

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001244-MR

THOMAS WAYNE MITCHELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 93-CR-001597

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Thomas Wayne Mitchell brings this appeal from a May 12, 2006, order of the Jefferson Circuit Court finding Mitchell competent to plead guilty in 1994 after conducting a retrospective competency hearing. We affirm.

In July 1993, a Jefferson County Grand Jury indicted Mitchell upon two counts of first-degree rape, second-degree assault, unlawful imprisonment, fourth-degree assault, first-degree burglary, violation of a protective order, and with being a second-

<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

degree persistent felony offender. Mitchell subsequently entered into a plea agreement with the Commonwealth. In exchange for a plea of guilty to the charges, the Commonwealth reduced the second-degree assault charge to fourth-degree assault and recommended a total sentence of twenty-two years' imprisonment. Pursuant to the plea agreement, Mitchell entered a guilty plea in 1994; however, at the sentencing hearing, Mitchell discharged his counsel and moved to withdraw his guilty plea. The circuit court denied the motion and sentenced Mitchell to twenty-two years' imprisonment. A direct appeal to the Court of Appeals was affirmed in *Mitchell v. Com.*, 1995-CA-000077-MR.

Mitchell then filed a Ky. R. Crim. P. 11.42 motion and a Ky. R. Civ. P. 60.02 motion seeking to vacate his sentence. The circuit court denied the motions. Mitchell pursued a direct appeal to the Court of Appeals. In *Mitchell v. Com.*, 2000-CA-001236-MR, the Court held that reasonable grounds existed for the circuit court to have questioned Mitchell's competence to plead guilty in 1994. As such, the Court of Appeals remanded the case to the circuit court for a determination of whether a retrospective competency hearing was appropriate under *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 2001). The Court of Appeals specifically instructed the circuit court:

If the court finds that a competency hearing is not possible, or if it determines that Mitchell was not competent to plead guilty pursuant to RCr 8.06, it shall enter an order granting him a new trial, provided, however, that Mitchell shall not be retried until he is found competent to stand trial.

If the circuit court determines that a retrospective competency hearing is warranted, and it further finds that Mitchell was competent to enter a guilty plea, then the court shall make findings of fact in support of this conclusion in its order, which shall be appealable by Mitchell. (Footnote omitted).

Upon remand, the circuit court concluded that a retrospective competency hearing was appropriate and found that Mitchell was competent to enter the guilty plea in 1994. This appeal follows.

Mitchell contends that the circuit court erred by determining that a retrospective competency hearing was constitutionally permissible. Citing to *Thompson*, Mitchell alleges that his retrospective competency hearing was improper because the available evidence was inadequate, thus violating his due process rights. *See id.* Mitchell particularly alleges that twelve years had lapsed since entry of his guilty plea in 1994. He also points out that only one expert, Dr. J. Robert Noonan, evaluated Mitchell's competency before entry of the guilty plea and found him competent; however, Mitchell claims Dr. Noonan's evaluation was unreliable. In support thereof, Mitchell cites to the opinion of his expert, Dr. Eric Drogin, who testified at the retrospective competency hearing. Dr. Drogin testified that Dr. Noonan's report contained deficiencies and violated several professional standards. As such, Mitchell maintains that his retrospective competency hearing violated due process. We disagree.

In *Thompson*, the Supreme Court held that a retrospective competency hearing would not offend due process protections if the “quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation.” *Id.* at 409 (quoting *Martin v. Estelle*, 583 F.2d 1372, 1373 (5<sup>th</sup> Cir. 1978)).

When determining whether a retrospective competency hearing is constitutionally permissible, the Supreme Court outlined four factors that may be considered:

- (1) [T]he length of time between the retrospective hearing and the trial;
- (2) the availability of transcript or video record of the relevant proceedings;
- (3) the existence of mental examinations conducted close in time to the trial date; and
- (4)

the availability of the recollections of non-experts-including counsel and the trial judge-who had the ability to observe and interact with the defendant during trial.

*Thompson*, 56 S.W.3d at 409. However, the Supreme Court cautioned that these factors should not be considered “inclusive” and that the decision must be made on a “case-by-case basis.” *Id.*

In the case *sub judice*, there existed an interval of some twelve years between Mitchell's guilty plea and the retrospective competency hearing. At the hearing, the mental evaluation of Dr. Noonan was introduced by the Commonwealth. Dr. Noonan's evaluation was performed before Mitchell entered the guilty plea, and Dr. Noonan opined that Mitchell was competent at that time. Moreover, the sentencing judge, defense counsel, and prosecutor testified at the retrospective competency hearing; all believed that Mitchell was competent to enter the guilty plea in 1994. There was also a videotaped record of Mitchell's guilty plea colloquy that was utilized by the sentencing judge and other witnesses at the retrospective competency hearing. Considering the factors outlined in *Thompson* and the record as a whole, we are of the opinion there existed an adequate quantity and quality of evidence to enable the circuit court to determine Mitchell's competency to enter the guilty plea in 1994. *See id.* Consequently, we believe that the retrospective competency hearing was constitutionally permissible and did not violate Mitchell's due process rights.

Mitchell next argues that the circuit court erred by finding that he was competent to plead guilty in 1994. For the reasons hereinafter stated, we cannot say the court erred.

Recently, the Supreme Court held that a defendant is competent to enter a guilty plea if he possesses “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.” *Thompson v. Com.*, 147 S.W.3d 22, 32 (Ky. 2004)(quoting *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824, 825 (1960)). A circuit court's determination of competency is a finding of fact and reviewed under the clearly erroneous standard. *Thompson*, 147 S.W.3d 22 (citing *United States v. Branham*, 97 F.3d 835 (6th Cir. 1996)).

At the retrospective competency hearing, the sentencing judge, defense counsel, and prosecuting attorney testified that they believed Mitchell to be competent to plead guilty in 1994. Dr. Noonan also found Mitchell competent and stated that Mitchell's competency was not a “close call.” Although Mitchell's expert, Dr. Drogin, questioned Dr. Noonan's competency evaluation, Dr. Drogin could not opine whether Mitchell was competent to enter the guilty plea.

Considering the evidence as a whole, we hold that there existed substantial evidence of a probative value to support the circuit court's finding that Mitchell was competent to plead guilty. *See Thompson*, 147 S.W.3d 22. Hence, the circuit court's finding of competency is not clearly erroneous and will not be disturbed by this Court.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General  
  
Samuel J. Floyd Jr.  
Assistant Attorney General  
Frankfort, Kentucky