Michael Adam CARNEAL, Appellant
v. COMMONWEALTH of Kentucky, Appellee.

No. 2004-CA-001534-MR.
Court of Appeals of Kentucky.

May 26, 2006.

David Harshaw, Timothy G. Arnold, Assistant Public Advocates Department of Public Advocacy, Frankfort, Kentucky, Briefs for Appellant.

Gregory D. Stumbo, Attorney General, David A. Smith, Assistant Attorney General, Frankfort, Kentucky, Brief for Appellee.

Before: BARBER, KNOPF, and MINTON, Judges.

OPINION

KNOPF, JUDGE:

In October 1998, **Michael Carneal** pled guilty but mentally ill in McCracken Circuit Court to three counts of murder,[1] five counts of attempted murder,[2] and first-degree burglary.[3] Carneal had taken several guns from a friend's garage and had used one of them on the morning of December 1, 1997, to shoot eight of his young classmates at Heath High School in Paducah. Pursuant to the plea agreement, the trial court entered judgment on December 21, 1998, sentencing Carneal to life in prison without parole for at least twenty-five years. Because Carneal was a juvenile under sixteen years of age at the time of the shootings, this was the maximum allowable sentence.[4] Carneal was remanded to the custody of juvenile authorities, where he remained until his eighteenth birthday on June 1, 2001, when he was resentenced as an adult to adult incarceration. Three years to the day later, on June 1, 2004, Carneal moved for relief from his judgment on the ground that his schizophrenia rendered him incompetent in October 1998 to plead guilty. By order entered June 30, 2004, the trial court ruled that Carneal's motion was untimely and summarily denied relief. It is from that order that Carneal has appealed. Convinced that Carneal's motion was timely filed after he became an adult and that it presents sufficient evidence of incompetence to warrant a hearing, we vacate the trial court's order and remand for additional proceedings.

Following his indictment Carneal gave notice that he intended to introduce expert evidence of a mental disease or defect, and so, pursuant to the Commonwealth's motion and RCr 7.24 (3)(B), the trial court ordered that he submit to a mental examination. Two psychiatrists, Dr. Elissa Benedek and Dr. William Weitzel, and a psychologist, Dr. Charles Clark, examined him on behalf of the Commonwealth. In their joint report they opined that though his test results

indicated an elevated degree of mental disturbance and though he had mentioned persistent irrational fears and ideas, he had not reported the sort of sensory disturbances (hallucinations) or delusional beliefs that could be deemed symptoms of a serious mental illness. They concluded that at the time of the shootings Carneal had the capacity to understand the wrongness of his acts and to conform his conduct to the requirements of the law.

The two experts Carneal consulted on his own behalf, a psychiatrist, Dr. Diane Schetky, and a clinical psychologist, Dr. Dewey Cornell, reached the same conclusion. Although their evaluations do not appear in the record, it is not disputed that they believed Carneal suffered from depression and from "schizotypal personality disorder," but that he probably was not schizophrenic or otherwise psychotic. Dr. Cornell, however, a faculty associate of the Institute of Law, Psychiatry, and Public Policy at the University of Virginia, and a member of the research advisory board for the FBI's Center for the Analysis of Violent Crime, qualified his 1998 assessment by noting that Carneal had not been fully cooperative in describing his paranoid fears and other symptoms and that possibly he was in the early stages of schizophrenia or schizoaffective disorder.

Because an insanity defense was not supported even by his own experts, Carneal and his parents agreed to a guilty plea. They did so not in exchange for a bargain from the Commonwealth, but rather because Carneal felt he deserved the maximum punishment; because all of them wished to spare him, his victims, and his victims' families the ordeal of a trial; and because they sought treatment for his mental problems as quickly as possible.

Carneal alleges in his current motion that some time after his transfer to adult custody in June 2001, he began to be treated with the antipsychotic medications Geodon and Zyprexa. Under this treatment he gradually attained a degree of detachment from an elaborate system of auditory and visual hallucinations and of paranoid fears and ideations that he had begun to experience about six months before the shootings and of which the shootings formed a part. Prior to this treatment, he claims, he experienced voices warning him not to reveal anything about his delusional system. As a result, he told his examiners in 1998 and his doctors since then very little about it. Only recently has he gained the ability to hold his delusions somewhat at bay and to discuss them with others. He has since been reexamined by Drs. Cornell and Schetky and has attached their reevaluations of his condition to his motion for relief. Both doctors find Carneal's revelations credible and both state that had Carneal been forthcoming in 1998 about the extent of his delusional involvement they would have deemed him insane at the time of the offense. Dr. Cornell, furthermore, the only expert in 1998 asked to assess Carneal's competence for trial, would now opine that Carneal was not competent.

Carneal advances alternative procedural bases for the relief he seeks. Under RCr 10.02 and 10.06, he seeks a "new trial" on the ground of newly discovered

evidence. Under RCr 11.42 he seeks relief from his judgment on the ground that his guilty plea was invalid both because he was incompetent to enter it and because counsel was ineffective in recommending it. And under CR 60.02 (f) he seeks relief from his judgment on the ground that the belated discovery of his insanity constitutes an extraordinary justification for relief. We may dispense quickly with most of these alternatives.

We agree, first of all, with the federal courts that have held, under the similar federal rule, that "the validity of a guilty plea cannot be questioned by way of a motion for new trial."[5] A guilty plea, of course, waives all defenses but the failure to charge an offense and dispenses with a trial. Following a guilty plea, therefore, there can be no "new" trial, and even compelling new evidence of a defense is irrelevant unless and until the plea be deemed invalid. RCr 11.42 is the most common vehicle for attacking the validity of a guilty plea, and it is under that rule, we believe, not RCr 10, that Carneal's new allegations must be assessed.

Similarly, the extraordinary relief available under CR 60.02 supplements but does not duplicate RCr 11.42 relief.[6] In particular, CR 60.02 does not provide a means of evading the RCr 11.42 limitations period. If Carneal's claim amounts to an untimely RCr 11.42 claim, then CR 60.02 will not save it.

Finally, the question of timeliness aside, the record clearly refutes Carneal's allegations that counsel rendered ineffective assistance by recommending his guilty plea. As Carneal correctly notes, an illusory plea bargain, if relied upon by the defendant, may render a guilty plea involuntary and hence invalid.[7] He insists that his plea bargain was illusory because the only benefit he sought, the designation of guilty but mentally ill in hopes of ensuring treatment, did not in fact have any bearing on the medical treatment he would receive once incarcerated. Counsel should have known that the guilty-but-mentally-ill label is meaningless, he insists, and withheld the plea unless the Commonwealth offered a genuine benefit. Even if counsel's performance could be deemed deficient in this regard, however, Carneal would not be entitled to relief unless it appeared reasonably probable that the deficiency prejudiced him by inducing him to plead guilty when otherwise he would not have.[8] The record refutes such an inference. It makes clear, as noted above, that Carneal had no desire to lessen his penalty but wished instead to avoid a trial and to begin treatment as soon as possible. The plea that counsel endorsed accomplished that result; cynicism regarding the GBMI label would not have changed it.

We come then to Carneal's RCr 11.42 claim that his plea should be deemed invalid because he was incompetent to enter it and to the trial court's ruling that this claim is barred by RCr 11.42(10)'s three-year limitations period. The trial court apparently found that the limitations period began to run in December 1998, when Carneal, then about fifteen-and-a-half years old, was initially sentenced and remanded to the custody of the juvenile authorities. According to the trial

court, the limitations period expired in December 2001, and Carneal's June 2004 motion was clearly too late. Against this result Carneal argues that the limitations period should be deemed tolled during both his minority and his mental incompetence. We agree.

Both of those factors, minority and mental incompetence, are common grounds for tolling limitations periods,[9] and RCr 11.42 itself gives no indication that its limitations period is meant to be an exception. It is true that juvenile judgments are final for the purposes of appeal at the time the juvenile is initially sentenced and that RCr 11.42 indicates that the limitations period runs from the entry of the final judgment. A juvenile's trial counsel, however, often, as in this case, remains counsel until final sentencing when the child turns eighteen. Because many, if not most, RCr 11.42 claims are predicated on trial counsel's alleged ineffectiveness, it would be unfair to begin the limitations clock before the juvenile was legally competent to seek independent advice concerning trial counsel's performance. The trial court's rule, furthermore, would run the risk of requiring the juvenile to assert successive RCr 11.42 motions, one to address trial and initial sentencing issues and another to address issues arising at the eighteen-year-old final sentencing. The better rule, we believe, is the standard one tolling the limitations period during minority. As noted above, Carneal's motion was filed within three years of his eighteenth birthday and was, therefore, timely.

With respect to tolling during incompetence, that, too, of course, is the standard rule. Consistent with that rule, in Robertson v. Commonwealth,[10] our Supreme Court recently held that equitable tolling may apply to the RCr 11.42 limitations period. Under the five-factor test the Court adopted for determining whether tolling was appropriate,[11] bona fide claims of mental incompetence could well be found to excuse the petitioner's unawareness of the filing requirement and his apparent lack of diligence. Because we have found that the limitations period was tolled during Carneal's minority, however, we need not address whether equitable tolling on account of his alleged mental incompetence applied as well.

We are confronted, then, with the merits of Carneal's claim that he was incompetent to plead guilty. The test for determining competency is whether the defendant 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."[12] Trying, accepting the guilty plea, convicting, or sentencing a person who does not satisfy the competency standard constitutes a due-process violation.[13] Case law has distinguished two types of competency claims, procedural and substantive:

A procedural competency claim is based upon a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent. . . . The purpose of the competency hearing—the procedural due process right—is to ensure that the

substantive due process violation does not occur, i.e., the Commonwealth does not try an incompetent criminal defendant.[14]
Although the trial court did not hold a competency hearing in this case, either before Carneal's guilty plea or his sentencing, Carneal does not base his claim on an alleged procedural violation. Such a violation occurs only when "a reasonable judge, situated as was the trial court . . . should have experienced doubt with respect to competency to stand trial[,]" and yet did not hold a hearing.[15] Here, where neither counsel, experts, nor Carneal's demeanor alerted the trial court to a potential lack of competency, arguably no violation occurred.[16]

Instead, Carneal makes a substantive competency claim, relying on the new evidence discussed above to allege that he was incompetent at the time of his plea. Under federal due-process standards, he is entitled to an evidentiary hearing on the issue of his competence to plead guilty "if he presents sufficient facts to create a real and substantial doubt as to his competency."[17] This is a formidable burden that only well substantiated claims will meet. Newly discovered evidence may be the basis of such a claim.[18] Carneal has met this formidable burden.

Carneal's new evidence is not simply a reinterpretation by a new expert of the same data other experts interpreted at the time of the original proceeding, nor is it otherwise merely cumulative or impeaching. It is genuinely new data, apparently undiscoverable until recently when Carneal began receiving more effective medication. It is sufficiently material, furthermore, to lead two of the highly qualified experts familiar with Carneal to alter substantially their assessments of him, and it is precisely the sort of evidence, evidence of hallucinations and elaborate delusions, that the other experts who examined Carneal in 1998 said could have led them to a more serious diagnosis. Finally, the evidence of Carneal's paranoid fear of counsel, if credited, lends strong support to his claim that at the time of his plea his ability to cooperate with counsel and to assist in his defense was significantly compromised. We are convinced, therefore, that Carneal has presented sufficient facts to create a real and substantial doubt about his competence to plead guilty.

This used to be enough to entitle a movant to relief, but our Supreme Court has recently held that before relief can be granted it must first be determined that a retrospective competency determination is not feasible.[19] Although retrospective competency hearings are not favored, our Supreme Court has noted, they are permissible in some circumstances, and it is the trial court that must determine in the first instance whether those circumstances obtain.[20] The test to be applied "is whether the quantity and quality of [presently] available evidence is adequate to arrive at a [retrospective] assessment that could be labeled as more than mere speculation."[21] Factors bearing on this determination include

(1) the length of time between the retrospective hearing and the [original proceeding]; (2) the availability of transcript or video record of the relevant proceedings; (3) the existence of mental examinations conducted close in time to the [original proceeding]; 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 [the original proceeding]. . . . These factors are not inclusive and none are necessarily determinative.[22]
Here, clearly, expert recollection will also have an important bearing. And it is worth noting that the passage of a considerable amount of time does not necessarily rule out a retrospective determination.[23] Finally, it is the Commonwealth that bears the burden of showing "that a retrospective competency hearing is permissible."[24]

In sum, Carneal's RCr 11.42 motion was timely filed within three years of his majority, and the motion presents sufficient evidence to raise real and substantial doubts concerning his competence to plead guilty. Accordingly, we vacate the June 30, 2004, order of the McCracken Circuit Court and remand this case for the court to determine whether a retrospective competency hearing is permissible and, if so, to conduct such a hearing. If a retrospective competency determination is not feasible, or if it is determined at the hearing that Carneal was not competent to enter his guilty plea, then he shall be permitted to withdraw the plea and, if competent to do so, either plead again, or proceed to trial.

ALL CONCUR.

[1] KRS 507.020.

[2] KRS 506.010 and KRS 507.020.

[3] KRS 511.020.

[4] KRS 640.040.

[5] United States v. Lambert, 603 F.2d 808, 809 (10th Cir. 1979).

[6] Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) (citing Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983)).

[7] Dillehay v. State, 672 N.E.2d 956 (Ind.App. 1996).

[8] Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[9] See KRS 413.170 ("If a person entitled to bring any action . . . was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability[.]").

[10] 177 S.W.3d 789 (Ky. 2005).

[11] The Court adopted the following five factors for determining whether equitable tolling is applicable to an otherwise limitation-barred RCr 11.42 motion: "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim." 177 S.W.3d at 792.

[12] Thompson v. Commonwealth, 147 S.W.3d 22, 32 (Ky. 2004) (citation and internal quotation marks omitted).

[13] Id. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). See also KRS 504.090, KRS 504.100, and RCr 8.06.

[14] Thompson v. Commonwealth, supra 33 (Ky. 2004) (citations and internal quotation marks omitted).

[15] Thompson v. Commonwealth, 56 S.W.3d 406, 408 (Ky. 2001). See also McGregor v. Gibson, 248 F.3d 946, 953 (10th Cir. 2001) (same).

[16] Cf. Turner v. Commonwealth, 153 S.W.3d 823 (Ky. 2005) (discussing factors which made not holding hearing reasonable).

[17] Boyde v. Brown, 404 F.3d 1159, 1166 (9th Cir. 2005); Battle v. United States, 419 F.3d 1292, 1299 (11th Cir. 2005) (petitioner must present "clear and convincing evidence creating a real, substantial and legitimate doubt [about] his competence to stand trial.").

[18] Boyde v. Brown, supra; People v. Gonzalez, 800 P.2d 1159 (Cal. 1990).

[19] Thompson v. Commonwealth, 56 S.W.3d 406 (Ky. 2001) (citing Hayden v. Commonwealth, 563 S.W.2d 720 (Ky. 1978)).

[20] Id.

[21] Thompson v. Commonwealth, 56 S.W.3d 406, 409 (Ky. 2001) (internal quotation marks omitted).

[22] Id.

[23] Johnson v. Commonwealth, 103 S.W.3d 687 (Ky. 2003) (competence validly determined seven years after original guilty plea).

[24] Thompson v. Commonwealth, 56 S.W.3d 406, 409 (Ky. 2001).