

STATE OF WISCONSIN
IN SUPREME COURT

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**CLERK OF SUPREME COURT
OF WISCONSIN**

No. 2013AP1228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JIMMIE LEE SMITH,

Defendant-Appellant.

APPEAL FROM A COURT OF APPEALS' DECISION REVERSING
A CIRCUIT COURT ORDER AND JUDGMENT OF CONVICTION
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE DAVID L. BOROWSKI AND JEFFREY A. CONEN,
PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

I. The court of appeals exceeded its constitutional authority by engaging in fact finding.

The circuit court assessed the credibility of the witnesses and the evidence. It concluded that Jimmie Lee Smith's trial attorney, Stephen Sargent, was the most credible. Since Mr. Sargent did not doubt Smith's competence, the circuit court denied Smith's motion

on the grounds and concluded that he was competent at trial and sentencing.

The court of appeals rejected the circuit court's findings, and made its own findings in violation of its constitutional authority. It found it important that Mr. Sargent and the circuit court did not know about Smith's jail records, but the doctors knew about the records and relied upon them. *State v. Smith*, 2014 WI App 98, ¶ 25, 357 Wis. 2d 582, 855 N.W.2d 422 (Pet-Ap. 118). The court of appeals believed that access to the jail records made the doctors' opinions more reliable than Mr. Sargent's opinion. *Id.* ¶¶ 25-26 (Pet-Ap. 118). The court exceeded its authority by making this finding of fact.

Smith focuses on the jail records and argues that those are facts that are undisputed. Smith's brief at 17-20. But the circuit court did not make any finding regarding accuracy of the jail records. The court of appeals exceeded its constitutional authority where it found facts when the circuit court did not make an explicit finding on the issue. *See Gottsacker v. Monnier*, 2005 WI 69, ¶¶ 33-35, 281 Wis. 2d 361, 697 N.W.2d 436. The jail records are not undisputed facts, but information upon which the doctors based their opinions. The circuit court found those opinions lacking. The court of appeals had no authority to reverse that finding.

Jail records showed that Smith displayed psychotic symptoms before and during trial (91:11). The jail records alone are not proof of incompetency because psychotic symptoms alone are insufficient to show incompetence to stand trial. Not every mentally disordered defendant is incompetent. *State v. Byrge*, 2000 WI 101, ¶ 48 n.21, 237 Wis. 2d 197, 614 N.W.2d 477.

The court of appeals must accept a reasonable inference drawn by a circuit court from established facts if more than one reasonable inference may be drawn. *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 571, 360 N.W.2d 65 (Ct. App. 1984). The circuit court found Mr. Sargent's testimony more credible (94:8) (Pet-Ap. 128). The court believed that Mr. Sargent's contact with Smith at the relevant time rendered his opinion more trustworthy than the

doctors. The court of appeals exceeded its authority when it ignored that finding.

II. The court of appeals impermissibly weighed the evidence rather than defer to the circuit court.

Smith characterizes the State's position as one that required the court of appeals to provide absolute deference to the circuit court. Smith's brief at 20. This characterization misrepresents the State's position. The State asserts that the court of appeals applied the wrong standard of review. The court of appeals did not provide deference to the circuit court and instead independently weighed the evidence to reach its conclusion. The court of appeals action was improper.

Smith states that the court of appeals "found that the decision of the postconviction court was clearly erroneous." Smith's brief at 20. But the court of appeals' decision does not support that statement.

The court of appeals began by articulating the standard of review was a "clearly erroneous" standard. *Smith*, 357 Wis. 2d 582, ¶ 19 (Pet-Ap. 114). It then stated that because "[t]he postconviction court was not the same court who observed Smith at trial and sentencing . . . [t]he deference accorded the trial court's competence assessment in *Garfoot* and *Byrge* does not apply to the postconviction court here." *Id.* ¶ 23 (Pet-Ap. 117). It incorrectly believed the circuit court's decision conflicted with *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986). *Smith*, 357 Wis. 2d 582, ¶ 24 (Pet-Ap. 117-18). It concluded that the jail records alone demonstrated Smith's incompetence. *Id.* ¶ 25 (Pet-Ap. 118). And it reversed the circuit court's order and remanded the case for a new trial. *Id.* ¶ 26 (Pet-Ap. 119).

Nowhere in its decision does the court of appeals apply the clearly erroneous standard. On the contrary, it states that it does not owe deference to the circuit court. *Smith*, 357 Wis. 2d 582, ¶ 23 (Pet-Ap. 117). The court of appeals failed to defer to the circuit court's findings because the postconviction court was a different court from

the court at trial and sentencing. It impermissibly found facts and weighed evidence, and by doing so applied the improper standard of review.

III. The circuit court did not erroneously exercise its discretion.

The circuit court did not erroneously exercise its discretion when it concluded that Smith was competent at trial and sentencing. The court of appeals should have affirmed the circuit court's conclusion. The circuit court listened to the doctors' testimony, heard Mr. Sargent's testimony, read Smith's argument, read the State's argument, and came to a rational conclusion. The circuit court's decision is not clearly erroneous. It was a proper exercise of its discretion.

The circuit court agreed with the State that the doctors came to the wrong conclusion because during trial and sentencing Smith did not give anyone a reason to question his competency (94:5) (Pet-Ap. 125).¹ The court respected both doctors for conceding that the passage of time meant their opinions were not as solid as if they met Smith at the time of trial and sentencing (94:5-6) (Pet-Ap. 125-26). The court found Mr. Sargent credible when he testified that he did not have any reason to question his client's competence during the proceedings (94:6-7) (Pet-Ap. 126-27).

The circuit court concluded that it could not find Smith incompetent based on the testimony of the doctors alone (94:9) (Pet-

¹Smith cites to *State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237, to argue that the circuit court improperly adopted the State's argument. Smith's brief at 32-33. The court of appeals criticized "wholesale adoption of the State's brief as its decision." *McDermott*, 339 Wis. 2d 316, ¶ 9 n.2. In that case, the circuit court's total analysis was that for all the reasons in the State's brief, the court denied the defendant's motion. *Id.* Here, the circuit court did not wholesale rely on the State's brief, but instead read the conclusion and then articulated the reasons for its agreement with the conclusion (94:5) (Pet-Ap. 125). This is a proper exercise of discretion.

Ap. 129). The court believed Smith had been competent at trial and sentencing. *Id.* The court denied Smith's motion. *Id.*

The inquiry into competency is a judicial, not a clinical inquiry. *Byrge*, 237 Wis. 2d 197, ¶ 48. "A history of irrational behavior and prior medical opinions about a defendant's condition, like a defendant's demeanor, can serve as indicia in the competency determination." *Id.* Clinical reports may state that a defendant is incompetent, but really mean only that the defendant had some mental illness which required treatment. *Id.* "Even if a defendant has suffered past psychiatric episodes, he or she nonetheless may evince sufficient present ability to proceed." *Id.* ¶ 49.

Smith argues that the two doctors' opinions were "uncontradicted." Smith's brief at 35. But Mr. Sargent's opinion contradicted the doctors' opinions. Smith ignores Mr. Sargent's opinion, but the circuit court did not. The circuit court assessed the credibility of all the witnesses at the postconviction hearing. The circuit court found Mr. Sargent more credible than the doctors (94:8 9) (Pet-Ap. 128-29). This is a valid exercise of discretion.

Smith also asserts that the circuit court's decision is inconsistent with *State v. Johnson* and therefore an erroneous exercise of discretion. Smith's brief at 36. The court of appeals seemed to agree. *Smith*, 357 Wis. 2d 582, ¶ 24 (Pet-Ap. 117). But that conclusion misrepresents the circuit court's holding.

Contrary to Smith's argument and the court of appeals' decision, the circuit court complied with *Johnson*. *Johnson* stands for the proposition that retrospective competency hearings may be held under some circumstances. *Johnson*, 133 Wis. 2d at 225. The court appointed an expert for the State (87). The court held a retrospective competency hearing (91, 92). The court heard from both Dr. Collins and Dr. Pankiewicz (91). The court heard from Mr. Sargent (92). The parties briefed the issue (61, 62). The court read both briefs (94:4) (Pet-Ap. 124). The court complied with the *Johnson* decision. It rejected the doctors' opinions in favor of Mr. Sargent's opinion. This was a proper exercise of discretion.

IV. Smith's attorney did not provide ineffective assistance by failing to raise his competency at trial.

Since Smith was competent at the time of trial and sentencing, his attorney cannot be ineffective for failing to raise the issue of his competence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). The result of the proceeding would not have changed. *See id.*

The question of effective assistance of counsel involves a determination of the point when counsel is required to raise the issue of incompetence. *Johnson*, 133 Wis. 2d at 218. When "defense counsel has reason to doubt the competency of his client to stand trial, he must raise the issue with the circuit court. The failure to raise the issue of competency makes the counsel's representation fall below an objective standard of reasonableness." *Id.* at 220 (internal quotations and brackets omitted).

Smith relies heavily on five letters he wrote to his attorney as a sign of his incompetence and to argue that the failure to raise the issue constituted ineffective assistance. Smith's brief at 39-40. Nothing in Mr. Sargent's interaction with Smith caused him to question Smith's competency (92:51). The circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court was persuaded by Mr. Sargent's testimony (94:8) (Pet-Ap. 128). The court found that Mr. Sargent was not ineffective for failing to raise the issue because the issue did not exist (94:6) (Pet-Ap. 126). The court of appeals did not address this conclusion. This court should conclude that Mr. Sargent did not provide ineffective assistance for failure to raise the issue of Smith's competency at the time of trial and sentencing.

V. The circuit court had no reason to doubt Smith's competency at trial or sentencing.

Finally, Smith challenges his competency under *Pate v. Robinson*, 383 U.S. 375 (1966). He asserts that the trial court had reason to doubt his competency and should have raised the issue. Smith's brief at 45. 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. *Pate*, 383 U.S. at 385.

At trial, the court conducted a few exchanges with Smith. It also heard from Smith at sentencing. The court did not have any other interaction with Smith. The court had no reason to doubt Smith's competency based on those interactions. Nothing in those exchanges struck the court as out of the ordinary. Those exchanges indicate that Smith understood 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 hole 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.

Even if the trial 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. *Byrge*, 237 Wis. 2d 197, ¶ 48 n.21. It is a judicial not clinical inquiry and the court is not required to establish a psychiatric classification of the defendant's condition. *Id.* ¶ 48. 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 concerns. The sentencing allocution, while rambling and unhelpful, did not 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.

CONCLUSION

Accordingly, the State respectfully requests that this court reverse the court of appeals' decision reversing the circuit court's order denying postconviction relief.

Dated this 17th day of August, 2015.

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 2,149 words.

Dated this 17th day of August, 2015.

Christine A. Remington
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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 17th day of August, 2015.

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