

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000055-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 02-CI-008422

HONORABLE LISABETH HUGHES
ABRAMSON, JUDGE, JEFFERSON
CIRCUIT COURT AND A.P., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.
SCHRODER, JUDGE. The Commonwealth of Kentucky appeals an order of the Jefferson Circuit Court, denying a writ of prohibition and mandamus. The Commonwealth sought the writ in order to restrain the Jefferson District Court from granting funds for an additional competency evaluation of A.P., a child charged with sex abuse in the first degree. Although the district court erred in permitting the request for funds by defense counsel to

be made ex parte, pursuant to the provisions of KRS 31.185, ultimately we agree with the circuit court that the district court did not abuse its discretion in granting a second competency evaluation. We therefore affirm.

Following the sex abuse charge, A.P. moved for a competency evaluation, which was performed by court-appointed expert Dr. Dennis J. Buchholz of the Psychological Services Center of Louisville, Kentucky. Dr. Buchholz concluded that A.P. was competent to stand trial. A.P. then moved ex parte, pursuant to KRS 31.185(2), to obtain funds for another competency evaluation.¹

On October 31, 2002, the district court made an oral ruling that such funds would be made available to the defendant. The Commonwealth thereafter filed a petition for writ of prohibition and mandamus as an original proceeding in the Jefferson Circuit Court. The Commonwealth argued that under KRS 504.100, such ex parte proceedings are not permitted, and furthermore, that funds may not be provided to indigent defendants for additional competency evaluations.

¹ We note that there was some lack of clarity regarding defense counsel's request for expert assistance. The circuit court noted in its opinion that the record was unclear as to "the exact nature and scope" of the expert assistance being sought by A.P.'s counsel. The circuit court ultimately treated the question as pertaining solely to funds for an additional assessment of competence to stand trial. That is also the way the question has been characterized by both parties on appeal.

The circuit court denied the writ on the grounds that the defendant's request did fall within the purview of KRS 31.185, and that it was well within the district court's discretion to order funds for an additional competency evaluation.

We note as a preliminary matter that the Commonwealth has incorrectly designated the circuit court judge, rather than the district court judge, as the appellee in this case. Failure to name an indispensable party on appeal may be grounds for dismissal. In Sweasy v. King's Daughters Memorial Hospital, Ky., 771 S.W.2d 812 (1989), the Kentucky Supreme Court addressed the implications of failing to name the trial court judge as a party in the context of an original action:

[a]n original action . . . such as this, seeking a writ of mandamus or prohibition ordering a trial judge to grant or deny interlocutory relief in a pending action is different from other appellate proceedings. The trial judge is a party in name only. He has no interest in the outcome of the litigation, and no connection to it other than the obligation to abide by the Court of Appeals' decision. Indeed, although the trial judge is the named party, the final order of the appellate court is binding on whoever holds the office of trial judge at the time of the decision. . . . The real party in interest in the trial court is the person who will be adversely affected if the Petition is granted; he may respond and defend even though the trial judge does not. It is this party and not the trial judge who has an interest in perfecting the appeal

when the writ of prohibition or mandamus is granted.

Sweasy, 771 S.W.2d at 817.

In light of the holding in Sweasy, we deem it sufficient that the Commonwealth also named the real party in interest, A.P., in the notice of appeal.

The fundamental question in this case is whether the provisions of KRS 31.185 that authorize expert assistance for indigent defendants, apply to expert evaluations of competency to stand trial. KRS 31.110(1)(b) states that an indigent defendant is entitled "[t]o be provided with the necessary services and facilities of representation including investigation and other preparation." In addition, KRS 31.185(1) provides:

Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities **for the evaluation of evidence** as are available to the attorney representing the Commonwealth. If he or she considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order from the special account of the Finance and Administration Cabinet. (emphasis supplied.)

KRS 31.185(2) states:

The defending attorney **may request to be heard ex parte** and on the record with regard to using private facilities under subsection (1) of this section. If the defending attorney so requests, the court shall

conduct the hearing ex parte and on the record. (emphasis supplied.)

We agree with the Commonwealth that an expert evaluation of a defendant's competency to stand trial does not constitute "evaluation of evidence" within the meaning of the statute and hence, defense counsel may not avail itself of the provision of the statute that permits ex parte requests for funds.

Clearly, the provision for ex parte proceedings in KRS 31.185(2) was included in order to allow a defendant to request expert assistance in preparing for trial without risking the disclosure of trial strategy to the prosecution. In an opinion rendered after this appeal was briefed, the Kentucky Supreme Court prohibited the Commonwealth from obtaining its own independent competency evaluations of defendants on the grounds that the Commonwealth could "gain the inherent and possibly unfair advantage of gleaning insight as to the defense strategy." Bishop v. Caudill, Ky., 118 S.W.3d 159, 164 (2003). The Court expressed concern that the prosecution's mental health examiner could glean harmful evidence, such as the commission of prior crimes, from its examination of a defendant. It is unlikely, however, that requiring defendants to move the trial court for an additional competency evaluation under KRS 504.100, rather than allowing them to proceed ex parte, would lead to the

disclosure of either harmful evidence or trial strategy to the prosecution.

The inquiry into a defendant's competency to stand trial is very different and distinct from an inquiry into whether the defendant is criminally responsible for the acts with which he is charged. Bishop, 118 S.W.3d at 162.

As provided in KRS 504.100, the determination of competency is made by the trial court. If the trial court has reasonable grounds to believe that a defendant's competency to stand trial is at issue, the statute mandates that a psychologist or psychiatrist be appointed to examine, treat, and report on the defendant's condition. A competency examiner is working for the court, not necessarily the defense or the Commonwealth.

Bishop, 118 S.W.3d at 163, citing Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1995).

The determination whether a defendant is competent to stand trial is therefore a separate issue from the determination of guilt or innocence. The judge is the arbiter of competency. The language of KRS 31.185, referring to the "evaluation of evidence" does not encompass the evaluation of competency to stand trial.

The appellee has raised the argument that non-indigent defendants possess the advantage that they may hire as many competency experts as they can afford without alerting the Commonwealth. Although this is true, any unfair advantage in

favor of non-indigent defendants is balanced by the fact that under the provisions of KRS 504.100, the trial court at all times retains the ultimate discretion in assessing the testimony of these experts in arriving at its decision regarding a defendant's competency to stand trial.

Of course, in some cases defense counsel will wish to request funds for a mental health examination both for the purpose of evaluating a client's competency to stand trial, and also to explore the possibility of a defense based on insanity or incompetency to form intent. In these cases, defense counsel may certainly invoke the ex parte provisions of KRS 31.185 in order to avoid divulging any aspect of his or her trial strategy.

The appellee argues that the Commonwealth does not have standing in this case on the grounds that the provision of funds for expert assistance is a private matter between the defendant and the court, pursuant to the ex parte provisions of KRS 31.185. In light of our determination that the provision of funds solely for an additional evaluation of competency to stand trial does not fall within the parameters of KRS 31.185, this argument is rendered moot. Furthermore, the statute [KRS 504.100] requires an evidentiary hearing at which all parties--the court, the defendant, and the prosecution--are constitutionally entitled to examine the [competency] evaluator

and the basis of the report. See Gabbard v. Commonwealth, Ky., 887 S.W.2d 547, 551 (1994). The fact that the Commonwealth is specifically permitted to participate in the evidentiary hearing regarding competency gives it standing on this issue.

The appellee also argues that the Commonwealth has failed to meet the threshold requirements for relief pursuant to a writ of prohibition and mandamus. The decision to issue or deny a writ of prohibition is within the sound discretion of the court. Rowley v. Lampe, Ky., 331 S.W.2d 887 (1960). In order for such an original action to be considered, the petitioner must demonstrate that (1) the lower court was acting outside its jurisdiction, or within its jurisdiction but erroneously; (2) that there is no adequate remedy by appeal and; (3) intervention is necessary to prevent great injustice and irreparable injury or to preserve the orderly and correct administration of justice. See Commonwealth v. Ryan, Ky., 5 S.W.3d 113, 115 (1999); Roman Catholic Diocese of Lexington v. Noble, Ky., 92 S.W.3d 724, 728-29 (2002).

In this case, the first two elements were met because the lower court acted incorrectly by granting the appellee's motion ex parte, and the Commonwealth was without the remedy of an appeal. We adjudge that the Commonwealth has also met the third requirement because a resolution of this conflict was

necessary in the interests of "preserving the orderly and correct administration of justice."

There is no indication in the record that the trial court abused its discretion in granting an additional competency evaluation, particularly when we consider the youth of the defendant, the seriousness of the charge, and the grave concerns defense counsel expressed in a bench conference with the circuit judge, regarding the methodology employed by Dr. Buchholz. The Commonwealth has gone so far as to suggest that an indigent defendant is limited to one expert competency evaluation only. KRS 504.100 does not contemplate such a limitation, and indeed it states that the court shall appoint **at least** one expert if a defendant's competency to stand trial is in doubt. If defense counsel chooses to alert the court to deficiencies it detects in the evaluation performed by the court-appointed expert, or to request funds for another evaluation, we do not think the statute limits the court's discretion to act upon such motions.

The Commonwealth has also tried to bolster its argument that the defendant is only entitled to one competency evaluation by citing Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 850 (1992). In Crawford, the Kentucky Supreme Court concluded that a defendant's due process rights were not violated when the court refused to grant his request for a second independent psychological examination. Crawford merely

set the minimum standard, however, and certainly does not stand for the proposition that a court may not grant further expert assistance in determining competency to stand trial.

In light of the great discretion the trial court has in the appointment of experts to assess a defendant's competency to stand trial, we do not believe that the Commonwealth would be unduly prejudiced if the district court's order is allowed to stand in this case.

The Jefferson Circuit Court's order denying the writ of prohibition is affirmed.

ALL CONCUR.

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