STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODDEE W. DANIEL,

Defendant-Appellant-Petitioner.

Review of a Decision of the Court of Appeals, District II,
Reversing an Order of the Circuit Court for Kenosha County,
Wilbur W. Warren III, Judge

AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

KELLI S. THOMPSON
State Public Defender
State Bar No. 1025437

JOSEPH N. EHMANN
SPD Regional Attorney Manager
State Bar No. 1016411

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8388
ehmannj@opd.wi.gov

Attorneys for the State Public Defender

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When there is Reason to Doubt a Criminal Defendant's Competency and the Matter Proceeds to Hearing, Wisconsin Law Places the Burden on the State to Prove Competency. Consequently, the Court of Appeals Decision that a Postconviction Court May Assign to Defense Counsel the Burden of Proving the Defendant Incompetent is Error.

After summarizing the factual and constitutional backdrop to the appeal, this brief discusses constitutional, practical, and ethical considerations supporting the defendant's position. The bottom line is that an allegedly incompetent defendant's own personal assessment of his competency, alone, cannot constitutionally permit a finding of competency. But the state's interpretation of the statute at issue – incorporated into postconviction practice by ***Debra A.E.*** – would have exactly that effect. There are practical and ethical reasons not that a defense attorney, acting as advocate, cannot be expected to affirmatively present evidence and argument contrary to his client's position. Therefore, this court must interpret § 971.14 as requiring the state to prove competence any time the defense – the defendant or defense counsel – alleges incompetence.

Background

Roddee Daniel's appointed appellate attorney, Anthony Jurek, moved the court to determine Mr. Daniel's competency. Finding the "reason to doubt competence" standard met, the court appointed an expert to report on Mr. Daniel's condition. One expert who spent a short time with Mr. Daniel opined Mr. Daniels was competent, Mr. Daniel's treating psychiatrist opined he was not. Because Attorney Jurek declined to waive it, the matter proceeded to hearing. At the hearing the court asked the then 18-year-old,

diagnosed-schizophrenic defendant, with an I.Q. of 71, "You don't believe you're impaired in any way because of any mental condition or inability to understand?" and "Do you believe that you're competent to proceed?" and Mr. Daniel responded "yeah" (R. 149:11). Because Mr. Daniel answered "yeah," the state did not present evidence and argued that the court was required to find Mr. Daniel competent. The court, however, allowed defense counsel to assume the burden of persuasion and ultimately ruled that Mr. Daniel was competent because Attorney Jurek failed to prove incompetence by clear and convincing evidence. (R. 150).

Although the Wisconsin Legislature in enacting Wis. Stat. § 971.14 assigned the burden of proof to the state, the court of appeals ruled that § 971.14 was "not helpful" because it "governs competency decisions only through the sentencing stage of a criminal trial." ***State v. Daniel***, 2014 WI App. 46, ¶ 8, 354 Wis. 2d 51, 847 N.W.2d 855. The court then stated the "answer" to the question of who bears the burden of proof "is found in ***Cooper v. Oklahoma***, 517 U.S. 348 (1996)," because although ***Cooper***, too, "dealt with the test for competence to stand trial," the court of appeals saw "no distinction in the difference." *Id.*, ¶11. Accordingly, the court held that it was proper for the postconviction court to assign the burden of proving Mr. Daniel incompetent to Mr. Daniel's attorney, but remanded the matter because the postconviction court incorrectly applied a "clear and convincing evidence" standard.

Aside from its flawed logic, the court of appeals ignores this court's determination that "[i]n conducting any hearing" on competency at the postconviction stage "the circuit court should be guided by sec. 971.14(4)…to the extent feasible." ***State v. Debra A.E.***, 188 Wis. 2d 111, 132, 523 N.W.2d 727 (1994). Section 971.14(4) places the burden

of proof on the state and it was "feasible" to hold the state to its burden in Mr. Daniel's case.

The issue here turns on this court's interpretation of Wis. Stat. § 971.14(4)(b). Statutory construction begins with the language of the statute. ***Watton v. Hegerty***, 2008 WI 74, ¶14, 311 Wis. 2d 52, 744 N.W.2d 619. If the meaning of the statute is plain, the inquiry stops. *Id.* Plain meaning may be ascertained not only from the words employed, but from context. *Id.* This court must interpret statutes "to avoid absurd or unreasonable results," *Id.*, and in a manner "to preserve a statute and find it constitutional if it is at all possible to do so." ***State v. Stenklyft***, 2005 WI 71, ¶122, 281 Wis. 2d 484, 697 N.W.2d 769.

Constitutional requirements

The importance of ensuring that incompetent defendants not face criminal process, either at trial or on appeal, cannot be overstated. In ***Cooper*** the Court said the issue of a defendant's competence is "rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial." 517 U.S. at 355. Only when a defendant is mentally competent will he or she be able to exercise effectively rights conferred by the constitution and make the "profound" and "essential" decisions the law requires a defendant, personally, to make. *Id.* at 365. ***Cooper*** characterizes as "dire" the consequences of proceeding in a criminal matter with an incompetent defendant and notes "[b]y comparison to the defendant's interest, the injury to the State of the opposite error—a conclusion that the defendant is incompetent when he is in fact malingering—is modest." 517 U.S. at 365-66.

This court in ***State v. Johnson***, 133 Wis. 2d 207, 223-24, 395 N.W.2d 176 (1986), foreshadowed ***Cooper*** in declaring the fundamental nature of the right. Moreover, the

state's stake or interest on appeal is even less because unlike at trial where an incompetent defendant may avoid criminal prosecution altogether if competency cannot be restored, the incompetent appellate defendant continues to serve his or her full criminal sentence. An incompetent appellate defendant gains no legal or strategic advantage by malingering.

Under ***Cooper*** states are given wide latitude to establish procedures to determine competency, including allocation of the burden of proof. 517 U.S. at 355. However, ***Cooper*** also makes clear that any procedure that is not "sufficiently protective" of the right of an incompetent person to not face criminal process will be deemed constitutionally infirm. *Id.* at 367-68. To that end the Court held that a statute that allows a defendant who is more likely than not incompetent, but not so by clear and convincing evidence, to face criminal process, is "incompatible with the dictates of due process." *Id.* at 370.

Argument

Wisconsin could create a scheme whereby the defense or defense counsel bears the burden of proving a defendant's incompetence, but it cannot be done without significant change to existing law. Whenever there is reason to doubt a defendant's competency a court at the trial stage must proceed under Wis. Stat. § 971.14(1r), and at the appellate stage must do so "to the extent feasible." ***Debra A.E.***, 188 Wis. 2d at 132. In creating § 971.14 the Wisconsin Legislature allocated the procedural burden of proving competency to the state. Cases of this court interpreting § 971.14 make clear that defense counsel plays an important but very limited role in the process, and affirm that the ultimate burden of persuasion rests with the state. *See* ***State v. Meeks***, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859;

State v. Byrge, 2000 WI 101, ¶30, 237 Wis. 2d 197, 614 N.W.2d 101; and ***State v. Johnson***, *Id*.

While a prosecutor or a court, sua sponte, may raise the issue if there is reason to doubt a defendant's competency, as a practical matter responsibility for raising competency almost always falls to defense counsel. ***Debra A. E.***, 188 Wis. 2d at 131; ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 506 (1997). This court has ruled that whenever a defense attorney has reason to doubt competency he or she must raise the issue, even over a client's objection. ***State v. Johnson***, 133 Wis. 2d at 220.

However, recognizing the tension between an attorney's conflicting duties to his or her client as a partisan advocate, and to the court as an officer of the court, this court ruled that "[a]n attorney's duty under *Johnson* demands a very narrow and limited breach of the attorney-client privilege." ***State v. Meeks***, 263 Wis. 2d 794, ¶46. An attorney must disclose otherwise confidential information regarding competency, but only to the extent necessary to raise the issue. *Id.* at ¶48. *Also see* SCR 20:1.14(c) ("Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6" Confidentiality). Thus, once counsel has raised competency and the client disagrees, counsel's ability to assist the court is limited and responsibility under controlling Wisconsin law falls to the state to prove competency.

Turning to the procedure mandated under Wis. Stat. § 971.14, once "reason to doubt" is established under § (1r)(b) the circuit court is required to appoint one or more examiners to perform a competency exam. § 971.14(2). The examiner reports his or her findings to the court. § 971.14(3). Then, § 971.14(4)(b), in relevant part, states:

> "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 competence….In the absence of these waivers, the court shall hold an evidentiary hearing on the issue."

The Wisconsin Legislature decoupled defense counsel's decision to waive a competency hearing from that of the defendant in response to this court's decision in ***State ex rel. Matalik v. Schubert***, 57 Wis. 2d 315, 204 N.W.2d 13 (1973). An earlier version of § 971.14(4), required hearing waivers only by the prosecutor and defense counsel. *See* Wis. Stat. § 971.14(4) (1973). This court ruled that not allowing a defendant the opportunity to personally establish his or her competency, contrary to the expert's or counsels' opinion, or hold the state to its burden of proving competence, violated due process. *Id.*

While in the first sentence of § 971.14(4)(b) "the defendant" and "defense counsel" are stated as separate entities or actors, the rest of the paragraph references only "the defendant." Specifically, the procedure to be followed at a competency hearing under § 971.14(4)(b) is as follows:

> "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."

Thus, while one interpretation of § 971.14(4)(b) would seem to make the hearing process and burden of proof hinge

on a defendant's self-assessment of his or her own competency (i.e. "the judge shall ask the defendant whether he or she claims to be competent or incompetent"), interpreting the statute in that manner would produce an absurd result and render the statute constitutionally infirm. It would require that when an objectively incompetent defendant "claims to be competent" and the state declines to present any evidence, the court would be required to find that defendant competent.

The U.S. Supreme Court in ***Cooper*** made clear that a statute violates due process if it allows a court to find competent a defendant who more likely than not is incompetent. 517 U.S. at 370. For this reason, the word "defendant" in the context of the procedure at a hearing must be interpreted to refer to both defendant and defense counsel. It means that at a hearing the court should direct its inquiry regarding competency to both the defendant and defense counsel, and if competency was raised on defense counsel's motion and counsel's concerns have not abated, pursuant to ***Johnson*** counsel must so inform the court. The state, then, should be held to its burden to prove the defendant competent. *Also see* ***State v. Guck***, 176 Wis. 2d 845, 848, 500 N.W.2d 910 (1993)("sec. 971.14(4)(b) does not require a personal statement by a criminal defendant.").

Although a competency determination "constitutes a judicial inquiry, not a medical determination," the legislature recognized that a determination of capacity to understand legal proceedings requires specialized knowledge that may be beyond the ken of laypersons or jurists. ***Byrge***, 237 Wis. 2d 197, ¶ 31. Accordingly, it enacted a requirement that the court "shall appoint one or more examiners having specialized knowledge…to examine and report upon the condition of the defendant." Wis. Stat. § 971.14(2)(a).

It is self evident that persons suffering from mental health disorders or who have other cognitive impairment are not in the best position to evaluate their own condition. It is not uncommon in mental commitment or forced medication cases for a mentally impaired person to deny that he or she is mentally ill. Moreover, asking a cognitively impaired person or person burdened by language deficiencies closed questions such as "Are you competent to decide x?" or "Do you understand y?" does not produce meaningful information because the implied answer to such questions is "yes." *See* Michele La Vigne, Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, UC Davis Journal of Juvenile Law & Policy, Vol. 15:1, p. 117 (Winter 2011).

Consequently, § 971.14(4)(b) should not be read to allow a person for whom there is reason to doubt competency, who answers "yes" when asked if he or she is competent, have that answer relieve the state of its burden to prove competence, and mandate a finding that such person is competent when the state declines to present evidence or testimony.

Although § 971.14(4)(b) states that defense counsel can "present other evidence on the issue" at a competency hearing, ***Meeks*** and ethics rules arguably prevent defense counsel from doing so against their client's wishes. Even when counsel knows or believes his or her client is incompetent, if the client disagrees, in our adversary system, defense counsel may be obligated to argue that the client is competent.

As noted above, unless the "district attorney, the defendant and defense counsel" agree to waive a hearing and

allow the judge to determine competency on the basis of a stipulated report, the matter must proceed to hearing. Decisions of this court imply when a competency matter proceeds to hearing, the state must prove the defendant competent. The point is succinctly stated in ***Byrge***. "Absent a waiver, the circuit court conducts a hearing. The court must find the defendant incompetent unless the State can prove, by the greater weight of the credible evidence, that the defendant is competent." ***Byrge***, 237 Wis. 2d 197, ¶30. (Citation omitted). That is, if a hearing is not waived by all parties or actors, the state bears the burden of proof.

Because defense counsel cannot present evidence to prove his or her client is not competent when the client claims to be competent, if the state is relieved of its burden to present evidence by introducing the court-ordered report and presenting testimony from the expert who examined the defendant and prepared the report, the circuit court would have no basis upon which to make a ruling and the court of appeals would have nothing to review. It would allow the state to compel an incompetent defendant to proceed by simply refusing to present evidence. Interpreting the statute in this manner, thus, would lead to an absurd result and would violate due process.

Anecdotally, the SPD believes the vast majority of circuit courts require the state to prove competency under all circumstances when a competency matter proceeds to hearing, regardless of whether the defendant claims personally to be competent. However, in some cases courts where the court-ordered report indicates incompetence, courts have found their hands tied by a prosecutor's decision to not present evidence when a defendant claims to be competent and the state agree. This court clarifying that the state must prove a defendant competent in all circumstances when a

competency matter goes to hearing would mean business as usual for most courts and would resolve or provide a path forward in situations like that noted above.

The state's argument that on appeal a defendant who is personally claiming to be competent is not asserting a fundamental right to liberty because his or liberty has already been restrained by virtue of the conviction, suggests a fundamental misunderstanding of how our criminal justice system works. (State's brief, p. 10). A defendant on appeal may have a higher hurdle to clear, but his or her right to challenge the state's authority to restraint their liberty is as vital on appeal as it is at trial.

The state's argument asking this court to rule that "a previous determination of competency to stand trial" should "create[] a presumption of competency to pursue postconviction relief" ignores the fact that competency is not static or linear, and that what is relevant is a defendant's present state of mind, not what it might have been weeks, months or years earlier. (State's brief, p. 11).

The state's reliance on cases from other jurisdictions to argue for diminished process on appeal should not persuade. In other jurisdictions, appellate issues are raised and decided on the basis of a static record. Wisconsin is unique in allowing, or requiring, the defendant to raise issues on the basis facts outside the trial record. Thus, the standards for competency on appeal in Wisconsin must be as rigorous and exacting as those for trial. If anything, closer scrutiny may be justified because the decisions a defendant is personally required to make on appeal (i.e. whether to appeal and the objective of the appeal) are more abstract and arguably involve more complex thought than those at trial (i.e. whether to plead guilty, waive a jury or testify).

In sum, the State Public Defender asks that this court reaffirm that at postconviction or on appeal, competency should be determined by the procedure set forth in Wis. Stat. § 971.14 when feasible. The State Public Defender further asks that this court clarify that in all circumstances when a competency matter goes to hearing, the state bears the burden of proving a defendant competent by the greater weight of the credible evidence.

Dated this 8th day of December, 2014.

Respectfully submitted,

JOSEPH N. EHMANN
SPD Regional Attorney Manager
State Bar No. 1016411

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8388
ehmannj@opd.wi.gov

Attorneys for the State Public Defender

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,978 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 8th day of December, 2014.

Signed:

JOSEPH N. EHMANN
SPD Regional Attorney Manager
State Bar No. 1016411

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8388
ehmannj@opd.wi.gov

Attorney for the State Public Defender