

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002936-MR

DAVID A. MACK

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
INDICTMENT NO. 97-CR-983

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * * * *

BEFORE: GARDNER, HUDDLESTON and KNOX, Judges.

HUDDLESTON, Judge. David A. Mack was convicted of Trespass in the First Degree and sentenced to twelve months in jail. He contends on appeal that the judgment of conviction should be vacated because he was denied the pre-trial mental evaluation to which he was entitled.

In the early morning hours of January 26, 1997, Mack approached Kevin Joint, President of Alpha Tau Omega (ATO), a University of Kentucky fraternity, inside the fraternity house to return a wallet that he had stolen from a member of the fraternity. Mack told Joint that he was involved in a program as part of his

probation pursuant to which he was instructed to inform individuals how to keep their belongings safe. Mack requested an opportunity to speak at an ATO fraternity meeting to discuss these issues. He gave Joint his telephone and pager numbers.

In May 1997, Mack contacted Joint for the second time inside the ATO fraternity house. He gave him another wallet that he had stolen from an ATO member. Mack asked why he was not contacted about speaking at a fraternity meeting. Joint replied that Mack was not welcome in the ATO fraternity house. Despite the warning, Mack went back to the ATO house for a third time to speak with Joint. Mack knocked at the door another fraternity member's room and told him that he was an acquaintance of Joint's. Mack was informed again that he was not welcome at ATO.

On June 26, 1997, at approximately 6:00 a.m., Mack attempted to enter through a door of the Farmhouse fraternity at the University of Kentucky. When this failed, he climbed through a window. Mack was confronted by Clay Crouch, a Farmhouse fraternity member. Mack told Crouch that he was doing a mock break-in as a way to sell security systems. He wanted to speak with the Farmhouse President. Mack left his name and mentioned that he had spoken with the ATOs.

Mack's actions were first reported as a result of an investigation of other burglaries and/or thefts at U.K. fraternity houses. Mack was identified in a line-up by members of several fraternities as the man who had been in their fraternity houses.

Mack was later arrested and admitted being inside the ATO house on three occasions and inside Farmhouse on one occasion.

Mack was also alleged to have made statements about his criminal history to several fraternity members and claimed that he had gone to fraternity houses as condition of his probation. Mack later remembered visiting the fraternity houses but could not recall making any such statements.

Based upon Mack's unusual behavior and his statements regarding his memory, Mack's counsel moved for a continuance of Mack's trial and for a mental evaluation of Mack. Both motions were denied. The only issue on appeal is whether the trial court erred in denying Mack's motion for a mental examination.

Mack argues that he should have been examined pursuant to Ky. Rev. Stat. (KRS) 210.360, which provides, in pertinent part, that:

(1) When a person who has been twice previously convicted of a felony is indicted by a grand jury as a persistent felony offender, the circuit clerk of the court in which he is indicted shall give notice of the indictment to the secretary of the Cabinet for Human Resources within seven (7) days after the indictment is returned by the grand jury. The secretary shall cause such person to be examined by a psychiatrist or licensed clinical psychologist already in the employ of the cabinet, to determine his mental condition and the existence of any mental illness or retardation which would affect his

criminal responsibility. This examination shall be made without expense other than the amount to cover necessary travel, as provided by law for any other employee of the state traveling on official business.

(2) The psychiatrist or licensed clinical psychologist making the examination shall submit a written report of his findings to the judge of the court having jurisdiction, who shall make the report available to the prosecuting attorney and the attorney for the defendant. (Emphasis supplied.)

Mack was indicted on September 8, 1997, on four counts of Burglary in the Second Degree and one count of being a Persistent Felony Offender in the First Degree. On September 10, 1997, in response to the Fayette Circuit Court's notification, the Cabinet for Health Services advised the court that an appointment for an examination was available at Eastern State Hospital.

On October 30, 1997, Mack filed his motion for a mental examination based upon what his counsel referred to as a "delusional type illness." The trial court denied Mack's motion finding "no sufficient reason to continue the trial for an evaluation."

Despite the mandatory language of KRS 210.360 (formerly KRS 203.340), the Kentucky's highest court has held that the statute is not mandatory. Copeland v. Commonwealth, Ky., 397 S.W.2d 59 (1965). In Etherton v. Commonwealth, Ky., 379 S.W.2d 730 (1964), the Court said that:

In Harrod v. Commonwealth, 311 Ky. 810, 226 S.W.2d 4 (1950), the purpose of the statute was found to be to determine whether such an accused should be sent to one of the State's penal institutions or to one of its mental hospitals, and we expressly declared, 'It is manifest that the prisoner acquires no right to such an examination under the statute itself.'

We are bound to follow those rulings.¹

However, if "KRS 210.360 affords the only real avenue by which [a defendant] can have the benefit of a psychiatric examination, a denial might well raise a question under the Equal Protection Clause of the Fourteenth Amendment [to the Constitution of the United States]." Brister v. Commonwealth, Ky., 439 S.W.2d 940, 941 (1969). Likewise, when a defendant demonstrates to the trial court that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent mental health professional who will conduct an appropriate examination and assist in evaluation, preparation and presentation of his defense. Ake v. Oklahoma, 470 U.S. 68, 82-83, 105 S.Ct. 1087,1096, 84 L.Ed.2d 53,66-67 (1985). See also Hunter v. Commonwealth, Ky., 869 S.W.2d 719, 722 (1994).

Ky. R. Crim. Proc. (RCr) 8.06 provides that:

¹ Supreme Court Rule (SCR) 1.030(8)(a) provides that the Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.

If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him, or to participate rationally in his defense, all proceedings shall be postponed until the issue of incapacity is determined by KRS 504.100.

KRS 504.100, to which reference is made in RCr 8.06, requires that if during any stage of the proceedings the court has reasonable grounds to believe that the defendant is incompetent to stand trial, the court shall appoint at least one psychiatrist or psychologist to examine, treat and report on his mental condition. The "reasonable grounds" for belief must be called to the attention of the court by the defendant or must be so obvious that the judge cannot fail to be aware of them. Pate v. Commonwealth, Ky., 769 S.W.2d 46 (1989).

We hold that the evidence before the trial court of the defendant's bizarre behavior, coupled with his counsel's representations, was sufficient under RCr 8.06 and KRS 504.100, as well as Ake v. Oklahoma, supra, to require that the trial be postponed until the issue of Mack's capacity to stand trial could be determined; and that determination could be made in this instance only after Mack had been examined by a qualified psychiatrist or clinical psychologist.

Accordingly, Mack's conviction is vacated and this case is remanded to Fayette Circuit Court with directions to appoint a psychiatrist or clinical psychologist to examine Mack and report

upon his mental condition. Upon receipt of the mental health professional's report, the trial court shall conduct a hearing to determine whether Mack was competent to stand trial on November 4, 1997. In the event that Mack is determined to have been competent to stand trial, his conviction shall be reinstated. If, however, Mack is determined to have been incompetent at the time he stood trial, his conviction shall be vacated and he shall be granted a new trial. If an new trial is granted, the issue of Mack's competence to stand trial may again be raised.

GARDNER, JUDGE, CONCURS.

KNOX, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOX, JUDGE, DISSENTING. I respectfully dissent.

I see nothing that would have provided the trial court with reasonable grounds to believe that Mack was incompetent to stand trial, considering KRS 504.100, or that Mack lacked the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his defense, considering RCr 8.06.

I believe trial counsel's characterization of Mack's behavior as "bizzare" has influenced the perception that the trial court was given a basis for directing a mental examination. I would instead characterize Mack's excuse for his criminal behavior, i.e. that he was performing a service for the fraternity members by stealing their wallets, as disingenuous rather than bizzare. To

judge a defendant's mental status only by the absurdity of his excuse for his criminal conduct would constitute an expansive view of mental incompetency and mental incapacity. Were we to do so, we would benefit no one except those called upon to conduct the many evaluations that would, no doubt, be necessary to resolve the issue.

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