RENDERED: DECEMBER 14, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000714-MR

DAVID DOYLE — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00096

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD[1] AND STUMBO, JUDGES; BUCKINGHAM,[2] SENIOR JUDGE.

HOWARD, JUDGE: David Doyle (hereinafter Doyle) appeals from the February 27, 2006, order of the McCracken Circuit Court, denying his CR 60.02 motion to set aside his 2003 criminal conviction and 10-year sentence. Finding no reversible error, we affirm.

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[1] Judge Howard completed this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007, as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

[2] Senior Judge David Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Doyle was indicted by a McCracken County Grand Jury on March 7, 2002, for attempted murder, burglary in the first degree, and violation of an emergency protective order. The charges grew out of an incident where he was intoxicated and broke into the home of his estranged wife, stabbed her and then cut his own throat. On February 18, 2003, Doyle pleaded guilty to an amended charge of assault in the first degree, as well as the original charges of burglary and violation of an EPO.

While the case was pending and prior to entering his plea, Doyle filed a motion for a competency evaluation. That motion was granted and the trial court entered an order on July 15, 2002, referring him to the Kentucky Correctional Psychiatric Center. After a 39-day inpatient evaluation, a report was issued addressing Doyle's competency to stand trial, as well as whether a mental defect or disease caused him to lack the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. That report found that he was competent to stand trial. Doyle then filed a notice pursuant to RCr 7.24(3)(B)(1) indicating his intent to introduce testimony relating to a mental condition having bearing upon the issue of guilt, but made no motion for a competency hearing, nor raised any other issue regarding his competence to stand trial.

On November 11, 2004, Doyle filed a motion pursuant to RCr 11.42 alleging that counsel had provided constitutionally ineffective assistance in several respects, which motion was denied by the trial court. Doyle did not, however, raise any

issues in that motion regarding his mental state, either concerning the court's failure to hold a competency hearing or his counsel's failure to demand one.

On February 10, 2006, Doyle filed the CR 60.02 motion which led to the present appeal, seeking to vacate and set aside the judgment. On this motion, for the first time, he argued that the circuit court erred in not holding a competency hearing before allowing him to enter his guilty plea. The trial court denied his motion, without an evidentiary hearing or the appointment of counsel, and this appeal followed.

The Department of Public Advocacy was initially ordered to represent Doyle on this appeal. After a review of the record, the Department of Public Advocacy moved to be relieved from the case indicating the appeal was "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense," under KRS 31.110(2)(c). That request was granted and Doyle has proceeded with this appeal *pro se*.

The single issue Doyle raises on appeal is whether the trial court erred when it failed to conduct a competency hearing pursuant to KRS 504.100(3). Although we agree it was error not to hold a competency hearing after the filing of a mental health report, we find that error to be harmless and affirm the decision of the trial court.

We note first that CR 60.02 is not the appropriate vehicle by which to raise this issue. The relief afforded by CR 60.02 is an extraordinary remedy. *Wilson v. Commonwealth,* 403 S.W.2d 710 (Ky. 1966). We give great deference to the decisions of the trial court in ruling on such motions and will only overturn those decisions for an

abuse of discretion. *Brown v. Commonwealth,* 932 S.W.2d 359 (Ky. 1996). Relief by way of CR 60.02 is limited to relief that was not available by any other avenue. *See Barnett v. Commonwealth,* 979 S.W.2d 98 (Ky. 1998); *Gross v. Commonwealth,* 648 S.W.2d 853 (Ky. 1983). The issue of the lack of a competency hearing could have been raised in the trial court, before Doyle entered his plea. It was not. It could also have been raised on the RCr 11.42 motion, either as to the failure of the trial court to conduct a competency hearing or the failure of trial counsel to demand such a hearing. Again, the issue was not raised.

In *Gross v. Commonwealth*, *supra,* the Kentucky Supreme Court set out the procedure which must be followed for post-conviction relief:

> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 . . . is for relief that is not available by direct appeal and not available under RCr 11.42. . . .
>
> Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. . . . The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. 648 S.W.2d at 856, 857 (emphasis in original).

The issue regarding Doyle's competence to stand trial could have been raised on his RCr 11.42 motion. Therefore, neither the failure of the trial court to hold a competency hearing nor the failure of trial counsel to demand one is reviewable on a CR 60.02 motion.

As to the merits of the claim that a competency hearing should have been conducted, KRS 504.100(1) requires that,

> If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint . . . [a mental health professional] to examine, treat and report on the defendant's mental condition.

Doyle's counsel filed a request to have an evaluation done, apparently seeking both to ascertain whether Doyle was competent to stand trial, and to evaluate his ability to appreciate the criminality of his actions at the time of the stabbing, which might provide a substantive defense to the charges. Once the report was returned and showed that Doyle was competent to stand trial, neither counsel nor Doyle did anything further to raise the issue of his competence with the trial court.

Neither does Doyle now suggest that any other evidence exists beyond the report, which indicated he was competent to stand trial. Absent some additional showing, one can fairly conclude that he never requested a competency hearing because he was content with the report and chose not to contest the competency issue further.

However, KRS 504.100(3) specifies that after "the filing of a report (or reports), the court *shall* hold a hearing to determine whether or not the defendant is

competent to stand trial." (emphasis added). The use of the word "shall" in the statute makes the hearing mandatory once a report is filed. *See Clark v. Commonwealth,* 591 S.W.2d 365 (Ky. 1979); *Gabbard v. Commonwealth,* 887 S.W.2d 547 (Ky.App. 1994). In *Gabbard,* we stated,

> After the filing of a report, KRS 504.100(3) states the court *shall* hold a hearing. The statutes do not require defense counsel to file a motion for such a hearing. They state precisely what process is due under the law.

Id. 887 S.W.2d at 552 (emphasis in original).

In *Mills v. Commonwealth,* 996 S.W.2d 473, 486 (Ky. 1999), the Kentucky Supreme Court held, "The competency hearing of KRS 504.100(3) is mandatory and cannot be waived by a defendant."

However, this is not the end of our inquiry. The failure to conduct even a mandatory competency hearing can be harmless error. The question on appeal, when a trial court has failed to hold such a hearing, is whether a reasonable judge should have experienced doubt with respect to the defendant's competence to stand trial. *See West v. Commonwealth,* 161 S.W.3d 331 (Ky.App. 2004); *Mills v. Commonwealth, supra.* In *West,* we stated,

> The trial court ordered a mental evaluation as to both appellant's competence to stand trial and his mental condition at the time of the offense. The judge did not include any facts in support of the order. The evaluating psychologist found that appellant understood the charges against him, had the ability to understand the significance of a plea of guilty or not guilty, and was competent to participate rationally in his own defense. . . .

> It appears that the court's order was only in response to appellant's motion for a determination of his competence to stand trial. Appellant's motion, in turn, was based more on conjecture than on any clear facts. Appellant points to no additional facts, such as his behavior or other information external to the proceedings, which would cause a reasonable judge to doubt appellant's competence. Therefore, we conclude that the failure to hold a hearing in this case was harmless error.

Id. 161 S.W.3d at 335.

Our review of the record indicates that the above quote describes the facts in this case almost precisely and the outcome is therefore the same. The failure of the trial court to conduct a competency hearing in this case was harmless error.

Finally, Doyle asserts that he was entitled to an evidentiary hearing and the appointment of counsel on his CR 60.02 motion. In *Gross v. Commonwealth, supra,* the Supreme Court held,

> Before the [CR 60.02] movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Id. 648 S.W.2d at 856.

Doyle did not allege any such facts in his motion, and therefore was not entitled to an evidentiary hearing. *Gross* also holds that the appointment of counsel is not required in these circumstances.

Both because CR 60.02 is not the proper vehicle by which to raise this issue and because the error in failing to conduct a competency hearing was harmless, the order of the McCracken Circuit Court denying Doyle's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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