IMPORTANT NOTICE

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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 12, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-3-03 ELA Growth

1998-SC-1025-MR & 2002-SC-0045-MR

DANIEL HORTON HERALD — APPELLANT

V.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
97-CR-50-1

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In case number 1998-SC-1025-MR, Herald appeals from a judgment based on a jury verdict which convicted him of two counts of first-degree robbery, first-degree sodomy, first-degree attempted sodomy, first-degree rape and being a first-degree persistent felony offender. He was sentenced to a total of forty years in prison. In case number 2002-SC-45-MR, Herald appeals from a judgment that found him competent to stand trial after a retrospective competency hearing. We have consolidated these two appeals in order to render one opinion.

The questions presented are whether the absence of defense counsel from a pretrial hearing is reversible error; whether the trial judge erred in releasing juvenile and mental health records to KCPC as part of a competency evaluation; whether the retrospective competency hearing violated state and federal due process of law;

whether Herald was competent to stand trial and whether Herald was entitled to a directed verdict on either or both robbery charges.

Herald, his codefendant, Colemire, and the three victims were all cellmates at the Mason County Detention Center. During their incarceration together, the two defendants terrorized the three victims, committing crimes of robbery, sodomy and rape. The victims sustained multiple injuries as a result of the crimes committed by Herald and Colemire.

Ultimately, the jury convicted Herald of two counts of first-degree robbery, first-degree sodomy, first-degree attempted sodomy, first-degree rape and of being a first-degree persistent felony offender. He was sentenced to twenty years on each charge. As a result of the PFO conviction, the twenty-year sentences were enhanced to forty years, said sentences to run concurrently for a total of forty years in prison. It should be noted that this Court has already affirmed the conviction and twenty-year sentence of Colemire. See Colemire v. Commonwealth, 98-SC-1026-MR.

Following his conviction, Herald appealed to this Court as a matter of right and argued that his conviction should be set aside because the trial judge failed to hold a competency hearing. Pursuant to Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001), we remanded this case for the trial judge to determine whether a retrospective competency hearing was possible and, if so, to hold such a hearing. We also instructed the trial judge to determine whether the release of Herald's prior juvenile and mental health records to KCPC was proper.

On remand, the trial judge held two evidentiary hearings. At the first hearing, Dr. Johnson, who originally examined Herald for competency in December 1997 at KCPC and found him competent, testified without contravention that a retroactive competency

evaluation was possible. He informed the trial judge and the attorneys what information he needed to make that determination. Subsequently, the trial judge ordered various state penal institutions to send Dr. Johnson copies of the relevant information from the period of December 23, 1997 through October 12, 1998. After receiving and reviewing the information, Dr. Johnson filed a supplemental report which concluded that his original view that Herald was competent to stand trial had not been altered.

At the ensuing competency hearing, Dr. Johnson gave uncontroverted testimony that Herald was competent at the time of his trial on October 12, 1998. The trial judge entered a judgment on January 14, 2002 which found that a retrospective competency hearing was constitutionally permissible; that as a result of the retrospective competency hearing, Herald was competent to stand trial and that the mental health and juvenile records of Herald were not improperly released to KCPC. These consolidated appeals followed.

I. Pretrial Hearing

Herald contends that he was denied his right to counsel at the November 21, 1997 hearing on the Commonwealth's "Motion on Shortened Notice for Release of Juvenile and Mental Health Records," therefore the KCPC report is unreliable and must be struck from the record. We disagree.

In the original proceedings, the trial judge granted the motion by defense counsel for Herald to undergo a competency evaluation. Thereafter, the Commonwealth filed a "Motion on Shortened Notice for Release of Juvenile and Mental Health Records," so that a complete evaluation could be performed. At the hearing on that motion on November 21, 1997, neither Herald nor his defense counsel were present. From the

outset, the trial judge recognized that defense counsel was going to withdraw from the case and later the following colloquy took place:

> Trial Judge: I have no problem with the motion, but how about the fact that - - well, I guess officially speaking, [defense counsel] is still on the case. He hasn't withdrawn.
>
> Commonwealth: Well, we did notice this. I can't - - I think we've talked to him on Tuesday when we became aware of how soon Mr. Herald will be transferred.

On November 24, 1997, the trial judge entered an order releasing the various juvenile and mental health records to KCPC for their use in an evaluation of Herald. That same day, defense counsel filed his motion to withdraw. That motion, however, was not granted until December 9, 1997 when the trial judge entered an order granting defense counsel leave to withdraw. Substitute counsel was appointed on January 23, 1998.

It is clear from our review of the record that Herald had counsel at the time of the hearing on November 21, 1997. His original defense counsel remained of record until December 9, 1997. It is also clear that nothing in the record contradicts the claim by the Commonwealth that counsel for Herald was noticed on the motion to release the various records. In fact, on remand, the Commonwealth raised the issue of notice at a December 13, 2001 hearing. There, counsel for Herald indicated that the original defense counsel was preparing an affidavit for the court that he received no notice of the hearing. Our review of the record, however, shows that no such affidavit was forthcoming or ever materialized.

The absence of defense counsel from the November 21, 1997 pretrial hearing was not reversible error. At no time during the original proceedings did defense counsel raise a Sixth-Amendment challenge to the absence of defense counsel at the

pretrial hearing. Although defense counsel could not contemporaneously object to his own absence, he could have raised an objection at the next available juncture. Here, the record demonstrates that defense counsel was served with written notice of the hearing and with the order of the trial judge releasing the records. Defense counsel never filed any type of motion to alter, amend, vacate or set aside the November order.

We recognize that contrary to the trial judge's finding of fact, defense counsel did not state at a January 16, 1998 pretrial conference that he was aware of the order releasing the records. However, the simple fact remains that defense counsel was given notice of the hearing and the subsequent order. The arguments raised by Herald concerning the prejudice in not being present at the hearing are speculative and without merit. There is no support for his allegation that the Commonwealth relied on selective records to support a finding of competency. No reversible error occurred.

II. Release of Records

We find no error in the decision of the trial judge to release the juvenile and mental health records. See KRS 610.340 which allows a trial judge to release confidential juvenile court records for "good cause." See also KRE 506 and 507 which state that neither the counselor-client privilege nor the psychotherapist-patient privilege can be raised if the patient is asserting that patient's mental condition as an element of a claim. Here, Dr. Johnson stated that the records were necessary for a proper examination of Herald to determine whether he was competent to stand trial. The KCPC report was reliable evidence to determine competency. The trial judge did not err in releasing the records.

III. Retrospective Competency Hearing

Sufficient evidence existed to hold a retrospective competency hearing. 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." Thompson, supra. The determination of whether a retrospective competency hearing is permissible should be left to the trial court. Thompson.

In this case, the trial judge found that a retrospective competency hearing satisfied the requirements of due process for the following reasons:

1) The length of time between the retrospective hearing and the trial was approximately three years and the original examining psychologist had sufficient recollection of the defendant and his testing to render a retrospective opinion.
2) The original mental examination was conducted approximately nine months prior to trial. Additionally, Dr. Johnson was provided with correctional and mental health records of the defendant for the time period between the original examination in December 1997, and the trial date of October 12, 1998.
3) There was no unusual or bizarre behavior exhibited by the defendant between the examination date of December 1997 and trial date of October 1998 which would alter the original opinion of the examining psychologist.
4) There was no unusual or bizarre behavior exhibited by the defendant at any of the pretrial or trial proceedings which caused either the trial defense counsel or the trial court to question the defendant's competency.
5) The trial defense counsel was aware of the results of the December 1997 mental examinations and was apparently satisfied that the defendant had the mental capacity to understand the charges and participate in all phases of the proceeding.
6) The quality and quantity of the evidence available at the hearing on January 7, 2002, was more than adequate for this Court to make an informed decision on the issue of the defendant's competency.

After careful review of the record, we find no error in the determination by the trial judge that a retrospective competency hearing was permissible. Herald's claim that an independent competency evaluation by a defense expert is an essential component of a retrospective competency determination is without merit. His reliance on United States v. Mason, 52 F.3d 1286 (4th Cir. 1996) is misplaced because that case merely acknowledges that the existence of an independent evaluation at the time in question can be a sufficient justification for a retrospective determination. Moreover, in Thompson this Court held that no single factor standing alone controls whether the retrospective competency hearing is permissible. The retrospective competency hearing did not violate the state or federal due process rights of Herald.

IV. Competency to Stand Trial

The trial judge also properly determined that Herald was competent to stand trial. The test for mental competence is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. U.S., 362 U.S. 402, 80 S.Ct. 788 4 L.Ed2d 824 (1960). Here, the only witness on the issue of whether Herald was competent to stand trial was Dr. Johnson, the examining psychologist who was called by defense counsel. Dr. Johnson examined Herald in December 1997 and supplemented his report on December 31, 2001. Despite the repeated efforts of defense counsel to impeach the credibility of Dr. Johnson, the trial judge found that the evidence clearly and convincingly established that Herald was competent to stand trial in October 1998.

The uncontradicted testimony demonstrated that Herald understood the court proceedings and was able to cooperate with his trial defense counsel. He possessed

working knowledge of the roles of the prosecutor, the defense attorney, the witnesses, the judge, and the jury. Considering the entire record, the trial judge correctly determined that Herald was competent to stand trial.

V. Directed Verdicts

The trial judge properly overruled the motion by Herald for a directed verdict of acquittal on the charge of first-degree robbery against one of the victims. The critical elements of this crime are the use of physical force causing injury to another person while in the course of committing a theft. See KRS 515.020. At trial, the victim of the robbery testified that Herald and his codefendant repeatedly came into his cell area and while one of them beat him, the other took his commissary items. Contrary to the claim by Herald this charge involved more than the chocolate milk incident.

The victim further testified that he sustained multiple injuries as a result of these attacks during the repeated robberies. Specifically, he stated that he had knots across his forehead, a bruised sternum, bruised kidneys and a swollen neck. Based on all the evidence, a reasonable jury could easily conclude that Herald committed first-degree robbery. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

The trial judge also properly overruled the motion by Herald for a directed verdict of acquittal on the charge of first-degree robbery against a second victim. This victim indicated that Herald and his codefendant would physically beat him after they took his commissary items. He further testified that because of these beatings he sustained a blackened eye, bruised ribs and a swollen face and nose. An eyewitness to the crimes specifically stated that the beating and threats occurred at the time the items were taken. Consequently, a reasonable jury could easily conclude that Herald committed first-degree robbery against this second victim. Benham, supra.

The judgment finding Herald competent to stand trial is affirmed. The judgment of conviction and sentence is also affirmed.

Cooper, Graves, Johnstone, Stumbo and Wintersheimer, JJ., concur. Lambert, C.J., and Keller, J., concur in result only.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Matthew D. Nelson
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204