STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

State of Wisconsin,

Plaintiff-Respondent,

v.

Roddee W. Daniel,

Defendant-Appellant.

Appeal No.
12AP2692-CR

Kenosha County Case
No. 08CF1035

DEFENDANT-APPELLANT'S BRIEF

Appeal from the Circuit Court of Kenosha County
The Honorable Wilbur W. Warren III Presiding

THE LAW OFFICE OF ANTHONY JUREK
Anthony J. Jurek (SBN 1074255)
Attorney for Defendant-Appellant
Roddee W. Daniel

222 S. Hamilton St., Ste. 22
Madison, WI 53703
Phone: (608) 843-8909

Issue Presented

The sole issue presented is whether Roddee Daniel is competent to pursue postconviciton relief. The circuit court decided he was.

Standard of Review

Wisconsin law does not explicitly prescribe a standard of review for circuit court determinations that a defendant is competent to pursue *postconviction* relief. Appellate review of a competency *to stand trial* determination is conducted under the "clearly erroneous" standard. *State v. Byrge,* 2000 WI 101, 614 NW 2d 477. Under the "clearly erroneous" standard, a circuit court's findings will not be upset unless they are contrary to the great weight and clear preponderance of the evidence. *State v. Turner*, 136 Wis. 2d 333, 343, 401 N.W.2d 827 (1987). A circuit court's finding is clearly erroneous when, although there is evidence to support it, a reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

Statement on Oral Argument and Publication

Undersigned counsel does not request oral argument at this time. Undersigned counsel believes publication will afford the state of Wisconsin with further guidance on a novel issue which is likely to recur.

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Statement of the Case

Nature of the Case

This case concerns the preservation of Roddee Daniel's right to appeal his conviction and life plus fifteen year sentence without the possibility of extended supervision in a first degree intentional homicide and burglary case. Because Roddee has at times equivocated regarding whether to appeal and attempted to fire appellate counsel, and appellate counsel believes that Roddee lacks the competency to do so, appellate counsel seeks review of the circuit court's determination that Roddee is competent to pursue postconviction relief. While Roddee has apparently claimed he is competent (R. 149; A-App. 32), appellate counsel nonetheless brings this appeal under SCR 20.1.14.[1] SCR 20.1.14 permits a lawyer who reasonably believes that a client with diminished capacity cannot adequately act in his own interest to prevent substantial harm to take reasonably necessary protective action to protect the client, including seeking the appointment of a guardian.

Appellate counsel seeks the appointment of a guardian to make those decisions allocated to Roddee by law. While undersigned counsel may be authorized to take protective action under SCR 20.1.14 until a court finds the Defendant incompetent and appoints a guardian (or until all remedies to that end are exhausted), it is not as clear that a lawyer may proceed with a full appeal on the merits of the case when his client frequently oscillates between wanting counsel to appeal and wanting to fire counsel. In this case, counsel's ethical obligation conflicts with the circuit court's determination.

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[1] SCR 20:1.14 reads:

Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6. When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Procedural Posture, Disposition in trial court and Facts relevant to appeal

Roddee was convicted of First Degree Intentional Homicide and Burglary for the murder of Capri Walker, which occurred when he was 15 years old. He was sentenced to life without parole, plus fifteen years. (R. 96-97.) The case is replete with potential issues of arguable merit. Contested motions for reverse waiver (R.5), to dismiss the criminal complaint for the unconstitutionality of the statute (R. 21), to sever defendants for trial (R.49), for change of venue (R. 50), to suppress statements (R. 53), to determine competency (R. 71), etc., were all decided against the Defendant. As with any case of this nature, other issues of arguable merit are exceedingly likely.

Appellate counsel has been unable to bring those issues because Roddee has inconsistently wanted to terminate representation. (R.108; A-App.2; R. 149; A-App. 26.) On the basis of Roddee's erratic behavior, in light of *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994), appellate counsel moved the circuit court to rule on Roddee's competency to pursue postconviction relief. (R. 108; A-App. 1-7)

As a result of counsel's motion, the circuit court ordered an evaluation. (R. 110.) Roddee would not meet with the evaluator, so the evaluator submitted only a partial report, abstaining from any conclusion regarding competency. (R. 114, A-App. 8-11.) The circuit court ordered the Defendant to Mendota Mental Health Institute for an in-patient evaluation and scheduled a competency hearing. (R. 115.) The evaluator at Mendota concluded that Roddee was competent. (R.117, A-App. 12-16.) An independent forensic psychologist disagreed. (R. 155, Exh 5, A. App 117-121.)

At the hearing, the court endeavored to abide by the instruction in *State v. Debra A.E.* and conform the hearing as much as possible to Wis. Stat. § 971.14(4).[2] (R. 149; A-

[2] Wis. Stat. § 971.14(4)(b) reads: If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report filed under sub. (3) or (5). In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of the hearing by telephone or live audiovisual means. At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent. If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3) (dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that

App. 30-40.) The statute requires the court at the commencement of the hearing to inquire of the defendant whether he is competent. Wis. Stat. § 971.14(4). The court inquired personally of the Defendant whether he was competent and the Defendant responded "Yeah." (R. 149, A-App. 32.) Appellate counsel urged the court to conduct an open-ended colloquy, and while the court persisted in asking closed questions, the court permitted counsel to question the Defendant. (R. 149, A-App. 33-36.)

> MR. JUREK: Roddee, can you explain for the Court what it means to appeal a conviction?
>
> MR. DANIEL: No.
>
> MR. JUREK: Well, what happens if you decide to appeal?
>
> MR. DANIEL: I don't want to talk.
>
> MR. JUREK: I understand you might not want to talk. I think it's important for this Court to know that if you don't want to appeal or if you want to fire me that you're able to do that. So what happens if you don't appeal?
>
> MR. DANIEL: I can get charged with a crime.
>
> MR. JUREK: You'll get charged with a crime?
>
> MR. DANIEL: Uh-huh.
>
> MR. JUREK: And what happens then?
>
> MR. DANIEL: I don't want to talk.
>
> MR. JUREK: I know you don't want to talk. We're almost done. What happens if you get charged with a crime?
>
> MR. DANIEL: I don't want to talk.

(R. 149, A-App. 35-36.)[3] The court then expressed the belief that under Wis. Stat. § 914.17, it needed to make an initial determination of competency. (R. 149; A-App. 36.) Undersigned counsel argued against that, advising the court that no initial determination was required, and that the court ought to just proceed with the hearing. (R. 149; A-App. 36-37.) The State, on the other hand, advised the court that the State did not intend to

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whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

[3] This interaction mirrored the interaction between Roddee and undersigned counsel before the hearing, as reported by Social Worker Julie Stockwell. (R. 149; A-App. 132-133.)

contest Roddee's competency and argued for a "directed verdict" finding the Defendant competent. (R. 149; A-App. 37-38.)

The court made a preliminary determination that Roddee was competent based on Roddee's "declaration," and noted that the State did not intend to present evidence to the contrary. (R. 149; A-App. 38-40.) The court then advised counsel "So now if you're not waiving your right to present evidence as to incompetency, then I think you probably have the burden to do that." (R. 149; A-App. 40.) Counsel accepted that burden, and the court advised that the burden was "preponderance of the evidence." (R. 149; A-App. 40.)

Testimony was received by Dr. Jose Alba, Roddee's treating psychiatrist at the Wisconsin Resource Center; Dr. Mark Phelps, who in the context of his forensic fellowship at Mendota wrote the report opining that Roddee was competent; Dr. Deborah Collins, from the Wisconsin Forensic Unit, who had initially examined Roddee for competency to stand trial; Ms. Julie Stockwell, L.C.S.W., a licensed clinical social worker from the Wisconsin Resource Center, who is Roddee's case manager; and Dr. Frank Cummings, a forensic psychologist who independently assessed Roddee for competency. Marked as exhibits were a note by Dr. Alba from Roddee's treatment record, Dr. Phelps' report, Roddee's records from Rogers Memorial, and the report of Dr. Cummings.[4] Their testimony and the exhibits are discussed in detail in the Argument section below.

The hearing ran past the courthouse closing time, and so the judge ordered closing arguments in writing. The judge's ruling that Roddee was competent occurred by telephone hearing, which Roddee would not participate in. (R. 150; A-App. 214-228.) A Ruling that Roddee is competent to pursue postconviction relief was signed on July 31, 2012. (R. 130; A-App. 229.)

Argument

Competency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made. *Debra A.E.* at 124-126. Whether a person is competent depends on the mental capacity that the task at issue requires. *Id.* To be competent to pursue postconviction relief, an individual needs to decide whether to appeal, what the objectives of an appeal will be, and assist counsel in developing a factual foundation for appeal.

[4] The Appendix to this Brief, printed separately, contains the 2010 report of Dr. Collins regarding Roddee's competency to stand trial under the heading of Exhibits offered at this Competency Hearing. Dr. Collins' report was previously received by the circuit court before Roddee's trial as Record number 75 and was discussed but not marked as an exhibit at this hearing.

Debra A.E. at 124-126. Roddee cannot do any of these. His decisional competency is such that he cannot even decide whether to appeal, let alone what the objectives should be or assisting counsel in developing a factual basis for appeal. He is incapable of making long-term decisions, such as whether to take medication or whether to appeal his conviction. Appointment of a guardian is required to safeguard Roddee's right to appeal. If appointed, a guardian will decide whether to appeal and what the objectives are. By virtue of these proceedings, a record will be developed to afford Roddee additional appellate remedies should he ever achieve competency.

A reviewing court will only upset a circuit court's determination of competency if that determination is clearly erroneous. *State v. Byrge*, 2000 WI 101, 237 Wis.2d 197. A circuit court's finding is clearly erroneous when, although there is evidence to support it, a reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). This court must view all the evidence relevant to the competency determination in order to determine whether the circuit court's ruling was clearly erroneous. A circuit court's credibility determinations are not insulated from review: Documents or objective evidence may contradict the witness' story, or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. *Id* at 575. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. *Id.*

This is such a case. The evidence in this case is the testimony of mental health professionals, with the circuit court record and Roddee's mental health records serving as a background. The evidence that he is competent is not credible. The findings of the circuit court are clearly erroneous and do not reflect the evidence. The evidence that he is not competent is greater, more reasonable and more thorough. Viewing all the evidence, the great weight and clear preponderance of the evidence is that Roddee is not competent to pursue postconviction relief.

The Evidence that Roddee is Competent is Not Credible

Dr. Phelps, who had almost completed a seven month fellowship at Mendota Mental Health Institute which would allow him to sit for forensic boards, produced a report opining that Roddee was competent and testified at the Competency Hearing to that effect. Dr. Phelps' ignorance regarding Roddee and regarding appeals renders his opinion so incredible on its face that a reasonable factfinder would not credit it. His written report, too, evinces a cut-and-paste mentality that utterly undermines his credibility. He opens his report by writing that Roddee was referred "for evaluation of

his competency to stand trial." (R. 117; A-App. 12.) While he goes on to write that it regards "his competency to participate in the current legal proceedings associated with his prior convictions..." Dr. Phelps reiterates under the "Competency" heading that "Mr. Daniel has not fully participated in any formal examination of his competency *to stand trial"* (R. 117; A-App. 14 (emphasis added)) and the standard expressed in his conclusion was that he was evaluating Roddee's competency "to understand the proceedings and assist in his own defense" (R. 117; A-App. 15.) Under "Sources of Information" he notes he reviewed a "letter to the court regarding *competency to stand trial* [sic][5] dated March 15, 2012 and authored by Dr. Rawski." (R. 117; A-App. 13(emphasis added).) In other words, Dr. Phelps was assessing Roddee for his competency to stand trial.

After witnessing proceedings the morning of the Competency Hearing which would have alerted him to the fact that he assessed Roddee with the wrong standard, he opened his testimony by offering that the report should read "assist in his own defense in the appeals process." (R. 149:59;A-App. 80.) Dr. Phelps was demonstrably ignorant of the process that he was supposed to be evaluating Roddee's capacity to participate in. He could not say what an appeal entails.

> Q: Do you have any idea of what that process looks like, the appellate process?
>
> A: As far as which parts?
>
> Q: Well, the steps that have to take place in order to bring an appeal.
>
> A: I do not have the expertise in the law that would be required for an understanding of all of the steps of the appeals process.
>
> Q: Could you describe any of the steps that have to be taken in the appeals process?
>
> A: My understanding is that he files an appeal. That is about the extent of my knowledge.

(A-App. 83.) If he does not know what the process is, he cannot possibly assess someone's competency to participate in that process. Appealing a conviction is a longer process than a trial leading to that conviction. There are different kinds of appeals, different courts to appeal to, different grounds upon which relief can be sought, some of which are complementary whereas others are mutually exclusive, different remedies, etc. If Dr. Phelps' understanding is limited to "he files an appeal" without regard to

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[5] Dr. Rawski's report was not aimed at "competency to stand trial," but opens with "...I attempted to evaluate Roddee W. Daniel regarding his competency to participate in the current legal proceedings associated with prior convictions..." (R. 114; A-App. 8) and closes with "I am unable to offer an opinion to a reasonable degree of medical certainty regarding Roddee Daniel's current competency to participate in the legal proceedings related to his recent convictions." (R. 114; A-App. 11.)

timeframes, courts, issues, remedies, etc., he couldn't possibly assess whether Roddee has the requisite competence to make a decision and then stick with it for the required time.

The verbiage of Dr. Phelps report is misleading. His report is laden with accounts about what Roddee "acknowledged" or "refused." (R. 117; A-App. 12-16.) Dr. Phelps admits in his report that there was only one meeting in which Roddee spoke with him, and that Roddee used only brief sentences, frequently that he "didn't want to talk about that." (R. 117; A-App. 15.) Dr. Phelps testified as well that Roddee's interactions were just brief sentences, monosyllabic answers and nods or shakes of his head. (R. 149:72; A-App. 93.)

Very little of Dr. Phelps' report was the result of his own work. (R. 149:59, 68-71, 79; A-App. 80, 89-92, 100.) Dr. Phelps viewed none of Roddee's then-current treatment records from WRC in arriving at his conclusion that Roddee was competent. (R. 149:70-71; A-App. 91-92). Dr. Phelps reviewed only a quarter of the records from Roger's Memorial. (*Compare* R. 149:96; A-App. 117 *with* R. 149:100; A-App. 121; R. 149 Exh. 4.) He never read Dr. Collins' report, but rather only Dr. Rawski's summary of it. (R. 149:71; A-App. 92.) Neither did he review the report of Dr. Lisowski[6] that the circuit court had forwarded to Dr. Rawski. (*Compare* R.117; A-App. 12-13 ("Sources of Information" from Dr. Phelps' report) *with* R. 112 (Letter to Dr. Rawski from Judge Warren dated 2/29/12.) Perhaps because Dr. Phelps did so little of his own work, his report presents typos as fact.[7] Dr. Phelps never spoke with counsel, either appellate or trial, as forensic practices would dictate. (*Compare* R.117; A-App. 12-13 ("Sources of Information" from Dr. Phelps' report) *with* R. 149:133-136 (Dr. Cummings' testimony referencing that interviewing counsel is accepted forensic practice and explaining why it is important).)

Dr. Phelps testified that the majority of his report was gleaned from the report of Dr. Rawski (R. 149:59, 68-71, 79; A-App. 80, 89-92, 100), who never met with Roddee (R. 114; A-App. 8-11), but instead took information from the report of Dr. Collins (R.

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[6] Dr. Lisowski's report was pursuant to a reverse-waiver motion by Roddee's original trial counsel and found, among other things, that Roddee had an IQ of approximately 71 and was repeating ninth grade. (R. 127; A. App. 205.)

[7] *Compare* Dr. Phelps' assertion in his report that Roddee "was transferred to Racine County Jail on September 14, 2010" (R. 117; A-App. 13) *and* Dr. Rawski's typo that "Medical records from RCJ indicate that Mr. Daniel was transferred to RCJ from DCI on September 14, 2010" (R. 114; A-App. 9) *and* Dr. Phelp's testimony that "That was in Dr. Rawski's report as well" (R. 149:70; A-App. 91) *with* Dr. Alba and Ms. Stockwell's testimony that he was admitted to WRC on that date. (R. 149: 23, 119; A-App. 44, 140.)

114; A-App. 8-11), who didn't have the benefit of Roddee's records from Rogers Memorial in developing her opinion (R:149:89-90; A-App. 110-111), and who had only met with Roddee once for less than 30 minutes years before (R. 149:95; A-App. 116).

Despite that there was only one meeting in which Roddee spoke with him, that he had no real knowledge of the appellate process, that the majority of his report was premised on the reports of others (which were themselves premised on the reports of others) and that he failed to review relevant records, Dr. Phelps concluded that Roddee is competent to seek postconviction relief. Dr. Phelps relied on the report of Dr. Rawski, who relied on the report of Dr. Collins, who relied on the notes of the KCDC and testified that she met with Roddee for less than half an hour before telling the trial court that he was competent to stand trial years before. She also testified that she reviewed no records from Rogers Memorial prior to making her determination. Dr. Phelps concluded that Roddee was competent to seek postconviction relief because he was able to learn unit rules: To keep his room clean, to show up for meals, and to shower. (R. 149: 80-83; A-App. 101-104.) Dr. Phelps could not point to any behavior of Roddee's that a typical middle schooler could not perform. (R. 149:80-83; A-App. 101-104.)

Dr. Phelps, charged by the circuit court with determining Roddee's competency to pursue postconviction relief, with more than 20 years of schooling leading to a specialty in forensic psychiatry, could not tell the court what pursuing postconviction relief entailed. He nonetheless swore to a reasonable degree of medical certainty that an individual with schizopherenia who failed ninth grade and has an IQ of 71 was competent to pursue postconviction relief.

Dr. Phelps testimony is so implausible on its face that it cannot be regarded as credible.

The Findings of the Court are Clearly Erroneous and Do Not Reflect the Evidence

A circuit court's finding is clearly erroneous when, although there is evidence to support it, a reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The oral ruling in this case contains references to the evidence. (R. 150 A-App. 214-228.) The circuit court ruled that Roddee is competent to pursue postconviction relief, recapping select portions of the record. *Id.* The findings of the circuit court do not accurately reflect the evidence offered. In some instances it is outright misstated, and in others it divorces testimony from its context. This Court is obligated to review the entire record to determine if the circuit court's finding was clearly erroneous.

The circuit court began its oral ruling by noting that the motion for a competency determination was filed pursuant to 971.14(4). (R. 150; A-App. 216.). That is incorrect. The motion was filed pursuant to *Debra A.E.* (R. 108; A-App. 2.)

The circuit court expressed that a competency hearing may not have been necessary at all since Roddee claimed to be competent and the State declined to present evidence. (R. 150; A-App. 216-217.) This is contrary to the statute, which states a hearing shall be held unless "the district attorney, the defendant *and defense counsel*" waive their respective opportunities to present evidence. Wis. Stat. § 971.14(4)(b)(Emphasis added).

Under the statute, it was also unnecessary for the court to make a preliminary determination of competency. *Id.* No "preliminary determination" is required by statute: rather, if the district attorney, defendant and defense counsel waive their opportunities to present evidence, a prompt determination of competency is to be made. *Id.* If the opportunity to present evidence is not waived, the court is to inquire of the defendant at the commencement of the hearing whether he is competent, and then evidence is to be taken. *Id.* Since the statute does not anticipate the defendant and defense counsel disagreeing as to competency, it does not assign a burden in the event that they do. The court's misunderstanding as to preliminary determinations and the necessity of a hearing indicate that it was operating under the wrong impression of the law. Whether there is a presumption to be overcome and who carries a burden are substantive issues.

The court found "[Dr. Alba] indicated that Mr. Daniel has short-term comprehension, but he was unsure about long-term comprehension." (R.150; A-App.219-220.) This finding is divorced from context. On cross examination, Dr. Alba testified that Roddee's answers to the court that morning were responsive, but qualified that answer by saying that he wasn't certain Roddee understood the long-term consequences. (R.149:49; A-App.170.) On direct (R.149:30-35; A-App.51-56) and redirect (R.149:55-56; A-App.76-77), Dr. Alba testified that Roddee would make decisions in the short term and not follow through with them when they have long term consequences. The court's finding that Dr. Alba "...was unsure about long-term comprehension" inaccurately characterizes a qualification to an answer as an assertion of fact.

The court acknowledged the Chapter 51 commitment in Winnebago County and stated "it doesn't go to the incompetency so much as it does the lack of cooperation of Mr. Daniel in that regard to his medicines." That utterly misstates the facts. It is not possible to compel a competent person under Chapter 51 to take medicines just because they are being uncooperative. Ordering involuntary medication requires a finding of

incompetency. In Roddee's case, the Winnebago County Court Order finding incompetency and compelling medication was included in the original motion for a ruling. Boxes were checked indicating that:

> Due to mental illness the subject is not competent to refuse psychotropic medication or treatment because: the subject is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives; or, the subject is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her condition in order to make an informed choice as to whether to accept or refuse psychotropic medications.

(R. 108; A-App. 5.) This finding of incompetency was no rubber stamp: Dr. Alba testified that his first attempt to have Roddee found incompetent to refuse medication was denied by the Winnebago County court. (R. 149:31-32:A-App. 52-53.)

The court stated that Dr. Alba testified that most individuals with major mental illnesses are competent. (R. 150:7; A-App. 220.) This again divorces Dr. Alba's testimony from its context, in which Dr. Alba agreed generally that most people with major mental illnesses are competent, distinguishing them from Roddee, who was found incompetent to refuse medication. (R. 149:50-52; A-App. 71-73.)

The court states that Dr. Alba had not ruled out malingering. (R. 150:7-8; A-App. 220-221.) Again, the court divorces Dr. Alba's testimony from context. As a stand-alone finding, it would seem as though Dr. Alba had not ruled out that Roddee is wholly faking illness. In fact, what Dr. Alba testified was that both exaggerating *and denying* symptoms is typical, then went on to describe how he used many factors to diagnose Roddee with undifferentiated schizopherenia and moved a court to commit Roddee for the purposes of involuntarily medicating him. (R. 149:28-32; A-App. 49-53.)

The court stated that Dr. Phelps' diagnosis was similar to that of Dr. Alba. (R. 150:8; A-App. 221.) That is incorrect. Dr. Phelps' report contains the diagnosis of "Personality Disorder, Not Otherwise Specified with Antisocial Features." (R. 117; A-App. 15.) That's more akin to what Dr. Alba characterized as a "wastebasket term." (R. 149:25; A-App. 46.) It is entirely different from Dr. Alba's diagnosis of undifferentiated schizophrenia.

The court stated of Dr. Phelps that "at least his testimony, was that he did not disagree with the conclusions that were reached by Dr. Alba." (R. 150:8; A-App. 221.) While Dr. Phelps stated he did not disagree with the testimony offered by Dr. Alba and admitted that it might impact his diagnosis (R. 149:102; A-App123), he certainly

disagreed on a very critical conclusion: Roddee's competency. (*Compare* R. 149:102; A-App.123 *with* R. 149:30-35, 39-53; A-App.51-56, 60-74.)

The court stated that Ms. Stockwell testified Roddee was taking classes to get an HSED. (R. 150:11; A-App. 224.) This mischaracterizes her testimony:

> Q Okay. In your experience with him over the past nine months, has he demonstrated an ability to engage in long term decision making?
>
> A Long-term decision-making? Can you give me any examples?
>
> Q Sure. Say for instance he decided that he wanted to complete his high school equivalency diploma. Would Roddee be capable of figuring out how to do that?
>
> A Roddee has requested to take classes. I believe he really wanted to take classes at WRC. I'm not sure why, what his motivation was for wanting to take the classes. Some were educational that maybe could go to an HSED, but he was unable to maintain in the classes. And then he requested to drop the classes [...] And Roddee, when I would ask him why he dropped, he wouldn't answer or he would say, "can't focus."

(R. 149:107-108; A-App. 128- 129.)

Contrary to the court's finding that Ms. Stockwell testified he was taking classes to obtain an HSED, Ms. Stockwell testified that he was dropping classes because he was "unable to maintain," which would indicate Roddee's incompetency to make long-term decisions.

The court stated "Although other examiners, including the mental health people at KCDC, Dr. Collins and Dr. Phelps found malingering to be present and even Dr. Alba could not rule out malingering, Dr. Cummings did not see any evidence of malingering at all." (R. 150:12; A-App. 225.) This is another mischaracterization of the evidence. The circuit court was apparently referring to Dr. Collins 2010 report, in which she noted staff at the KCDC hypothesized malingering. (R. 75; A-App. 190-191.) As for Dr. Collins, she testified:

> Q And you eventually decided on a diagnosis or an assessment of probable malingering?
>
> A No.
>
> Q No? Okay. Can you tell me what you did decide?
>
> A I didn't offer a diagnosis. I acknowledged what other people said in his clinical record and how others perceived him at the time I saw him, but I didn't offer a diagnosis. One isn't required for a competency evaluation or by statute.

(R. 149: 94-95; A-App. 115-116.) Dr. Alba stated he had not ruled out malingering, and qualified that by noting that malingering as he was using the term included denial of symptoms. (R. 149:29; A-App. 50.) Dr. Phelps' report did not find malingering but, as did Dr. Collin's report, indicated that it had been hypothesized by KCDC. (R. 114; A-App. 12-16). Dr. Phelps did not offer testimony as to malingering.

The capstone of the circuit court's finding was Roddee's note to the court. A copy is Record 129, A-App. 213. In Roddee's childish handwriting, it reads in its entirety:

> To Judge Warren Branch 5
>
> this is Roddee Daniel i want to plead Guilty for the murder of Capri Walker I want to plead Guilty Im admiting that I killed Capri Walker.

The court said of the letter "Such a statement could certainly be construed as acceptance of responsibility, acknowledgment of consequences of his actions and an affirmative decision not to appeal his sentence. If he is competent, it is not for counsel to decide that for him." (R. 150:13-14; A-App. 226-227.) Contrary to the court's characterization, this note is indicative of Roddee's failure to understand where in the process he is. Similar to his comment the day of the competency hearing, he seems to believe that if he pleads guilty, he can be charged with a crime. This is not someone who even understands what an appeal is, let alone whether to pursue one, who can decide what the objectives would be, and who is capable of assisting counsel in developing a factual basis.

The circuit court's findings are clearly erroneous because, aside from being founded on the incredible opinion of Dr. Phelps, the facts cited to support its ruling are either false or taken out of context.

The Evidence that Roddee is Not Competent is Greater, More Reasonable, and More Thorough

To be competent to pursue postconviction relief, an individual needs to decide whether to appeal, what the objectives of an appeal are, and assist counsel in developing a factual foundation for appeal. *Debra A.E.* at 124-126. Roddee can do none of those. The testimony of Dr. Alba, clinical social worker Julie Stockwell, and Dr. Frank Cummings clearly establishes that Roddee is not competent to pursue postconviction relief.

At the hearing on the motion to determine competency, Dr. Alba, Roddee's treating psychiatrist at the WRC, testified that Roddee has an undifferentiated

schizophrenia which impairs his judgment to such an extent that Dr. Alba sought a court order finding Roddee incompetent to refuse medication, which a Winnebago County court granted. (R. 149:20-56; A-App. 41-77.) Social Worker Julie Stockwell testified as to Roddee's demeanor, bizarre behavior and indecision in several regards (R. 149:103-121; A-App. 124-142.) Dr. Frank Cummings testified that Roddee utterly lacked the decisional competency to make a determination regarding whether to appeal and whether to fire his attorney, and buttressed his conclusions with observations and citation to objective standards. (R. 149:123-159; A-App. 144-180.)

Dr. Alba was clearly objective and had no interest in the outcome of the hearing. His goal is to treat his patient. (R. 149:24; A-App. 45.) He had spoken with neither defense counsel (R. 149:55; A-App.76) nor the prosecution (R. 149:23-24; A-App.44-45) before the day of his testimony. Dr. Alba testified that Roddee has a severe mental illness which impairs his ability to function and make long term decisions. (R. 149:31-32, 49, 55; A-App.52-53, 70, 76.) He testified that Roddee was referred to WRC with the "wastebasket term" of Psychotic Disorder. (R. 149:25; A-App.46.) He described the review of records he undertook to arrive at an intelligent diagnosis. (R. 149:27; A-App.48.) He testified that in his investigation he had found evidence of psychosocial issues going back to before Roddee was born, since his mother was using drugs while Roddee was in utero. (R. 149:27; A-App.48.) He described in detail observations of Roddee's bizarre behavior at WRC. (R. 149:25-26; A-App.46-47.) He described the evolution of his diagnosis from the "wastebasket term" that Roddee was referred with to a reasoned diagnosis supported by available records and observation: Undifferentiated Schizophrenia. (R. 149:29-30, 43; A-App.50-51,64) He pointed to examples of Roddee's functioning, or lack off. (R. 149:55-56; A-App.76-77.) He said that Roddee would commit to taking his medicine, but then after a short time he would not follow through or would change his mind. (R. 149:34-35; A-App.55-56.)

Dr. Alba testified that he challenged Roddee's competency and a Chapter 51 was initiated at Dr. Alba's request. (R. 149:30-33, 39-53; A-App.51-54, 60-74.) A Winnebago County court ruled that due to a serious mental illness Roddee was incompetent to weigh the advantages and disadvantages of treatment, and could be compelled to receive treatment. (R. 149:32-35; A-App.53-56.)

Ms. Julie Stockwell, L.C.S.W., from WRC, had been in court all day and observed previous testimony, including the Court's colloquy with Roddee. (R. 149:105; A-App.126.) She testified as to his demeanor and behavior based on over nine months of daily interaction at the WRC. (R. 149:104-105; A-App.125-126.) She testified that his behavior in court and the behavior others had testified to had been consistent with his

behavior over the past nine months. (R. 149:108-113; A-App.129-134.) She explained some of his bizarre behavior and how it is impossible to draw a reasoned explanation for his behavior from him, even when a variety of questioning methods are employed. (R. 149:108-113, 119-120; A-App.129-134, 140-141.)

She also testified as to a conversation she had witnessed between Roddee and appellate counsel before the hearing. (R. 149:111-112; A-App.132-133.) In that conversation, she recounted that Roddee had said he wanted to plead guilty. (*Id.*) When counsel asked what that meant, Roddee said it meant he'd be charged with a crime. (*Id.*) When counsel asked what happens then, Roddee said he didn't want to talk about it. (*Id.*) Ms. Stockwell imitated Roddee's speech generally in a manner that the court agreed could be characterized as mumbling. (R. 149:109-110; A-App.130-131.) She testified that the behavior seen at the Competency Hearing was consistent with what she's observed over the nine months she had Roddee on her unit. (R. 149:112; A-App.133.)

Finally, Dr. Frank Cummings testified. (R. 149:123-159; A-App.144-180.) Dr. Cummings testified that he had thoroughly reviewed the documents appellate counsel was in possession of. (R. 149:140-141, 148-149; A-App.161-162, 169-170.) He testified that there was ample evidence to support Dr. Alba's diagnosis of schizophrenia. He further testified that the treatment records he had reviewed indicated an altered thought process consistent with the onset of schizopherenia days before the killing Roddee was convicted of. (R. 149:137-138; A-App.158-159.) Dr. Cummings reviewed his report in detail. (R. 149:123-159; A-App.144-180.) His testimony buttressed his report finding that to a reasonable degree of professional certainty, Roddee was incapable of performing the responsibilities allocated to him on appeal by law. (*Id.*; R. 155 Exh. 5; A-App. 17-21.)

Dr. Cummings' report was based on review of thousands of pages of documents, his own two meetings with Roddee, and collateral interviews with WRC staff and appellate counsel. Dr. Cummings' report buttresses Dr. Alba's diagnosis. Dr. Cummings report compares Roddee's observed abilities to the demands of pursuing relief of a first degree homicide conviction. Dr. Cummings' report supports a finding of incompetency in all aspects.

The testimony of Dr. Alba, Ms. Stockwell and Dr. Cummings is thorough, informed and credible. They had thoroughly reviewed the historical records related to Roddee in coming to their conclusions. Dr. Alba obtained a Chapter 51 commitment because Roddee was incompetent to refuse treatment: a decision much more akin to the ability to appeal than following unit rules. Ms. Stockwell confirmed that the mumbling, bizarre, disorganized behavior seen in court was typical of Roddee over the span of her

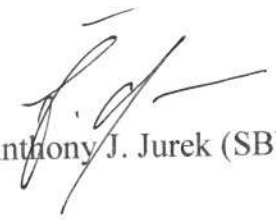
acquaintance with him. His incompetency was not a show put on for some benefit. There is no benefit to feigning incompetence at the postconviction level. Dr. Cummings has applied a range of observations regarding Roddee's abilities to this competency to perform those roles on appeal that are reserved for Roddee, and determined that Roddee is not competent to perform those roles.

Roddee is incompetent because he does not know what an appeal is. He demonstrably does not understand the procedural posture of his case. He has a low IQ and a major mental illness. He cannot follow through with decisions whether to take a class or take medication. He has been found incompetent to refuse treatment. He is simply incapable of performing the functions on appeal allocated to him by law.

Conclusion

This Court should find that the circuit court's ruling that Roddee is competent to pursue postconviction relief is clearly erroneous, and that a guardian should be appointed to make the decisions for Roddee allocated to him by law.

Respectfully submitted this 3rd day of September, 2013.



Anthony J. Jurek (SBN 1074255)

FORM AND LENGTH CERTIFICATION

I hereby certify that: This brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusion and excluding other content, is 6.325 words. The text of the electronic copy of this brief is identical to the text of the paper copy. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 3rd day of September, 2013.

Anthony J. Jurek (SBN 1074255)

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Anthony J. Jurek (SBN 1074255)
222 S. Hamilton St., Ste. 22
Madison, WI 53703
Phone: (608) 843-8909