STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP1228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMMIE LEE SMITH,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

TABLE OF CONTENTS

Page

Cases

Page

Statutes

Other Authorities

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2013AP1228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMMIE LEE SMITH,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent State of Wisconsin ("State") does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS

Defendant-Appellant Jimmie Lee Smith's ("Smith") statement of facts is sufficient to frame the issues for review. The State will include any additional relevant facts in the argument section of this brief.

ARGUMENT

I. THE CIRCUIT COURT HAD NO REASON TO DOUBT SMITH'S COMPETENCY AT TRIAL OR SENTENCING.

A. Legal Principles.

Defendant's have a procedural due process right to ensure adequate procedures for determining competency. *Pate v. Robinson*, 383 U.S. 375, 386 (1966). A circuit court has a sua sponte duty to inquire into a defendant's competency when faced with evidence raising a bona fide doubt whether the defendant is competent. *Id.* at 385.

A right to be competent at trial cannot be waived. *Robinson*, 383 U.S. at 384. An incompetent defendant cannot waive the right to be competent, unless he is competent. *Id.* Therefore, it would be contradictory to allow an incompetent defendant to waive the right. *Id.* The appellant must show facts sufficient to establish reasonable doubt regarding competency at the time of trial. *Id.*

B. The Circuit Court Had No Reason To Doubt Smith's Competence at Trial or Sentencing.

Smith argues that the circuit court violated his procedural due process right to be competent at trial. Smith's Brief at 32-34. At trial and sentencing, the court had limited contact with Smith. Nothing in the interactions between Smith and the court raised a doubt

about Smith's competency. The circuit court did not have a sua sponte duty to inquire into Smith's competency.

At trial, the court conducted a few exchanges where it questioned Smith. The morning the trial began, the court had this exchange with Smith.

> THE COURT: All right. Mr. Smith, do you understand that you have the right to challenge both - - well, challenge any statements that you made to the police on town grounds. The first ground is that you did not receive your Miranda warnings; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: The second ground would be that the statement was not voluntary, do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Voluntariness goes to police impropriety or coercion only; do you understand that?
>
> THE DEFENDANT: yes.
>
> THE COURT: Do you wish to have a motion on either of those two issues?
>
> THE DEFENDANT: I don't think so, Judge.
>
> THE COURT: You don't think so or you don't want to?
>
> THE DEFENDANT: No.
>
> THE COURT: All right. Have you had enough time to talk to your lawyer?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you believe that's in your best interest to proceed in this manner?
>
> THE DEFENDANT: Yes.

THE COURT: Do you understand that your lawyer could argue the fact that you may have been confused, which may go to the weight of the confession?

THE DEFENDANT: Yes.

THE COURT: But certainly does not go to the admissibility; do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Sargent, have you gone over your client's rights to have these motions heard with him?

MR. SARGENT: Yes, I have.

THE COURT: Do you believe he's choosing to waive the Miranda Goodchild hearing freely, voluntarily and intelligently?

MR. SARGENT: Yes.

THE COURT: Do you believe it's in his best interest to proceed in this manner?

MR. SARGENT: Yes.

(74:3-5).

Before voir dire, the court conducted this exchange with Smith.

THE COURT: All right. Mr. Sargent, you want to make a record.

MR. SARGENT: I would just like to place on the record that Mr. Smith and I have discussed the case and Mr. Smith has stated his innocence and does not want to accept any plea offer. Correct, sir?

THE DEFENDANT: Right.

MR. SARGENT: Say it a little louder.

THE DEFENDANT: Correct.

> THE COURT: You do understand that once we get started, which is going to be in a matter of a couple of minutes, that there will be no resolution of this matter mid-stream unless you plead to the charge with no negotiations. Do you understand that?
>
> THE DEFENDANT: Correct.

(75:3).

After voir dire, Smith's attorney told the court that he conferred with Smith throughout the jury process and selections, and Smith said that was correct (75:63). Finally, after the State rested its case, the court conducted this colloquy with Smith:

> THE COURT: All right. Mr. Smith, you have the right to testify in this matter, you have the right to remain silent. Do you understand that?
>
> THE DEFENDANT: Correct.
>
> THE COURT: You make that choice yourself, sir. Do you understand that?
>
> THE DEFENDANT: Correct.
>
> THE COURT: Have you had enough time to talk to your lawyer?
>
> THE DEFENDANT: Yes.
>
> THE COURT: What's your choice?
>
> THE DEFENDANT: My choice was to waive it.
>
> THE COURT: I'm sorry?
>
> THE DEFENDANT: Waive it.
>
> THE COURT: To waive it? So do you want to testify or do you not want to testify?
>
> THE DEFENDANT: I don't want to testify.

THE COURT: All right. And has anyone forced you to do this?

THE DEFENDANT: No.

THE COURT: Do you believe it's in your best interest?

THE DEFENDANT: Yes.

THE COURT: And are you making this choice freely and voluntarily?

THE DEFENDANT: It's freely and voluntarily.

(77:78-79).

The only other exchange the court had with Smith was at sentencing. At sentencing, Smith told the court:

> Today I want to say in court that I have been through a lot in my life. I help peoples and I got - - I got this. I bail peoples out of jail, I got this. I let peoples stay in my house, I got this. I let peoples eat at my house, I got this.
>
> Today [the victim], I don't know what she lookin' for out of me and why is she comin' to court like this? What it is that she want from me? She in love with me or something? Sayin' that she haven't took a shower since this happened to her? What is wrong with her? I let bygones be bygones. Peoples done throw salt on me every day, every day out there on the street. Peoples took money from me at the court sale, at the courthouse. But I let it ride, they wouldn't even give it back. I let it go.
>
> I sit up North, did time behind bailin' this girl, Yvonne Carter, out of jail in Chicago, Illinois for child neglect, because I went to court the day that she was - - she was in court, and I went and bailed her out of jail. And then I hear all of this about me? And she supposed to have been back in court. She never go back. She never go back for her - - for - - to get her bail back. but I'm the one who had to sign her bail as being right to this day.

I am very, very sorry that I even helped this lady. But these ladies are sayin' things like this about me. And she ain't white like her, the lady that - - that I bailed out of jail, she's black. And her daughter, I looked out for them when they was starvin' to death, livin' out on the street corner. I'm out here tryin' to make a living every day at my job workin', lost my job behind all of that, feedin' them, lettin' them stay in the house, ended up gettin' in trouble with my landlord by buyin' air-conditionin' and things without asking his permission, could I have it in my apartment with the rent and - - and included with the lights.

And this is the thanks I get out of it? 12 years like I murdered someone out there on the street? I sat in there 12 years for bailin' her out of jail. I didn't see all these troubles until I bailed her out of jail. Helped her and her family.

And then my brothers, them too, I even brought them to my house and helped them. When I lived with them, they couldn't even pay the light bill. Wouldn't even pay the light bill. The landlord was lettin' them work off his job to pay the rent. And told him to switch the lights in his name. He didn't even do it.

So by me handin' over parts of my Quest card, because I never gained footage after being locked up for bailing Yvonne out of jail for being convicted of child neglect, for $200 I had to put my name to that, and now she's on the run and I get all of this out of that? She never - - She ain't - - wouldn't go back to court because I just see her last year. She worked at the same company as I did, I see her there on the 27th and National. She there.

And then this other lady back in - - Lee Ellen Wash, she don't even know her name. She callin' me every day. I'm over by my - - my - - my livin' relatives after I got out of jail, never gained footage, never got a job, never got back to my feet. I know nobody in this courtroom don't care.

And - - And at that one time I didn't care about my $40 that I gave away to the courthouse, I gave away $40 for a marriage license fee and I couldn't even get it back from the courts. And this

happened before all of this stuff about bailin' Yvonne out of jail. And the courts seemed like this is all my fault? This is not all my fault.

I also talked to Lee Ellen Wash, I sent her a letter last year. And then Yvonne Carter, I went back to her house after I got out of jail and she still wasn't workin' out right. And then we - - I ended up gettin' shot behind all this. I got a bullet hole through my body and laid up at Froedtert Hospital for almost six months out there fightin' for my life because of these people that hates on me.

I can prove it to you that I got the shot, it is right here in my stomach. I got shot, laid up almost 90 days, I was fightin' for my life at Froedtert because I bailed her out.

MR. SARGENT: Excuse me, your Honor. (Brief discussion off the record.)

THE DEFENDANT: It's got to be out there. I need to put this out there on the table.

THE COURT: Well, we're going to have to put an end to this because none of this really has a whole lot to do - -

THE DEFENDANT: I know it don't have a whole lot, but, here, I didn't set up in jail and then I got out and then I couldn't even stay on my money, and then I get on SSI and stay on it for like four or five checks and then they cut it off. I get these lawyers $2,300 to represent me. They - - I still ain't on for all of this pain and sufferin' that I'm goin' through for not lookin' out for my life after I got my finger injured by my family work helpin' this guy getting' on the job there. And he didn't even have the decency enough to say I will invite you out to dinner for lookin' out for me. He didn't even have the decency to do that for me.

And then Miss Wash, she come over to my house, I got the settlement from the - - from the gunshot, I buy a car, I take her down there to see my family, she want to run both of us off the highway, kill us both.

> THE COURT: All right. Well, Mr. Smith, none of this really has anything to do with - -
>
> THE DEFENDANT: But this has got a lot to do with this case.
>
> THE COURT: It really doesn't. So we're going to cut it off if you are not going to get to the point.
>
> THE DEFENDANT: The point is, if you want to hear what my goal are, my goal is to get out of here to get back to work and to get my Social Security. That's it. You don't want to hear what I gotta say but you want to sentence me, though. You want to give me the maximum time, say that I'm a mean person. But I'm not mean. This place is mean. They took money from me here. And then when I write a letter to my family about it back in Chicago telling them how could I stay in Wisconsin with a stolen car from Chicago here, how could I stay here, how could I stay here, I had to sign my letters that I written to them because these peoples here took my - - took my marriage license fee and then they took my adoption fee. Now, that is not fair to me. you guys are not being fair.
>
> THE COURT: We're done.
>
> THE DEFENDANT: I'm done but y'all - - I just want to address - - When I want to talk, y'all don't want to hear the truth.

(79:14-19).

The limited exchanges at trial and Smith's rambling sentencing allocution are the whole interaction the court had with Smith at trial and sentencing. Smith's interaction with the court at trial was completely appropriate. Nothing in those exchanges would have struck the court as out of the ordinary. Nothing in those exchanges would indicate anything to the court except Smith's understanding of the proceedings.

Smith's sentencing comments were strange, but those comments alone are not enough to put doubt in the

court as to Smith's competency to proceed. The circuit court is not trained in medical diagnosis. The postconviction court explained that it sees defendants every day that do not help themselves in allocution (92:34). The court thought that in probably a third of cases or more defendants dig themselves a bigger hold than before they speak (92:34). The court felt that unhelpful comments alone did not relate to competency (92:34-35). Smith's rambling comments alone would not indicate incompetency.

Likewise, even if the court could have diagnosed Smith with a thought disorder as the doctors who examined him postconviction did, mental illness alone does not mean a defendant is incompetent. *State v. Byrge*, 2000 WI 101, ¶ 48 n.21, 237 Wis. 2d 197, 614 N.W.2d 477. It is a judicial not clinical inquiry and the court is not required to establish a psychiatric classification of the defendant's condition. *Id.* The court must apply a legal, not a medical, standard. *Id.* Not every mentally disordered defendant is incompetent. *Id.* ¶ 48 n.21.

The circuit court had no reason to doubt Smith's competency during trial or sentencing based on its interaction with Smith. The interaction at trial did not raise any questions. The sentencing allocution, while rambling and unhelpful, is insufficient to give the court doubt about Smith's competency. The circuit court did not have an obligation to sua sponte raise competency at trial or sentencing. Smith's procedural due process right was not violated even though the court did not examine competency at trial or sentencing.

II. SMITH'S ATTORNEY DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO RAISE HIS COMPETENCY AT TRIAL.

A. Standard of Review.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that this court reviews without deference to the circuit court's conclusions. *Id.*

B. Legal Principles.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To demonstrate prejudice, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see Love*, 284 Wis. 2d 111, ¶ 30.

The failure to raise the competency issue at the time of trial does not constitute a waiver and the issue is preserved for appeal. *See Robinson*, 383 U.S. at 384. The question of effective assistance of counsel involves a determination of the point when counsel is required to raise the issue of incompetence. *State v. Johnson*, 133 Wis. 2d 207, 218, 395 N.W.2d 176 (1986). When defense counsel has reason to doubt the competency of his client to stand trial, he must raise the issue with the circuit court. *Id.* at 220. The failure to raise the issue of competency makes the counsel's representation fall below an objective standard of reasonableness. *Id.*

C. Smith Failed to Meet His Burden to Prove His Attorney Provided Ineffective Assistance.

Smith argues that his attorney provided ineffective assistance for failure to raise the issue of his competency at trial. Smith's Brief at 27-32. Like the circuit court, Smith's attorney did not have reason to challenge Smith's competency at trial based on the information available to him at the time. His attorney did not provide deficient performance. The failure to raise the issue of competency did not cause Smith prejudice. His attorney did not provide ineffective assistance. The circuit court properly concluded that Smith's attorney was not ineffective (94:6).

Smith's attorney was present for the trial and sentencing and therefore, had the same information the circuit court did about the exchanges detailed in section I of this brief. Additionally, Smith's attorney met with Smith seven times during his representation and received four letters from him during the relevant time.[1] Nothing in those interactions caused Smith's attorney to question

[1]Smith's attorney received a fifth letter from Smith after sentencing (92:11). That letter is not relevant to the determination of whether Smith's attorney provided ineffective assistance for failing to raise the issue of Smith's competency at trial or sentencing.

his competency (92:38). Smith's attorney did not provide ineffective assistance.

The first letter Smith's attorney received was a notice of a court date (92:7).[2] The letter did not strike the attorney as "odd" because he receives a lot of communication from clients (92:8). The court felt that Smith knowing about court dates made it sound like Smith was competent (92:9). The second letter was dated during the trial, and it said that Smith had contacted the Department of Corrections about clearing his criminal record (92:15). Smith's attorney said that throughout his representation Smith was concerned about a charge of failure to register as a sex offender (92:16). Smith was homeless at the time and did not feel his registry violation was fair (92:22). The third letter asked Smith's attorney to cancel a social security disability application Smith had filed (92:17). Smith's attorney did not remember this letter or discussion about social security (92:17). He said he would not have discussed it much since it would have been beyond the scope of his representation (92:17). The letter also told Smith's attorney that a corrections officer took a black pen from him and loaned it to another inmate (92:18). That information also had no relation to Smith's attorney representation in the criminal case (92:18). The fourth relevant letter was Smith complaining about the sexual offender registry and his treatment in jail (92:28-29).

Smith's attorney also reviewed a recorded interview with Smith, but did not have recollection at the postconviction hearing of what the interview showed (92:19).[3] That interview was recorded ten months before trial (92:37).

---

[2]The actual exhibits do not appear in the appellate record, but Smith's attorney described them on the record at the postconviction hearing (92:6-28).

[3]While the DVD was introduced at the postconviction hearing, it does not appear in the appellate record.

Smith and his attorney met seven times (92:21). Smith's attorney was never concerned about Smith's mental health during those meetings (92:21). He was concerned that Smith had drunk enough alcohol to compromise his recall of the assault (92:21). Smith agreed to present a defense that the victim consented to intercourse (92:23-24). Smith's attorney explained that Smith was very upset at sentencing and saw his allocution not as a mental health problem, but an anger problem (92:35).

Smith's attorney did not have any doubt about Smith's competency and felt Smith was able to assist in his own defense (92:38). Smith's attorney felt that Smith did assist him at trial (92:41). If he thought that Smith was incompetent, he would have raised the issue with the court right away (92:51). He explained that he might not actively look for competency, but would consider it if there was any reason to question a defendant's competence (92:51).

Smith's attorney did not provide ineffective assistance. Nothing in his interaction with Smith caused him to question Smith's competency (92:51). The circuit court was persuaded by Smith's attorney's testimony (94:8). The court found the testimony relevant to the legal question (94:9). This court should affirm that conclusion and find that Smith failed to meet his burden to prove his attorney provided ineffective assistance.

III. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN CONCLUDING THAT SMITH WAS COMPETENT TO STAND TRIAL.

A. Standard of Review.

This court will only disturb the circuit court's determination of whether a defendant is competent to stand trial "only if the circuit court exhibited an erroneous

exercise of discretion or if the circuit court decision was clearly erroneous." *State v. Garfoot*, 207 Wis. 2d 214, 223-24, 558 N.W.2d 626 (1997); *see also Byrge*, 237 Wis. 2d 197, ¶ 45.

B. Legal Principles.

"[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). "A defendant may not be put to trial unless he '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him."'" *Id.* (quoted sources omitted).

"No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Wis. Stat. § 971.13(1). The determination of competence is an individualized, fact-specific decision and expert testimony is necessary. *Garfoot*, 207 Wis. 2d at 227. When an expert conducts an evaluation for competency to stand trial, he or she must assess "the defendant's present mental capacity to understand the proceedings and assist in his or her defense." Wis. Stat. § 971.14(3)(c).

At the competency hearing, the court aims to verify that "the defendant can satisfy the understand-and-assist test." *Byrge*, 237 Wis. 2d 197, ¶ 48. It is a judicial not clinical inquiry and the court is not required to establish a psychiatric classification of the defendant's condition. *Id.* The court must apply a legal, not a medical, standard. *Id.* Not every mentally disordered defendant is incompetent. *Id.* ¶ 48 n.21. Many mentally ill defendants are legally competent to stand trial. Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65, 70.

The court must examine the "present mental capacity" of the defendant. *Byrge*, 237 Wis. 2d 197, ¶ 49. The history of behavior and prior medical opinions can serve as indicia in the competency proceeding, but past psychiatric episodes may mean a defendant is still presently competent to proceed. *Id.* ¶¶ 48-49. It is difficult to retroactively determine an accused's competence to stand trial. *Robinson*, 383 U.S. at 387.

The remedy for failure to have a competency hearing is not a retrial, but a hearing "to determine whether a meaningful *nunc pro tunc* competency hearing could be held." *State v. Weber*, 146 Wis. 2d 817, 823 n.3, 433 N.W.2d 583 (Ct. App. 1988).

C. Smith Was Competent When He Was Tried and Sentenced.

Smith also alleges that he was denied substantive due process when the circuit court conducted a trial and sentencing while Smith was incompetent. Smith's Brief at 16-27. The circuit court acted properly when it conducted a competency hearing. The court did not erroneously exercise its discretion when it concluded that Smith was competent at trial and sentencing. This court should affirm that decision.

At the competency hearing, the circuit court had all the information presented in sections I and II of this brief. The court knew what Smith said on the record at trial and sentencing. The court knew what Smith's attorney testified to at the postconviction hearing about his interactions with Smith. Additionally, the court had testimony from two doctors who presented the opinion that Smith was incompetent at the time of trial.

Dr. John Pankiewicz based his opinion mainly on review of records of past interviews with Smith to determine his competency to participate in postconviction proceedings (91:7). He concluded that there was substantial reason to question Smith's competency at trial

and sentencing (91:9). Dr. Pankiewicz's opinion was not as strong as it would have been if he had been able to examine Smith at trial (91:22). He had not reviewed portions of the trial transcript where Smith answered questions, and at the hearing testified that those portions would weigh in favor of Smith being competent at trial (91:26).

Dr. Deborah Collins testified that reaching a conclusion was challenging because the data was incomplete and she was missing information she would normally obtain at a contemporaneous interview (91:46). She said that the interview is normally the most important part of the evaluation (91:48). She said Smith could have been competent and psychotic at the same time (91:62). Dr. Collins thought that Smith's recorded statements at trial weighed toward competency, but did not change her opinion (91:59). Dr. Collins concluded that Smith was incompetent at the time of trial and sentencing (91:46).

The circuit court heard all the testimony. The court allowed both parties to submit written argument (92:53). Both sides submitted written argument to the court (61; 62). The court delayed time to decide the issue because it had not had ample opportunity to prepare to make its decision (93:2). The court read both briefs (94:4).

After taking the testimony and reviewing the parties' arguments, the court decided that Smith was competent at trial and sentencing (94:8). The court summed up Smith's argument as "people who were not present at the relevant time know more than the people who were present" (94:4-5). The court concluded that Smith had it wrong (94:5). The court respected the doctors who testified, but noted that both conceded that their opinion would ideally have been given at the time of trial and sentencing (94:5-6). The court relied upon Smith's experienced attorney who did not have any reason to question Smith's competence during the proceedings (94:6). The court thought that Smith's claim that the

circuit court erred in not observing his competency was also misplaced (94:7).

The court rejected the doctor's opinions based on the fact that they were doing their evaluation retrospectively and that procedure was extremely rare (94:7-8). The court felt that the lack of an interview with Smith was important (94:8). The court felt that the doctor's opinions were their own, but that the court was the entity called upon to make the legal determination (94:8). The court placed more weight on Smith's attorney's opinion from observations at trial and sentencing than on the doctor's opinions years later (94:8). The court found Smith competent at trial and sentencing (94:9). Therefore, the court denied Smith's motion (94:9).

Smith criticizes the circuit court for adopting the State's brief as its decision. Smith's Brief at 24-25. This court does disfavor it when circuit courts adopt a party's brief as its decision. *See State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237. That is not what the circuit court did here. In *McDermott*, the "sum total of the circuit court's analysis" in denying the motion was that, "'For all the reasons set forth in the State's excellent brief, which the court adopts as its decision in this matter, the court denies the defendant's motion as well as the evidentiary hearing he requests.'" *Id.*

In Smith's case, the court said it was adopting the State's brief, but then continued to explain the reasons for its decision for four and a half transcript pages (94:5-9). The court did not simply adopt a party's brief as its decision. It articulated reasons, on the record, why it found the State's brief persuasive (94:5-9). This method is not disfavored. The circuit court properly exercised its discretion.

Smith also criticizes the circuit court for giving great weight to the fact that the doctors did not talk to Smith at the time of trial and sentencing rather than to the

factors cited in the reports. Smith's Brief at 25-26. The determination of competence is an individualized, fact-specific decision and expert testimony is necessary. *Garfoot*, 207 Wis. 2d at 227. The circuit court heard the facts and determined which facts deserved greater weight. That is within the circuit court's discretion at a competency hearing. *See id.* at 223-24.

It is difficult to retroactively determine an accused's competence to stand trial. *Robinson*, 383 U.S. at 387. The court noted that while it respected the doctors, it found that the retroactive nature of their evaluations did not require deference. Instead, the court placed its faith in the trial and sentencing court and Smith's trial counsel to determine whether Smith was competent to stand trial. This is a proper exercise of the court's discretion.

At the competency hearing, the court aims to verify that "the defendant can satisfy the understand-and-assist test." *Byrge*, 237 Wis. 2d 197, ¶ 48. Smith's attorney did not have any doubt about Smith's competency and felt Smith was able to assist in his own defense (92:38). Smith's attorney felt that Smith did assist him at trial (92:41). The court's reliance on this testimony was proper.

The court rejected the doctors' testimony. However, it is a judicial not clinical inquiry and the court is not required to establish a psychiatric classification of the defendant's condition. *Byrge*, 237 Wis. 2d 197, ¶ 48. The court must apply a legal, not a medical, standard. *Id.* The court took its duty seriously, and properly exercised its discretion.

Smith may have been suffering from a mental illness at trial and sentencing. Jail records showed that Smith displayed psychotic symptoms before and during trial (91:11). However, psychotic symptoms alone are insufficient to show incompetence to stand trial. Not every mentally disordered defendant is incompetent. *Byrge*, 237 Wis. 2d 197, ¶ 48 n.21. That alone is

insufficient to allow this court to overturn the circuit court's decision.

This court should affirm the circuit court's conclusion. The circuit court listened to the doctors' testimony, Smith's trial attorney's testimony, read argument by Smith and the State, and came to a rational conclusion. The circuit court's decision is not clearly erroneous. It was a proper exercise of its discretion.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the circuit court's order denying postconviction relief and the judgment of conviction.

Dated this 8th day of January, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

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 5,316 words.

Dated this 8th day of January, 2014.

_____
Christine A. Remington
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 8th day of January, 2014.

_____
Christine A. Remington
Assistant Attorney General