State of Wisconsin

Court of Appeals District I

Case No. 2022AP187 CR and 2022AP188 CR

State of Wisconsin,

Plaintiff-Respondent,
v.

Michele M. Ford,

Milwaukee County Cases
21CM1807 and 21CM3452

Defendant-Appellant.

On Appeal from Incompetency Finding,
Entered in the Milwaukee County Circuit Court,
Hon. Jack Davila, Presiding

Brief and Appendix of Defendant-Appellant

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Issue Presented

An attorney representing a client in competency proceedings revealed her observations of the client's potential incompetency to the evaluator, even though the client wished to be found competent. Was this ineffective assistance of counsel?

Statement on Oral Argument and Publication

Publication is probably not warranted because this case mostly involves the application of facts to settled law. It may, however, be warranted to help clarify how to raise ineffective assistance of counsel in appeals of competency proceedings.

Oral argument is not requested but would be welcomed if ordered.

Statement of the Case

Michele Ford graduated from the University of Wisconsin with a law degree and worked as an attorney until 2015. (R. 16:3, App. 123).[1] A criminal complaint filed against her on June 29, 2021 alleges that, more than one month earlier, Ms. Ford yelled profanities at her neighbor, threw a potted plant at him, and waved a knife from a distance of about 30 feet. (R. 2, App. 100). Police said that Ms. Ford refused to speak to them and continued to hold her knife while they broke down her door and Tazed her. (Id.)

Ms. Ford missed her initial appearance on July 27 but appeared in court on August 4, 2021 and pled not guilty. (R. 50:1). On August 26, 2021, she appeared for a pre-trial conference and the district attorney raised competency, adding that at the last court hearing Ms. Ford brought a dog to court, said someone had been stealing her mail, pled "no-contest" to proposed bail conditions, and "it's our position that the defendant needs assistance of counsel." (R. 88:3, App. 106).

Ms. Ford said she was "absolutely competent," had "significant courtroom experience," and that there was no reason to question her competence, wondering out loud what the State's motive could be for raising the issue. (R. 88:3, App. 106). The court agreed that there was probable cause "in the complaint" to raise competency and scheduled Ms. Ford a competency evaluation. (R. 88:3-4, App. 106-107).

Ms. Ford missed her next court appearance on October 8, 2021 and was arrested and jailed later that day. The next day, October 9, she was jailed and charged with bail jumping. (R. 2, App. 104).[2] On October 15, Ms. Ford was seen by a competency evaluator, Dr. Pankeiwicz. (R. 16:2, App. 122). In his October 21 report, Dr. Pankiewicz stated that he could not tell whether Ms. Ford was competent or not and recommended that Ms. Ford undergo a second,

[1] These are consolidated cases. References are to the lower-numbered case, 2021CM1807, unless otherwise indicated.

[2] Reference is to the 2021CM3452 case.

inpatient assessment (R. 16:4, App. 124). The court ordered as much at an October 25 status conference. (R. 89:5-6).

Ms. Ford was admitted to the Mendota Mental Health Institute on November 1, 2021. She was examined by Dr. Kristin Johnson on November 2, 2021 for around an hour. (R. 21:1, App. 125). The next day, Dr. Johnson spoke with Ms. Ford's attorney. (R. 21:2, App. 126).

In Dr. Johnson's words,

"Attorney Styler indicated Ms. Ford appears to have procedural understanding, but she was concerned that the approach Ms. Ford wanted to take with her case was not always based on sound logic or appropriate legal strategy. Attorney Styler indicated Ms. Ford did not want to embrace all of her legal charges as she believed her "stalker" was to blame. Attorney Styler also noted concern regarding Ms. Ford's mental health and well-being as she had observed some unusual behaviors, including Ms. Ford reading a book in court, interrupting her attorneys, giving them unusual legal advice outside of her area of previous practice, and using legal jargon incorrectly." (R. 21:7, App. 131).

Dr. Johnson, in a report dated November 5, 2021, said that Ms. Ford was not competent. (R. 21:9, App. 133). Ms. Ford contested the finding. The court found Ms. Ford incompetent. (R. 87:19-22, App. 118-121). Ms. Ford now appeals the finding of incompetency.

Argument

I. Ms. Ford's trial counsel performed deficiently when she described her observations about Ms. Ford's competency to the evaluator.

A person who "lacks substantial mental capacity" to understand legal proceedings or assist in her defense is legally incompetent. Wis. Stat. § 971.13. The assistant district attorney raised the issue of Ms. Ford's competency. Ms. Ford insisted that she was competent. (R. 88:3, App. 106) It is clear from trial counsel's conversation with Dr. Johnson

that trial counsel personally doubted Ms. Ford's competency. (R. 21:7, App. 131).

If the State had not raised competency, trial counsel would have been obligated to raise it even against Ms. Ford's wishes. This duty to the court is a mandatory but "narrow and limited breach" of counsel's duty of client confidentiality[3] that serves the purpose of preventing incompetent people from being found guilty of crimes. *State v. Meeks*, 2003 WI 104,¶44-48, 263 Wis. 2d 794, 666 N.W.2d 859.

In situations like this one, in which counsel and client disagree about competency, counsel should break confidentiality only to raise the issue with the court. Allowing defense attorneys to do more than that would unacceptably undermine the lawyer-client relationship. *State v. Daniel,* 2015 WI 44, ¶38, 362 Wis. 2d 74, 862 N.W.2d 867 ("Were we to place the burden of proving incompetency on defense counsel when defendant asserts competency it would create a conflict between an attorney's duty as an advocate and an attorney's duty as an officer of the court.")

Since Ms. Ford wanted to be found competent, her trial counsel should not have shared counsel's own doubts about Ms. Ford's competence with the evaluator. Trial counsel's opinions, perceptions, and impressions about Ms. Ford's mental capacity were confidential under Supreme Court Rule 20:1:6. She should not have shared them without Ms. Ford's permission and in service of Ms. Ford's goals.

To summarize: breaking confidentiality to work against Ms. Ford's goal of being found competent violated professional norms and left Ms. Ford without adversary counsel for the evaluation portion of the competency proceedings. Counsel therefore performed deficiently under *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

II. Ms. Ford need not show that counsel's deficient performance prejudiced her defense because absence of counsel at a critical

[3] Supreme Court Rule 20:1.6 codifies the duty of confidentiality.

stage of the competency hearings made them fundamentally unfair.

The United States Supreme Court recently stated prejudice is a requirement "in most cases" alleging ineffective assistance of counsel under *Strickland*, but not necessarily all. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910, 1911 (2017).

Weaver, whose counsel failed to object to the denial of a public trial, argued that "fundamental unfairness" is an alternative way to satisfy the *Strickland* prejudice prong. *Id*. at 1911. The majority ruled against Weaver because he did not persuade them that the deficient performance in his case—failure to object to a structural error—resulted in fundamental unfairness. *Id.* at 1913. However, Weaver's argument—that a showing of fundamental unfairness resulting from attorney error obviates the need for a defendant to show prejudice under *Strickland*—is very much in play.

It is Ms. Ford's position that the breach of confidentiality by her trial counsel left her without counsel during a critical stage of the competency proceedings and rendered those proceedings fundamentally unfair.

Denial of counsel during a critical stage of judicial proceedings results in a presumption of unfairness. *United States v. Cronic*, 466 U.S. 648, 659 (1984). Competency is a judicial determination. *State ex Rel. Haskins v. Dodge County Court*, 62 Wis. 2d 250, 264, 214 N.W.2d 575 (1974). The evaluation Ms. Ford underwent is a mandatory part of the competency proceedings under Wis. Stat. § 971.14(2)(a). The resulting report needed to meet specific requirements under § 971.14(3). The evaluation was a critical part of the proceedings because it was the center around which the rest of the proceedings orbited. While courts are not supposed to rubber stamp evaluators' opinions (see *Haskins* at 264), they are supposed to examine those opinions carefully; whether to accept or reject a particular evaluator's opinions is the main determination in a contested competency hearing.

There is another sense in which these competency proceedings were fundamentally unfair to Ms. Ford. *Weaver* noted that the situation in which a criminal defendant is denied the right to defend him or herself at trial is structural error, even though it nearly always increases the probability of a bad outcome for the defendant. *Id.* at 1909. In the words of the *Weaver* majority, "that right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.*

By contesting the incompetency finding, Ms. Ford was making her choice about the proper way to protect her liberty, and she was entitled to that choice even though her counsel privately disagreed. For one thing, the incompetency finding affected her immediate liberty—following the finding on November 12, she ended up waiting until December 21, 2021 for a placement at a facility for remediation. (R. 36, App. 139). Furthermore, there remains a possibility that the judge could use the competency evaluation, with its negative observations about Ms. Ford's functioning, made by her own attorney, as a basis to find Ms. Ford dangerously unpredictable at a future sentencing hearing. *State v. Slagoski*, 2001 WI App. 112, ¶9, 244 Wis. 2d 49, 629 N.W. 2d 50. Finally, as a lawyer, the incompetency finding as recorded on CCAP could negatively affect Ms. Ford's prospects as a lawyer should she wish to practice again.

In short, trial counsel was not just absent from the competency proceedings during the evaluation stage. Ms. Ford was, at that critical stage, denied the right to decide what outcome to pursue. This made the entire competency proceedings fundamentally unfair and entitles her to reversal of the competency finding.

III. Although Ms. Ford should not be required to prove prejudice, she can nevertheless show that she was prejudiced by her trial counsel's actions.

Dr. Johnson's written conclusion twice cited specific statements by trial counsel, writing:

"This writer's experience along with the discussion with Ms. Ford's attorney raises significant concerning regarding her present ability to rationally consult with her attorney."

Later, "Ms. Ford was not a criminal attorney, yet she has offered legal advice to her attorneys that is not based on sound logic and has been resistant to exploring other options. While poor legal strategy does not necessarily equate incompetence, Ms. Ford's mental state appears to be contributing to her difficulty effectively navigating the criminal justice system." (R. 21:10, App. 134).

Trial counsel's inside perspective on what it was like to represent Ms. Ford lent critical support to Dr. Johnson's finding of incompetency. *State ex rel Haskins v. Dodge County Court* noted that evaluators are often too conservative in their competency recommendations. *Id.* at 264. Evaluators concluding incompetency seem more reliable when they can name as many concrete and specific reasons to doubt competency as possible. Trial counsel's doubts provided Dr. Johnson with an independent concrete basis for Dr. Johnson's conclusion. Without trial counsel's insight, Dr. Johnson may well have concluded that Ms. Ford's protestations of her own competency, the fact that her own lawyer had not been the one to raise the issue, the fact that Ms. Ford was a trained lawyer herself, and the fact that the original evaluator could not reach a conclusion supported a recommendation of competency. There is therefore a reasonable probability of a different outcome but for counsel's deficient performance.

IV. There is no need for a *Machner* hearing in this case because there is no legal strategy that relieves trial counsel of the duty of confidentiality.

Most *Strickland* claims in Wisconsin require testimony from trial counsel as to her strategy and decision-making. *State v. Machner,* 92 Wis. 2d 979, 804, 285 N.W.2d 905. This is so the court can determine "whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *Id.* Testimony from trial counsel cannot reasonably be required under *Machner* and would add nothing to the

analysis of this case because there is no strategy that can unilaterally relieve counsel of the duty of confidentiality or the duty to pursue the client's goals.

Again, Ms. Ford said she was competent. But Ms. Ford's attorney helped to find her incompetent by providing the evaluator with confidential information about Ms. Ford. Simply put, trial counsel was wrong to talk to the evaluator about her doubts about Ms. Ford's competency. How or why she decided to do so is irrelevant.

Finally, note that this is a civil appeal of an incompetency finding in an underlying criminal proceeding. *State v. Scott*, 2018 WI 74, ¶33, 382 Wis. 2d 476, 914 N.W.2d 141. It is an appeal as of right under Wis. Stat. § 808.03(1). *Id*. at ¶34. There is no provision, as in Rule 809.30 and Rule 809.107 appeals, for postconviction proceedings before a Notice of Appeal must be filed.

For the reasons stated above, Ms. Ford does not believe remand for a fact-finding hearing is necessary. She would, however, welcome it if this court deems it necessary.

Conclusion

For all these reasons, Ms. Ford requests that this court reverse the finding of incompetency against Ms. Ford of November 11, 2021, or, in the alternative, remand to the circuit court for a *Machner* hearing.

Dated this 31st day of October, 2022.

Respectfully submitted,

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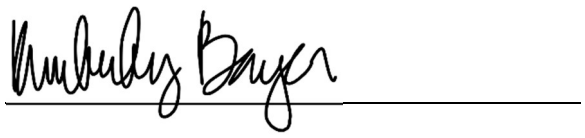
CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,125 words.

Dated this 31st day of October, 2022.

Signed:



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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 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.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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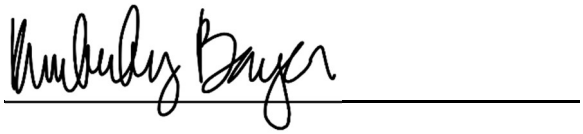

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