

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001992-MR

DONALD RICE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, SENIOR JUDGE
ACTION NO. 05-CR-00508

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REMANDING

** ** * ** * ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from a guilty plea entered by Donald Rice (Appellant) to first-degree trafficking in a controlled substance. He was sentenced to sixty-one months. Appellant contends that the trial court erred when it failed to evaluate his competency and hold a competency hearing, and by failing to hold a hearing to determine whether his guilty plea was knowing, intelligent, and voluntary. We agree that Appellant's competency was called into issue and that an evaluation and hearing were required to determine his ability to stand trial. In order to fully determine whether or not

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Appellant's guilty plea was knowing, intelligent, and voluntary, we will need the results of a competency hearing. For this reason, we remand this case to the trial court for a determination of whether a retrospective competency hearing is feasible and if so, to hold one, and provide this Court with a finding in regard to Appellant's competency. We defer ruling on Appellant's second argument until the issue of competency has been settled.

Appellant was arrested after a source for the Covington Police Department's Crime Suppression Unit made a controlled purchase of crack cocaine. During court proceedings, Appellant, through counsel, made the court aware that he was receiving Social Security Disability payments due to mental retardation and that he only had a second grade education. Defense counsel moved for a competency evaluation. An order was entered directing Appellant's competency to stand trial to be evaluated. The order stated, in pertinent part, that "from information from counsel for the Defendant, and the Court being otherwise advised, the Court believes that reasonable grounds exist which bring into question the Defendant's competency to stand trial and/or responsibility for criminal conduct." The evaluation was scheduled one month later. On that day, Appellant did not appear for his competency evaluation. The court was so informed and decided that Appellant was using the competency issue to delay the proceedings and withdrew the order for a competency evaluation.

The requirement to hold a competency hearing for defendants whose competency is called into question is set forth in KRS 504.100, which provides as follows:

- (1) 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 at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.
- (2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:
 - (a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and
 - (b) What type treatment and what type treatment facility the examiner recommends.
- (3) 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.

The standard of review to determine whether a competency hearing is required is “[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct a competency hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Bray v. Commonwealth*, 177 S.W.3d 741, 750 (Ky. 2005)(citations omitted). When the trial court entered the order to evaluate Appellant’s competency, it made a finding that there were reasonable grounds to question Appellant’s competency. From this moment on, Appellant’s competency was in question and an evaluation and hearing should have been held. This issue is preserved on appeal because the language in the statute is mandatory and competency to stand trial is a fundamental right of due process.

Instead of simply reversing Appellant's conviction, we find that a retrospective competency hearing may be the better course of action.

A retrospective competency hearing, "may satisfy the requirements of due process provided it is based on evidence related to observations made or knowledge possessed at the time of trial." Other factors bearing on the constitutional permissibility of a retrospective hearing include: (1) the 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 v. Commonwealth, 56 S.W.3d 406, 409 (Ky. 2001)(citations omitted).

Pursuant to the *Thompson* standard regarding a retrospective competency hearing, we remand this case to the Kenton Circuit Court for it to determine whether a retrospective competency hearing is constitutionally permissible under due process and, if necessary, to conduct such a hearing within 60 days from the entry of this opinion. If the trial court determines that such a hearing is not permissible under the *Thompson* criteria or that Mr. Rice was not competent when he entered his guilty plea, it shall enter an order vacating the plea and beginning the proceedings anew. If the trial court determines that a retrospective hearing is warranted and finds that Mr. Rice is competent to stand trial, then it shall make findings of fact in support of this conclusion in its order, which shall be appealable by Mr. Rice.

Any appeal taken by either party from an adverse decision shall be consolidated with this appeal, which we abate pending the resolution of the competency

hearing. Further briefing on the matter shall be limited to 10 pages by each side and shall be limited to only those issues addressed in this opinion. Finally, the Kenton Circuit Court shall notify this Court of its final disposition of this matter within 10 days of the entry of its final order. Upon submission of said supplemental briefing, this Court will address any issue raised in relation to the competency issue and, if appropriate, the reserved issue of the voluntariness of Appellant's guilty plea.

For the above reasons we hereby remand this case to the trial court to determine if a retrospective competency hearing is in order and, if so, to hold one. In the alternative, if a hearing is not feasible, the trial court shall hold a new trial.

ALL CONCUR.

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