STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP00275-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant.

Appeal from the Judgment of Conviction Entered in the
Circuit Court for Grant County,
the Honorable Craig R. Day Presiding
Circuit Court Case No: 18CF12

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Mr. White appeals his conviction of one count of assault by prisoner – throw/expel saliva, on the basis that the court did not afford him the full due process protections against being tried while incompetent established in Wisconsin's competency statutes. Specifically, by finding Mr. White competent to stand trial despite there being no admissible expert opinion as to his competency as required by Wis. Stat. § 971.14(3), the circuit court deprived Mr. White of both statutory and constitutional protections.

The State argues Mr. White has forfeited this objection to his competency determination because he "fail[ed] to make a specific, contemporaneous objection" and because he engaged in conduct inconsistent with the assertion of that right. (State Br. at 6.) The State also argues that there need not be any standard of admissibility for expert reports on competency and that any error to Mr. White was harmless. (State Br. at 25.) These arguments ignore the fundamentally important role of competency in criminal proceedings.

The constitution, and Wisconsin statutes, are violated when an incompetent defendant is tried and convicted. The requirement that a defendant be competent to stand trial may not be waived by the defendant or defense counsel; likewise, a defendant cannot forfeit the right by a failure to object or by conduct – conduct which very well may be a symptom or product of incompetence. Rather, it is incumbent on the trial court to ensure that statutory protections established to guarantee constitutional the due process right to a fundamentally fair trial are enforced in competency proceedings. Because the circuit court failed to do so here, its finding that Mr. White was competent was in error and the case should be remanded for further competency proceedings.

ARGUMENT

I. Mr. White did not forfeit his right to challenge the circuit court's determination that he was competent

A. Application of the rule of forfeiture is inappropriate in the context of competency

"Defendants who are tried and convicted while legally incompetent are deprived of a due process right to a fair trial." *State v. Byrge*, 2000 WI 101, ¶ 27, 237 Wis. 2d 197, 614 N.W.2d 477; *see also Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373 (1996). The trial of an incompetent defendant violates not just the United States and Wisconsin constitutions, but also Wisconsin state law. *Id*. at ¶ 28; Wis. Stat. § 971.13(1) ("No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.")

Some rights are so important to a fair trial that they "are not lost by a counsel's or litigant's mere failure to register an objection at trial." *State v. Ndina*, 2009 WI 21, ¶ 31, 315 Wis. 2d 653, 761 N.W.2d 612. "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable." *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). If these fundamental rights are to be relinquished, "it must be done by waiver, the intentional relinquishment of a known right." *State v. Soto*, 2012 WI 93, ¶ 40, 343 Wis. 2d 43, 817 N.W.2d 848 (criminal defendant's right to be present for a plea and sentencing hearing may be waived, but it cannot be forfeited). To decide whether forfeiture or waiver is appropriate, courts "look to the constitutional or statutory importance of the right, balanced

against the procedural efficiency in requiring immediate final determination of the right." *Id.* at ¶ 38. Rights that have been determined to be so fundamental that waiver, rather than forfeiture, are required include the right to assistance of counsel, the right to trial by jury, and the right of a defendant to be in the same courtroom as the presiding judge. *State v. Pinno*, 2014 WI 74, ¶ 57, 356 Wis.2d 106, 850 N.W.2d 207.

By contrast, the constitutional protection against being tried and convicted while incompetent is so fundamentally important to a fair trial that it cannot be lost, even by waiver. Ensuring a defendant is competent to stand trial is "a cornerstone of our criminal justice system," *State v. Byrge*, 2000 WI 101, ¶ 26, 237 Wis. 2d 197, 614 N.W.2d 477, and "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896 (1975) "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836 (1966); *see also State v. Johnson*, 133 Wis.2d 207, 220, 223, 395 N.W.2d 176 (1986) (defense counsel may not strategically decline to raise competency; where counsel has reason to doubt competency and fails to raise it, defendant is deprived of a fair trial). The competency procedures are a failsafe established out of the longstanding recognition that "only where a defendant is mentally competent will he be able to exercise effectively the rights which this society extends to persons charged with committing a crime." *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 322, 204 N.W.2d 13 (1973).

Wisconsin's competency statutes further demonstrate the importance of the competency determination to a fair trial. First, competency is so important that even if not raised by defendant or defense counsel, the court itself must act if

competency is in doubt. Wis. Stat. § 971.14(1r)(a). Second, while the statutes contemplate the ability of a defendant to waive a contested hearing on competency, *see* Wis. Stat. § 971.14(4)(b), there is no similar ability to waive a competency examination. *See* § Wis. Stat. § 971.14(2). Rather, the law goes so far as to allow for inpatient examination for up to 15 days, even if involuntary, and even if the defendant is released on bail if the defendant fails to cooperate in the examination or the examiner deems an inpatient evaluation necessary. Wis. Stat. § 971.14(2)(a)-(c).

Competency proceedings are an area of law where "a statutory mandate serves as a requirement on the courts themselves. The courts are obligated to obey those mandates, *sua sponte*, regardless of the parties positions." *Pinno*, 2014 WI 74 at ¶ 140 (Abrahamson, C.J. dissenting) ("[t]he responsibility to keep court proceedings open lies with each court" rather than with the parties to litigation); *see also State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis.2d 442, 647 N.W.2d 1189 (courts are required to address harmless error rule even if parties do not). Section 971.14 issues mandates to the circuit court that "shall" be followed "whenever there is reason to doubt a defendant's competency to proceed." Wis. Stat. § 971.14(1r)(a).

The circuit court had reason to doubt Mr. White's competency and appropriately began competency proceedings under Section 971.14. But the court then failed to follow the statutory mandates when it did not afford Mr. White an expert evaluation that could produce an admissible opinion on competency. Wisconsin's competence statute is set up to satisfy the requirements of due process. Given the circuit court's failure to afford Mr. White all the statutory protections necessary to protect his due process right to not be tried while incompetent, it would be fundamentally unfair to now bar him

challenging the court's ruling because he did not make a timely and specific objection. *See Pate*, 383 U.S. at 384; *Matalik*, 57 Wis. 2d at 322.

B. Even if forfeiture is applicable here, the court should address Mr. White's challenge

Even if this court deems Mr. White forfeited his objection to the court deciding competency without an admissible expert opinion on the issue, this court should allow Mr. White's claim to proceed on appeal. Forfeiture is a rule of judicial administration and does not prohibit this court from reaching the merits. *See Ndina*, 2009 WI 21, ¶ 38; *State v. Dyess*, 124 Wis.2d 525, 535-36, 370 N.W.2d 222 (1985) (appellate court may consider issues if in the interest of good judicial administration to do so.) The purposes of the forfeiture rule are: (1) to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal, (2) to give both parties and the circuit court notice of the issue and a fair opportunity to address the objection, (3) to encourage attorneys to diligently prepare for and conduct trials, and (4) to prevent attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. *Ndina*, 2009 WI 21, ¶ 30.

Here, "[t]he values protected by the forfeiture and waiver rules would not be protected in the instant case by applying a forfeiture or waiver rule." *Id.* at ¶ 38. Because Mr. White was unrepresented by counsel, the purposes of encouraging attorneys to prepare and to prevent attorneys from claiming error after having not objected for strategic reasons are inapplicable here. The other purposes are also not protected in this case because the issue of whether and how to proceed without an admissible expert opinion on competency was

raised and discussed between the State and the circuit court. (37:4-5; App. 107-08.) During this exchange, the court did not ask Mr. White whether he had any argument about the issue. (*Id.*) Mr. White did raise an objection prior to his trial, arguing the court's determination was improper because the court was not a doctor and had made the competency determination without relying on an expert opinion from a doctor. (40:3-4, 6-7; App.117-18, 120-21.) Given that the State and circuit court addressed the issue below, the State has a full and fair opportunity to respond.

II. Mr. White did not forfeit his right to receive an admissible expert opinion through his conduct

The State argues Mr. White forfeited his right to an expert examination and opinion on his competency because his conduct was "incompatible with the assertion of that right." (State Resp. at 21.) Notably, none of the cases the State cites in support dealt with issue of competency. [1] *See State v. Anthony*, 2015 WI 20, ¶ 10, 361 Wis. 2d 116, 860 N.W.2d 10 (defendant forfeited right to testify "by displaying stubborn and defiant conduct that presented a serious threat to both the fairness and reliability of the criminal trial process and the preservation of dignity, order, and decorum in the courtroom"); *State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543 (by refusing to come to court, defendant forfeited right to a colloquy to explain his right to testify and a determination that his waiver was knowing intelligent and voluntary); *State v. Cummings*, 199 Wis. 2d 721, 752-56, 546 N.W.2d 406 (1996) (defendant forfeited right to counsel

[1] In *Vaughn*, the defendant's competency was raised several times prior to trial resulting in multiple inpatient competency evaluations, all of which found him to be competent. 2012 WI App 129, ¶¶ 2-5. Vaughn did not challenge the competency findings on appeal. *Id.* at ¶ 24.

through his repeated refusal to cooperate with multiple court-appointed attorneys).

Here, the State argues that Mr. White's behavior was contrary to his right to have an effective expert evaluation of his competency, yet it provides no legal authority for the application of this forfeiture through conduct rule to competency proceedings. This is for the perhaps obvious reason that a determination on competency is needed precisely because defendant's behavior may *only* be deemed a forfeiture of a constitutional right if the defendant is in fact competent. In fact, Section 971.14(2) anticipates the potential that a defendant's behavior makes a competency evaluation difficult by providing for inpatient examination – even on an involuntary basis – if the court or expert evaluator deems it necessary. Wis. Stat. § 971.14(2)(a)-(c).

A defendant must be competent to make decisions about his constitutional rights during criminal proceedings or the proceedings must stop. *Matalik*, 57 Wis. 2d at 322 ("the procedure spelled out by section 971.14, on the determination of incompetency to proceed, is a critically important failsafe device for the benefit of accused persons who may not be able to fully cooperate and assist in their defense"). On the other hand, "[d]efendants who have been found to be competent may do things during the course of their prosecution and trial that others might deem self-defeating, foolish, or even foolhardy." *Vaughn*, 2012 WI App 129, ¶ 22.

Some of the conduct the State cites to argue Mr. White forfeited his right to the full competency proceedings is the very same conduct that the caused the court to have reasonable doubt about Mr. White's competency to proceed. To now use Mr. White's behavior – *prior to a determination of competency*

– as a basis to deprive him of the full due process protections of the competency proceedings is fundamentally unfair.

III. The circuit court failed to follow statutorily mandated competency procedures in violation of Mr. White's due process rights

A. The circuit court should have ordered an inpatient evaluation of Mr. White before proceeding with the competency determination

Contrary to its position before the circuit court, (*see* 37:4-5; App. 107-08), the State now argues that Mr. White did receive an admissible expert opinion on his competency, even though Dr. Engen was unable to form an opinion to a reasonable degree of professional certainty. (State Br. at 27-28.) The state argues for a reading of the plain language of Wis. Stat. § 971.14(3) that would lead to an absurd and unreasonable result – namely, that an expert could fail to gather enough information to form an opinion to degree of certainly that meets the standards within their profession, but still offer that opinion to the court as evidence impacting the determination of competency. This court should reject this literal reading of the statute that "would lead to an absurd or unreasonable result that does not reflect the legislature's intent." *State v. Jennings*, 2003 WI 10, ¶ 11, 259 Wis. 2d 523, 657 N.W.2d 393 (quotes omitted). Such an interpretation would fail to protect the fundamental right of a defendant to not be tried while incompetent – the purpose of the statute. *Matalik*, 57 Wis. 2d at 324 ("The purpose of section 971.14 is to maximize rather than minimize the rights afforded criminally accused persons."); *State v. Wanta*, 244 Wis. 2d 679, 695, 592 N.W.2d 645 (1999) ("The statute is narrowly tailored to achieve the State's interest in prosecuting competent criminal defendants

and in restoring the competency of those who are incompetent as soon as practicable, while being sufficiently protective of…an incompetent defendant's fundamental right not to be tried while incompetent.").

The State argues there is no specific legal requirement that an expert's opinion to be made to a reasonable degree of professional certainty to be considered. However, the circuit court was clear in finding that the opinion was not admissible and was not relied upon in its finding of competency. (37:4-5; App. 107-08; 39:18; App.110.) The State did not challenge this finding before the circuit court. (37:4-5; App. 107-08.) Thus, Mr. White did not receive the expert opinion regarding competency to which he was statutorily entitled.

The statutory requirements for a competency examination and expert report are rendered meaningless if, as here – *after* finding reason to doubt competency under Wis. Stat. § 971.14(1r)(a) – a court can simply proceed without the benefit of an admissible expert report and opinion, or can rely on the opinions of an expert that do not satisfy the professional standards within their field. The court's failure to follow these statutory procedures violated Mr. White's constitutional due process rights and therefore renders his conviction unconstitutional.

B. The circuit court's error was not harmless

The importance of the competency evaluation cannot be understated. *See State v. Garfoot*, 207 Wis. 2d 214, 227, 558 N.W.2d 626 ("determination of competence is an individualized, fact-specific decision. It is for this reason that expert testimony regarding a particular defendant's mental capabilities is necessary.") Mr. White's conviction should be reversed because the statutory procedures guaranteeing him an expert evaluation and opinion were not followed. *U.S. ex rel.*

Robinson v. Pate, 345 F.2d 691, 695 (7th Cir. 1965) ("to deny the established procedure to a particular accused…is a denial of due process"); *Pate*, 383 U.S. 375 at 385-86 (failure of state courts to invoke statutory procedures deprived defendant of the inquiry into the issue of his competence to stand trial to which he was constitutionally entitled). An erroneous finding of competency cannot be harmless error because it means that an incompetent defendant was subjected to trial and conviction.

The State's argument that there is no reasonable possibility that another competency examination would have a different result misinterprets Dr. Engen's report, which could not rule out his incompetence to a reasonable degree of professional certainty, in part because "malingering can co-exist with incompetency." (12:5.)

Further, as argued in Mr. White's initial brief, the competency finding allowed the trial to proceed with Mr. White waiving or forfeiting other fundamental constitutional rights – the right to counsel, the right to be present at trial, and the right to testify. (App. Br. at 32.) The State cannot prove there is no reasonable possibility that the relinquishment of these fundamental rights was not impacted by the erroneous competency finding.

The State fails to meet its burden to show that this error was harmless.

CONCLUSION

For the foregoing reasons, and those stated in his brief-in-chief, Mr. White respectfully requests this Court reverse and remand with directions to the circuit court to determine whether a retrospective determination of competency is possible. *State v. Smith*, 2016 WI 23, ¶ 44, 367 Wis. 2d 483, 878 N.W.2d 135. If a meaningful retrospective competency

hearing can be held, the circuit court must hold the hearing. *Id.* If, at the hearing, it is determined that Mr. White was not competent when he was tried, the circuit court must vacate the judgment of conviction and order a new trial. *Id.*

Dated this 29th day of April, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 2997 words.

Dated this 29th day of April, 2022.

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