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STATE OF WISCONSIN :: COURT OF APPEALS - DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2013-AP-1228-CR

vs.

Trial No. 09-CF-56

JIMMIE LEE SMITH,

Defendant-Appellant.

Appeal from a judgment of conviction entered December 15, 2009
and an order denying postconviction relief entered May 13, 2013
in the Circuit Court of Milwaukee County,
Hon. Jeffrey A. Conen, presiding at trial and sentencing and
Hon. David L. Borowski presiding in postconviction proceedings

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The trial court erred in finding that Mr. Smith was competent at the times of trial and sentencing

Mr. Smith asserts three distinct legal claims regarding his competency at trial and sentencing, in the following order: a substantive claim that Mr. Smith proved he was incompetent at the time of trial; a ineffective assistance claim based on trial counsel's failure to raise the competency issue; and a procedural claim based upon the trial court's failure to order a competency evaluation or hearing. In response, the State rearranged the order in which it addressed these claims. However, Mr. Smith replies to the State, addressing each claim in the order in which he originally asserted it.

Substantive incompetency claim.

The State asks this court to uphold Judge Borowski's finding that Mr. Smith was competent at the time of trial and sentencing. In so doing, the State points out on at least two occasions that "determination of competence is an individualized, fact-specific decision." State's br, 15, 19, quoting *State v. Garfoot*, 207 Wis.2d 214, 227, 558 N.W.2d 626 (1997).

The State is, however, unable to articulate how Judge Borowski's decision is individualized or specific as to Jimmie Lee Smith. Rather, the State points to two rather broad factors: that Mr. Smith's competency evaluations were conducted retrospectively without the contemporaneous interviews, and that trial counsel, having been present at the time of trial and sentencing, should be believed over psychological experts, who met with Mr. Smith only later. State's br. 17-19. By this reasoning, any retrospective review of a defendant's competency must fail. Judge Borowski's reasoning is not individualized to specific facts concerning Mr. Smith, but is categorical: as the State explained:

[Judge Borowski] summed up Smith's arguments 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).

State's br. 17. Such a categorical decision as to whom to believe is an erroneous exercise of discretion.

Judge Borowski's decision, and the State's arguments in support of it, contained no individualized facts regarding Mr. Smith for a simple reason: the specific facts overwhelmingly support the assertion that Mr. Smith was not competent at the time of trial. The State thus

ignores or grossly understates the specific facts.

For example, the State claims that “Dr. 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).” State’s br. 16. The State thus implies that he relied “mainly” on interviews not contemporaneous with or proximate to the times of trial or sentencing. In fact, Dr. Pankiewicz reviewed numerous other sources of information, including the complaint, police reports, defense and prosecution postconviction pleadings, and records from the Wisconsin Resource Center, the Department of Corrections and the Milwaukee County Jail. 91: 7-9; 99: 1-2. From these, and especially from the jail records, Dr. Pankiewicz was able to recount that while in jail awaiting trial, Mr. Smith was often seen demonstrating bizarre behavior and other psychotic symptoms. 91: 10-12; 99: 4. Rambling speech, agitated behavior and apparently delusional ideation were again shown later in the month of his trial 99: 5.

At a later point, the State sought to negate the importance of Mr. Smith’s psychotic symptoms by noting that not every mentally disordered defendant is incompetent. State’s brief 19. However, Mr. Smith was not

merely a mentally disordered defendant; he was twice adjudicated incompetent to assist in postconviction proceedings (83: 24-25; 85: 18), a fact mentioned nowhere in the State's brief. Thus, the question Judge Borowski had to determine was not *whether* Mr. Smith had become incompetent, but rather *when*.

Ineffective assistance incompetency claim

As the State notes, Mr. Smith's trial counsel saw no reason to raise the issue of Mr. Smith's competency. As the State also points out, the "question of effective assistance of counsel involves a determination of the point when counsel is required to raise the issue of incompetency." State's br. 12. The State also points out that trial counsel was present with Mr. Smith in court, met with Mr. Smith seven times and received several letter from Mr. Smith, and still saw no reason to raise competency. State's br. 12-13. The question is whether, based on what he knew of Mr. Smith, trial counsel should have raised the issue.

Mr. Smith wrote two letters to his attorney on days his trial was in progress. 92: 14-15, 17. Yet, these letters do not seem to show concern about the trial. Rather, in the letter of October 12, 2009 Mr. Smith asks his attorney to cancel a Social Security Disability claim *from 1989*, and

complains about his jailers showing favoritism in allowing inmates use of a black ink pen. 92: 17-18. Confronted with these matters, however, Mr. Smith's counsel replied only as to his uncertainty of the date he received this letter. Likewise, Mr. Smith's letter of October 13, 2009 expresses his desire that the DOC clear his criminal record. 92: 14-15. Counsel saw this only as a reflection of Mr. Smith's usual anger about his sex offender registry charge. 92: 15. Thus, even at the postconviction hearing, knowing that Mr. Smith's competence was now in issue, trial counsel was unwilling to accept any suggestion that Mr. Smith might have shown reason to doubt competence.

While Mr. Smith's behavior before and during trial may not have unequivocally given trial counsel cause to question competency, this changed during Mr. Smith's allocution at sentencing. Apx. 111-116; 79: 14-19. After the second paragraph, Mr. Smith's allocution became a rant about matters having no discernable connection to the case. He complained about bailing a woman named Yvonne Carter out of jail, which somehow led to 12 years in jail. Apx. 112; 79: 15. Somehow, this led to Mr. Smith being shot and spending almost six months in a hospital. Apx. 114; 79: 17. Mr. Smith's counsel interrupted the

allocution. Apx. 114; 79: 17. However, he testified he did so not because he perceived a competency issue, but rather merely an anger issue. 92: 35. That the object of this anger was far afield from anything relevant to sentencing did not seem to occur to trial counsel. He certainly, by the end of the allocution, had objective reasons to doubt competency. His failure to raise the issue constitutes deficient performance. Moreover, since there is a reasonable probability that Mr. Smith would have been found incompetent had trial counsel raised the issue at that point, Mr. Smith suffered prejudice. *Hummel v. Rosemeyer*, 564 F.3d 290, 303 (3rd Cir. 2009).

Procedural incompetency claim

The procedural competency claim turns on whether the trial court had reason to doubt competency. Thus, quite appropriately, the State's analysis starts with lengthy quotes, in full, of every occasion Mr. Smith spoke on the record during trial and sentencing. State's br. 3-9. The quotes from trial colloquies are unremarkable, and generally consist of Mr. Smith giving single word answers. As Dr. Collins noted, however, they are of minimal value in assessing Mr. Smith's thought processes. 91: 22.

Mr. Smith's allocution, however, is quite different.

Mr. Smith had free rein to address the court, at least until his counsel and the court interrupted. The State's analysis, however, does not address the content of the allocution, other than to acknowledge it as "rambling" and to agree with the trial court's assessment that it was "unhelpful." State's br. 9-10. The State argues that the "court is not trained in medical diagnosis" and that even if it were so trained, mental illness alone is not incompetence. State's br. 10.

Mr. Smith never meant to suggest that the sentencing court should have diagnosed Mr. Smith's condition. He suggests only that his bizarre and incoherent allocution reasonably provides doubt as to competency. Despite the almost incoherent nature of the allocution, and the sentencing court's observation that "none of this really has much bearing on what went on in this particular case," the court failed to raise competency. Apx. 116; 79: 19. In so doing, the court deprived Mr. Smith of his right not to be sentenced while incompetent. Moreover, a competency evaluation initiated in December of 2009 would have likely led to the same jail records which Dr. Collins and Dr. Pankiewicz later reviewed, and thus led to doubt about Mr. Smith's competency during trial.

CONCLUSION

Jimmie Lee Smith prays the this court vacate his conviction and sentence and remand the case for a new trial.

Respectfully submitted,

John T. Wasielewski
Attorney for
Jimmie Lee Smith

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 1676 words.

John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

John T. Wasielewski