

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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.

Supreme Court of Kentucky

2013-SC-000257-MR

FINAL

DATE 11-13-14 *Elva Grouth P.*
APPELLANT

JASON RUSSELL

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 12-CR-00231

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jason Russell, was convicted in Muhlenburg Circuit Court of third-degree assault and being a first-degree persistent felony offender (PFO), and was sentenced to twenty years in prison. Prior to trial, Russell moved for both a continuance and a competency evaluation. Both motions were denied. On appeal, he argues that the trial court erred by denying the motion for continuance and by not ordering a competency hearing as required by KRS 504.100. For the reasons set forth herein, the Court affirms his conviction and sentence.

I. Background

On August 10, 2012, Jason Russell was an inmate at the Green River Correctional Complex serving a thirty year sentence for a previous murder

conviction and concurrent sentences for other lesser crimes.¹ On that day, prison officials believed Russell was in possession of another inmate's property. Acting on this belief, two guards, Officers Angie Holland and Deremy Ellis, decided to search the cell Russell shared with another inmate.

At the time of the search, Russell was wearing a pair of grey shorts. Because the grey shorts did not appear on Russell's approved property list and he could not produce a receipt from an approved vendor showing his purchase of them,² Officer Holland concluded the shorts were not Russell's and ordered him to remove them. Russell responded to Officer Holland's order by saying, "She's not taking my stuff." Officer Ellis notified his supervisor that he was taking Russell to the Specialized Management Unit, or "The Hole." When Officer Ellis reached for his handcuffs, Russell punched him in the face, knocking him into the cell wall, bloodying him, and rendering him temporarily unconscious. Officer Ellis fell to the floor, and Russell continued beating him. After a few seconds, Officer Ellis pushed Russell off with his feet, and Officer Holland dragged Officer Ellis out of the cell. The officers used pepper spray to subdue

¹ Russell's brief incorrectly states that Russell is serving a sentence of life without parole. The Commonwealth did not dispute this and adopted Russell's statement of the case and procedural history. But Russell is, in fact, serving a sentence of thirty years in prison. On September 30, 2005, Russell pleaded guilty to the murder of a retired priest and convicted pedophile, Joseph Pilger. In exchange for Russell's guilty plea, the Commonwealth agreed to forego the death penalty and recommended a life sentence without the possibility of parole. But the trial court chose to disregard the Commonwealth's recommendation and instead sentenced Russell to thirty years' imprisonment. See *Russell v. Commonwealth Kentucky*, No. 2011-CA-001799-MR, 2012 WL 4210112, at *1 (Ky. App. Sept. 21, 2012) (unpublished opinion) (addressing Russell's RCr 11.42 appeal).

² When inmates first enter the prison, their possessions are inventoried. Any items an inmate acquires while incarcerated must be provided by an approved vendor, and receipts for such items must be kept in the inmate's property file.

Russell. Officer Ellis was taken to the hospital and evaluated because he had lost consciousness, but he returned to work the next day.

Russell was later transferred to the Kentucky State Penitentiary at Eddyville. On November 2, 2012, Russell was charged with assault in the third-degree and being a persistent felony offender (PFO).

On December 3, 2012, Russell's counsel moved the trial court to have Russell evaluated for competency. She stated that the reason for the motion was that Russell had notified her that he had suffered a traumatic brain injury in the past, that he had previously been under psychiatric care, and that he had been judged incompetent in a previous civil action. The Commonwealth opposed the motion, complaining that it lacked details and was based solely on the defendant's own statements with no other evidence in the record. The court stated that it was not inclined to grant the motion based on those allegations but nevertheless granted a one-week continuance of the motion for Russell to present further documentation in support of his motion.

On December 10, 2012, Russell appeared in court and presented the following documents as proof that he was mentally incompetent:

1. A CourtNet printout of the docket for his Fayette Circuit Court murder case, 04-CR-000246, with the last entry of October 3, 2011;

2. A copy of the Court of Appeals opinion denying his Criminal Rule 11.42 motion,³ and affirming the trial court's denial of his motion, rendered September 9, 2012;
3. A copy of this Court's case-information record showing that Russell had filed a motion for discretionary review of the Court of Appeals opinion (that motion has since been denied);
4. An Order of the Fayette Circuit Court, from Russell's murder case, dated February 28, 2005, stating that Russell becomes incompetent when his medication is altered and ordering that Russell be given medication in accordance with a letter from a physician at KCPC, and a copy of the letter from KCPC;
5. A one-page Kentucky Department of Corrections note, dated May 13, 2010, about Russell having stabbed another inmate "for not [sic] reason whatsoever then claims a voice," and discussing his medications;
6. A Special Management Unit Evaluation form from Eastern Kentucky Correctional Complex dated November 12, 2009 and filled out by a psychologist reflecting an interview with Russell; and
7. One page of handwritten physician's notes and orders dated September 24, 1998, noting an admission to "CPTU" and a diagnosis of

³ Russell filed a Criminal Rule 11.42 motion following his murder conviction in Fayette County. The motion was denied because he failed to file it within the three-year limitation period. On appeal, Russell claimed that his own mental incompetence caused him to miss the deadline, but the Court of Appeals found that there was no evidence that Russell's alleged incompetence affected his ability to timely file his motion and upheld the denial of his motion. *See Russell v. Commonwealth*, 2011-CA-001799-MR, 2012 WL 4210112 (Ky. App. Sept. 21, 2012) (unpublished opinion).

undifferentiated schizophrenia, followed by a discharge from CPTU the same day with a diagnosis of personality disorder not otherwise specified (antisocial traits).

The trial court specifically asked counsel what proof she had that Russell was not currently receiving his medication. Counsel stated that the Kentucky Department of Corrections note, dated May 13, 2010, and the Special Management Unit Evaluation form from Eastern Kentucky Correctional Complex, dated November 12, 2009, were “the only information that [she had] at [that] time that he was not getting his medication then.” Defense counsel then said, “I don’t have anything. But if the court would like to hear from Mr. Russell what medications if any he is receiving right now.” The court responded at that time that the documentation concerned only 2011 (in fact, the latest of those documents concerned 2010). The court then allowed the Commonwealth to respond, and the prosecutor noted that some of the documentation related to 2004 and 2005. The prosecutor also argued that none of the evidence presented was current or supported the motion. The trial court agreed and denied the motion. The court then set the matter for trial.

Several weeks before the trial date, defense counsel moved to continue the trial. She noted that Russell was awaiting a trial in Morgan County. She stated that his counsel in the other case had claimed to be attempting to secure funds for a private competency evaluation. Counsel also argued that because Russell was incarcerated at the Kentucky State Penitentiary in Eddyville, she had not had adequate time to visit with him and prepare for trial

as she was working out of the Madisonville DPA office. The trial court denied the motion. This motion was renewed on the first day of trial.

On February 20, 2013, Russell was convicted of third-degree assault, and found to be a persistent felony offender (PFO) in the first degree. He received an enhanced sentence of twenty years' imprisonment—the maximum available. This appeal followed as a matter of right. See Ky. Const. § 110(2)(b).

II. Analysis

A. The trial court did not abuse its discretion by denying the motion for a competency evaluation.

Russell argues that the trial court erred by not ordering a competency evaluation and hearing as required by KRS 504.100 and by the Due Process Clause of the Fourteenth Amendment. He also notes, correctly, that a defendant may not be tried or convicted while incompetent to stand trial. See *Drope v. Missouri*, 420 U.S. 162, 172 (1975) (noting that this “prohibition is fundamental to an adversary system of justice”); see also KRS 504.090 (“No defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues.”).

Under the Due Process Clause, a competency evaluation and hearing are required only “where there is *substantial evidence* that a defendant is incompetent.” *Padgett v. Commonwealth*, 312 S.W.3d 336, 347 (Ky. 2010) (quoting *Filiaggi v. Bagley*, 445 F.3d 851, 858 (6th Cir. 2006)). Under KRS 504.100, which creates an independent statutory right to an evaluation, see *id.* at 348, a defendant is entitled to a competency evaluation “[i]f upon arraignment, or during any stage of the proceedings, the court has reasonable

grounds to believe the defendant is incompetent to stand trial.” KRS 504.100(1). After such an evaluation, the defendant has a statutory right to a hearing. KRS 504.100(3); *see also Padgett*, 312 S.W.3d at 348 (distinguishing between constitutional and statutory right to a competency hearing).

The standard of review of the denial of a competency evaluation or failure to conduct a competency hearing is “[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Padgett*, 312 S.W.3d at 345–46 (quoting *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 2001)). Russell argues that the trial judge had sufficient reason to doubt his mental competency based on the evidence presented and was thus compelled by KRS 504.100(1) to order a competency evaluation. He argues that it was an abuse of discretion not to do so.

Russell cites *Gardner v. Commonwealth*, 642 S.W.2d 584 (Ky. 1982), in support of his argument that the court violated KRS 504.100 by not ordering the competency evaluation. In *Gardner*, this Court held that a trial judge, when faced with incoherent and unexplained conduct of a defendant, was required, in order to protect the due-process rights of the defendant, to obtain an up-to-date professional opinion of the defendant’s mental capacity to appreciate the nature and consequences of the proceedings against him and of the defendant's capacity to participate rationally in his own defense. *Id.* at 585. Russell also correctly notes that “evidence of a defendant's irrational behavior,

his demeanor in court, and any prior medical opinion on competence to stand trial are all relevant facts for a court to consider.” *Drope*, 420 U.S. at 180.

In *Gardner*, the record reflected that the defendant gave statements that “were totally incoherent and unresponsive to questions put to him by the court,” and that at least seven times during the trial, he gave “the same incoherent and unresponsive answers to questions propounded to the appellant by the court.” *Gardner*, 642 S.W.2d at 585. The defendant was also removed several times from the court for disruptive behavior. *Id.* The court said that, “the record reflects that his total conduct was a mental aberration in that the answers to the court's questions showed total lack of comprehension.” *Id.* This conduct made it clear that the trial court was mandated by the language of KRS 504.100 (then KRS 504.040) to order an evaluation of the defendant’s competency to stand trial. *Id.*

Unlike in *Gardner*, Russell did not display any aberrant behavior that would have given the court any reason to doubt his competency. Instead, he relies primarily on prior diagnoses of mental illness and a prior pronouncement by a trial judge that he becomes incompetent when not properly medicated. While these are relevant factors under *Drope*, they are not automatically determinative. And after our review of that evidence, we agree with the trial court that it does not rise to the level of substantial evidence of incompetency.

For example, Russell provided a letter from the Kentucky Corrections Psychiatric Center addressed to Judge Gary Payne, who presided over Russell’s Fayette County murder trial. The letter stated that Russell becomes

incompetent when not on the prescribed medication detailed in the letter. The letter also noted that it would be possible to reduce Russell's medication because the dose at that time "may make him too sleepy and/or give him just a little buzz," and that as a result, "reduction could make good clinical sense." Russell also provided the court with a copy of Judge Payne's order, dated April 28, 2005, requiring that the medication be administered by the Fayette County Detention Center to ensure Russell's competence for trial. While this is some evidence *suggesting* a competency issue, there was no accompanying evidence that Russell was not properly medicated at the time of his 2013 trial. A reasonable judge would have required some evidence, even if it was only the defendant's own testimony that he was off his medication, before experiencing doubt about Russell's competence at that time.

While Russell's counsel offered to let the trial court hear from Russell himself about whether he was properly medicated, she did not press the issue when the trial court responded to that offer by noting that the documentation related to 2011 and implied that it was not current. In fact, Russell's counsel does not appear to have ever affirmatively alleged that Russell was in fact not being medicated. Instead, she merely implied that he was not and relied on the 2009 documentation from Eastern Kentucky Correctional Complex and the 2010 report from the Department of Corrections, both of which suggested issues with Russell's medication at those times.

The Eastern Kentucky Correctional Complex Special Management Unit Evaluation, dated October 12, 2009, said that Russell had been off his

medication for two years at that time. Nevertheless, the report stated⁴ that while he was depressed, he was also cooperative; was oriented in time, person, place, and situation; that his cognition processes were coherent, logical, and relevant; that his cognition content was within normal limits; and that he had an appropriate affect for his situation. Written notes at the bottom of the evaluation noted that Russell was depressed but not suicidal and did not want to hurt himself or others but that he “wouldn’t mind if someone came in and killed him.” The note also recorded that Russell had asked to see a psychiatrist about medication after noting he had been off it for two years. The information was, at best, inconclusive and, more importantly, stale, having come about three and a half years before the 2013 trial.

Russell also provided the court a copy of a report from the Kentucky Department of Corrections dated May 13, 2010. The report indicated that Russell had been diagnosed as having a bipolar disorder as early as 2005 and that he was suspected of having auditory hallucinations (hearing voices) on the day the report was made. The report stated that he had stabbed another inmate (possibly because of the voices) and that he was angrily demanding a change in his medication. According to the report, he had stopped taking a drug called risperidone after 20 days because of sinus dryness and congestion and had demanded Seroquel. When he was told he would only be offered a “depakote/cpz combo,” he cursed and left, stating “it’s on you.” A note at the bottom of this report states that he had been prescribed “depakote thorazine,”

⁴ The report included a check-list on which these characteristics were checked.

and had to cooperate with this medication regimen before a “nonformulary” medication (presumably Seroquel) could be considered.⁵ Overall, the document suggests that Russell refused the formulary drug combination. Again, while this was evidence of issues with Russell’s medication at the time the report was made, the report was almost three years old at the time he went to trial in 2013.

Balanced against this evidence, to the extent it would have raised any judicial eyebrows, was the information from the Criminal Rule 11.42 proceedings in the Fayette County murder case. The issue in his appeal of that case was whether his alleged incompetency had made him file his 11.42 motion late (i.e., outside the three-year limitations period). The Court of Appeals affirmed the denial of his motion. The court looked at the same documents he has presented in this case and concluded that he “ha[d] not put forth any evidence of the nature of his incompetence and how it limited him from timely filing his RCr 11.42 motion.” *Russell v. Commonwealth*, 2011-CA-001799-MR, 2012 WL 4210112, at *3 (Ky. App. Sept. 21, 2012). The court also pointed to the fact that Russell, while claiming to be too incompetent to have timely filed his motion, had nonetheless eventually filed the motion while still claiming “continuous incompetence.” *Id.* It also noted that “Russell ha[d] also not explained how, despite his continuous incompetence, he was capable of filing

⁵ As the Court of Appeals noted in the 11.42 appeal, the various drugs mentioned in this report—Resperidone, Depakote, Thorazine, and Seroquel—“are psychotropic medications used to treat various mental disorders.” *Russell v. Commonwealth*, 2011-CA-001799-MR, 2012 WL 4210112, at *3 (Ky. App. Sept. 21, 2012).

well written and concise *pro se* motions to change venue, to suppress evidence, and for appointment of expert witnesses.” *Id.*

This Court cannot say that the trial court erred in refusing to order a competency evaluation based on this evidence. The documentation he produced showed, at best, that he had previously been diagnosed with mental illness in 1998; that he had been declared incompetent when not medicated in 2005; that approximately four years later, he was off his medication but wanted to talk to someone about it while, at the same time, appearing coherent and logical; and that another year later, he had acted violently and refused to take the drug combination that the Department of Corrections had offered him. The Court of Appeals, in the 11.42 appeal, read the documentation similarly to mean that Russell had been offered a drug combination from the Department’s formulary and that he had declined it and demanded his medication of choice (Seroquel). Yet another document, the letter included with Judge Payne’s order, suggested the reason why Russell refused the formulary drugs: his preferred medication could “give him just a little buzz.”

In denying the motion for the evaluation, the trial court was clearly concerned with Russell’s then-current mental condition. This Court agrees that the evidence presented was insufficient to raise the issue of Russell’s competency. The mere fact that he had previously been diagnosed with a mental illness and declared incompetent does not mean he was incompetent at the time of the trial in this case, nor would those facts necessarily give rise to a belief that competency was actually in question. The simple fact is that

Russell's evidence was stale and inconclusive, and his behavior in court was not indicative of an obvious mental health condition. Russell provided no documentation or testimony about the state of his medication or mental competency at the time of the trial in this case. In fact, he never even directly alleged that he was not medicated at that time and instead relied on vague inferences from the several-years-out-of-date documents.

This Court does not believe that a similarly situated judge would have had reasonable grounds to believe Russell was incompetent to stand trial. The trial court therefore did not act in a manner that was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Thus, it was not an abuse of discretion to deny the motion.

B. The trial court did not abuse its discretion in denying the motion for a continuance.

Russell also argues that the trial court's denial of his motion for a continuance violated his due process rights and was an abuse of discretion. Russell's trial counsel filed a written motion for continuance on February 4, 2013. At that time, she presented two arguments for why the continuance should have been granted. First, she argued that Russell's counsel in a Morgan County case was pursuing retaining a private expert to evaluate Russell for competency. When pressed on this, Russell's counsel had few details, stating only that she did not know whether funds for such an expert had been requested in the Morgan County case and that she had only been told by the other lawyer that he was pursuing hiring a private expert. Second, she argued

that Russell was by then incarcerated at the Kentucky State Penitentiary in Eddyville and she was working out of the Madisonville DPA office, which had not allowed her adequate time to visit with him and prepare for trial. Counsel also noted that she was preparing for an unrelated murder trial for another client at that time.

She renewed this motion on the day of trial. At that time, she elaborated on her claimed inability to have prepared for trial. She noted that Russell was in segregation at the prison and thus she could only visit with him on certain days. She also stated that she was not allowed to meet with him face to face and was limited to using a video conferencing system in a public meeting room, which made it impossible to share documents with Russell or to discuss matters privately.

“Upon motion and sufficient cause shown by either party, the court *may* grant a postponement of the hearing or trial.” RCr. 9.04 (emphasis added). The trial court is to consider the totality of the circumstances, though the following factors are important: “length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.” *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky.1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

Nevertheless, “the ultimate decision to grant a continuance lies within the sound discretion of the trial court, and a conviction will only be overturned upon a showing of an abuse of that discretion.” *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006). And a conviction will not be reversed for failure to grant a continuance “unless that discretion has been plainly abused and manifest injustice has resulted.” *Id.* (quoting *Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976)). This Court’s review of the trial court’s exercise of its discretion focuses on, but is not limited to, the factors laid out in *Snodgrass*.

Russell’s counsel asked for a continuance until “spring,” which was only a few months away at the time of trial (February 2013). That would have meant a short delay. Moreover, there had not been any previous continuances of the trial date. While there no doubt would have been some inconvenience to the parties, witnesses, and the court, since trial was slated for only a week later, Russell was already incarcerated and the delay would be minimal. These factors arguably weigh in favor of a continuance.⁶

Russell argues that the delay was not purposeful and that he did not cause it. The reason for the delay was so he could potentially be examined for competency in another county, which he claims was necessary because the trial judge in this case had refused to have him examined. But as discussed above, he had failed to show entitlement to a competency evaluation. Thus, the reason for the delay was his fault and was purposeful, since it was aimed only

⁶ The fifth factor, whether other competent counsel was available to take over the case, was not explored by the trial court, and does not appear to be at issue here.

at possibly obtaining evidence about his competency in the future, despite having already lost that claim in this case.

Russell admits in his brief that this case was not particularly complex. The facts of the case present simple assault. The trial ultimately lasted only a day, and the Commonwealth presented only three witness and seven photographic exhibits.

Of the first five factors, some weigh in Russell's favor, while others weigh against him or are neutral. But the most important consideration is whether the trial court's denial of the continuance led to identifiable prejudice. See *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) ("Identifiable prejudice is especially important."). Russell claims he suffered prejudice because he was unable to wait to obtain the results of the psychiatric evaluation in his Morgan County case. But "[c]onclusory or speculative contentions that additional time might prove helpful are insufficient. The movant, rather, must be able to state with particularity how his or her case will suffer if the motion to postpone is denied." *Id.* As discussed above, Russell's claim of incompetency was based only on out-of-date proof and thus it was at best speculative. That counsel in another case in another county *might* at a future date have been able to get Russell evaluated is further speculation. Russell's lawyer did not even know if funds had been requested for such an evaluation. There was no identifiable prejudice from failing to grant a continuance on the basis of waiting for an at-best *possible* competency

evaluation in another case, especially when there was insufficient proof in this case to require such an evaluation.

Similarly, there was no identifiable prejudice from the fact that Russell's counsel was working out of Madisonville while Russell was incarcerated in Eddyville or that she was preparing for another murder trial. Lawyers are often called on to juggle multiple clients and travel to visit with them. (It is worth noting that Madisonville is only about a 45 mile drive from Eddyville, mostly along highways.) Again, this case was not particularly complex, and thus the preparation time should have been less than for other cases.

Somewhat more troubling is the fact that when Russell's counsel was able to meet with him, she was not allowed face-to-face, private contact. But when asked whether a continuance would solve this problem, in light of the fact that Russell would still be housed at Eddyville, counsel stated only that she could try to arrange for a private meeting. The judge then asked her whether she had made any attempts to schedule a private meeting prior to the trial, and she admitted that she had not. Again, this shows no identifiable prejudice and is speculative.

In light of the circumstances of this case, this Court cannot say that the trial court abused its discretion in denying Russell's motion for a continuance. He ultimately failed to show any real need for a delay in the proceedings.

III. Conclusion

For the foregoing reasons, the judgment of the Muhlenberg Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ.,
concur. Keller, J., not sitting.

COUNSEL FOR APPELLANT:

Linda Roberts Horsman
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

David Bryan Abner
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601.