RENDERED: AUGUST 15, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001124-DG

KASHMIRE COX APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MARY M. SHAW, JUDGE
ACTION NO.2012-XX-000146

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

JONES, JUDGE: This appeal originated in Jefferson District Court. By Order rendered November 30, 2012, the district court dismissed, without prejudice, the underlying criminal charges against the Appellant, Kashmire Cox, after finding him incompetent to stand trial. The Commonwealth appealed to the Jefferson Circuit Court asserting that the district court abused its discretion when it refused

to order a competency evaluation pursuant to KRS[1] 504.100 prior to dismissing the charges. The circuit court reversed and remanded the matter to the district court with instructions to conduct any further competency proceedings pursuant to the requirements of KRS 504.100.

We granted Cox's request for discretionary review to determine whether the district court erred when it refused to order an evaluation under KRS 504.100 and instead relied upon an evaluation performed approximately ten months earlier as part of a separate criminal action against Cox. For the reasons more fully explained below, we conclude that the district court lacked the discretion to forego the evaluation process over the Commonwealth's objection, and therefore, we affirm.

I. Factual and Procedural Background

On November 3, 2012, the Louisville Metro Police Department was dispatched to the 200 block of Allston Avenue, in Louisville, Kentucky, to investigate a report it had received regarding Cox's possible illegal possession of a handgun. The investigating officer located Cox and questioned him. The officer retrieved a handgun from Cox's backpack along with a fully loaded magazine. He also located a bag of marijuana on Cox's person. The officer then confirmed that Cox had two EPO/DVO orders against him that prohibited him from owning or possessing firearms.

[1] Kentucky Revised Statutes.

Cox was subsequently charged with: (1) Carrying a Concealed Deadly Weapon under KRS 527.020; (2) Possession of Marijuana under KRS 218A.1422; and (3) two counts of Violation of a Kentucky EPO/DVO under KRS 403.763. He was brought before the district court in relation to those charges on November 30, 2012. At that time, Cox's attorney made a motion to dismiss the charges on the basis that Cox was incompetent to stand trial. In support of his motion, Cox relied on the findings of a January 2012 competency evaluation ("January 2012 Evaluation") that the district court had ordered under KRS 504.100 as part of a separate criminal matter.

Licensed clinical psychologist, Paul A. Ebben, conducted the January 2012 Evaluation. At that time, Ebben diagnosed Cox with "mild to moderate mental retardation, mood disorder, and history of ADHD." Ebben stated that these were "relatively permanent conditions at this point, primarily the mental retardation issue, so there will continue to be severe functional impairment both socially and occupationally." With respect to Cox's competency to stand trial on the charges facing him at that time, Ebben opined as follows:

> It is my opinion, within reasonable psychological certainty, that Mr. Cox remains incompetent to stand trial. The primary reason for incompetency is limited intellectual functioning. Because mental retardation is considered a permanent condition, not likely to improve regardless of intervention or strategy attempted, there is little or no optimism that competency will be attained or restored within the foreseeable future.

01/09/2012 Evaluation at 5.

The Commonwealth objected to Cox's motion, arguing that the district court was required by statute to conduct a new competency evaluation and hold a hearing on Cox's competency. The Commonwealth also argued, in part, that the validity of the prior evaluation was in question because Cox subsequently pleaded guilty to a misdemeanor drug possession charge and completed a court-ordered diversion program. Cox countered that his subsequent guilty plea was entered without the assistance of counsel, and therefore, should not be considered indicative of his competence.

The district court overruled the Commonwealth's objection. It concluded that there was nothing to call the January 2012 Evaluation into question. The district court also indicated that it was very familiar with Cox and was in a superior position to determine his competency. In essence, the district court determined that a second evaluation would not be helpful to it. After overruling the Commonwealth's objection, the district court found Cox incompetent to stand trial and dismissed the charges against him without prejudice.

The Commonwealth timely appealed to the circuit court. On appeal, the Commonwealth argued that the district court abused its discretion when it determined that Cox was incompetent to stand trial without the benefit of a new competency evaluation under KRS 504.100. In the alternative, the Commonwealth asserted that even if the statute permitted the district court to exercise some discretion in deciding whether to order an evaluation, the trial court abused that discretion in this case given the serious nature of the charges against Cox, the

length of time since the January 2012 Evaluation, and Cox's subsequent guilty plea.

Cox urged the circuit court to affirm the district court's dismissal. He maintained that the district court had the statutory discretion to forego a new evaluation and that the district court's finding of incompetency was based on substantial evidence of record.

On May 23, 2013, the circuit court issued an opinion and order reversing the district court's November 30, 2012, dismissal order. Specifically, the circuit court found:

> Under the circumstances of this case, this Court finds the District Court erred in its failure to order a competency evaluation for Cox. The report relied on by the District Court was not up to date, particularly given the fact that an assumingly competent Cox had plead guilty and participated in Marijuana diversion during the interim time. Those factors, combined with the language of KRS 504.100, obliged the District Court to order a current competency evaluation.

This discretionary appeal followed.

II. Standard of Review

The issue currently before us is a purely legal one, whether the district court had discretion to forego a new competency evaluation under KRS 504.100 over the Commonwealth's objection. We review legal questions, such as the present one, *de novo*. *Bell v. Bell*, 423 S.W.3d 219, 222 (Ky. 2014) ("[S]tatutory interpretation is a question of law for the court to be reviewed de novo.").

Unlike factual determinations, we owe no deference to the lower court's legal determinations. *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 612 (Ky. 2004).

III. Analysis

A. General Framework for Competency Proceedings

"Whether a defendant is competent to stand trial is a threshold question which must be answered before the defendant can be tried or sentenced." *Gabbard v. Commonwealth*, 887 S.W.2d 547, 551 (Ky. 1994). KRS 504.060(4) provides: "'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[.]" "Similarly, the United States Supreme Court has stated that the test for whether an individual is competent to stand trial is 'whether he has 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.'" *Keeling v. Commonwealth*, 381 S.W.3d 248, 262 (Ky. 2012) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960)).

We begin by recognizing that there is a presumption that every defendant is competent to stand trial. *Gabbard,* 887 S.W.2d at 551. However, the presumption of competency "disappears when there are reasonable grounds to hold a competency hearing." *Id.* "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion[s] on competence to stand trial"

are factors that a reasonable trial judge should consider in determining whether further inquiry into a particular defendant's competency is required. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908 (1975).

When such factors are present, Kentucky statutes lay out an orderly system for the trial courts to follow in making an ultimate determination on the defendant's competency. Specifically, KRS 504.100 provides:

> (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 statutory requirements of KRS 504.100 are distinct from the Due Process requirements of the Fourteenth Amendment of the United States Constitution. *See Padgett v. Commonwealth*, 312 S.W.3d 336, 347 (Ky. 2010). A trial court assessing whether a defendant is competent to stand trial must be cognizant that while statutory requirements and Due Process requirements are

interrelated, they are still separate. *Id.* Our Supreme Court recently explained that different standards come into play depending upon which interest is at stake:

> Due process under the Fourteenth Amendment requires that where substantial evidence that a defendant is not competent exists, the trial court is required to conduct an evidentiary hearing on the defendant's competence to stand trial. In contrast, under KRS 504.100, "reasonable grounds to believe the defendant is incompetent to stand trial" mandates a competency examination, followed by a competency hearing. Thus, while the failure to conduct a competency hearing implicates constitutional protections only when "substantial evidence" of incompetence exists, mere "reasonable grounds" to believe the defendant is incompetent implicates the statutory right to an examination and hearing.

Woolfolk v. Commonwealth, 339 S.W.3d 411, 422-423 (Ky. 2011) (internal citations omitted). Most importantly, unlike constitutional rights, the statutory "right to a hearing is not constitutional, and can be waived when there is not substantial evidence of incompetency in the record, because our long-standing rule is that defendants may generally waive statutory rights." *Padgett,* 312 S.W.3d at 348.

Assuming that sufficient evidence existed to cause the trial court to question the defendant's competency and assuming that the parties have not waived their statutory right to a hearing, the trial court must conduct one. *Bishop v. Caudill,* 118 S.W.3d 159, 161 (Ky. 2003). "If there is sufficient cause to hold a competency hearing . . . then KRS 504.080 lays out requirements for the hearing." *Gabbard*, 887 S.W.2d at 551. Importantly, KRS 504.080 requires that the defendant be afforded the opportunity to be present at the hearing, that the court-

appointed examining psychologist or psychiatrist be present at the hearing, and that any psychologist or psychiatrist retained by the defendant be permitted to participate in the hearing. KRS 504.080.

Following the hearing, the trial court must determine, based on all the evidence, whether the defendant is competent to stand trial on the charges at issue. At this stage, while the presumption of competency no longer applies, the defendant still bears the burden of proving that he is incompetent by a preponderance of the evidence. *Jackson v. Commonwealth,* 319 S.W.3d 347, 350-351(Ky. 2010). In determining whether a defendant has met his burden, the trial court "is not absolutely bound by the testimony of medical experts[.]" *Mozee v. Commonwealth*, 769 S.W.2d 757, 758 (Ky. 1989). "A judge is also entitled to consider the testimony of laypersons and his own observations and impressions based upon the conduct and testimony of the accused at the hearing." *Id.*

If the court finds the defendant competent, the proceeding continues. KRS 504.110(3). If the trial court determines that the defendant is incompetent to stand trial, the defendant shall not "be tried, convicted or sentenced so long as the incompetency remains." KRS 504.090. However, this does not end the inquiry. The court must next determine whether there "is a substantial probability he [the defendant] will attain competency in the foreseeable future." KRS 504.110(1). If so, it "shall commit the defendant to a treatment facility or a forensic psychiatric facility and order him to submit to treatment for sixty (60) days or until the psychologist or psychiatrist treating him finds him competent, whichever occurs

first." KRS 504.110. "If the court finds the defendant incompetent to stand trial but there is no substantial probability he will attain competency in the foreseeable future, [the court] shall conduct an involuntary hospitalization proceeding under KRS Chapter 202A or 202B." KRS 504.110(2).

B. Does KRS 504.100(1) Mandate a Competency Evaluation?

The issue before us is whether the district court had the discretion to rely on the January 2012 Evaluation instead of appointing a psychologist or psychiatrist to examine, treat, and report on Cox's mental condition as the Commonwealth requested under KRS 504.100(1).

The parties dispute whether KRS 504.100 affords the trial court the discretion to rely on a previous evaluation performed as part of another criminal case against the accused. In answering this question, we begin with the language of the statute, KRS 504.100(1), because statutory interpretation is based on plain meaning of the statutes. *Commonwealth v. Garnett*, 8 S.W.3d 573, 576 (Ky. App. 1999).[2]

With respect to the relevant time period, KRS 504.100 refers to the "arraignment" or "any stage of the proceedings." It is does not say "prior proceedings against the same criminal defendant" or refer in any manner to past competency evaluations. It is clear to us that the General Assembly was concerned with the proceeding pending before the trial court charged with determining competency for that particular criminal matter and not with past proceedings.

[2] The foremost principle of statutory construction is that where a statutory term is plain and unambiguous the courts must apply the statute as written. *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). The only exception is where strict adherence would lead to a "nonsensical result." *Overnite Transport Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky. App. 1990).

Additionally, KRS 504.100(1) provides that where reasonable grounds exist to cause the court to believe that the defendant may be incompetent, "the court *shall* appoint" at least one psychologist or psychiatrist to examine the defendant and report back. *Id.* (emphasis added). Our General Assembly has instructed us that when it uses the term "shall" it means "mandatory." KRS 446.010(39). In other similar contexts, our courts have held that the General Assembly's use of the word "shall" divests the trial court of the discretion to act. *See Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000) (explaining the term "may" is permissive and authorizes a court to act or not in its discretion, but the term "shall" is the equivalent of a mandate requiring the court to act as set forth in the relevant statute); *Commonwealth v. Todd*, 12 S.W.3d 695, 697 (Ky. App. 1999) (holding that the General Assembly's use of the word "shall" in a criminal statute "precludes any discretion on the part of the trial court").

Having reviewed the applicable statute, we find it to be unambiguous regarding whether the trial court can forego a competency evaluation in the immediate proceeding before it and rely instead on an evaluation performed in a prior proceeding. By its own explicit terms KRS 504.100(1) "requires a court to appoint a psychologist or psychiatrist to examine, treat and report on the defendant's mental condition whenever the court has reasonable grounds to believe that the defendant is incompetent to stand trial." *Slone v. Commonwealth*, 382 S.W.3d 851, 859 (Ky. 2012); *Gray v. Commonwealth*, 233 S.W.3d 715, 718 (Ky. 2007).

Despite the statute's plain mandate, Cox maintains that "[i]f a psychologist or psychiatrist's report held that a defendant was unlikely to regain competency within the foreseeable future, then short of a change in circumstances, any evaluation prepared should apply for a maximum of 360 days, so long as [the report] included a finding containing the qualifier of 'foreseeable future.'" In support of his position, Cox points to KRS 504.060(3), which defines "foreseeable future" as meaning "not more than three hundred sixty (360) days."

Cox argues that because his prior evaluation described the nature of his mental retardation as a "permanent condition," this goes beyond the "foreseeable future," meaning there is no hope that Cox will ever achieve competency. In such a circumstance, he maintains that it was permissible for the district court to rely on the January 2012 Evaluation because that evaluation was less than 360 days old.

Cox's reliance on KRS 504.060(3) is misplaced. KRS 504.060(3) simply defines "foreseeable future" as meaning "not more than three hundred sixty (360) days." KRS 504.060(3) does not, however, function as a timetable of when a trial court may rely on a previous competency evaluation. Rather, it is the guide by which a court should determine how to handle a defendant it has adjudged to be incompetent in the *particular proceeding* for which the evaluation was performed as directed by KRS 504.110(1). In this way, KRS 504.060(3) and KRS 504.110(1) work together with respect to the proceeding pending before the court that made the incompetency determination for that particular criminal matter. However, we

find no evidence that the General Assembly intended for an evaluation opining that the defendant would remain incompetent into the foreseeable future to be used as a substitute evaluation under KRS 504.100(1) for any future crimes that the same defendant might be charged with having committed.

Further, we find no merit in Cox's argument that because his condition was described as "permanent" that he could not, or would not, ever attain competency. As recently stated by the Kentucky Supreme Court in *Keeling*, 381 S.W.3d at 258:

> Finally, common sense and the most basic notions of justice tell us that once a formerly incompetent criminal defendant attains competency, he may still be required to answer for his alleged crimes. The phrase "no *substantial* probability that he will attain competency" does not foreclose a possibility that he will attain competency; indeed, it implicitly reserves that possibility. And if and when a criminal defendant does attain competency, his victims may be entitled to pursue justice through the courts.

While the January 2012 Evaluation concluded there was "little to no optimism that competency will be attained or restored in the foreseeable future[,]" this did not, however, "foreclose [the] possibility that [Cox] will attain competency." *Keeling* 381 S.W.3d at 258. Moreover, the January 2012 Evaluation was approximately ten months old. Additionally, every psychological evaluation carries some margin of error.

We also are cognizant that "the Commonwealth does not have the right to obtain an independent competency evaluation[.]" *Bishop*, 118 S.W.3d at

165. By refusing to order a new evaluation, the district court not only violated the clear mandate of the statute, it effectively created a situation where the Commonwealth was deprived of any opportunity to have Cox's competency reassessed by a mental health expert who could take into account the additional events that had transpired since the January 2012 Evaluation.

Cox's final argument against applying KRS 504.100(1), according to its mandatory terms, is one of public policy. He asserts that if trial courts are not vested with the authority to rely on prior competency evaluations less than 360 days old, the state will spend valuable financial resources reassessing competency. We find this argument unavailing.

While conserving financial resources is in the public interest, the public also has an interest is seeing competent individuals brought to trial to face the charges against them. By requiring a new evaluation, the public is assured that a defendant will only be adjudged incompetent after the trial court has received the most up-to-date mental health opinion possible.

Moreover, because the requirement for the evaluation is statutory and subject to waiver, with the trial court's consent, both parties could waive a new evaluation. *See Padgett*, 312 S.W.3d at 347. We can envision that the Commonwealth might agree to do so in a case in which there was very close temporal proximity to the previous evaluation and no facts to suggest that the defendant's mental state had changed since the prior determination of incompetency. In this case, however, the Commonwealth objected. In the face of

that objection, the trial court abused its discretion by refusing to comply with its statutory obligation to appoint a mental health expert to evaluate Cox's competency pursuant to under KRS 504.100(1).

IV. Conclusion

As such, for the forgoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jonathan S. Scheib
Daniel T. Goyette
Bruce. P. Hackett
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Jonathan S. Scheib
Louisville, Kentucky

BRIEF FOR APPELLEE:

David A. Sexton
Molly MacCaskey
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David A. Sexton
Louisville, Kentucky