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**STATE OF WISCONSIN
COURT OF APPEALS**

DISTRICT III

Case No. 2019 AP 524-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD W. KESSLER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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On appeal from the Circuit Court
of St. Croix County, Hon. R. Michael Waterman,
Circuit Judge, presiding.

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ARGUMENT

**I. KESSLER WAS NOT COMPETENT TO
WAIVE COUNSEL OR REPRESENT HIMSELF
AT TRIAL DUE TO AUDITORY COMMAND
HALLUCINATIONS BROUGHT ON BY
UNMEDICATED SCHIZOPHRENIA.**

- 1. The circuit court applied the wrong legal standard when it denied Kessler's postconviction motion based on an "adequate" colloquy at the time of waiver despite new evidence to the contrary.**

The circuit court denied Kessler's postconviction motion on the grounds that its pretrial colloquy with Kessler was adequate under *Klessig*. Kessler, therefore, was not entitled to present additional evidence. (160:12-13 (A:19-20)).¹

The state agrees this was error: "A retrospective evidentiary hearing is also the appropriate remedy for any credible postconviction allegation that a defendant's waiver of counsel was not valid or he was not competent to represent himself." (State's Brief, p. 18). Thus, "the dispositive question in this case...is whether Kessler's previously undisclosed mental health condition, and his assertions that voices compelled him to represent himself and direct his choices at trial, rendered him incompetent to waive the right to counsel and to represent himself." (State's Brief, p. 14). See *State v. Klessig*, 211 Wis. 2d 194, 207, 564 N.W.2d 716 (1997); *Keller v. State*, 75 Wis. 2d 502, 511-512, 249 N.W.2d 773 (1977); *State v. Velez*, 224 Wis.2d 1, 13, 589 N.W.2d 9 (1999). As this issue is conceded, Kessler will not argue it further.

The State argues, nonetheless, that Kessler received the retrospective hearing he was entitled to. Prior to the court's ruling a postconviction hearing was held and Kessler presented evidence. After denying the motion based on an "adequate" colloquy, the court went on the state: "I would be remiss if I did not at least comment on the [postconviction] evidence. None of the March 6 evidence persuaded me that Mr. Kessler was incompetent to represent himself." (160:13 (A:20)). The State argues that even if the circuit court denied the motion for the wrong reason, Kessler received his remedy, which is a retrospective hearing. (State's Brief, pp. 22-27). The circuit

¹ All appendix references (A:) are to the appendix attached to Kessler's Brief-in-Chief.

court thus found, in the alternative, that Kessler's schizophrenia did not render him incompetent to represent himself. Kessler was not experiencing auditory hallucinations at the time of trial, "much less that they were overwhelming." (160:15 (A:22)).

Whether the court actually rendered a decision on retrospective competency and waiver of counsel is unclear. The court referred to its remarks as a "comment on the evidence." (160:13 (A:20)). The court did not make a finding on whether Kessler was competent to waive counsel. The court did not identify or apply a legal standard. Kessler, therefore, is still entitled to a hearing on the merits concerning his waiver of counsel and his competency to represent himself.

2. Alternatively, Kessler did not waive counsel nor was he competent to proceed pro se because his decisions were motivated by auditory "command" hallucinations caused by schizophrenia.

There is no dispute that if Kessler did, in fact, suffer from the auditory hallucinations he described, he would not be competent to waive counsel or represent himself. The court acknowledged Kessler was diagnosed with paranoid schizophrenia and was prescribed Risperdal in 2015. (160:13 (A:20)). It acknowledged auditory hallucinations were documented on September 15, 2017. (160:14 (A:21)). Further, based on Kessler's request for Risperdal on June 30, 2017, "Mr. Kessler may have had some form of symptomology around the time of trial, enough to ask for Risperdal...." (160:14-15 (A:21-22)). Nonetheless, "there was no evidence that those symptoms were auditory hallucinations, much less that they were overwhelming, as Mr. Kessler described." (160:15 (A:22)). The court did not specifically find Kessler's postconviction testimony lacked credibility. Rather, it found his testimony was not "more

credible” than the records he presented, “especially considering the fact that Mr. Kessler has a vested interest in the outcome of the proceedings.” *Id.*

The court’s findings thus rely on the records Kessler presented which allegedly contradict his testimony. According to the court, those records show Kessler was not suffering from auditory hallucinations at the time of trial based on three critical findings.

First, the court concluded Kessler was not suffering from auditory hallucinations when he was reincarcerated on April 17, 2017 because no symptoms “were identified” by jail staff when Kessler had his initial health screening. (160:14 (A:21)).

Second, Kessler had “last filled” his Risperdal prescription on June 19, 2015. (160:14 (A:21); 148:6). He therefore went 22 months without medication prior to his reincarceration on April 17, 2017. He cannot reasonably claim he developed hallucinatory symptoms after sitting in jail without medication for two months when he had already gone 22 months without detectible symptoms.

Third, there was “no evidence” of *any* schizophrenic symptoms until June 30, 2017, two weeks after the waiver hearing, when Kessler made a request for Risperdal. There was no specific mention of auditory hallucinations until September 15, 2017, three months after the waiver hearing. (146:2; 148:1; 160:14 (A:21)).

A determination on competency to represent oneself is reviewed for an erroneous exercise of discretion. *State v. Smith*, 2016 WI 23, ¶34, 367 Wis. 2d 483, 878 N.W.2d 135. The court’s finding “will be upheld unless totally unsupported by the facts apparent in the record.” *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980).

The court's conclusion is clearly erroneous because the inferences it draws are neither reasonable nor supported by the record.

First, the court's finding that Kessler had no symptoms on April 17, 2017 because none were "observed" must be rejected. Auditory hallucinations by nature cannot be "observed" by third parties. The only way jail staff would have known Kessler was having auditory hallucinations is if he reported them. The court, therefore, has no factual basis for drawing any conclusion as to whether or not Kessler had schizophrenic symptoms on April 17, 2017.

Second, the court assumes Kessler lacked symptoms on April 17, 2017 because he did not need Risperdal to control them, and not because he was using Risperdal to control them. The court supports this inference by drawing another inference, namely that Kessler had not taken Risperdal for 22 months prior to his reincarceration. The court, in turn, supports this inference with its finding that Kessler "last" filled his Risperdal prescription on June 19, 2015. This house of cards collapses because the inference Kessler "last filled" his prescription on June 19, 2015 has no basis in fact.

The court's inference is based on an email exchange between Kessler and the jail nurse regarding Kessler's request for Risperdal. In his initial request, Kessler wrote: "I need my meds 'rispredal' (sic) You can call the free clinic on the westside of saint paul.." (90:48). The nurse responded by asking: "Do you remember which one was the most recent place you filled it at?" Kessler answered: "I did fill it at Open Cities." (90:49). The nurse later responded she had received a fax from Open Cities and that Risperdal was not on Kessler's medication list. (90:51).

Kessler then asked the nurse to call “East side pharmacy on east 7th street[.]”. Eventually, Kessler got a message from the nurse that she was “able to verify *from eastside free clinic* that you picked up risperidone on 06/19/15.” (emphasis added) (90:52).

Nothing in this exchange shows Kessler “last filled” his prescription on June 19, 2015. The nurse merely confirmed Kessler “picked up” Risperdal on June 19, 2015 from the “*eastside free clinic*.” (emphasis added) (90:53). According to Kessler, “the most recent place” he filled his prescription was “Open Cities.”² (90:49). Records also show Kessler was prescribed Risperdal at the Westside Community Health Services on Cesar Chavez street in May of 2015. (90:33). Kessler thus had at least four possible sources for Risperdal: the eastside free clinic; Open Cities; the East Side Pharmacy on 7th Street; and the Westside Community Health Services on Cesar Chavez street.

In addition, Kessler would’ve almost certainly had access to Risperdal while in Minnesota custody. Kessler was in Minnesota custody for nearly five months after he was released from the St. Croix County Jail on April 22, 2016. (25:1; 28:1; 33:2; 147:3). After Minnesota released him on September 2, 2016, he lived with his mother, a nurse, until he was re-incarcerated in St. Croix County on April 17, 2017. (37:1). Between September 2, 2016 and April 17, 2017 Kessler could have obtained Risperdal from any number of sources. The assumption that Kessler had no access to Risperdal between his release on April 22, 2016 and his re-incarceration on April 17, 2017, or that the east side clinic was the only place he could have obtained it, is unsupported by any evidence in the record. Nothing

2 Open Cities did not have Risperdal on Kessler’s medication list, although, as the State concedes, it’s possible they were mistaken. (State’s Brief, p. 26). Open Cities’ records may have been incomplete as Kessler noted they had “just put” him on their “doc list.” (90:52).

contradicts Kessler's testimony that he was taking Risperdal at the time of his arrest on April 17, 2017. (159:12 (A:62)).

Third, the court mistakenly assumes Kessler *first* had auditory hallucinations in September of 2017. The court agreed Kessler asked for Risperdal on June 30, 2017, ten days after trial, which "suggests Mr. Kessler may have had some form of symptomology around the time of trial,...." (160:15 (A:22)). The court found this "symptomology" did not include auditory hallucinations, however, *because "the first time that auditory hallucinations were mentioned is September 15, 2017[,]"* nearly three months after trial. (160:14 (A:21)). The court is wrong. Westside Community Health Services noted "auditory hallucinations" on May 28, 2015, more than two years before trial. (90:33). Jail health records also note auditory hallucinations at a clinical visit on July 25, 2017 (Kessler had "ideas/beliefs the TV sends him messages from God.") (146:1; 90:55). In short, Kessler was being treated for auditory hallucinations since at least 2015, he requested Risperdal 10 days after trial, and some 30 days after trial, at his next scheduled health appointment on July 25, 2017, he expressly reported auditory hallucinations.

While there are no jail records documenting auditory hallucinations between April 17, 2017 and June 14, 2017, there is no dispute Kessler began experiencing auditory hallucinations at least two years earlier. Two months in jail without medication would have been more than enough time for these symptoms to re-appear. Kessler's schizophrenia did not just magically go in remission.

Kessler also made several inexplicable decisions at or near the time of trial which corroborate his auditory hallucinations.

First, his decision to represent himself five days before trial, after the case had been pending for nearly 21 months, took both the court and trial counsel by surprise. (156:3, 13 (A:27, 37)). Kessler's explanation, that he "just maybe" wanted "the opportunity" to represent himself, and that it would help the jury to get to know him "personally" (156:10, 13 (A:34, 37)), while plausible, is not particularly persuasive, especially when he agreed trial counsel "was a good lawyer" and would probably do a better job than he could. (156:15, 19-20 (A:39, 43-44)).

Second, Kessler appeared for trial in his orange jail jumpsuit. (157:6). His sole explanation was that he had "a right to" appear that way. (157:7). The State argues this was a calculated (albeit "unusual") strategy "to cast himself as a powerless victim of a wrongful prosecution...." (State's Brief, p. 25). Even if this were true, the State's theory and Kessler's testimony are not mutually exclusive. Kessler testified he was commanded to appear in his jumpsuit. The possibility he tried to make use of it does not contradict his testimony that he didn't have a choice in the first place.

Third, his decision to forgo all his preemptory strikes had no tactical rationale. This choice, as well as the others, were all choices Kessler was "commanded" to make. (159:13-14, 15-16 (A:63-64, 65-66)).

The court also relies on certain aspects of Kessler's performance at trial, including his *pro se* pre-trial motions and some of his cross-examination, as evidence he was competent to represent himself. The problem with the court's reasoning is that it assumes Kessler cannot be directed by auditory commands and act rationally at the same time. As Kessler noted in his testimony, the voices he hears do not inhibit his ability to analyze or apply rational thought in context. (159:17 (A:67)). Examples of rational behavior do not undermine Kessler's claim he was

commanded to waive counsel, proceed pro se, appear in his jumpsuit, and waive his preemptory strikes.

The court rejected Kessler's testimony because it was contrary to his mental health records. Those records, however, do not contradict Kessler's testimony. The court wrongly assumed Kessler was without symptoms on April 17, 2017; it wrongly assumed he didn't need Risperdal to control his symptoms; it wrongly assumed Kessler had not taken Risperdal since June of 2015; and it wrongly assumed Kessler first had auditory hallucinations three months after trial. The court's reasoning is erroneous because it relies on inferences which have no factual support in the record. The court's conclusions are therefore erroneous as well.

The State did not meet its burden of proving Kessler validly waived his right to counsel. Kessler cannot knowingly, intelligently, and voluntarily waive his right to counsel if his decision to do so is caused by schizophrenic delusions. It doesn't matter how articulate he may be, or whether he can draft pre-trial motions. Likewise, he is not competent to represent himself if his choice to do so and his trial tactics are dictated by delusions.

CONCLUSION

This Court should remand for a formal determination of Kessler's postconviction claim that he did not validly waive his right to counsel and was not competent to represent himself based on the postconviction evidence. Alternatively, if the circuit court did decide this question adversely to Kessler, the circuit court erred, and this Court should reverse the convictions and remand for a new trial.

Respectfully submitted this August 30, 2019.

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809.19(8)(b)&(c)**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line. This brief contains 2970 words.

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I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

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I certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on August 30, 2019. I further certify that the brief was correctly addressed and postage was prepaid.

Dated this August 30, 2019.

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