

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,

Plaintiff-Respondent,

v.

Appeal No. 2019AP592 - CR
Lower Court Case No.
2017CF000727

Lance L. Black,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HON. JANET C. PROTASIEWICZ, PRESIDING

Brief and Appendix of the Defendant-Appellant

Submitted by:

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STATEMENT OF ISSUES

I. Did the trial court prejudge Lance Black's competence and therefore fail to exercise its discretion in finding him competent to proceed at trial?

Following a hearing the trial court found Black competent to proceed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. The briefs are sufficient for the court to decide this case.

Publication is warranted to help further define what is required to find a defendant competent to proceed during their own trial.

STATEMENT OF THE FACTS AND CASE

On February 15, 2017, defendant-appellant Lance L. Black was charged with (1) possession of a firearm as a convicted felon and (2) possession of cannabis as a second offense. According to the criminal complaint, police officers had seen him on the morning of February 5, 2017, in a high-crime area in Milwaukee. Later, they observed him and two others enter a building known to them for drug trafficking under suspicious circumstances. They entered the building and saw Black on a stairway with a plastic bag of what they believed was cannabis. The officers ordered him to stop. He ran off and they gave chase. In a hallway, they found the discarded bag of cannabis. Following a fruitless chase, they

came back and found the coat they believed he was wearing. Inside the coat was a semi-automatic pistol. He was charged with possession of a firearm as a convicted felon contrary to Wis. Stat. § 941.29(1m)(a) and Possession of THC (2nd+ Offense) contrary to § 961.41(3g)(e), with a penalty enhancer for committing the offense while possessing a dangerous weapon contrary to § 939.63(1)(c). (1:1-19).

Mr. Black plead not guilty and the matter was set down for a jury trial. On June 12, 2017, the court began a jury trial. Before the jury panel was brought in for voir dire the court adjourned for the afternoon. (84:1-26). In the afternoon Black requested an adjournment and a new attorney. The court granted his request. (83:1-13).

A three-day jury trial was conducted between September 5 and 7, 2017. (88-94). Black chose to testify in his defense. The jury could not reach a verdict on either count and the court declared a mistrial. (94:17). Following the dismissal of the jury, the state requested a date for a new trial. During this discussion, Black's attorney moved to withdraw based on his safety concerns at a second trial. Then Black caused a disturbance, unhappy that there would be a re-trial. (94:21-23).

The second trial was conducted over the course of five days between October 9 and 13, 2017. Day one consisted of voir dire. (96:1-71). Day two began with preliminary instructions, opening statements and the State called its first

witness - police officer Allen Tenhaken, who had been involved in seeing Black with cannabis and later finding a gun in what he believed was Black's coat. (97:27-115). During the state's direct examination of officer Tenhaken, Black engaged in an outburst in front of the jury. He engaged in a rant about his attorney, the introduction of evidence by the state and the fact that a second trial was occurring and kicked a table. (97:115-16).

The trial court dismissed the jury to deal with Black. He was restrained and removed from the courtroom. Black's attorney moved for a mistrial. The court denied the motion and adjourned for lunch. (97:117-19). Following lunch, Black would not leave his jail cell. The court moved the trial to a different courtroom with a glass booth where Black could hear and see the trial. However, before the jury was brought back in he created a disturbance that could be heard in the courtroom. (98:1-22). The court had Black returned to his cell, brought the jury back in and instructed them not to consider the fact that Black was not present in assessing the evidence and reaching a verdict. The state continued on with the direct examination of its witnesses without Black being present in the courtroom. (98:23-).

The morning of the trial's third day, Black's counsel moved for a competency evaluation. (99:4-5). The court granted the request. It ordered a competency exam to be conducted that morning. (34). The trial continued without Black being

present. (99:8-). Later that morning the court held a competency hearing. (99:68-76; A.Ap. 2-10). Doctor of Psychiatry, Deborah L. Collins, was placed under oath and the hearing began. Both the state and defense stipulated to her credentials. (99:69; A.App. 3). She testified that she had met and evaluated Black at his jail cell. (Id.).

Dr. Collins testified that it was her “opinion to a reasonable degree of professional certainty that he lacks substantial capacity, mental capacity, to understand the proceedings or assist in his defense, with emphasis on being of assistance in his defense, and that he's not competent to proceed.” (99:70; A.Ap. 4). Counsel for Black, the state and the court asked her questions going to the basis for her opinion. (99:70-76; A.Ap. 4-10). Black’s counsel moved for a mistrial and medication. The court adjourned the hearing to the afternoon. (99:76; A.Ap. 10).

(Note: Dr. Collins did submit a written report of her examination in accord with her testimony but it was not filed until after the jury had reached its verdict. (62:1-3; A.Ap. 19-21).

Reconvening, the trial court stated it had examined *State v. Garfoot*, 2007 Wis. 2d 214 and its test for competency. Black’s attorney argued that he did not think he would be able to work with Black, especially as to his testifying as he did in the first trial. The state argued that Black had been competent throughout most of the first trial and the second until evidence

of identification was introduced. That he was able to control himself and understand the proceedings until he felt things were not going his way. Black's counsel responded that Dr. Collins' opinion was that Black could not control himself because of his personality disorder and that he believed Black could not assist with his own defense. (100:2-7; A.Ap. 11-18).

The trial court found Black competent based on its observations of him at his first trial and the beginning of the second. The trial court observed that: "In this trial, when the trial began, he was comporting himself very well. He had in front of him Wisconsin statute books. He had notepads. I think he had been reviewing the discovery. He could certainly make coherent statements about the discovery, what information he had, what information he thought he didn't have." (100:7; A.Ap. 16) Based on this and the court's other observations of Black, and his behaving and understanding the proceedings, it found him competent to proceed. (100:7-9; A.Ap. 16-18).

The trial continued without Black being present. He was found guilty on both counts by the jury. He appeared and addressed the court at his sentencing hearing via closed-circuit television. The court, citing a need for protection of the public and punishment gave Black a sentence of 10 years on count one (5 years incarceration and 5 years of extended supervision) and 4 years on count two (3 years of incarceration and 1 year of extended supervision) to be served consecutively. (104). Black timely filed a notice of motion for postconviction relief.

(63) A judgment of conviction was entered on December 4, 2017. (66:1-2; A.Ap. 22-23).

Given the standard of review for sufficiency of the evidence to support the verdict set forth in *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) and exercising discretion in sentencing set forth in *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, Black is not challenging those determinations. While he disagrees with them, challenging them given these standards of review would be a fruitless exercise.

I. ARGUMENT.

The trial court prejudged the competency of Lance Black and therefore did not exercise its discretion.

A. Standard of Review.

“The findings of a circuit court in a competency to stand trial determination will not be upset unless they are clearly erroneous because a competency hearing presents a unique category of inquiry in which the circuit court is in the best position to apply the law to the facts.” *State v. Byrge*, 2000 WI 101, ¶4, 237 Wis. 2d 197, 614 N.W.2d 477.

An exercise of discretion "contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *State v. Taylor*, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466.

When the defendant claims to be incompetent, the state bears the burden of proving by the greater weight of the credible evidence that the defendant is competent. *State v. Garfoot*, 207 Wis. 2d 214, 221-22, 558 N.W.2d 626 (1997).

B. Argument.

In this case, the trial court prejudged Black competent before holding a competency hearing and receiving evidence. It stated on the record that:

These jurors already were subjected to a four-hour delay yesterday. I certainly am not going to allow Mr. Black's outbursts and behavior to result in more extreme delays or result in a mistrial, for that matter.

(99:6; A.Ap. 1)

Being solicitous of a jury's time is commendable but not when it involves prejudging Black's due process and Wis. Stat. § 971.13(1) right to not be tried when he was incompetent. ("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." *Id.*).

Prejudging competency is not an exercise of discretion. One might find this statement was simply a matter of the court expressing frustration that the jury trial was not moving forward. It is more likely, however, an expression of the court's ultimate opinion that regardless of what competency evidence might be placed before it that the trial would continue.

This conclusion is buttressed by the fact the only evidence received at the competency hearing was that Black was not presently competent to continue with his trial. The testimony of Dr. Collins was unequivocal that Black was not competent to understand the proceedings and assist with his own defense. “It's my opinion to a reasonable degree of professional certainty that he lacks substantial capacity, mental capacity, to understand the proceedings or assist in his defense, with emphasis on being of assistance in his defense, and that he's not competent to proceed.” (99:70; A.Ap. 4). It was Dr. Collins’ further opinion that with medication, Black would be competent to proceed with his trial. (99:72; A.Ap. 6).

When the trial court asked if the state was planning on introducing any testimony contrary to Dr. Collins’ opinion that Black was incompetent, the state responded: “No.” (100:2; A.Ap. 11). Therefore, the only evidence going to Black’s competency was the testimony of Dr. Collins that he was incompetent.

Competency is a judicial rather than a medical determination. “[T]he court must ultimately determine whether evidence that the defendant is competent is more convincing than evidence that he or she is not. The trial court is in the best position to make decisions that require conflicting evidence to be weighed.” *State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). In this case, the court had no conflicting evidence to weigh.

The only evidence before the court was the opinion of Dr. Collins that Black was presently incompetent to stand trial. The state offered the opportunity to present evidence in opposition to Dr. Collins' testimony stated it had none to offer. The state did offer a number of reasons why it believed that Black was competent. It noted he had been found competent in a previous case. That Black was able to keep his composure throughout most of the first trial and part of the second. That he was able to converse with his counsel, make his own objections to evidence and that it was only when things were not going his way that he engaged in outbursts designed to disrupt the proceedings. (100:3-5; A.Ap. 12-14). This was, however, the opinion of the state, not evidence.

To be clear, the trial court did note that it had reviewed *State v. Garfoot* and its test for competency. It's stated its highest respect for Dr. Collins. But it believed that its long experience with Black outweighed her short period of examination. The trial court noted that Black had been able to control himself in the first trial until he realized he would not be free following the mistrial. That he had been assisting counsel and taking notes during the second trial. That he had discovery and was making objections about discovery and the state's evidence. But it was when things were going bad for him, that evidence against him was being introduced, that he engaged in outbursts to disrupt the proceedings. The trial court further noted that Dr. Collins had not found Black to be

psychotic. Based on the trial court's observations of Black at the two trials it found him competent. (100:7-9; A.Ap. 16-18). The remainder of the jury trial through the return of the jury's verdicts proceeded without Black being present. (100-103)

The trial court's statements of the law and facts would be a sufficient exercise of discretion but for one thing. It had prejudged Black's competency before hearing any evidence. The holding in *State v. Garfoot* is instructive:

The trial court's superior ability to observe the defendant and the other evidence presented requires deference to the trial court's decision that a defendant is or is not competent to stand trial. Only the trial court has the opportunity to view the defendant. Only the trial court can judge the credibility of witnesses who testify at the competency hearing. Thus, only the trial court can accurately determine whether the state presented evidence that was sufficiently convincing to meet its burden of proving that the defendant is competent to stand trial.

207 Wis. 2d 214, 223, 558 N.W.2d 626 (1997).

In this case, the state offered no evidence of competence. All it offered was an opinion. The state challenged none of Dr. Collins' testimony that at that time Black was incompetent to proceed.

The test for competency goes to Black's "present" state of mind at the time it was brought into issue. As the *Garfoot* court held, the test is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of

rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Garfoot*, 207 Wis. 2d 214 at 222, quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). The only evidence of Black’s present state of mind was Dr. Collins’ testimony that at that time he was incompetent.

Black and his counsel have the highest respect for the trial court. It took an interest in ensuring a proper competency examination and hearing was conducted. Nevertheless, Black submits the trial court’s frustration in not moving this second trial forward clouded its judgment and caused it to prejudge his competency. In rejecting the only evidence it had before it the trial court failed to exercise its discretion.

CONCLUSION

For the foregoing reasons, defendant-appellant Lance L. Black respectfully requests that this Court reverse the judgment of conviction and remand the case for further proceedings.

Dated: August 5, 2019

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced using proportional serif font. The length of this brief is 2559 words.

Dated: August 5, 2019.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

Dated: August 5, 2019

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BRIEF AND APPENDIX E-FILING CERTIFICATION

Pursuant to Wis. Stat. §809.19(12)(f) and §809.19(13)(f), I hereby certify that the text and content of the electronic copies of this brief and the separate appendix are identical to the text of the paper copies.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 5, 2019, I caused ten copies of the Combined Brief and Appendix of Defendant-Appellant Lance L. Black to be delivered to the U.S. post office for delivery to the Clerk of the Court of Appeals within three days.

I also hereby certify that on August 5, 2019, I caused three copies of the Combined Brief and Appendix of Defendant-Appellant Lance L. Black to be served via U.S. Mail, postage prepaid, on

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Appendix of the
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Lance L. Black

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