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 REPLY BRIEF

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

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Standard of Review

The standard of review for a postconviciton competency determination has not been directly addressed in Wisconsin. The standard of review for competency to stand trial determinations has been. *State v. Garfoot,* 207 Wis. 2d 214, 558 N.W.2d 626 (1997); *State v. Byrge,* 2000 WI 101, 614 NW 2d 477. Some of the rationale supporting that standard of review is less applicable to competency to pursue postconviction relief determinations. For example, the Court has equated a finding of competence with a finding of fact, and advised that a circuit court is in the best position to make that factual determination. *Id.* Among the reasons the circuit court is in the best position to make that determination is the court's exposure to the Defendant. *Id.* In a postconviction competency motion, however, the court's exposure to the Defendant, as in this case, will likely be significantly attenuated.

There is thus good reason to employ a less deferential standard of review. In this case, the circuit court's ruling is nonetheless clearly erroneous because the great weight and clear preponderance of the evidence is that Roddee is not competent. The State does not argue for a different standard of review. If this Court requests further briefing on the standard of review, we will be happy to provide it.

The State's Definition of the Clearly Erroneous Standard of Review is Lacking.

The State's definition of the clearly erroneous standard of review is lacking. The State, citing to *State v. Meeks*, 2002 WI App 65, 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) asserts that "clearly erroneous" means "totally unsupported by facts of the record." While reversed, *Meeks* was nonetheless citing to language in *State v. Garfoot*, 207 Wis. 2d 214, 558 N.W.2d 626 (1997). *Garfoot*, however, was not adopting "totally unsupported by facts in the record" as a statement of what "clearly erroneous" means, but rather citing to *State v. Pickens*, 96 Wis.2d 549, 292 N.W.2d 601(1980) in likening a competency determination to a factual finding. In *Pickens*, considering whether a defendant was competent to represent himself apparently without the benefit of a record reflecting that the circuit court judge addressed all the appropriate factors (*Id.* at 564), the Court stated it would uphold the circuit court's decision unless that decision was totally unsupported by facts in the record (*Id.* at 569). The Court was not implying that any nonsense reason plucked from the record out of context would insulate the circuit court ruling from review under the clearly erroneous standard. It was saying that where the circuit court failed to address relevant factors on the record, a reviewing court could nonetheless review the entire record for support of the circuit court's ruling.

Instead of redefining what "clearly erroneous" means, the Court in *Garfoot* advised that the standard "is time tested, well understood, and appropriate for a determination that is primarily factual." *Garfoot* at ¶ 22. The most common statement of the standard is that "[a] finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 368, 752 N.W.2d 748, 753(citations omitted). "Clearly erroneous" and "great weight and clear preponderance of the evidence" are the same essentially the same standard. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575, 577 (Ct. App. 1983).The U.S. Supreme Court said of employing the standard that 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 a definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985). Clearly, "totally unsupported by the record" is not an apt statement of the standard.

The Great Weight and Clear Preponderance of the Evidence is that Roddee is Incompetent

In order to command a reversal under the clearly erroneous standard, evidence contrary to the circuit court's ruling must constitute the great weight and clear preponderance of the evidence. *Cogswell v. Robertshaw Controls Co.,* 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). The circuit court's determination that Roddee is competent to pursue postconviction relief is clearly erroneous. The great weight and clear preponderance of the evidence is that Roddee is not competent to pursue postconviction relief.

The State seems to concede that evidence of Roddee's incompetence is "greater, more reasonable and more thorough," but asserts that is not the standard. Asserting that the evidence of Roddee's incompetence is greater, more reasonable, and more thorough is to say that it is the great weight and clear preponderance of the evidence. "More reasonable and more thorough" asserts that the evidence is qualitatively superior in addition to being quantitatively greater. It is not merely that there was more evidence that Roddee lacks competency to pursue postconviction relief, it is that the evidence was more reasonable and thorough as well.

Our Brief delineates that the findings of the circuit court were factually wrong, that the evidence that Roddee is competent is not credible, and that the evidence Roddee is incompetent is greater, more reasonable and more thorough. All that together is to say that the circuit court's determination of competency was clearly erroneous, because the great weight and clear preponderance of the evidence is that Roddee is not competent.

Dr. Phelps was Not Credible

The State concedes some of Dr. Phelps' carelessness, but attempts to mitigate Dr. Phelps' incredibility and suggest that his opinion is somehow valid nonetheless.

Our Brief thoroughly delineates that Dr. Phelps had little idea what he was assessing Roddee for. The State contends that Dr. Phelps' sufficiently captured the proper standard when he claimed he was evaluating whether Roddee "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." State's Response at 10. But Dr. Phelps' assertion that he was assessing Roddee's ability to understand what his lawyer is attempting to do is undercut by Dr. Phelps' own ignorance of what an appellate lawyer does.

> Q You said that the first thing that you would look at in evaluating his competency to pursue postconviction relief would be that he understands what I'm attempting to do. To the best of your knowledge, what is it that I as an appeals lawyer attempt to do?
>
> A My understanding is that you will attempt to determine whether he had a fair trial and determine whether there is any part of that that would be not fair requiring a retrial or an over-turning of his case.
>
> 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.

Competency Hearing at 60.

Dr. Phelps admitted he could not describe *any* steps of the appeals process. If Dr. Phelps does not know the process, he cannot credibly offer an opinion as to Roddee's ability to take part in that process.

For example, barring extensions, it can take up to 60 days after a Notice of Intent to Pursue Postconviction Relief is filed for the transcripts and record to be served. Wis. Stat. § 809.30(2). It can take another 60 days, barring extensions, for a Motion for

Postconviction Relief or Notice of Appeal to be filed. *Id.* If it is a Motion for Postconviction Relief that is to be filed, barring delays, the circuit court can take up to 60 days to have a hearing on the postconviction motion and decide it. *Id.* That is a six month period in which a Defendant would need to persevere in his desire to appeal a conviction. Roddee failed in his efforts to comply with treatment for a similar amount of time, and as a result was committed for the purposed of being involuntarily medicated. Roddee tried to take courses at the Wisconsin Resource Center, but dropped them before completing them. If Dr. Phelps does not know that it can take more than half a year for the first step in the appellate process, he cannot assess Roddee's ability to make and stick with a decision for that long. Being ignorant of the process, Dr. Phelps did not even know to evaluate Roddee's long-term decisional ability.

Another example: If the issue is not sufficiency of the evidence or an issue previously decided, a postconviction motion is necessary, with a postconviction hearing being likely. *Id.* If the issue is sufficiency of the evidence or an issue previously raised, an appeal directly to the Court of Appeals may be appropriate. Dr. Phelps testified that he was ignorant of any steps in the appellate process, so it follows that Dr. Phelps is ignorant of the difference between a postconviction motion and an appeal to the Court of Appeals. If Dr. Phelps is not aware that there are different avenues of postconviction relief, he cannot assess Roddee's ability to comprehend that there are different avenues.

Finally and relatedly, a Defendant himself must decide whether to appeal, what the objectives of an appeal are, and assist counsel in developing a factual basis for appeal. *State v. Debra A.E.*, 188 Wis.2d 111, 125, 523 N.W.2d 727 (1994). When given the opportunity, Dr. Phelps gave no indication that he was aware of the particular responsibilities that would face Roddee. Unaware of Roddee's role, again, he cannot evaluate Roddee's competency to fulfill that role.

The State argues that Dr. Phelps' carelessness in preparing his report, failure to read Roddee's records, and reliance on others' work does not render his opinion incredible. Dr. Phelps carelessness extended to articulating the wrong standard, assessing Roddee for competency to stand trial rather than competency to pursue postconviction relief. Dr. Phelps' failure to read was not just the records from 2008: It was a failure to read the current records from the Wisconsin Resource Center, failure to read the report of Dr. Collins summarized by Dr. Rawski, and failure to carefully read even the report of Dr. Rawski. Relatedly, it is not his reliance on certain aspects of Dr. Rawski's report that we take issue with. It is that Dr. Phelps apparently did not even know what Dr. Rawski was writing about: He cited Dr. Rawski's report as about "competency to stand trial"—it

was not—and incorporated Dr. Rawski's typos as fact. See our Brief in Chief at 6-8. The State does not address any of these failures.

The only affirmative aspect of Dr. Phelps' opinion the State can point to is that Dr. Phelps said that Roddee could learn, retain and use new information. That is not determinative. The ability to learn, retain and use new information might be one factor in determining competency to pursue postconviction relief, but there is no authority to suggest that competency is equivalent with the ability to learn, retain and use new information. The behaviors pointed to by Dr. Phelps were minimal. He observed Roddee doing nothing a typical middle schooler could not, a fact we keep coming back to because in addition to having schizophrenia, Roddee failed 9th grade and has an I.Q. of 71. Remembering where food is served and when to go to bed is not the same as making and sticking with a decision that has lifelong consequences and will take months or years to see to completion. While the ability to learn and retain new information is the only finding the State can point to, that factor is not enough to render Roddee competent to pursue postconviction relief.

The Circuit Court Misstated the Evidence in its Ruling

The State discusses only a select sample of the many false or inaccurate findings of the circuit court delineated in our Brief. Of the few examples it selected, the State asserts that we do not "explain why these factual miscues render the court's ruling clearly erroneous, and the State submits they are minor errors that do not seriously undermine the court's ultimate conclusion." To the contrary, once the court's clear errors are considered, there is nothing left to support its ruling. As noted in our Brief, the court's findings are clearly erroneous because they are either false or taken out of context (which renders them false, too).

The State argues that we, not the court, are in error in asserting that a hearing was required. We agree with the State that *Debra A.E.* affords the circuit court latitude in determining a procedure for deciding postconviction competency motions. The State ignores that the court was basing its opinion that a hearing was unnecessary on its erroneous reading of the statute that *Debra A.E.* encourages it to follow. The court was not saying that in its discretion under *Debra A.E.* it could decide to forego a hearing; it was saying that under the statute *Debra A.E.* encourages it to follow a hearing was unnecessary. That is an erroneous reading of the statute, and it was the same sort of erroneous reading which led the court to make an unnecessary preliminary finding of competency and shift the burden to defense counsel.

Aside from attempting to mitigate the circuit court's misapprehension of the statute, the State ignores that the court took Dr. Alba's testimony out of context and that the court misstated what a Chapter 51 commitment means. The State casts the court's negative interpretation of Roddee's letter—which was not in evidence—as perhaps wrong, but harmless. Citing a letter demonstrating Roddee's utter misunderstanding of where he is in the process to support a ruling that he understands that process is not harmless. All of these examples demonstrate that the circuit court's ruling was clearly erroneous.

Ironically, after arguing that Dr. Phelps met with Roddee more recently than Dr. Cummings and implying Dr. Phelps' opinion is thus more relevant, the State purports to find evidence that Roddee's lack of cooperation is volitional in the report of Dr. Lisowski, prepared in 2008. The image of Roddee evoked by Dr. Lisowski's report is certainly different than what had been recently seen and described from the Wisconsin Resource Center and at the hearing. We do not know whether Roddee was mentally functioning differently in 2008, or—as we demonstrated Dr. Phelps did—Dr. Lisowski merely couched her observations in official sounding professional language which did not reflect reality. Regardless, the issue is Roddee's competency now, not whether he was more articulate in 2008. The value that Dr. Lisowski's report does provide is to convey to us that Roddee's IQ –a relatively consistent and immutable trait--is 71.

While the State attempts to mitigate some of the clear errors of the circuit court, once all the errors are accounted for, there is nothing left of the court's ruling. It must be clear to this Court that the circuit court's findings were false and that its ruling was clearly erroneous. The great weight and clear preponderance of the evidence is that Roddee is not competent to pursue postconviction relief.

Burden at the Hearing

The parties agree that the statute does not anticipate the Defendant and defense counsel disagreeing as to the Defendant's competency. The State submits that when such a disagreement occurs, the burden rightly rests with defense counsel to prove the defendant incompetent. We disagree.

Defense counsel is already duty-bound, as in this case, to move the court for a ruling on the Defendant's competency when defense counsel has reason to doubt the Defendant's competency. Language imposing that duty seems crafted to minimize straining the advocacy relationship between defense counsel and client while ensuring that incompetents are protected. To mandate the procedure the State suggests would be

to undercut an advocacy relationship which is likely already strained by defense counsel's having raised the issue despite his client's disagreement.

Further, switching the burden to defense counsel is contrary to the flow of the statute and to similar procedures. As in suppression motions before trial, or affirmative defenses at trial, defense counsel is required to meet a preliminary burden, and after that preliminary burden is met the burden shifts. It makes more sense to require that where defense counsel and the Defendant disagree as to the Defendant's competency, after defense counsel's motion establishes that there is reason to doubt the Defendant's competency, that the State would be burdened with proving the Defendant competent.

Such a procedure would require no more of the State than if the Defendant and defense counsel were in agreement. To require otherwise would be to drive a wedge between the Defendant and defense counsel.

In this case, the court made a preliminary finding before the hearing not required by the statute that Roddee was competent based on Roddee's assertion that he was competent. Because of that erroneous preliminary finding, defense counsel adopted the burden, as it was the only way to proceed to a hearing. This Court should find that the appropriate procedure is for the State to bear the burden of proving the Defendant competent. Nonetheless, since the State waived its opportunity to present evidence and had the opportunity to cross-examine defense counsels witnesses, this Court should proceed to the merits of this case notwithstanding the procedure employed by the circuit court.

Conclusion

For the reasons presented herein and in our Brief in Chief, 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 18th day of November, 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 3,000 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 18th day of September, 2013.

Anthony J. Jurek (SBN 1074255)