giving such permission when the officer spoke with the homeowner. Therefore, Clark and his counsel had this information regarding Clark's possible defense

before Clark pleaded guilty. Accordingly, Clark is not entitled to withdraw his guilty plea based on this allegedly new evidence of his actual innocence because Clark and his counsel had this evidence in their possession at the time he entered his plea.

Accordingly, the order of the Cumberland Circuit Court denying Clark's motion to withdraw his guilty plea on the basis that he had a defense of actual innocence is affirmed. However, the order of the Cumberland Circuit Court denying Clark's motion for a competency evaluation and a competency hearing is reversed. This case is remanded to the circuit court with the instruction that Clark's competency should be evaluated and a competency hearing held to determine whether Clark is incompetent and whether he should be permitted to withdraw his guilty plea on that basis.

ALL CONCUR.

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