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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

NO. 2005-CA-000039-MR

CORY KAVANAUGH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
INDICTMENT NO. 04-CR-00794

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

KNOPF, JUDGE: On June 28, 2004, a Fayette County grand jury indicted Cory Kavanaugh on one count each of second degree robbery,<sup>1</sup> second degree fleeing or evading police,<sup>2</sup> and third-degree criminal trespass.<sup>3</sup> Following a jury trial, Kavanaugh was

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<sup>1</sup> KRS 515.030, a class C felony.

<sup>2</sup> KRS 520.100, a class A misdemeanor.

<sup>3</sup> KRS 511.080, a violation.

acquitted of the criminal trespass charge, but was convicted on the robbery and fleeing charges. The jury fixed his sentence at a total of eight years, which the trial court imposed.

On appeal, Kavanaugh argues that the trial court should have ordered a competency hearing for him after his trial counsel had expressed concerns about Kavanaugh to the court. The trial court questioned Kavanaugh at the bench and concluded that he was competent. However, neither Kavanaugh nor his trial counsel requested a competency hearing.

Nevertheless, KRS 504.100(1) requires a court to appoint a psychologist or psychiatrist "to examine, treat and report on the defendant's mental condition" whenever "the court has reasonable grounds to believe that the defendant is incompetent to stand trial." Furthermore, KRS 504.100(3) states that after such a report is filed, "the court shall hold a hearing to determine whether the defendant is competent to stand trial." These provisions are mandatory and cannot be waived by a defendant.<sup>4</sup> Therefore, defense counsel's failure to request an evaluation of Kavanaugh and a hearing is not necessarily determinative.

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<sup>4</sup> Mills v. Commonwealth, 996 S.W.2d 473, 486 (Ky. 1999).

The Due Process Clause prohibits proceedings against an accused who lacks the competency to stand trial.<sup>5</sup> An accused is incompetent to stand trial if he or she lacks the capacity to either (1) appreciate the nature and consequences of the proceedings against him or her, or (2) participate rationally in his or her defense.<sup>6</sup> In Mills v. Commonwealth,<sup>7</sup> the trial court ordered a psychiatric evaluation in response to notice filed by the defense that it intended to introduce evidence concerning mental illness, insanity, or mental defect.<sup>8</sup> But there was no behavior exhibited by Mills in court, or information provided to the court by counsel or other sources, that should have caused the trial court to experience doubt as to Mills' competence to stand trial.<sup>9</sup> The Court in Mills noted 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 trial court to consider prior to holding a competency hearing. The Court held that the trial court's

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<sup>5</sup> Medina v. California, 505 U.S. 437, 439, 112 S .Ct. 2572, 2574, 120 L. Ed. 2d 353 (1992); Gabbard v. Commonwealth, 887 S.W.2d 547, 551 (Ky. 1994).

<sup>6</sup> RCr 8.06.

<sup>7</sup> *Supra*.

<sup>8</sup> *Id.* at 485.

<sup>9</sup> *Id.* at 486.

failure to conduct a competency hearing was harmless because there were no reasonable grounds to question Mills' competence.<sup>10</sup>

On the other hand, in Thompson v. Commonwealth,<sup>11</sup> serious problems relating to the defendant's competence were brought to the trial court's attention, "includ[ing] possible serious and chronic mental illnesses, neurological problems which may be organic in nature, and the presence of a mental condition which may affect defendant's ability to perceive and interpret information provided to him by counsel."<sup>12</sup> The trial court in Thompson ordered a competency evaluation and hearing, but subsequently the defendant entered a plea of guilty and waived the issue. Nonetheless, the Kentucky Supreme Court held that the trial court was required to conduct a competency hearing prior to accepting the guilty plea.<sup>13</sup>

The facts of the present case are more similar to those presented in Mills than in Thompson. Kavanaugh's trial counsel approached the court shortly after he rejected the Commonwealth's offer of two years' imprisonment in exchange for a guilty plea to an amended count of felony theft by unlawful

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<sup>10</sup> Id.

<sup>11</sup> 56 S.W.3d 406 (Ky. 2001).

<sup>12</sup> Id. at 407-08.

<sup>13</sup> Id. at 408-09.

taking. Counsel expressed concerns to the court that Kavanaugh was "delusional", referring to a videotape that did not exist. Counsel also informed the court that Kavanaugh had mentioned wanting to harm himself.

The trial court asked defense counsel if this conduct suggested a competency issue. Counsel stated that he believed that Kavanaugh was "competent to a point", but Kavanaugh did not appear to understand the gravity of the situation or the benefit of accepting the Commonwealth's plea offer. The trial court stated that it wished to speak to Kavanaugh in case there was any issue about his competency. The trial court asked Kavanaugh if he believed that a videotape existed which would exonerate him. Kavanaugh replied that he did not. The court also explained to Kavanaugh that he was charged with a class C felony with potential imprisonment of five to ten years. Kavanaugh answered that he understood. The court informed Kavanaugh of defense counsel's concerns about the evidence, the benefit of accepting the Commonwealth's offer, and the risks of proceeding to trial. Kavanaugh stated that he understood but he wanted to go to trial anyway. At the conclusion of this exchange there was no further comment by the court or argument of counsel.

Our standard of review 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."<sup>14</sup> In this case, neither defense counsel nor the trial court found any reason to seriously question Kavanaugh's competency. Defense counsel questioned Kavanaugh's judgment in rejecting the Commonwealth's offer. Counsel also expressed concerns that Kavanaugh had unrealistic expectations concerning the outcome of a jury trial. Upon questioning by the trial court, however, Kavanaugh clearly stated that he understood the risks. Kavanaugh's demeanor in court did not present any reasonable grounds for the trial court to doubt his competency, and there was no other evidence to suggest that Kavanaugh was not competent to stand trial. Consequently, the trial court did not abuse its discretion by failing to order a competency evaluation and hearing.

Kavanaugh also points to testimony given by his mother during the sentencing phase. Ms. Morton testified that Kavanaugh became very distraught following a family tragedy, and that he "needed help." She added that Kavanaugh claimed to have a religious experience, and thereafter he became very devout. However, she did not suggest that Kavanaugh was delusional or incapable of rational decisions. When viewed in context, Ms. Morton's testimony does not call Kavanaugh's competency into

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<sup>14</sup> *Id.* at 408, quoting Mills, 996 S.W.2d at 486.

question. Therefore, the trial court did not err by failing to order a competency hearing at that point.

Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin J. Halbleib  
Appellate Public Advocate  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky