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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002334-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 03-CR-00001-002

DEANNA GAYLE WOOTEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: The Commonwealth of Kentucky appeals from orders of the Bracken Circuit Court that ultimately led to the court determining Deanna Gayle Wooten to be incompetent to stand trial on two counts of first-degree criminal abuse. We affirm.

The indictment alleged that between February 2002 and November 2002, Wooten permitted her live-in boyfriend to physically abuse her two young children. Wooten was arraigned in January 2003, and the court entered an Order for Reciprocal

Discovery in March 2003. At a status hearing on July 10, 2003, Wooten's attorney requested the court to order Wooten to be evaluated by Kentucky Correctional Psychiatric Center (KCPC) to determine her competency to stand trial. The court granted the motion and directed Wooten's attorney to draft an order. No such order appears in the record, and it is apparent that no order was tendered to the court for entry.

At some point thereafter, Wooten's attorney filed an ex parte motion under seal requesting state funding for a mental health expert. Wooten stated in the motion that it was filed pursuant to KRS[1] 31.185 and KRS 31.200,[2] and she moved therein that the court authorize funding so she could engage the services of Dr. Peggy Pack "for mental evaluations for purposes of possible guilt and innocence defenses and mitigation." Wooten further noted in her motion that she was requesting a hearing only if the court was inclined to deny the motion.

On September 20, 2003, the court entered a sealed order directing Wooten to provide authority for allowing the ex parte request. Wooten's attorney filed a response citing KRS 31.185(2) as authority for the court to grant the motion. Although no hearing was held on the record to support the

[1] Kentucky Revised Statutes.

[2] KRS 31.200 was repealed effective July 15, 2002.

granting of the motion, the court entered an ex parte order in March 2004 authorizing the funding of the expert witness.

At a status conference in June 2004, Wooten's attorney revealed the existence of the sealed order. On July 22, 2004, Wooten's attorney provided a copy of Dr. Pack's report to the Commonwealth and gave notice of its intent to introduce evidence of Wooten's mental retardation at the time of the offense. Dr. Pack's report addressed the competency issue but did not state an opinion as to whether Wooten was or was not competent to stand trial. Eight days later, the Commonwealth made a motion that Wooten be required to submit to a mental examination at KCPC and that Dr. Pack be required to provide a more specific report.

The court granted the Commonwealth's motion to have Wooten examined at KCPC, but it denied the Commonwealth's motion for a more specific report. Wooten was examined by Dr. Barbara Jefferson, a contract-provider for KCPC who worked at Comprehend, Inc. A competency hearing was held on October 18, 2004, and the court heard testimony from Dr. Jefferson and Dr. Pack. Dr. Jefferson testified that Wooten was competent to stand trial. Dr. Pack, while initially declining to state her opinion as to Wooten's competency, eventually testified that Pack was "at that marginal line" of competency. Both Dr.

Jefferson and Dr. Pack testified that Wooten was mildly mentally retarded.

In an order entered on October 19, 2004, the court determined Wooten to be incompetent to stand trial. The court reasoned as follows:

> The court finds the defendant, Deanna Gayle Wooten, incompetent to stand trial. While the defendant has the capacity to understand the nature and consequences of the proceedings if the proceedings are carefully explained in the simplest terms, she, by virtue of limited ability to process new information, does not have the ability to assist her counsel at trial in her own defense. Defense counsel may have the luxury of explaining in detail the preliminary steps and procedures leading up to trial, but in the trial itself, if the defendant cannot mentally process and respond to the testimony and other trial events, it is clear that she cannot effectively or rationally assist her counsel during the most important phase of the prosecution. For these reasons, the defendant is incompetent to stand trial.

In support of its ruling, the court first noted that both expert witnesses agreed that Wooten was a very slow learner and that it was virtually impossible for her to process "courtroom language" or other legal concepts without a tedious, lengthy, and patient explanation of every event. The court also noted Dr. Pack's testimony that Wooten would not understand the trial proceedings and would not be of any assistance whatsoever to her attorney during the trial. The court further noted Dr.

Jefferson's testimony that Wooten's attorney would be required to explain to Wooten at length, "in simplistic terms," everything that happened in the courtroom during the trial. Further, the court noted that both expert witnesses were of the opinion that Wooten had not understood the competency hearing "and would only understand it if it were carefully explained in simple words and in measured doses."

Following the entry of the order, the Commonwealth filed its appeal herein. The Commonwealth appealed from the orders of the court granting Wooten's ex parte motion for funding to hire Dr. Pack, the order denying the Commonwealth's motion to require Dr. Pack to give a more specific expert opinion in her report, and the court's order determining Wooten to be incompetent to stand trial. We will address the three arguments made by the Commonwealth in its brief in the order in which they are presented.

The Commonwealth's first argument is that the court abused its discretion by entering an ex parte order, without a hearing, that provided Wooten with funding to retain a private expert on the issue of competency to stand trial. It cites KRS 31.185(1) to support its argument. The statute states as follows:

> Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities for the

> evaluation of evidence as are available to the attorney representing the Commonwealth. If he or she considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order from the special account of the Finance and Administration Cabinet.

KRS 31.185(1).

The Commonwealth asserts that the court abused its discretion in granting the order because Wooten did not demonstrate the need for the use of a private expert witness rather than use of the state facilities and because the court did not hold a hearing on the motion as required by KRS 31.185(2). Further, the Commonwealth contends that Wooten improperly utilized KRS 31.185 as a means for obtaining funds for a private expert witness on the issue of competency because KRS 504.100, not KRS 31.185, governs the procedure for competency determinations. That statute provides 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 at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

KRS 504.100(1).

Before addressing the Commonwealth's arguments, we must examine the actions by Wooten's attorney in the context of KRS 31.185 and KRS 504.100. It is important to begin by noting,

as did the Kentucky Supreme Court, that "[c]ompetency to stand trial is not to be confused with the defense of mental illness or insanity." See Bishop v. Caudill, 118 S.W.3d 159, 162 (Ky. 2003). "Competency to stand trial pertains to the defendant's mental state at the time of trial, whereas an insanity defense concerns the defendant's mental state at the time of the commission of the crime." Id. The Bishop court further noted that "[a] defendant may be sane at the time of the offense but incompetent to stand trial; or he may be insane or mentally ill at the time of the offense, yet competent to stand trial." Id. As we have noted above, KRS 504.100 addresses the procedure to be employed when the court has reasonable grounds to believe the defendant is incompetent to stand trial. KRS 31.185 addresses ex parte requests by defendants for funds for the use of private facilities for the evaluation of evidence where the use of state facilities may be considered impractical.

On its face, Wooten's ex parte motion for private expert witness funding was not improper. It cited KRS 31.185, and it requested the funding of a private expert witness "for mental evaluations for purposes of possible guilt and innocence defenses and mitigation." However, Wooten's attorney directed Dr. Pack to first examine the issue of competency. In fact, Dr. Pack's initial report primarily addressed only that issue.

As we have noted, competency determinations are governed by KRS 504.100, not KRS 31.185. Under KRS 504.100(1), the court shall appoint at least one psychologist or psychiatrist to examine the defendant to determine competency. The appointed examiner "is working for the court, not necessarily the defense or the Commonwealth." Bishop, 118 S.W.3d at 163, citing Binion v. Commonwealth, 891 S.W.2d 383 (Ky. 1995). Nothing in the statute authorizes independent evaluations by either the Commonwealth or the defendant.[3] In short, Wooten was not entitled to funding for a private expert witness on the issue of competency to stand trial.

Furthermore, we agree with the Commonwealth that the court abused its discretion by granting Wooten's motion even if it was otherwise appropriate under KRS 31.185. Wooten was required to show that the use of a private expert witness was "reasonably necessary." See KRS 31.110; Hicks v. Commonwealth, 670 S.W.2d 837, 838 (Ky. 1984). In addition, Wooten had to show that state facilities were unavailable or that the use of those facilities would be impractical. See KRS 31.185; Binion, 891 S.W.2d at 385. She failed to make the required showing in either her motion or in her response to the court's order requiring her to show authorization for its granting of the

[3] In the Bishop case, our supreme court held that the Commonwealth does not have the right to obtain an independent competency evaluation of the defendant. Id. at 165.

motion. Further, no hearing was held where Wooten's attorney could have attempted to establish that funding was "reasonably necessary." In short, while Wooten's ex parte motion was not improper on its face because it related solely to mental evaluations concerning her criminal responsibility, we agree with the Commonwealth that the court abused its discretion by entering the order without first being presented with evidence so as to determine whether a private expert witness was "reasonably necessary" and whether state facilities were unavailable or impractical. Such evidence could have been provided with the motion or presented during an ex parte hearing if so requested by the defendant. See KRS 31.185(2). Wooten did neither.

Nevertheless, we conclude that the error was harmless. See RCr[4] 9.24. Ultimately, the court appointed KCPC to examine Wooten in accordance with KRS 504.100(1). At the competency hearing, the court heard the KCPC expert witness as well as Dr. Pack. Because the statute allows the court to appoint "at least one (1) psychologist or psychiatrist to examine" the defendant, we conclude the court had the authority to hear and consider Dr. Pack's testimony although it may have been obtained through an improper application of the statutes.

[4] Kentucky Rules of Criminal Procedure.

As for any remedy for the court's abuse of discretion, the Commonwealth argues in its brief that "the order should be vacated and the case should be remanded for proceedings consistent with this opinion." The Commonwealth is not clear as to what remedy it seeks. We believe it would defy common sense to remand the case for a new hearing with Dr. Pack's testimony to be excluded. There was evidence from Dr. Pack, upon which the court relied, that indicated Wooten was incompetent to stand trial. If the court believed Wooten to be incompetent to stand trial based on this evidence, the remedy should not be to vacate the order and remand the case so the court can declare Wooten competent to stand trial even though it believes her to be incompetent. In short, because the court granted the Commonwealth's request for the KCPC appointment under KRS 504.100(1), we conclude that error in allowing the defendant to introduce testimony from an expert witness whose public funding was improperly obtained was harmless.

The Commonwealth's second argument is that the circuit court erred by failing to grant its motion to require Dr. Pack to provide a more specific report. Dr. Pack's report did not give an opinion regarding Wooten's competency. The Commonwealth's motion alternatively asked for exclusion of any testimony or opinion from Dr. Pack if she was not going to give a more specific opinion. The Commonwealth contends that Dr.

Pack's testimony at the competency hearing that Wooten was "marginally competent" was not known by the Commonwealth prior to the hearing and that such testimony should have been excluded if the court was not going to order her to give a more specific opinion in her report.

The Commonwealth had an opportunity to cross-examine Dr. Pack at the competency hearing. She initially continued to testify that it was for the court, not her, to determine competency. In responding to a request from the court to clarify her opinion, she stated that Wooten was "marginally competent." The only perceivable change from her report to her testimony leaned in the Commonwealth's favor. Because the statutes do not require the evaluation report to be as specific as the Commonwealth would have liked it, we find no error or abuse of discretion in the court's denial of the Commonwealth's motion. Even if error or abuse of discretion existed, it would have been harmless because the Commonwealth was not prejudiced by any slight variance between Dr. Pack's report and her testimony.

The Commonwealth's final argument is that the court erred in determining that Wooten was not competent to stand trial. "'Incompetency to stand trial' means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate

rationally in one's own defense." KRS 504.060(4). In further defining competency, the Kentucky Supreme Court in the Bishop case referred to Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). Bishop, 118 S.W.3d at 162. Therein our supreme court noted that "the United States Supreme Court held that a defendant is competent if he can 'consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. at 162-63. The Bishop court further noted that the U.S. Supreme Court in the Godinez case held that a competent defendant is one who "can make a 'reasoned choice' among the alternatives available to him when confronted with such crucial questions as whether he should testify, waive a jury trial, cross-examine witnesses, put on a defense, etc." Id. at 163, citing Godinez, 509 U.S. at 397-98.

The court in this case cited the testimony of the expert witnesses that Wooten was a slow learner and that it was "virtually impossible for her to process sophisticated language (e.g. courtroom language) or concepts without tedious, lengthy and patient explanation of every event." The court also relied on the testimony of Dr. Pack that Wooten would not understand the actual trial proceedings and would be of no assistance whatsoever to her counsel during the trial. Further, the court noted that even Dr. Jefferson acknowledged that Wooten's

attorney would have to explain everything at length to her in simplistic terms.

"The trial court has a broad discretion in determining whether a defendant has the ability to participate rationally in his defense." Hopewell v. Commonwealth, 641 S.W.2d 744, 748 (Ky. 1982). Based on the evidence before it, we conclude the trial court did not abuse its discretion in determining that Wooten was not competent to stand trial.

The order of the Bracken Circuit Court is affirmed.

ALL CONCUR.

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