

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000090-TG

FINAL

DATE 4/8/10 Kelly Klaber D.C.
APPELLANT

VIRGIL LEE KELLY

V. ON APPEAL FROM CLARK CIRCUIT COURT
HONORABLE GARY D. PAYNE, SPECIAL JUDGE
NO. 03-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Virgil Lee Kelly was convicted in the Clark Circuit Court of first-degree assault, first-degree sexual abuse, and being a first-degree persistent felony offender. Enhanced pursuant to the persistent felony offender statute,¹ Appellant's total sentence was twenty-five years for the assault conviction and fifteen years for the sexual abuse conviction, ordered to be served consecutively for a total sentence of forty years' imprisonment. Appellant filed an appeal in this Court, which resulted in an opinion affirming in part, reversing in part, and remanding for a retrospective competency hearing. *Kelly v. Commonwealth*, No. 2004-SC-000786-MR, 2006 WL 3386636

¹ KRS 532.080.

(Ky. Nov. 22, 2006). Before this Court is an appeal from the trial court's finding that Appellant was competent to stand trial.

After this Court's remand, the case sat until October 3, 2007, when Appellant filed a "Motion To Vacate Judgment And Order Immediate Release" in the trial court. The motion contended that the Clark Circuit Court had 120 days to conduct the retrospective competency hearing, and that its failure to do so entitled Appellant to immediate release.

After the trial court denied Appellant's motion to vacate and release, it scheduled—and, on July 17, 2008, conducted—the retrospective competency hearing. The trial court found Appellant competent in an order filed July 18, 2008. After a motion to alter, amend, or vacate was denied, Appellant filed a notice of appeal, which was inadvertently docketed with the Court of Appeals.² On recommendation of the Court of Appeals, the appeal was transferred to this Court.

This Court's November 22, 2006 Memorandum Opinion remanding did not mention any time limit for the trial court to conduct a retrospective competency hearing. However, Appellant refers to the opinion's discussion of the statutory duty³ to conduct a competency hearing, and to its discussion of *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 2001).

In *Thompson*, the Court determined that a competency hearing is mandatory "[o]nce facts known to a trial court are sufficient to place a

² No. 2008-CA-002112.

³ See KRS 504.100.

defendant's competence to stand trial in question[.]” *Id.* at 408 (quoting *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999)). The *Thompson* Court concluded that, while the better practice is to conduct the competency hearing before the trial, a retrospective competency hearing is permissible if the hearing is adequate to arrive at an assessment that is not mere speculation as to the defendant’s competency at the time of trial. 56 S.W.3d at 409 (citing *Martin v. Estelle*, 583 F.2d 1373, 1374 (5th Cir. 1978)). In this Court’s November 22, 2006 opinion in Appellant’s case, we stated, “Accordingly . . . the case must be remanded to the trial court for a retrospective hearing to determine whether Appellant was competent to stand trial, in accordance with *Thompson v. Commonwealth*.” 2006 WL 3386636, at *4 (internal citation omitted).

Appellant contends *Thompson* mandates a retrospective competency hearing be held within 120 days, and the failure to do so entitles him to immediate release. We disagree. The *Thompson* opinion did order Thompson’s competency hearing to be held within 120 days, but not in the context of the due process requirements for a retrospective competency hearing.

Thompson held that “a retrospective competency hearing is permissible depending on the facts of a particular case.” 56 S.W.3d at 409 (overruling *Hayden v. Commonwealth*, 563 S.W.2d 720 (Ky. 1978)). The *Thompson* Court remanded the matter to the trial court “for the limited purpose of determining whether a retrospective competency hearing is permissible in this case, and, if so, to conduct such an evidentiary hearing” 56 S.W.3d at 410. The Court

then abated the remainder of Thompson's appeal pending the results of the matter of competency on remand. *Id.*

Instead of remanding for proceedings consistent with the opinion, the *Thompson* Court remanded with detailed instructions, including instructions to "if necessary, conduct a competency hearing within 120 days from the entry of this Opinion and Order." *Id.* The instructions went on to outline other procedural issues. *Id.* These instructions were particular to Thompson's case, and not a standard for all retrospective competency hearings.

Appellant is correct that a long time had passed between the remand and the retrospective competency hearing in this case. However, there is no rule or statute that would require us to vacate the conviction and release Appellant. Appellant could have filed a motion for a hearing in the trial court, to put the court on notice and give it a reasonable opportunity to schedule a hearing. If this was not effective, Appellant could have utilized CR 76.36 to obtain a writ of mandamus to require the trial judge to act. No reversible error occurred.

Appellant also contends error in his not being present before the trial court at a June 12, 2008 hearing. *Thompson* requires the trial court to determine whether a retrospective competency hearing is permissible in a particular case. 56 S.W.3d at 410. Appellant argues that, at the June 12 hearing, the trial court made this determination in his absence.

However, the record reveals that the trial court did not take any evidence nor did it make any determination on June 12. Instead, the court scheduled a

competency hearing.⁴ Because the trial court did not take any evidence nor make any determination on June 12, there was no error in Appellant not being present.

Appellant does not allege error in the trial court failing to make an independent finding as to the permissibility of a retrospective competency hearing. In addition, after the trial court found Appellant to have been competent to stand trial, on Appellant's motion, the court made additional findings of fact that a competency hearing was permissible. No reversible error occurred. Accordingly, the retrospective finding of competency by the Clark Circuit Court is affirmed.

All sitting. All concur.

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⁴ After the June 12, 2008 hearing, the trial judge retired and was replaced by a special judge, who conducted the actual competency hearing and made all findings.