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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000203-MR

DANIEL O. RICHARDSON

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE SAMUEL T. SPALDING, JUDGE
ACTION NO. 13-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Daniel O. Richardson appeals from a Marion Circuit Court judgment after entering a plea of guilty conditioned on his right to appeal the trial court's ruling that he was competent to stand trial.

After the police attempted to stop Richardson for suspicion of driving under the influence, he led the officers on a chase, during which he almost hit one

of the officers head on, and reached speeds of eighty miles per hour in a fifty-five mile per hour zone. He finally stopped when the motor in his truck blew out. He refused to obey the commands of the police officers when they approached him, and resisted them to such an extent that he had to be physically removed from the truck and forced into handcuffs. Richardson was charged with wanton endangerment in the first degree; fleeing/evading police in the first degree; operating a motor vehicle under the influence of drugs/alcohol; resisting arrest; criminal mischief in the third degree; and multiple traffic offenses.

The trial court granted defense counsel's motion for a competency evaluation pursuant to Kentucky Revised Statutes (KRS) Chapter 31. "[I]n cases where the defendant is indigent: (1) the assistance of a psychological expert is 'constitutionally and statutorily required'; and (2) the funds necessary to retain such an expert are a 'reasonable and necessary' expense authorized under KRS Chapter 31." *Bishop v. Caudill*, 118 S.W.3d 159, 166 (Ky. 2003) (citations and footnotes omitted) (concurring opinion). A report was prepared and submitted by Dr. Eric Drogin, a licensed psychologist. Dr. Drogin performed a cognitive examination which showed that Richardson had "significant difficulties with concentration, abstract reasoning, calculation and short-term memory." Another test revealed a "clinically significant range of neuropsychological impairment," and the second part of that test had to be abandoned because Richardson was "incapable of successfully tracking to two separate notions (in this case numbers and letters) simultaneously." Other tests showed that his intellectual function was

that of a child of six, or of a child between eight and ten years of age. Dr. Drogin also testified telephonically at a hearing on April 24, 2014. He explained that Richardson's oral vocabulary score was akin to that of a first grader. Dr. Drogin had also administered a test which indicated that Richardson was not malingering. Dr. Drogin concluded that Richardson was not competent to stand trial because of a significant intellectual disability.

At the close of Dr. Drogin's testimony, the Commonwealth's attorney requested another evaluation of Richardson's competency, stating that the Commonwealth wanted its own expert. Defense counsel objected and the Commonwealth's attorney acknowledged that her terminology may have been incorrect, but that she was fully aware that such an expert would be appointed to assist the court and would not be the Commonwealth's expert.

The trial court held that a further evaluation by a court-appointed expert would be ordered, not necessarily because he disagreed with Dr. Drogin, but because he found many of his conclusions to be "a little bit general" and not necessarily consistent with the facts he related in his report.

Dr. Beth Johnson, an outpatient examiner with the Kentucky Correctional Psychiatric Center, performed the court-ordered evaluation. She concluded that Richardson was competent to stand trial. Her test results largely mirrored the results of Dr. Drogin's testing, revealing a person with very limited intellectual functioning who was not malingering. She submitted a written report, and she and Dr. Drogin testified telephonically at a hearing on December 12, 2014.

Richardson's uncle also testified on his behalf. Dr. Drogin testified that when he met with Richardson for a second time, Richardson denied facing any charges. Dr. Drogin also testified that, unlike Dr. Johnson, he would never "educate" a subject about the court system, the roles of various players, or the meaning of charges during the course of an evaluation.

After reviewing the hearings and the reports, the trial court entered an order finding Richardson "minimally competent to appreciate the nature of his conduct and to meaningfully participate in his own defense, and therefore . . . competent to stand trial."

Richardson then entered a guilty plea pursuant to an offer from the Commonwealth, which provided that in exchange for a plea of guilty to fleeing/evading police and operating a motor vehicle under the influence of alcohol/drugs, the Commonwealth would dismiss the other charges and recommend a sentence of two years, suspended and probated for five years. Richardson was required to complete alcohol treatment. The plea was conditioned on his right to appeal the trial court's determination of competency.

"Incompetency to stand trial" is defined as lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense as a result of mental condition. KRS 504.060(4). "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." KRS 504.100(1). After the filing of the report, the trial court is required to hold a hearing to determine if the defendant is competent to stand trial. KRS 504.100(3).

The burden is upon the defense to prove a defendant's incompetence by a preponderance of the evidence. *Jacobs v. Commonwealth*, 58 S.W.3d 435, 440 (Ky. 2001). "We review a trial court's finding of competency for clear error and will reverse only if it is not supported by substantial evidence." *Jackson v. Commonwealth*, 319 S.W.3d 347, 349 (Ky. 2010) (quoting *Chapman v. Commonwealth*, 265 S.W.3d 156, 174 (Ky. 2007)).

Richardson argues that the trial court misunderstood its role in assessing his competency: that it wanted him to be found competent, and therefore ordered another evaluation to be performed by Dr. Johnson, even while admitting that it could not "disagree" with Dr. Drogin's conclusions. He further argues that the trial court was not bound to follow Dr. Johnson's opinion simply because she was the "court's expert."

Richardson points to the following evidence that Dr. Drogin's opinion should have been given greater weight than Dr. Johnson's: Dr. Drogin had more experience (twenty-three years) in evaluating persons for competency than Dr. Johnson, who had worked at a state hospital for two years and had participated in a three-day training in forensic psychology; Dr. Drogin was certified by two different boards in forensic psychology whereas Dr. Johnson had no certifications; Dr. Johnson used "outdated modalities" and language in preparing her report

which Richardson contends might indicate a lack of reliability; Dr. Johnson holds the degree of Doctor of Psychology, whereas Dr. Drogin holds a PhD in psychology which Richardson contends is more scholarly and rigorous.

Even if we accept for the sake of argument that Dr. Johnson had less impressive academic and professional credentials than Dr. Drogin, and used outmoded testing methods, the fact remains that she arrived at an assessment of Richardson's intellectual ability that was very similar to Dr. Drogin's. Dr. Johnson and Dr. Drogin substantially agreed that Richardson suffered from various intellectual deficits, but differed as to whether these deficits rendered him incompetent to stand trial. The nature of the connection between Richardson's intellectual deficits and his competency to stand trial is precisely the issue which prompted the trial court to order another evaluation.

The nature of the inquiry in a competency proceeding is: (1) whether the defendant is sufficiently coherent to provide his counsel with information necessary or relevant to constructing a defense; (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.

Commonwealth v. Wooten, 269 S.W.3d 857, 864 (Ky. 2008) (citations omitted).

According to Dr. Johnson, Richardson could assist his counsel in his defense because he had a basic understanding of the process and the roles of the parties, and was fully aware of the facts of his case. "The trial court has a broad

discretion in determining whether a defendant has the ability to participate rationally in his defense.” *Id.* When the trial court acts as the finder of fact, it “has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it.” *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006).

The trial court found Dr. Johnson’s opinion as to competency to be more credible than Dr. Drogin’s. The trial court’s finding of competency in this case was based on substantial evidence in the form of Dr. Johnson’s report and testimony, and consequently will not be reversed.

For the foregoing reasons, the judgment of the Marion Circuit Court is affirmed.

ALL CONCUR.

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