

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001305-MR

WILLIAM B. HENRY

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 00-CR-00062 & 00-CR-00062-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: William B. Henry appeals his conviction and sentence for trafficking in a controlled substance, cocaine. Because the trial court erred in failing to conduct an evidentiary hearing on the issue of appellant's competency to stand trial, we vacate and remand.

On March 22, 2000, Detective Joe Higgins of the Russellville Police Department conducted a controlled drug buy with a confidential informant. The informant went to the residence shared by appellant and Belinda Morris at 458 E. Second Street in Russellville, Kentucky, where he purchased rock cocaine. As a result, appellant was indicted on one count of

trafficking in a controlled substance, cocaine. A jury trial was held on August 18, 2000, at which differing versions of events were presented.

At trial, the informant, Pat Baugh, testified that, prior to March 22, 2000, he regularly went to the residence where appellant and Belinda lived. Baugh testified to the details of the March 22, 2000 controlled buy as follows. Baugh testified that when he came up to the residence, appellant was at the door, and had been going between the kitchen and patio, cooking ribs. Baugh testified that he and appellant greeted each other, and then Baugh walked in the door, gave appellant the \$20 bill that Detective Higgins had given him, and said he needed a \$20 piece. Baugh testified that appellant gave the \$20 to Belinda, and she went in the back room and came out and placed a rock of cocaine on the table and appellant said "there you go." Baugh testified that he (Baugh) then picked up the cocaine and that appellant saw him do this. Baugh then left to meet Higgins and turned the cocaine over to him.

Belinda Morris testified that she and appellant were living at the residence on March 22, 2000. Belinda testified that she had smoked crack with Baugh before, and that Baugh came to her house a lot. Belinda testified that sometimes when Baugh came he would ask her to go get cocaine for him, which she would do. She testified that on the date at issue, she got the crack for Baugh, although she couldn't remember whether she sold Baugh some crack she had already purchased for herself but hadn't smoked yet, or if she left and went somewhere to get it for him.

Belinda testified that appellant took the money that day because he "always wanted to take the money."

Appellant testified that on March 22, 2000, when Baugh came up to the house, he was cooking ribs on the patio, and going inside and outside of the house. Appellant testified that he hadn't met Baugh before that day. Appellant testified that Baugh went in the house, and then appellant went in the house, and that Baugh asked where Belinda was. Appellant testified that Baugh sat at the table and smoked some crack. Appellant testified that Baugh set money on the table. Appellant testified that he [appellant] gave the money to Belinda and that he didn't know what it was for. Appellant testified that he knew the money must have been for Belinda because he knew that it wasn't his. Appellant also testified that Baugh said "this is for Belinda." Appellant stated that he was in and out of the house while Baugh was there. Appellant testified that he offered Baugh some ribs but Baugh left. Appellant testified that he knew Belinda smoked crack but didn't know that she sold it.

The jury was instructed on trafficking in a controlled substance, and complicity to traffic in a controlled substance. The jury found appellant guilty of trafficking in a controlled substance. Following the verdict, just prior to the penalty phase, appellant's counsel informed the court that he was concerned whether appellant was competent to go forward with the penalty phase. Counsel explained that his understanding about appellant's competency had changed, in that he didn't realize that appellant might not be competent until during the time he

and appellant were waiting and talking prior to the verdict, as well as during appellant's testimony. Counsel noted that appellant took Prozac, and that counsel believed that appellant had mental problems. Counsel stated that appellant was not able to assist him to prepare for the penalty phase, in that although there were church people and relatives who apparently would testify in support of appellant, appellant would not respond to counsel's urging to get them to court. Counsel therefore moved the court, per RCr 8.06, to postpone the penalty phase in order for appellant to undergo a mental evaluation. The trial court, noting that "[appellant] seems to be able to testify alright," subsequently denied the motion and proceeded with the penalty phase. The jury recommended the minimum sentence of five years imprisonment.

Prior to the final sentencing, per an order entered October 27, 2000, the trial court ordered a psychiatric evaluation of appellant. The order stated that it appears that "there is reason to believe that [appellant] is not mentally capable of understanding the charges against him or aiding his counsel in the trial of said case." Per a referral from the Kentucky Correctional Psychiatric Center (KCPC), appellant was first examined by clinical psychologist Robert B. Sivley, PhD. In a report dated December 1, 2000, Dr. Sivley diagnosed appellant as suffering from mild mental retardation, but concluded, however, that appellant understood the charges and "is able to present rational information in his own defense" and that "[appellant] is competent to do so."

On December 20, 2000, appellant's counsel moved the court to order a reevaluation of appellant. The court granted counsel's motion and ordered appellant to KCPC again. In a report dated March 1, 2001, prepared by clinical psychologist Richard K. Johnson, PhD, appellant was again found to be mildly mentally retarded. Dr. Johnson concluded, however, that appellant was competent to stand trial.

After having been continued several times, final sentencing was held on April 4, 2001. Appellant's counsel moved the court to postpone the sentencing in order for appellant to obtain an independent mental evaluation. The court denied the motion, noting that appellant had been found competent in the two aforementioned evaluations. Based on the two evaluations, the court found appellant was competent to be sentenced, and sentenced him to five years' imprisonment in accordance with the jury's recommendation. On May 17, 2001, the court entered its final judgement and sentence of imprisonment.

Appellant first argues that the trial court erred in failing to continue the penalty phase of the trial after appellant's counsel raised concerns about his competency, and erred in failing to hold a competency hearing after ordering the evaluations of appellant. The standard for competency is whether the accused has "the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his defense." Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 682 (1990). The question of competency can be raised at any time in the proceedings. RCr 8.06; KRS 504.100. See

also, Gabbard v. Commonwealth, Ky., 887 S.W.2d 547 (1994);
Johnson v. Commonwealth, Ky., 17 S.W.3d 109 (2000).

RCr 8.06 provides:

[i]f 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 her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

KRS 504.100 states, in pertinent part:

(1) 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.

. . . .

(3) After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

"Criminal prosecution of a defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment." Mills v. Commonwealth, Ky., 996 S.W.2d 473, 486 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1182, 145 L. Ed. 2d 1088 (2000), citing Medina v. California, 505 U.S. 437, 439, 112 S. Ct. 2572, 2574, 120 L. Ed. 2d 353 (1992).

"[O]nce facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question." Mills, 996 S.W.2d at 486, citing Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 103 (1975).

The competency hearing of KRS 504.100(3) is mandatory. Mills, 996 S.W.2d at 486; Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001). The standard of review of a trial court's failure to hold a competency hearing is "[w]hether 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, 996 S.W.2d at 486, quoting Williams v. Bordenkircher, 696 F.2d 464, 467 (6th Cir. 1983), cert. denied, 461 U.S. 916, 103 S. Ct. 1898, 77 L. Ed. 2d 287 (1983).

We believe the case of Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001) is controlling of the present case. In Thompson, the trial court ordered a defendant to be transferred to KCPC for evaluation to determine his competency to stand trial. The trial court's order stated that mental problems had been brought to the court's attention "which may affect defendant's ability to perceive and interpret information provided to him by counsel." Id. at 407-408. At the hearing at which the court accepted the defendant's guilty plea, defense counsel conceded the issue of the defendant's competency. In accepting the plea, the trial court relied on the defense counsel's concession and a review of the reports generated by the doctors who examined the defendant.¹ Id. at 408. The trial court did not hold a competency hearing. The Supreme Court held that "the trial court's own order establishes the sufficiency of

¹ As in the present case, the Thompson dissent indicates that the evaluation of the defendant, performed by a KCPC psychiatrist, found him competent to stand trial.

the trial judge's level of doubt as to Thompson's competence to plead guilty." Id. at 408. As a result, the Court held that, per KRS 504.100, an evidentiary hearing was required, and the trial court's failure to hold such hearing violated the appellant's due process rights.

In Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999), however, the Supreme Court held the trial court's failure to hold an evidentiary hearing to be harmless error. In Mills, the appellant had given notice that he intended to introduce evidence concerning mental illness, insanity, or mental defect pursuant to KRS 504.070. Mills, 996 S.W.2d at 485. The trial court ordered a mental examination, the report pursuant to which found Mills to be competent. Based on the fact that the report found him competent, the fact that Mills "point[ed] to nothing else that should have caused the trial court to question his competency to stand trial," and the fact that "the trial judge did not order the psychiatric examination due to a belief that there were reasonable grounds to question Mills' competency to stand trial," but "merely ordered the examination out of expediency in response to Mills' notice . . . ," the Supreme Court found that Mills "failed to establish any factual basis which should have caused the trial court to experience reasonable doubt as to Mills competence to stand trial" and held the trial court's failure to hold a competency hearing to be harmless error. Mills, 996 S.W.2d at 486.

____ Although, in the present case, as in Mills, the appellant was found competent by the mental evaluations, it can

be distinguished from Mills in that the language of the trial court's own order indicates that the court had a sufficient level of doubt as to appellant's competency. See Thompson, 56 S.W.3d at 408. In its October 27, 2000 order, ordering the mental evaluation of appellant, the trial court stated that "there is reason to believe that [appellant] is not mentally capable of understanding the charges against him or aiding his counsel in the trial of said case." Accordingly, we believe we are compelled to follow Thompson, and hold that in this case the trial court was required to hold a competency hearing.

In Thompson, our Supreme Court outlined the remedy for the situation, as in the present case, where a trial court was required but failed to hold a competency hearing. The Court held that a retrospective competency hearing is permissible depending on the facts of a particular case. Thompson, 56 S.W.3d at 409.

A retrospective competency hearing, "may satisfy the requirements of due process provided it is based on evidence related to observations made or knowledge possessed at the time of trial." Cremeans v. Chapleau, 62 F. 3d [167, 169 (6th Cir. 1995).] Other factors bearing on the constitutional permissibility of a retrospective hearing include: (1) the length of time between the retrospective hearing and the trial; (2) the availability of transcript or video record of the relevant proceedings; (3) the existence of mental examinations conducted close in time to the trial date; and (4) the availability of the recollections of non-experts - including counsel and the trial judge - who had the ability to observe and interact with the defendant during trial [citation omitted]. These factors are not inclusive and none are necessarily determinative. Rather, the question is decided on a case-by-case basis. [citation omitted]. In evaluating these factors, we note that the passage of a considerable

amount of time is not an insurmountable obstacle. See, e.g., Cremeans v. Chapleau, 62 F. 3d at 170 (passage of almost seven years between trial and competency hearing did not violate defendant's due process rights).

The test to be applied in determining whether a retrospective competency hearing is permissible is whether the "quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation." Martin v. Estelle, 583 F.2d 1373, 1374 (5th Cir. 1978). Further, the Commonwealth has the burden to show that a retrospective competency hearing is permissible. Lokos v. Capps, 625 F.2d 1258, 1262 (5th Cir. 1980).

Id. at 409-410. Thompson concluded that the determination of whether a retrospective competency hearing is permissible should be left to the trial court. Id. at 410. If the trial court determines that a retrospective competency hearing is permissible, Thompson indicates that the trial court is to conduct such hearing. Id. If the trial court rules that a retrospective competency hearing is not permissible, Thompson indicates that a new trial should be granted. Id. Because Thompson requires this case be remanded, appellant's argument that the trial court erred in failing to postpone the proceedings per RCr 8.04 is rendered moot.

Appellant finally argues that the trial court erred in failing to instruct the jury on facilitation. Appellant did not request an instruction on facilitation and concedes that this issue was not preserved for review. "RCr 9.54(2) [] requires a party to make a specific objection to the giving or the failure to give an instruction before the Court instructs the jury . . . in order to preserve that issue for review on appeal."

Commonwealth v. Collins, Ky., 821 S.W.2d 488, 492 (1991).

Appellant therefore requests we review the issue for palpable error per RCr 10.26. A palpable error is one which results in manifest injustice, which occurs when there is a substantial possibility that the outcome would have been different except for the error. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

"A defendant is guilty of criminal facilitation when he knowingly provides another with the means or opportunity to commit a crime, KRS 506.080, by, for instance, loaning a car to another knowing that it will be used in a robbery." Adkins v. Commonwealth, Ky. App., 647 S.W.2d 502, 505 (1982), citing Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977). In the present case, there is no evidence to show that appellant merely provided the means or opportunity for Belinda Morris to traffic in cocaine. Rather, by taking the money, appellant was an active participant. Accordingly, a facilitation instruction was not warranted, and hence, no palpable error occurred. Churchwell v. Commonwealth, Ky. App., 843 S.W.2d 336 (1993); Adkins, 647 S.W.2d 502.

For the aforementioned reasons, the judgment of the Logan Circuit Court is vacated and the case remanded for proceedings consistent with this opinion.

KNOPF, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: The majority opinion vacates Henry's conviction and

sentence so that the case can be remanded to the trial court for either a retrospective competency hearing or a new trial. I respectfully dissent from this portion of the opinion. In my opinion, Henry is entitled to only a new sentencing hearing at the most.

There was no indication to either the judge, the prosecutor, or defense counsel that Henry might not be competent until after the jury rendered its verdict finding him guilty of the offense. After the jury returned its guilty verdict but before the penalty phase commenced, defense counsel expressed his concern to the court that there had been a change in Henry's demeanor since the jury returned its verdict and that the proceedings should be continued in order for a competency evaluation to be completed. Henry had testified during the guilt phase of the trial, and the court stated that "he seemed to testify alright." Further, the trial court found that Henry's unresponsiveness to defense counsel's pleas to gather penalty phase witnesses and Henry's depression and taking of Prozac were insufficient grounds to order a competency evaluation and continue the penalty phase hearing.

A trial judge is given wide latitude in determining whether a defendant should be evaluated to determine competency. Conley v. Commonwealth, Ky. App., 569 S.W.2d 682, 685 (1978). The trial judge had the opportunity to observe Henry testify during the guilt phase of the trial and then heard arguments from defense counsel that Henry was depressed and on Prozac. I perceive no abuse of discretion in the trial court's refusal to

continue the penalty phase proceedings and order a competency evaluation. Thus, in my opinion the guilty verdict and the jury's sentence recommendation should stand.

I agree with the majority opinion that the court's imposition of the sentence should be vacated pursuant to the Thompson case. I believe the proper action for this court to take is to vacate the sentence and remand the case to the trial court for a retrospective competency hearing concerning whether Henry was competent when he was sentenced by the court or for a new sentencing hearing. However, under the majority opinion, the trial court could order a new trial entirely if it found Henry was not competent during the guilt phase and the penalty phase of the trial. I disagree with this procedure because there was no question of competency during the guilt phase and because the trial court was within its discretion in denying the competency evaluation during the penalty phase.

This situation is somewhat akin to the circumstances in Johnson v. Commonwealth, Ky., 17 S.W.3d 109 (2000). In that case the issue of competency did not arise until after the trial but before the final sentencing. Id. at 111. The trial court therein ordered a competency evaluation prior to sentencing the defendant. Id. After the reports were filed indicating that the defendant was competent, the court sentenced the defendant without holding an evidentiary hearing on the issue of competency. Id. Ultimately, the Kentucky Supreme Court dismissed the appeal as premature because other post-trial motions were still pending. Id. at 114. The court also directed

the trial court to hold an evidentiary hearing and to rule on the issue of the defendant's competency to stand trial. Id. I agree with Justice Keller's opinion concurring in part and dissenting in part wherein he stated he would limit the scope of the competency hearing to the question of whether the defendant was competent at the time of his sentencing. Id.

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