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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001781-MR

BRIAN DALE THURMAN — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 16-CR-00144

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brian Dale Thurman appeals a judgment of the Mason Circuit Court entered October 3, 2017, on a conditional plea of guilty to two counts of sexual abuse in the first degree. He was given a sentence of four years in prison on each count, to be served concurrently, for a total of four years. Thurman argues on

appeal that the trial court erred by finding him competent to stand trial. After careful review of the record and applicable law, we affirm.

In November 2016, Thurman was charged with two counts of sexual abuse in the first degree of a victim under twelve years of age, one count for touching the victim's penis and one for touching the victim's buttocks. Defense counsel later asked for a competency evaluation, which the trial court granted. Thurman was sent to the Kentucky Correctional Psychiatric Center (KCPC) for evaluation, after which Dr. Steven Sparks, a forensic psychologist consultant for KCPC, submitted a lengthy report in which he stated that he was unable to determine conclusively whether Thurman was competent.[1] The trial court later held an evidentiary hearing on Thurman's competency, at which Dr. Sparks was the sole witness.

Dr. Sparks testified that he or one of his colleagues administered seven psychological tests to Thurman. On the Competence Assessment for Standing Trial—Mental Retardation test, Thurman performed "poorly," scoring similarly to people found not to be competent. However, Dr. Sparks noted that

[1] Although we will not explore the matter since it was not raised as an issue, Kentucky Revised Statutes (KRS) 504.100(2) requires a court-appointed mental health professional to reach a definitive opinion about whether a defendant is competent. *Commonwealth v. Wooten*, 269 S.W.3d 857, 863 (Ky. 2008).

Thurman's responses were slightly below "chance," which suggested Thurman gave a low effort.

Similarly, on the REY 15 item memory screening test, which is designed to determine if someone is giving adequate effort, Thurman's scores were at the cutoff line for determining whether he gave full effort. However, Dr. Sparks stated that test was not designed or normed for people with an intellectual disability (ID), which Thurman has. In short, the scores of someone with an ID on that test may be inaccurate. However, Dr. Sparks added that some of Thurman's responses on that REY test were "absurd" and suggestive of a lack of effort. Conversely, Thurman's high score on the Test of Memory Malingering indicated he was trying to answer. Next, Dr. Sparks related that Thurman had an elevated score on the Miller Forensic Assessment of Symptoms Test, which again suggested he was feigning some psychiatric symptoms. But that test was also not normed for people with an ID, which Dr. Sparks said could have impacted Thurman's score.

The fifth test discussed by Dr. Sparks was the Wechsler Adult Intelligence Scale, Fourth Edition, on which Thurman's score fell at the borderline between having mild and moderate ID. However, Dr. Sparks testified that Thurman answered some easy questions incorrectly and some harder questions correctly, which Dr. Sparks interpreted as possibly suggesting Thurman gave an inconsistent effort. On the sixth test, the Kaufman Brief Intelligence Test, Second

Edition, Thurman's score was in the range of people who have a moderate to severe ID. Thurman also performed very poorly on the seventh test, the Kaufman Functional Academic Skills Test.

Dr. Sparks also related observations not directly linked to those tests. For example, Dr. Sparks testified that Thurman said repeatedly that he did not want to be found competent, which Dr. Sparks believed indicated Thurman had some level of understanding of competency and the impact a competency determination would have. Dr. Sparks testified that Thurman made other statements indicating he had some understanding of the court system, such as statements suggesting he knew the difference between a misdemeanor and a felony.

When asked, Dr. Sparks stated he was unable to come to a definitive conclusion in his written report about Thurman's competency due to Thurman's inability to express information logically and his seeming lack of forthright responses. However, when questioned by the judge, Dr. Sparks testified that he believed Thurman was aware of the nature of the charges against him and could rationally assist his attorney, though Dr. Sparks referred to that as a "gray area." Finally, Dr. Sparks testified that he discounted prior conclusions that Thurman was incompetent because the prior evaluations seemed to accept Thurman's responses at face value instead of assessing whether he was putting forth sufficient effort.

On March 30, 2017, the trial court issued an order finding Thurman to be competent. The court noted that competency evaluations between 2003 and 2008 had found Thurman incompetent, but opined that Thurman's "understanding of the legal process has evolved since his earlier evaluations." Relying on comments made by Thurman to Dr. Sparks about the legal system and the pending charges, the court concluded Thurman had the ability to assist his attorney and the capacity to participate rationally in his own defense.

In August 2017, Thurman conditionally pleaded guilty to two amended counts of sexual abuse,[2] reserving the right to contest the trial court's competency determination. The judgment sentencing Thurman to a total of four years' imprisonment, as per the plea agreement, was entered on October 3, 2017. This appeal followed.

"'Incompetency to stand trial' means, as a result of 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). Forcing an incompetent defendant to stand trial violates the United States Constitution. *Henderson v. Commonwealth*, 563 S.W.3d 651, 664 (Ky. 2018) (citing, *e.g.*, *Drope v. Missouri*, 420 U.S. 162 (1975)).

[2] Pursuant to KRS 510.110(2), sexual abuse is a Class C felony if the victim is less than twelve and otherwise is a class D felony. The plea agreement *sub judice* essentially served to reduce Thurman's charges from Class C to Class D felonies.

The "modest" requirement that a defendant be competent "seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Godinez v. Moran*, 509 U.S. 389, 402 (1993). *Accord Drope,* 420 U.S. at 171 ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). A defendant bears the burden at a competency hearing of proving he is incompetent. *Gabbard v. Commonwealth*, 887 S.W.2d 547, 551 (Ky. 1994). A competency determination is based upon the preponderance of the evidence, *Chapman v. Commonwealth*, 265 S.W.3d 156, 174 (Ky. 2007), and the trial court has broad discretion in determining whether a defendant has the capacity to participate rationally in his defense. *Wooten*, 269 S.W.3d at 864. Thus, an appellate court "may disturb a trial court's competency determination only if the trial court's decision is clearly erroneous (*i.e.*, not supported by substantial evidence)." *Chapman*, 265 S.W.3d at 174.

It is uncontested that Thurman has an ID. And, it is uncontested that he has previously been found incompetent. Moreover, Dr. Sparks thoroughly explained the inconsistent results yielded from KCPC testing. But those factors are not dispositive for several reasons in this case.

First, having an ID alone does not make a defendant incompetent. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding that "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial."). Second, a court may properly find a defendant to be competent even after previous determinations of incompetency. *Keeling v. Commonwealth*, 381 S.W.3d 248, 257-259 (Ky. 2012). Third, and relevant to this case, Dr. Sparks explained to the court that the mixed test results and his inability to reach a competency determination stemmed at least in part from Thurman's lack of full effort.

Importantly, Dr. Sparks testified that Thurman gave some indications that he was aware of the nature of the charges against him and of the legal proceedings in general. For example, Thurman referred to wanting to be found incompetent, *sua sponte* used the term "jury trial," made statements suggesting he knew the difference between a misdemeanor and a felony, referred to the charges as a "set-up," and noted he was questioned by "[t]hose state boys" outside the presence of his attorney. And when questioned by the court, Dr. Sparks went further than his written report by testifying that he believed Thurman was aware of the charges against him and could rationally assist his attorney in presenting a defense. That testimony supports the trial court's conclusion that Thurman was competent.

The trial court was faced with a difficult situation involving a host of competing factors and evidence. Indeed, the court had to make a choice that Dr. Sparks declined to make in his report since the court's competency determination is both binary and mandatory. Under the facts and circumstances of this case, we cannot conclude that Thurman met his burden to show incompetency or that the trial court's decision was wholly unsupported by substantial evidence. Therefore, we must affirm.

For the foregoing reasons, the October 3, 2017, final judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James P. Judge
Assistant Attorney General
Frankfort, Kentucky