

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0974-MR

DATE 7-6-06 Ellettsburg, D.C.

CLARA LOU HENSON

APPELLANT

V.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
2001-CR-00147-2

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a decision of the trial judge that Henson was competent to stand trial. She entered a conditional guilty plea reserving her right to appeal the competency ruling. She was sentenced to life in prison for murder, five years for conspiracy to commit murder and ten years for first-degree robbery, all to run concurrently with each other.

The sole issue reserved for review questions the trial judge's order that Henson was competent to stand trial.

After an initial mental evaluation, both sides stipulated and agreed that Henson was seriously mentally retarded as defined in KRS 532.130. Based on that stipulation, the trial judge entered an order excluding the death penalty because of Henson's limited mental capabilities.

The trial judge heard testimony from a licensed psychologist called by the prosecution and another called by Henson. The prosecution expert acknowledged that he had made errors in the scoring of one test administered to Henson but that after correction he retained the opinion that Henson was competent to stand trial. The expert witness for Henson determined from testing that Henson was not competent to stand trial. The trial judge remarked that he thought Henson would be committed to treatment for a maximum of ten days if he found her incompetent and with no further findings or conclusions ruled she was competent to stand trial. The conditional guilty plea was later entered. The question of whether the trial judge abused his discretion is now before this Court.

A defendant must first be competent to stand trial before any additional proceedings are begun. Gilbert v. Commonwealth, 575 S.W.2d 455 (Ky. 1978). If a defendant lacks the capacity to understand the nature and object of the proceedings, is unable to consult with counsel or is unable to assist in preparing a defense, they are not competent to stand trial. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The burden of proof rests on the defendant to prove she is not competent. Jacobs v. Commonwealth, 58 S.W.3d 435 (Ky. 2001).

We will not substitute our judgment for that of the trial judge unless there is a manifest abuse of discretion. Gates v. Gates, 412 S.W.2d 223 (Ky. 1967). The test is not whether on review of the evidence, we would decide the matter differently but whether the trial judge was clearly erroneous or whether there is an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423 (Ky. 1982). The trial judge heard evidence from two expert witnesses who disagreed as to their conclusions which is not a rare occurrence. A careful review of that testimony gives no indication that it would be clearly erroneous

to decide the case based on one opinion or the other. The trial judge determined, based on those opinions, that Henson was competent to stand trial. We find nothing that allows us to substitute our judgment for that of the trial judge. The decision was not clearly erroneous and we can find no abuse of discretion.

The finding of the trial judge that Henson was competent to stand trial is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Thomas W. Ransdell
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint Evans Watson
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204