

**ARKANSAS COURT OF APPEALS**

DIVISION I  
No. CACR10-729

ANTONIO HARRIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MARCH 30, 2011

APPEAL FROM THE MISSISSIPPI  
COUNTY CIRCUIT COURT,  
CHICKASAWBA DISTRICT  
[NO. CR 208-106 ]

HONORABLE BARBARA HALSEY,  
JUDGE

AFFIRMED

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**ROBERT J. GLADWIN, Judge**

Appellant Antonio Harris appeals his aggravated-robbery conviction claiming that the trial court erred by failing to make a determination, pursuant to Arkansas Code Annotated section 5-2-310(c)(1) (Supp. 2009), that he had regained fitness to proceed to trial. We affirm.

Harris was charged with aggravated robbery by information filed on March 14, 2008, in Mississippi County Circuit Court. Counsel for Harris filed a petition for commitment and notice of the affirmative defense of mental disease or defect. The trial court entered an order for Harris's evaluation on August 5, 2008. The conclusion of the evaluation was that Harris had a mental disease, that he lacked the capacity to understand the proceedings against him, and that he lacked the capacity to assist in his own defense. The trial court entered an order for a reevaluation on April 3, 2009. The second evaluation concluded that Harris was not fit

to proceed and was in need of inpatient treatment for restoration of his competency to stand trial. As a result of the first two evaluations, the trial court entered an order for commitment due to lack of fitness to proceed on August 3, 2009.

A third forensic evaluation was conducted after Harris's stay at the Arkansas State Hospital. This evaluation was filed with the trial court on October 19, 2009, and concluded that Harris was fit to proceed to trial. A jury trial was held on March 19, 2010, and Harris was found guilty of aggravated robbery and sentenced to 120 months' imprisonment in the Arkansas Department of Correction. Harris filed a timely notice of appeal, and this appeal followed.

It is well settled that the conviction of a defendant while he is legally incompetent to stand trial violates due process. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992). Arkansas Code Annotated section 5-2-302 (Repl. 2006) expressly prohibits trying a person who lacks the capacity to understand the proceedings against him or to assist effectively in his own defense because of mental disease or defect. A criminal defendant is ordinarily presumed to be mentally competent to stand trial, and the burden to prove otherwise is on the defendant. *Davis v. State*, 375 Ark. 368, 291 S.W.3d 164 (2009). The test of competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001); *Lawrence, supra*.

Arkansas Code Annotated section 5-2-305(a)(1)(C) (Supp. 2009) states that the trial court shall immediately suspend proceedings if the defendant files notice that he will put his fitness to proceed in issue or if there is otherwise reason to doubt the defendant's fitness to proceed. Use of the word "shall" makes compliance with a statute mandatory. *See Smith v. State*, 347 Ark. 277, 61 S.W.3d 168 (2001). Upon suspension of the proceedings, the trial court is required to enter an order directing a mental examination of the defendant under one of the means outlined in the statute. *See Ark. Code Ann. § 5-2-305(b)(1)*. This statute is intended to prevent the trial of anyone who is legally incompetent. *Lawrence v. State, supra*. The trial court's determination of the issue is reviewed under the "clearly erroneous" standard. *Jimenez v. State*, 2010 Ark. App. 804, 379 S.W.3d 762.

Arkansas Code Annotated section 5-2-310(c)(1) states as follows:

On the court's own motion or upon application of the department, the prosecuting attorney, or the defendant, and after a hearing if a hearing is requested, if the court determines that the defendant has regained fitness to proceed, the criminal proceeding shall be resumed.

Harris contends that when fitness to proceed becomes an issue, it is the duty of the trial court to make a determination of that issue, either on the report of the Arkansas State Hospital or after a hearing on the issue. *See Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002). Harris claims that the trial court erred by proceeding to trial upon receipt of the third evaluation from the Arkansas State Hospital that reported him competent to stand trial without further hearings or a determination by the trial court. Harris argues that he did not waive this argument by failing to challenge the issue of competency at the trial-court level or

by failing to insist on a hearing. Instead, he contends that given the three evaluations—two of which found him to be incompetent—the trial court’s previous finding and order that he was not fit to proceed, and his history of mental-health treatment, it was imperative that the trial court make a further inquiry of competency before proceeding to trial.

He also cites *Pate v. Robinson*, 383 U.S. 375 (1966), for the proposition that it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently “waive” his right to have the court determine his competency to stand trial. In *Pate*, the United States Supreme Court found that the question of the defendant’s competency had not been waived; rather, it was made an issue by defense counsel frequently throughout the proceedings.

We agree with the State that, unless a defendant requests them, a trial court does not have an affirmative duty to enter written findings that a defendant’s fitness has been restored before resuming the criminal proceedings. See *McClellan v. State*, 264 Ark. 223, 570 S.W.2d 278 (1978) (holding that, after a psychiatrist’s report indicating fitness to proceed is filed, the trial court did not err by resuming the proceedings without affirmatively determining that the defendant was fit to proceed). On October 19, 2009, Dr. Michael Simon of the Arkansas State Hospital filed a report indicating that Harris’s fitness to proceed had been restored. Harris did not dispute the doctor’s findings or request that the trial court enter written findings that he was fit to proceed. Consequently, he does not demonstrate that the trial court erred by

allowing the criminal proceedings to resume without making an affirmative determination that his fitness had been restored.

Further, even if the trial court had a duty to enter a finding that Harris's fitness had been restored, Harris was not prejudiced by the trial court's failure to do so. Harris did not dispute the doctor's conclusion that he was fit to proceed and to assist in his own defense, and Harris testified on his own behalf during his trial. *See Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988) (holding that appellant who testified at trial failed to demonstrate prejudice from the trial court's determination that he was fit to proceed).

Affirmed.

WYNNE and GLOVER, JJ., agree.