

RENDERED: AUGUST 30, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000429-MR  
AND  
NO. 2012-CA-000430-MR

BRIAN SAGO

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN GRISE, JUDGE  
ACTION NOS. 09-CR-00737 & 11-CR-00314

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Brian Sago appeals from the Warren Circuit Court's order denying his motion for relief from final judgment made pursuant to CR<sup>1</sup> 60.02(b).

Sago contends that newly discovered evidence compels the court to relieve him from final judgment. We disagree and affirm the decision of the circuit court.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

Sago was indicted on September 16, 2009, on three counts of unlawful transactions with a minor in the first degree and one count of custodial interference. At numerous stages of the trial proceedings, Sago's attorney requested competency evaluations. The first evaluation was performed by Dr. Robert Sively, a clinical psychologist on contract with the Commonwealth, on January 21, 2010. Dr. Sively indicated that he could not make a definitive finding as to Sago's competency. While Dr. Sively did detect the possibility of malingering, he expressed concern that Sago might not be competent and, as a result, recommended inpatient evaluation at the Kentucky Correctional Psychiatric Center ("KCPC").

Upon admission to KCPC on March 4, 2010, Sago underwent long term, multi-disciplinary observation and evaluation under the supervision of Dr. Timothy Allen, a licensed psychiatrist. Dr. Allen provided testimony that Sago was competent and that, in spite of his intellectual limitations, his ability to function and understand the proceedings was not substantially hindered. Based on these two reports, the circuit court determined that Sago was competent.

Three months later, Sago's attorney requested an additional evaluation and the court granted the request. An evaluation was conducted by Dr. Eric Drogin. He concluded that Sago was not presently competent, but could attain competency if he was provided with psycho-educational counseling about the legal process. Without overruling its initial competency determination, the court agreed

to allow Sago to undergo counseling with Dr. Charles Webb. Dr. Webb met with Sago over the course of three days. Dr. Webb then testified on March 3, 2011, that Sago was capable of understanding the nature of the legal proceedings against him in a fundamental way. As a result, the court confirmed its determination that Sago was competent and capable of understanding and participating in the proceedings in a meaningful way.

Unbeknownst to the circuit court, on March 27, 2011, Sago was charged in Warren District Court with one count of criminal mischief first degree and his attorney in district court sought a competency determination. Dr. Bruce Fane conducted a sixty to ninety minute evaluation and determined that Sago was not competent.

Meanwhile, on March 31, 2011, Sago entered a guilty plea that reduced the three charges of unlawful transaction with a minor and the single charge of custodial interference to one charge of rape in the third degree. Eventually, on June 6, 2011, Sago also entered a guilty plea in circuit court to the charge of criminal mischief and was sentenced in both cases to a total of seven years' imprisonment. The circuit court was not made aware of Dr. Fane's competency evaluation and report concluding that Sago was incompetent.

Subsequent to the entry of Sago's guilty pleas, his attorney entered a motion for relief from judgment pursuant to CR 60.02(b), claiming that Dr. Fane's evaluation ordered by the district court and resulting report constituted new evidence. The circuit court agreed that the report constituted new evidence, but

determined that it did not necessitate a finding of incompetence and denied the motion. This appeal followed.

The denial of a CR 60.02 motion is reviewed for abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). KRS<sup>2</sup> 504.090 precludes an incompetent defendant from standing trial, or being convicted and sentenced as long as the incompetency continues. A defendant is incompetent to stand trial when, "as a result of a mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense." KRS 504.060(4). With this in mind, we turn to the circuit court's rationale for denying relief.

When reviewing its decision regarding Sago's competency, the circuit court explained that even if it had had the benefit of Dr. Fane's evaluation, it would not have found Sago incompetent. The court explained that it took extensive measures to determine if Sago was competent to stand trial, and, in an abundance of caution, allowed him to participate in psycho-educational counseling. The court further opined that the original four evaluations did not conclusively establish that Sago was incompetent, and the two doctors who spent the most time with Sago, Drs. Webb and Allen, determined that he was competent. The court went on to

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<sup>2</sup> Kentucky Revised Statutes.

explain that Dr. Fane’s evaluation did not present markedly new factual findings, but simply came to a different conclusion.

As a result, we do not find the circuit court’s determination constitutes an abuse of discretion. The circuit court considered Dr. Fane’s evaluation, weighed it against the other competency evaluations, and determined that the evaluation did not justify relief from its prior judgment. In fact, the circuit court was not even required to consider Dr. Fane’s evaluation since its existence could have been discovered with due diligence exercised by the parties. *See* CR 60.02(b) (relief may be granted upon “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial”).

Accordingly, the circuit court’s decision to deny Sago’s CR 60.02(b) motion was not arbitrary, unreasonable, or unsupported by sound legal principles and instead was the result of thorough review. Therefore, we affirm.

ALL CONCUR.

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