STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 12AP2692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODDEE W. DANIEL,

Defendant-Appellant.

ON APPEAL FROM AN ORDER FINDING DEFENDANT COMPETENT TO PURSUE POSTCONVICTION RELIEF, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE WILBUR W. WARREN, III, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED FOR REVIEW

Is the circuit court's determination that Daniel is competent to pursue postconviction relief clearly erroneous?

The circuit court found Daniel competent.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the parties' briefs thoroughly set forth the relevant facts and legal authorities.

The State agrees that the opinion should be published because it will likely address the procedure a circuit court should employ when the defendant and his attorney disagree on whether the defendant is competent to pursue postconviction relief. Due to the novelty of this issue, publication would provide needed guidance to the criminal bench and bar.

SUPPLEMENTAL STATEMENT OF FACTS

Although not mentioned in Daniel's Statement of the Case, this court in an order dated January 25, 2013, treated this appeal as a permissive appeal rather than an appeal as of right. On its own motion, the court granted Daniel leave to appeal the July 31, 2012 order finding him competent to pursue postconviction relief.

Additional facts will be presented in the Argument section where necessary.

ARGUMENT

THE CIRCUIT COURT'S FINDING THAT DANIEL IS COMPETENT TO PURSUE POSTCONVICTION RELIEF IS NOT CLEARLY ERRONEOUS.

A. Competency to stand trial and standard of review.

"Competence to stand trial is a cornerstone of our criminal justice system." *State v. Byrge*, 2000 WI 101, ¶ 26, 237 Wis. 2d 197, 614 N.W.2d 477 (citing *Drope v. Missouri,* 420 U.S. 162, 171-72 (1975)). Defendants who are tried and convicted while legally incompetent are deprived of their due process right to a fair trial. *Drope*, 420 U.S. at 172; *Pate v. Robinson*, 383 U.S. 375, 378, 385 (1966).

Wisconsin law provides that an incompetent person, *i.e.,* one "who lacks substantial mental capacity to understand the proceedings or assist in his own defense," will not be "tried, convicted or sentenced" while his "incapacity endures." Wis. Stat. § 971.13(1). As the court in *Byrge* observed, this statute codifies the test for competency set forth in *Dusky v. United States,* 362 U.S. 402 (1960) (per curiam). In *Dusky,* the Court described the pertinent inquiry as "'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.'" 362 U.S. at 402. Thus, "[t]he aims of a competency hearing are modest, seeking to verify that the defendant can satisfy the understand-and-assist test." *Byrge,* 237 Wis. 2d 197, ¶ 48 (citation omitted).

A competency hearing is a judicial inquiry guided by the evidence and legal standard; it is not a clinical inquiry dictated by a medical diagnosis. *State v. Meeks*, 2002 WI App 65, ¶ 10, 251 Wis. 2d 361, 643 N.W.2d 526, *rev'd on other grounds*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. A history of psychiatric illness does not necessarily render the defendant incompetent. *State ex rel. Haskins v. County Court of Dodge County*, 62 Wis. 2d 250, 264-65, 214 N.W.2d 575 (1974). Moreover, given the nature of mental illness, a defendant may have been competent during a prior proceeding but be incompetent now. *State v. Meeks*, 2003 WI 104, ¶ 50, 263 Wis. 2d 794, 666 N.W.2d 859.

An appellate court will not upset a circuit court's determination that a criminal defendant is competent unless it is clearly erroneous. *Byrge*, 237 Wis. 2d 197, ¶¶ 45-46; *State v. Garfoot*, 207 Wis. 2d 214, 224-25, 558 N.W.2d 626 (1997). A competency finding is clearly erroneous only if it is totally unsupported by the facts of record. *Id.* at 224; *Meeks*, 251 Wis. 2d 361, ¶ 10. As this court explained in *Meeks*,

> "[B]ecause a competency hearing presents a unique category of inquiry in which the circuit court is in the best position to apply the law to the facts," our review of the court's findings and conclusion is highly deferential.

Id. (citations omitted.)

B. Additional legal principles applicable where a defendant's competency to pursue post-conviction relief is at issue.

The supreme court's approach to the issue of competency differs somewhat when raised in the postconviction context. In *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994), the seminal case in this area, the court said that post-sentencing, "if state or defense counsel has a good faith doubt about a defendant's competency to seek postconviction relief, counsel should advise the appropriate court of this doubt on the record and move for a ruling on competency." *Id.* at 131. The court[1] can also raise sua sponte the issue of reason to doubt a defendant's competency. *Id.*

In the postconviction context, even after the circuit court finds that reason to doubt the defendant's competency exists, the court is not required to order an evaluation. Rather, the court wields discretion to determine the manner in which it will determine the defendant's postconviction competency:

> If the court determines that a reason to doubt a defendant's competency exists, it shall, as an exercise of its discretion, determine the method for evaluating a defendant's competency, considering the facts before it and the goals of a competency ruling. *The method of evaluation will vary depending on the facts and on whether and where the defendant is incarcerated. A court may rely on*

[1] "The court" can refer to the circuit court, as it does here, or to the appellate court, depending on the stage in the proceedings at which reason to doubt the defendant's competency arises.

> *the affidavits of counsel, a stipulation, or the court's observance of the defendant, or may order an examination of the defendant by a person with specialized knowledge.* A circuit court may also, in its discretion, hold a hearing before determining a defendant's competency. In conducting any hearing the circuit court should be guided by sec. 971.14(4) . . . to the extent feasible.

Debra A.E., 188 Wis. 2d at 131-32 (emphasis added).

In *Debra A.E.*, the court explained that the meaning of competency in the context of legal proceedings depends on the purpose for which the determination of competency is made. 188 Wis. 2d at 124-25. There the court noted that after sentencing, one decision a defendant must make is whether to proceed with or forego postconviction relief. *Id.* at 125. In addition, a defendant "may be required to assist counsel in raising new issues and developing a factual foundation for appellate review." *Id.* at 126 (footnote omitted). The court concluded that "a defendant is incompetent to pursue postconviction relief under sec. 809.30 . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." *Id.* (footnote omitted).

Pursuant to the principles set forth above and in the preceding section, the State submits that although it is a close question, the circuit court's determination that Daniel is competent to pursue postconviction relief is not clearly erroneous.

C. Even if meritorious, Daniel's criticisms of the trial court's decision finding Daniel competent to pursue postconviction relief do not mean the court's finding of competence is clearly erroneous.

Daniel advances three reasons why he believes the trial court's finding that he is competent to pursue postconviction relief is clearly erroneous. First, he claims that the report and testimony of Dr. Mark Phelps, the only doctor who opined that Daniel is competent at this stage of the proceedings, are not credible. Daniel's brief at 5-8. Second, Daniel says that many of the findings the court made in its oral decision either do not accurately reflect the evidence of record or are taken out of context. *Id.* at 8-12. Third, he argues that evidence of his incompetency is "greater, more reasonable, and more thorough" than the evidence that he is competent. *Id.* at 12-15 (capitalization omitted).

The three reasons Daniel proffers overlap to some degree, so that it is impossible to discuss each one separately as if it is unaffected by the other two. Nevertheless, the State will attempt to respond seriatim to each of Daniel's sub-arguments. Prior to doing so, the State will briefly address the question of what burden defense counsel shouldered at the post-sentencing competency hearing

Neither *Debra A.E.* nor any subsequent case suggests, let alone prescribes, the burden of proof the court should impose where the defendant claims to be competent but his appointed counsel disagrees, and the State sides with the defendant.

Here, the trial court's decision finding Daniel competent assumed that defense counsel had to prove by clear and convincing evidence that Daniel is incompetent to pursue postconviction relief (150:5).[2] That is the burden of proof § 971.14(4) assigns to the State where the defendant claims to be competent (the situation here), and the State wants to prove he is incompetent. The statute does not address the situation where the defendant and defense counsel have divergent views on the former's competence to stand trial. Rather, the statute implicitly assumes that the defendant and his attorney share the same view.

Although the question is not free of doubt, the State submits that the better view is that defense counsel must prove by clear and convincing evidence that his client is incompetent when the client and the State share the view that the client is competent to pursue postconviction relief. Assigning this burden to defense counsel provides symmetry to the process, i.e., it imposes the same burden on defense counsel that the State would have to shoulder under § 971.14(4) to show incompetency to stand trial where the defendant and his counsel assert that he the defendant is competent. Given that the court in *Debra A.E.* directed circuit courts to be guided by this statute "to the extent feasible" (188 Wis. 2d at 132), assigning this burden to defense counsel would also be consistent with the court's directive.[3]

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[2] Contrary to what it said in its oral ruling, the trial court at the outset of the competency hearing stated that the standard of proof was the lesser "preponderance of the evidence," and the prosecutor agreed (149:19).

[3] Although defense counsel in his written "Competency Hearing Closing Argument" pointed out that everyone had

(Footnote continued)

1. Dr. Phelps' report and testimony are not incredible.

Daniel claims that the report and testimony of Dr. Phelps, who opined that Daniel is competent to pursue postconviction relief, are incredible because Dr. Phelps does not understand the appeal process, based his report largely on the reports of other experts, failed to review available records and found Daniel competent because he was able to learn rules of his living unit that a middle-schooler could follow. *See* Daniel's brief at 5-8.

Admittedly, Dr. Phelps' report incorrectly stated that Daniel was admitted to Mendota Mental Health Institute (MMHI) to be evaluated for "his competency to stand trial" rather than his competency to pursue postconviction relief or appeal (117:1). The report also contained Dr. Phelps' conclusion that Daniel "has substantial mental capacity to understand the proceedings and assist in his own defense" (*id.*:4), the test used when a defendant's competence to stand trial is being evaluated. However, during his testimony at the competency hearing, Dr. Phelps corrected his conclusion, saying it should have read "'assist in his defense in the appeals process'" (149:59). He testified that he understood he was to assess Daniel with respect to his competency to pursue postconviction relief (*id.*:60). Dr. Phelps' carelessness in drafting his report does not mean the report or his later testimony was incredible.

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agreed that preponderance of the evidence was the correct burden (127:1 n.1), in his appellate brief he does not appear to be challenging the lower court's application of the "clear and convincing" standard.

Rather, it was merely a factor bearing on the weight to attach to his report and testimony.

As for Daniel's assertion that "[i]f [Dr. Phelps] does not know what the process is, he cannot possibly assess someone's competency to participate in that process" (Daniel's brief at 6), the State disagrees with that proposition. Dr. Phelps testified this was his first case of evaluating competency to assist on appeal (149:61). It is therefore not surprising that he was not conversant with the steps required to be taken during the appellate process. Despite his unfamiliarity with how the process works, Dr. Phelps testified that he believed competency to pursue postconviction relief requires that Daniel "understands what his lawyer is attempting to do, that he understands what he is attempting to do, and he understands the principal participants involved, and he also understands the consequences of his prior conviction" (*id.*:60). This description sufficiently captures the proper standard.

As for Daniel's criticism that Dr. Phelps based his opinion largely on the work of others, that sort of reliance is commonplace when other experts have previously evaluated the same subject. *Cf.* Wis. Stat. § 907.03. That reliance was also occasioned by Daniel's repeated refusals to answer questions Dr. Phelps posed during their meetings (*see* 117:3-4). That Dr. Phelps relied on the work of previous examiners does not render his report or testimony incredible.

Insofar as Daniel faults Dr. Phelps for reviewing only one-quarter of the records from Rogers Memorial Hospital (Daniel's brief at 7),

many of those records date back to 2004 and 2005 (*see* 155:Exh. P-4), i.e., eight to nine years before the competency assessment It was not necessary for Dr. Phelps to review each and every document included in these records in order to assess Daniel's competency as of 2012.

While Daniel takes Dr. Phelps to task for basing his competency determination on Daniel's ability to learn and conform to the rules of the housing unit at MMHI, the doctor explained that one of the things experts look to in assessing competency is "an ability to learn, to retain and to use new information" (149:65). While it is true the rules Daniel mastered demonstrated such things as an ability to order items from the canteen by submitting his requests on time, the fact a middle-schooler could perform such tasks does not mean Daniel's conduct is not indicative of his ability to acquire and use new information. This is particularly so, given that Daniel was admitted to MMHI on April 11, 2012 (117:3) and had learned the rules by the time Dr. Phelps examined him later that month.[4]

For all these reasons, the facets of Dr. Phelps' report and testimony Daniel criticizes do not render the report and testimony incredible.

[4] Dr. Phelps testified he met with Daniels three or four times, the last contact occurring on April 24, 2012, with each session lasting fifteen to twenty minutes (149:67).

2. Incorrect factual statements in the trial court's oral decision do not render its competency finding clearly erroneous.

The second reason Daniel advances to support his assertion that the trial court's finding of competence is clearly erroneous is his allegation that many of the facts the trial court set forth in its oral decision do not accurately reflect the evidence or are taken out of context. Daniel's brief at 8. He cites numerous examples to support this proposition. *Id.* at 9-12.

Some of Daniel's accusations are well-founded, but some are not. But even those that are do not mean the trial court's ultimate conclusion is clearly erroneous.

Admittedly, the trial court was mistaken in stating that the motion to determine competency was brought under § 971.14(4) (150:3). As Daniel points out, the motion was brought pursuant to *Debra A.E.*, 188 Wis. 2d 111. *See* 108:1. But given that the supreme court in *Debra A.E.* urged circuit courts to use the procedure in § 971.14(4) to the extent feasible at a hearing to determine competency to pursue postconviction relief, 188 Wis. 2d at 132, the State does not see how this misstatement is evidence that the court's competency determination is clearly erroneous.

As for Daniel's assertion that the trial court's statement that a hearing may not have been necessary is contrary to the statute, Daniel is the one in error. In *Debra A.E.*, the court made it clear that the circuit court has discretion on whether to hold a hearing to inquire into a

defendant's competency to pursue postconviction relief. 188 Wis. 2d at 132. The court said other methods could be used to determine competency in this context. *Id.* at 131-32. As Daniel himself has observed, the statute does not govern competency determinations during the postconviction stage of a criminal case; it only applies to defendants who have not yet been sentenced. *Id.* at 128 n.14.

With respect to factual errors in the court's oral ruling, some of the criticisms Daniel has leveled at the lower court receive support from the record. For example, the court was incorrect in stating that Julie Stockwell testified that Daniel was taking classes to obtain an HSED (150:11). In fact, Stockwell said she did not know what Daniel's motivation was for taking classes (149:108). She merely commented that some of the classes "maybe could go to an HSED, but he was unable to maintain in the classes" (*id.*).

Similarly, the circuit court's statement that Dr. Collins found malingering to be present (*see* 150:12) is contrary to her reply of "No" when asked at the competency hearing if she "eventually decided on a diagnosis or an assessment of probable malingering" (149:94).[5]

[5] In fairness to the trial court, Dr. Collins's April 2010 report (75) suggests that Dr. Collins thought Daniel was malingering although she did not offer that opinion. For example, she stated that "[c]ollateral information coupled with the current evaluation findings suggest that Mr. Daniel's symptom report and presentation does [sic] not fall entirely outside of his control" (*id.*:5). She also noted the contradiction between Daniel's response "I forgot" when asked with what he was charged and his earlier verbal acknowledgment that he was alleged to be involved in causing a woman's death (*id.*:4).

Daniel does not explain why these factual miscues render the court's conclusion clearly erroneous, and the State submits they are minor errors that do not seriously undermine the court's ultimate conclusion.

Finally, the trial court's reliance on Daniel's handwritten letter to support its competency determination is not entirely unjustified. The trial court received the handwritten letter on July 3, 2012 (129). In it Daniel wrote, "i want to plead Guilty for the murder of Capri Walker I want to plead guilty Im admiting that I killed Capri Walker" (129; errors in original).

On one hand, Daniel's expressed desire "to plead guilty" indicates that when he wrote the letter long after his conviction and sentencing, he did not realize that he had already been found guilty. This construction of the letter supports postconviction counsel's contention that Daniel does not understand the function of an appeal. On the other hand, the letter could be Daniel's childlike way of expressing that he does not want to appeal because he takes responsibility for killing Capri Walker. That is the construction the trial court chose to give it (150:13-14), but even if the court was wrong in doing so, the letter was just one piece of the evidence on which the court relied in declaring Daniel competent.

For all these reasons, any factual errors in the trial court's oral decision finding Daniel competent to pursue postconviction relief do not render that finding clearly erroneous.

3. Even if this court agrees that evidence that Daniel is incompetent to pursue post-conviction relief is greater than the evidence that he is competent to do so, that does not mean the trial court's competency finding is clearly erroneous.

Daniel's third reason for claiming the trial court's competency finding is clearly erroneous is that the evidence of incompetency is "greater, more reasonable, and more thorough" than the evidence that he is competent. Daniel's brief at 12 (capitalization omitted). In support of this claim, Daniel references some of the testimony provided at the competency hearing (149) by social worker Julie Stockwell, defense-retained psychologist Dr. Frank Cummings, and Dr. Jose Alba, Daniel's treating psychiatrist. Daniel's brief at 13-14.

The State does not dispute the accuracy of Daniel's factual assertions; the State admits Daniel has correctly summarized the testimony of Ms. Stockwell, Dr. Cummings and Dr. Alba from the competency hearing. While Daniel may be correct in asserting that this testimony and other evidence showing him incompetent to pursue postconviction relief is greater, more reasonable and more thorough than the evidence showing him to be competent, that is *not* the issue on appeal. The question is whether the trial court's competency determination is clearly erroneous, a standard this court has equated with "totally unsupported by the record." *Meeks*, 251 Wis. 2d 361, ¶ 10, citing *Garfoot*, 207 Wis. 2d 214, 224.

The trial court's finding of competency is not totally unsupported by the record. In addition to the report and testimony of Dr. Phelps, who examined Daniel for competency closer to the date of the hearing than did any of the other evaluators,[6] the trial court had before it the report prepared by Dr. Suzanne Lisowski, who conducted a pretrial psychological evaluation of Daniel in 2008 (127:7-14). That report is striking in that it paints an entirely different picture of Daniel than the later reports that characterize him as refusing to talk and basically uncommunicative. Whereas Dr. Collins in 2010 reported that Daniel could not provide "the most basic details" of his personal history, such as his age or date of birth (75:2), Dr. Lisowski obtained detailed information from him during her pretrial assessment. To illustrate, Dr. Lisowski summarized some of Daniel's statements about his family and personal history:

> Roddee reports that he was born in Kenosha and is the second child in a maternal sibship of ten born to his mother, Latrina Edwards. He reports that his sister, Crystal, age 16, has been living with an aunt for approximately a year due to difficulties between her and their mother. Roddee indicates that he is close with his sister and maintained contact with her at school. He does not believe his sister has any substance abuse or mental health issues but acknowledges that she has received multiple police tickets for shoplifting. Roddee believes that Crystal has had two admissions to a mental health hospital for brief overnight

[6] Dr. Phelps last examined Daniel on April 24, 2012 (117:1), just seven weeks before the June 13, 2012 hearing (149). In contrast, Dr. Cummings last examined Daniel on January 25, 2012 (155:Exh. P-5:3), nearly five months prior to the competency hearing.

> stays which he describes occurred because, "She lost it," but he has no additional information. Crystal is reportedly employed at this time.
>
> . . . .
>
> Roddee is aware that he was born premature, cocaine positive, and describes himself as having been "a crack baby" who was diagnosed with seizures at a young age. He indicates that his mother had substance abuse problems, primarily involving cocaine, and the basic needs of the family were not met. He notes that there were no extended family members who provided support or assistance. Roddee indicates that his mother had been incarcerated twice during his life, including a six-year span beginning when he was approximately five years of age. He believes that he probably met his father when he was two or three years of age but had no subsequent contact. Roddee states that he has been told that his father is a "good person," who has a good job and that Roddee looks like him.

(127:8.)

Although Dr. Lisowski did not evaluate Daniel for competency to stand trial and her contact with him occurred nearly four years before the post-trial competency hearing, the plethora of information she included in her report substantiates Dr. Phelps's conclusion that Daniel's refusal to participate in the evaluation process is a function of his "volitional desires" rather than a consequence of his mental illness. *See* 117:5.

In light of the highly deferential standard of review applicable to a trial court's competency determination, it cannot be said that the circuit

court's finding that Daniel is competent to pursue postconviction relief is clearly erroneous.

CONCLUSION

This court should affirm the circuit court's order finding Daniel competent to pursue postconviction relief and remand this matter for further proceedings under Wis. Stat. § (Rule) 809.30(h).

Dated this 1st day of November, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3910 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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.

Dated this 1st day of November, 2013.

_____
Marguerite M. Moeller
Assistant Attorney General