

[Cite as *State v. Flanagan*, 2017-Ohio-955.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103680

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JACOB FLANAGAN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
REVERSED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-15-594231-A

**BEFORE:** Keough, A.J., Boyle, J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** March 9, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant, Jacob Flanagan (“Flanagan”), appeals from the trial court’s judgment finding him guilty of abduction and gross sexual imposition and sentencing him to 18 months incarceration. Flanagan contends that the trial court erred in accepting his guilty plea and sentencing him because the court did not comply with its statutory duty under R.C. 2945.37 to hold a hearing to determine his competency to stand trial after the issue was raised in the trial court. We agree and, accordingly, reverse Flanagan’s conviction and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

{¶2} In March 2015, Flanagan was indicted in a multicount indictment on two counts of rape in violation of R.C. 2907.02(A)(2); one count of attempted rape in violation of R.C. 2923.02/2907.02(A)(2); three counts of gross sexual imposition in violation of R.C. 2907.05(A)(1); and one count of kidnapping in violation of R.C. 2905.01(A)(4). He entered a plea of not guilty and was declared indigent.

{¶3} Because of ongoing issues related to Flanagan’s mental health, on April 9, 2015, the trial court referred Flanagan to the court psychiatric clinic pursuant to R.C. 2947.06(B) for a mitigation report.

{¶4} On June 1, 2015, in accordance with R.C. 2945.37, the trial court again referred Flanagan to the court psychiatric clinic, this time to determine his competence to stand trial. Although the examiner apparently submitted an evaluation report regarding Flanagan’s competency, the trial court’s docket contains no entries indicating that the report was submitted, that Flanagan stipulated to the report, or that the trial court held a

competency hearing. Nor is there any entry on the docket indicating that the trial court ever made a competency finding. Indeed, after the referral to the court psychiatric clinic, the docket does not contain any other reference to the issue of Flanagan's competency.

{¶5} Although the issue of Flanagan's competency remained unresolved, on August 10, 2015, the court accepted his guilty plea to abduction and gross sexual imposition, as amended in Counts 3 and 5 of the indictment. The trial court subsequently sentenced Flanagan to 18 months incarceration with five years of postrelease control, and determined that he is a Tier I sexual offender. This appeal followed.

## II. Law and Analysis

{¶6} In his first assignment of error, Flanagan contends that the trial court committed reversible error because it accepted his plea without conducting the competency hearing required by R.C. 2945.37(B).

{¶7} A person who “lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense” may not stand trial. *State v. Jirousek*, 8th Dist. Cuyahoga No. 99641, 2013-Ohio-4796, ¶ 8, quoting *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 155. “Fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial.” *State v. Berry*, 72 Ohio St.3d 354, 359, 1995-Ohio-310, 650 N.E.2d 433.

{¶8} An accused's due process right not to be tried or convicted while incompetent has been codified in R.C. 2945.37, which states in pertinent part:

(B) In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial

has commenced, *the court shall hold a hearing on the issue* as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion.

(C) The court shall conduct the hearing required or authorized under division (B) of this section within thirty days after the issue is raised, unless the defendant has been referred for evaluation in which case the court shall conduct the hearing within ten days after the filing of the report of the evaluation \* \* \*.

(Emphasis added.)

{¶9} The Ohio Supreme Court has stated that “there is no question that where the issue of the defendant’s competency to stand trial is raised prior to trial, a competency hearing is mandatory.” *State v. Bock*, 28 Ohio St.3d 108, 109, 502 N.E.2d 1016 (1986); *State v. Ahmed*, 103 Ohio St.3d 27, 813 N.E.2d 637, ¶ 64 (“R.C. 2945.37 requires a competency hearing if a request is made before trial.”) Likewise, this court has consistently held that pursuant to R.C. 2945.37(B), a trial court must hold a hearing on the issue of a defendant’s competency if the issue is raised prior to trial. *Jirousek*, 8th Dist. Cuyahoga No. 99641, 2013-Ohio-4796, at ¶ 10; *State v. Dowdy*, 8th Dist. Cuyahoga No. 96642, 2012-Ohio-2382. In this case, the issue was raised prior to trial but the trial court did not hold the hearing required by R.C. 2945.37(B).

{¶10} Nevertheless, citing *Bock*, the state urges us to find that the trial court’s failure to hold the statutorily required hearing was harmless error. In *Bock*, the Ohio Supreme Court found harmless error in the trial court’s failure to conduct a competency hearing where the defendant testified at trial and was subject to cross-examination, and the record failed to reveal sufficient indicia of incompetency. *Id.* at paragraph one of the syllabus.

{¶11} This case is easily distinguishable from *Bock*, however. Flanagan pleaded guilty; he never testified, and at the plea hearing, he simply answered yes or no to questions about whether he understood the rights he was waiving by pleading guilty. Thus, his responses are insufficient to demonstrate competency. And unlike *Bock*, there was indeed “indicia of incompetency” in the record: the trial court twice referred Flanagan to the court psychiatric clinic for evaluation, once for a mitigation report and the second time for a competency evaluation.

{¶12} Furthermore, unlike in *Bock*, the record in this case is insufficient to allow us to conclude that the trial court’s failure to conduct a competency hearing was harmless error. Although the court psychiatric clinic submitted a report, no further action was taken to determine whether Flanagan was competent — the docket reflects that the parties did not stipulate to Flanagan’s competence, the trial court did not hold a hearing to evaluate Flanagan’s competence, and the trial court made no formal finding regarding Flanagan’s competence after the issue was raised.

{¶13} Indeed, the docket contains no reference whatsoever to Flanagan’s competency after the docket entry referring him for a competency evaluation. And the transcript of the plea hearing demonstrates that the trial court made no reference to the competency report or to Flanagan’s competency prior to accepting his plea. After the plea was taken, the trial court informed Flanagan of the date for sentencing. Only then did it note that there was a court psychiatric report dated June 19, 2015, concerning Flanagan’s competency to stand trial, and a mitigation report dated April 27, 2015. The court then asked defense counsel if either report needed to be updated for the purposes of sentencing. The trial court made no competency determination at or before the plea

hearing; its comments about the competency report, made *after* the plea was accepted, were the only reference it made to Flanagan's competency.

{¶14} This case is similar to *Dowdy*, 8th Dist. Cuyahoga No. 96642, 2012-Ohio-2382, where this court held that because the results of the psychiatric evaluation ordered by the trial court were not part of the record and not stipulated to by the parties, the court was unable to glean sufficient information from the record to conclude that the trial court's failure to conduct the hearing was harmless. *Id.* at ¶ 16, citing *State v. Cruz*, 8th Dist. Cuyahoga No. 93403, 2010-Ohio-3717, ¶ 11-16. Accordingly, this court reversed the defendant's conviction and remanded the case for the trial court to hold a hearing on the defendant's competency pursuant to R.C. 2945.37. *See also State v. Morris*, 8th Dist. Cuyahoga No. 98591, 2013-Ohio-1033, ¶ 10.

{¶15} Likewise, in *Jirousek*, 8th Dist. Cuyahoga No. 99641, 2013-Ohio-4796, this court held that the record was insufficient to conclude that the court's failure to conduct the statutorily required competency hearing was harmless error. The court noted that the issue of the defendant's competency was raised prior to trial, but the trial court did not hold a hearing or otherwise make a formal finding of competency on the record, no psychiatric evaluation was filed with the trial court, and the parties did not stipulate to the defendant's competency. Accordingly, this court held that it could not glean sufficient information from the record to conclude that the trial court's failure to conduct a hearing was harmless error. *Id.* at ¶ 12.

{¶16} In this case, the issue of Flanagan's competency was raised prior to trial, as reflected by the trial court's entry of June 1, 2015. However, the court did not hold a hearing on the issue, the record does not reflect any formal finding or adoption of

competency, and there was no stipulation to Flanagan's competency or the results of his psychiatric evaluation. The docket is simply devoid of any further reference to the competency issue subsequent to the court's referral for psychiatric evaluation.

{¶17} Basic principles of due process mandate that someone who is incompetent not be put to trial. When the issue of competency is raised before trial, a court must hold a hearing pursuant to R.C. 2945.37(B) on that issue and after considering the evidence presented by the parties at that hearing, make a finding as to the defendant's competency.

R.C. 2945.37(B), (C), (D), (E), and (G). This is because, as the Ohio Supreme Court recognized in *State v. Were*, 94 Ohio St.3d 173, 177, 2002-Ohio-481, 761 N.E.2d 591, "common sense dictates that no defendant can make a record of lack of competency absent the findings and hearings contemplated by R.C. 2945.37 and 2945.371." Without first conducting a competency hearing and determining Flanagan's competency, the trial court could not ensure that his guilty plea was made knowingly, voluntarily, and intelligently. *See Morris*, 8th Dist. Cuyahoga No. 98591, 2013-Ohio-1033, ¶ 11. Accordingly, we cannot sanction the trial court's failure to comply with its statutory obligation in this case by excusing it as harmless error. This court has a duty to ensure that the most vulnerable members of our society are protected and due process is afforded to them by the mechanism provided in the statute.

{¶18} The dissent would have this court find harmless error in the trial court's failure to hold a hearing based on the court psychiatric clinic's report, which found Flanagan competent to stand trial. The dissent contends that this report was "unrefuted" and, therefore, sufficient to demonstrate Flanagan's competency. But the report is unrefuted precisely because the trial court did not hold the competency hearing required



by R.C. 2945.37(B). We cannot speculate as to the evidence that might have been presented at a competency hearing if one had been held, nor presume that the trial court would have found Flanagan competent to stand trial simply because of the clinic's finding. *See In re B.M.R.*, 2d Dist. Miami Nos. 2005 CA 1 and 2005 CA 18, 2005-Ohio-5911, ¶ 18. We do not know what evidence Flanagan would have presented at a hearing in light of his ongoing mental health issues. Furthermore, at a hearing, the examiner would have been subject to cross-examination regarding her findings, and could have been challenged regarding her examination techniques and application of the legal standards used in determining whether Flanagan was capable of assisting in his own defense. *Id.* That the trial court *could have* found Flanagan competent in light of the clinic's report does not mean it necessarily would have, and does not excuse its failure to hold a hearing. *Id.*, citing *State v. Were*, 94 Ohio St.3d 173, 761 N.E.2d 591 (2002) (holding that, in the absence of a defense stipulation or a hearing, the trial court erred in concluding based on the examiner's written report that the defendant was competent).

{¶19} Because the record in this case is insufficient to find that the trial court's failure to hold a competency hearing was harmless error, the first assignment of error is sustained.

{¶20} In his second assignment of error, Flanagan contends that the trial court erred in sentencing him to the maximum sentence. In his third assignment of error, he argues that he was denied effective assistance of counsel because defense counsel allowed him to plead guilty, despite the trial court's failure to conduct a competency hearing. In light of our resolution of the first assignment of error, these assignments of error are rendered moot, and we need not consider them. *See App.R. 12(A)(1)(c).*

{¶21} We reverse Flanagan’s conviction and vacate the sentence, and remand with instructions for the trial court to conduct a competency hearing pursuant to R.C. 2945.37(B).

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

ANITA LASTER MAYS, J., CONCURS;  
MARY J. BOYLE, J., DISSENTS WITH SEPARATE OPINION

MARY J. BOYLE, J., DISSENTING:

{¶22} Respectfully, I dissent and would affirm Flanagan’s conviction and sentence.

{¶23} Unlike the majority, I find that the trial court’s failure to hold a competency hearing constitutes harmless error. This case is even more compelling than the circumstances in *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986), wherein the Ohio Supreme Court held that “the failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.” The majority finds *Bock* distinguishable because Flanagan pleaded guilty and therefore did not testify and was not subject to cross-examination. But in this case, we have the benefit of a competency report from Dr. Joy Stankowski of the Cuyahoga County Psychiatric Clinic.

Dr. Stankowski examined Flanagan and ultimately opined, with reasonable medical certainty, that Flanagan “is at present able to understand the nature and objectives of the court proceedings.” Thus, we have an unrefuted expert report stating that Flanagan is competent to stand trial. This is not a case where we need to rely simply on the defendant’s responses during the plea colloquy.

{¶24} Apart from the competency report eliminating any doubt as to Flanagan’s competency, there is absolutely no indicia of any alleged incompetency in the record. The majority believes that the record contains “indicia of incompetency” because the trial court twice referred Flanagan to the court psychiatric clinic for evaluation. The second referral, however, arose simply because the first referral was ignored. And Flanagan was not twice referred for a competency evaluation. Instead, on April 9, 2015, the trial court referred Flanagan to the court psychiatric clinic for determining “eligibility for mental health/developmental disability due to a psychotic disorder.” This referral appears to have been made to determine whether Flanagan was eligible to be transferred to the specialized mental health docket. The record further reflects that on June 1, 2015, Flanagan was re-referred to the court’s psychiatric clinic on the same grounds stated in April 2015 but also for the purpose of determining competency to stand trial; this was the first and only competency referral. It is not clear from the trial court’s record if the trial court sua sponte sought the competency evaluation or if the request was being made by defense counsel. Nonetheless, the record is clear that Dr. Stankowski found Flanagan to be competent to stand trial and that, after the initial referral, neither defense counsel nor any other party ever raised any issue regarding Flanagan’s competency.

{¶25} The majority acknowledges that the trial court referenced the competency report at the plea hearing and does not dispute that the trial court received a report. Nor does it dispute that the report is part of the record on appeal. But because nothing was formally filed on the docket reflecting the submission of the report as required by R.C. 2945.371(G), and the parties never stipulated to the findings of the report, the majority implies that the report should be ignored. I disagree. Aside from the majority not citing any authority in support of this proposition, I find such an approach contravenes judicial economy and the harmless error doctrine.

{¶26} Moreover, I find this court's decision in *State v. Dowdy*, 8th Dist. Cuyahoga No. 96642, 2012-Ohio-2382, to be easily distinguishable from this case. In *Dowdy*, the appellant was referred to the court psychiatric clinic for examination. But unlike this case, the clinic's doctor reported that she was unable to render an opinion as to appellant's competency to stand trial, resulting in the trial court referring appellant to Northcoast Behavioral Healthcare for an inpatient competency evaluation. That evaluation never occurred, resulting in reversible error on appeal. Unlike *Dowdy*, however, we have a report that expressly found Flanagan competent to stand trial.

{¶27} Similarly, I do not find this court's reasoning in *State v. Jirousek*, 8th Dist. Cuyahoga No. 99641, 2013-Ohio-4796, persuasive because it relied on *Dowdy* and found reversible error on the basis that "[t]he docket is simply devoid of any further reference to the competency issue subsequent to the court's referral for psychiatric evaluation." *Id.* at ¶ 12. This case is distinguishable. Here, the trial court expressly referenced the competency report on the record. Indeed, appellate counsel could have obtained the report if the report had been requested.

{¶28} Applying *Bock*, I find that the trial court's failure to hold a hearing constitutes harmless error in this case, and therefore the first assignment of error should be overruled. See, e.g., *State v. Jones*, 8th Dist. Cuyahoga No. 103383, 2016-Ohio-3060, ¶ 12, quoting *State v. Macon*, 8th Dist. Cuyahoga No. 96618, 2012-Ohio-1828, ¶ 35 ("failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.").

{¶29} Additionally, I would affirm the trial court's imposition of the maximum sentence in this case because the sentence is not contrary to law. And I would overrule Flanagan's final assignment of error, having found that a competency report was completed and that the failure to hold a hearing constitutes harmless error.