

FILED

July 23, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

July 24, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, concurring:

In the instant case, the evidence of the defendant's guilt was strong, and there was evidence that the defendant was competent to stand trial. In fact, the defendant's counsel assured the Court that the defendant's competency was not an issue. Nevertheless, as the Court's opinion cites, under *State v. Sanders*, 209 W. Va. 367, 377, 549 S.E.2d 40, 50 (2001), the trial court should have *on its own motion* ordered a competency examination, if the court thought, the defendant's competency could be reasonably questioned. Perhaps a competency examination would have been appropriate in this case.

The problem with requiring trial courts to do things *sua sponte*, of course, is that it is hard for the judge to remember and keep track of such duties, especially in the middle of trial. In the instant case, if there were substantial evidence of the defendant's incompetence, regardless of what his counsel said, we would consider whether the trial court's failure to order a competency exam *sua sponte* was reversible error. Because there was insufficient evidence in this case, any error by the trial court was harmless. Accordingly, I concur.