

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002380-MR

GLENN FRANKLIN DEAN, JR.

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN WHITE, JUDGE
ACTION NO. 90-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE: In July 1990, a Christian County jury convicted Glenn Dean, Jr., of two counts of first-degree rape and related offenses stemming from Dean's and a codefendant's violent attack upon a sixteen-year-old girl. Dean was sentenced to ninety years' imprisonment. In *Dean v. Commonwealth*, 884 S.W.2d 417 (Ky. 1992), our Supreme Court upheld Dean's conviction and sentence. In September 2005, Dean moved for relief from his 1990 conviction pursuant to CR 60.02. The Christian Circuit Court denied that motion on October 13, 2005

and Dean has appealed. Dean contends that he was not accorded a mandatory competency hearing prior to his 1990 trial and that the circuit court erred by ruling that because Dean could have raised this issue during his direct appeal he is precluded from raising it now. Although our reasoning differs somewhat from that of the trial court, we agree that Dean's current motion is untimely, and in any event Dean's underlying claim is meritless. Accordingly, we affirm.

Prior to Dean's trial his counsel moved for a psychiatric evaluation on the ground that "[t]here is a substantial reason to believe that defendant is not entirely aware of the consequences of the charges against him, or possibly [will] not be able to communicate adequately with his counsel." The trial court granted the motion, and Dean was eventually evaluated by both a KCPC psychologist and a psychologist retained by the defense. The report of the state psychologist appears in the record, and Dean's psychologist testified during the penalty phase of the trial. Both found that Dean was of low average intelligence and had trouble reading, but neither found any disabling mental defects or psychiatric conditions. Dean had no trouble communicating with either of them, gave what they deemed valid responses to their several tests, and displayed a detailed recollection of the crime and the surrounding events. The state psychologist

concluded that "Mr. Dean is clearly competent to stand trial." Confronted with the state's evaluation and what apparently was a similar evaluation by the psychologist he had retained, defense counsel waived a competency hearing and stipulated to Dean's competence. The matter then went forward to trial.

Relying on *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 2001), and *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999), Dean correctly observes that once a criminal defendant's competence is brought into doubt, "the trial court must hold an evidentiary hearing to determine the question." *Mills v. Commonwealth*, 996 S.W.2d at 486. Nevertheless, our Supreme Court has held that the appellate standard of review in a case where the trial court has failed 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." *Id.* at 486 (quoting *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983)). Where there is no continuing reason for doubt, the failure to hold a hearing is at most a harmless error. *Id.* Here, assuming that counsel's motion for an exam initially raised a meaningful doubt about Dean's competence, neither Dean's demeanor, counsel's subsequent representations, nor either expert's examination provided any reason for continuing to doubt Dean's competence. The trial

court's failure to hold a competency hearing, therefore, was a harmless error, not the plain error Dean alleges, and thus even on the merits Dean's CR 60.02 motion was properly denied.

The motion was also untimely. Although the failure to raise competency issues on direct appeal generally does not preclude collateral review, because the defendant's alleged incompetence may well invalidate his apparent waiver, *Silverstein v. Henderson*, 706 F.2d 361 (2nd Cir. 1983), the availability of collateral review is not limitless. Generally, of course, the vehicle for collateral review of a criminal conviction in Kentucky is RCr 11.42, which imposes a three-year limitations period for collateral relief. The extraordinary remedy provided by CR 60.02 is not available where the issue could have been raised in an RCr 11.42 proceeding. *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005). Here, Dean's competency claim could have been raised under RCr 11.42 and was thus subject to that rule's limitations period. The error Dean alleges—the lack of a hearing—was apparent on the face of the record, and he has offered no reason why the limitations period should be tolled for nearly ten years. Dean's reference to RCr 10.26, the substantial error rule, is unavailing. That rule expands the scope of review somewhat, by permitting review of plain errors unpreserved in the original proceeding, but it does not expand the time for review. Even plain error review must be

sought in a timely manner, which, for the purposes of this case, means within the three-year limitations period. Dean's motion was untimely, and for that reason, too, it was properly denied. Accordingly, we affirm the October 13, 2005, order of the Christian Circuit Court.

ALL CONCUR.

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