STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case Nos. 2022AP000187-CR & 2022AP000188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHELE M. FORD,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State re-frames the issues presented, as two may dispose of the appeal before reaching the merits.

1. Was this Court's jurisdiction properly invoked by timely notices of appeal?

This Court should answer: No. Ford did not file notices of appeal within the 45 day deadline. The 45 day deadline for filing a notice of appeal began with the circuit court's filing of a written order determining incompetency on November 12, 2021, but the notice of appeal was not filed until February 7, 2022, well over 45 days later.

2. Are these appeals moot?

This Court should answer: Yes. Ford has been restored to competency, and the cases are administratively closed.

3. Has the issue of ineffective assistance of counsel been preserved for review?

The circuit court was not presented this question.

This Court should answer: No. The issue of ineffective assistance of counsel was not raised before the circuit court and cannot be raised here for the first time.

If the Court disagrees, then this Court should remand to the circuit court for fact finding on Ford's claim of ineffective assistance.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On June 29, 2021, the State filed a criminal complaint charging Ford with one count of Disorderly Conduct, Use of a Dangerous Weapon for an incident where she pulled out a knife and threatened a neighbor. (R2:1)[1]. A summons was mailed, but Ford failed to appear for her initial appearance on July 27, 2021. (R3). Ford was returned on an arrest warrant on August 4, 2021 and Ford made her initial appearance. (R50:1; R3). At this hearing, bail was set, which included a standard term that "Defendant shall appear on all court dates." (R9:1).

Ford appeared for the next court date, on August 26, 2021, and the State raised the issue of Ford's competence to stand trial. (R88:2). The circuit court ordered that Ford be evaluated to determine her competence to stand trial. (R11; R88:3). The circuit court set a return date on October 8, 2021. (R50:2). In a letter dated October 5, 2021, the Wisconsin Forensic Unit informed the circuit court that Ford arrived 35 minutes late for her first appointment, such that it had to be re-scheduled, and then failed to appear for her second appointment. (R:12).

Ford failed to appear in court on October 8, 2021 and a bench warrant was issued. (R50:2; R13). Because of the violation of her bond, the State filed a new complaint charging Ford with one count of misdemeanor bail jumping. (88R2). Ford appeared on this new case on October 10, 2021, and competency was raised in this case as well. (88R38:1). An evaluation was ordered, with a return date of October 25, 2021. (88R38:1). Ford was returned on the bench warrant issued in

[1] This brief cites almost exclusively to 22AP187, so these appear as "R__". To the extent that the record in 22AP188 is cited, these will appear as "88R__".

case number 2021CM001807 on October 15, 2021, and this case was set over to October 25, 2021 for status. (R58:2-6).

In a letter dated October 21, 2021, Dr. Pankiewicz of the Wisconsin Forensic Unit informed the circuit court that he was unable to make a determination as to Ford's competency and recommended she be remanded into custody for an in-patient assessment. (R16:2-4). On October 25, 2021, the circuit court "ordered [Ford] remanded and sent to Mendota FORTHWITH for a competency evaluation." (R51:3).

On November 5, 2021, Dr. Kristin Johnson of Mendota Mental Health Institute filed a report in which she opined that Ford "**lacks substantial mental capacity** to understand the proceedings and assist in her own defense", but was "**likely to be restored to competency** within the statutory period." (R21:1-9)(emphasis in original).

At the hearing held on November 11, 2021, Ford's attorneys confirmed that they had the report and had reviewed it with Ford. (R87:2-3). The State did not object to the report, but Ford indicated she was competent. (R87:3). Ford's attorneys asked "to waive oral testimony, meaning that the doctor doesn't have to testify, and we'd be prepared today to just argue based on the report, and have the Court make a finding as to whether or not she's competent or incompetent." (R87:8).

The State pointed out that, "What [] Ford risks is if the Court does make a judicial finding that she is not competent based upon this report and argument she will go forth to Mendota. And I'm sure [Ford's attorneys] have explained that to her." (R87:8-9). To which Ford's attorneys responded, "She's aware. […] So, what she's asking for is that a decision be made with argument based on the report itself. Obviously, this is what the doctor will testify to." (R87:9). The parties then made their arguments as to Ford's competence. (R87:9-19). The circuit court adopted the findings of Dr. Johnson that Ford "lacked substantial mental capacity to understanding the proceedings and assist in her own defense, but that if provided treatment will likely be restored to competency within the statutory period." (R87:21-22). The circuit court ordered inpatient competency restoration. (R87:24). Despite the circuit

court's order that Ford be transported to Mendota forthwith, Ford was only transferred to Mendota on December 21, 2021. (R50:5). That same day, the circuit court filed a signed order finding Ford incompetent to proceed. (R25:1).

On January 24, 2022, Dr. Johnson submitted a new competency evaluation of Ford to the court. (R41:1). Therein, Dr. Johnson found that Ford did not lack substantial mental capacity to understand the proceedings and assist in her own defense. (R41:6).

In a hearing on January 31, 2022, the parties did not contest Dr. Johnson's findings in her new report, so the Court found Ford competent to proceed and reinstated the proceedings. (R50:6). Despite being restored to competency, Ford filed a notice of appeal from the order determining incompetency on February 7, 2022. (R49).

After the record was transmitted, Ford failed to appear for court on June 24, 2022, and a bench warrant was issued.[2] Ford was returned on the bench warrant on July 29, 2022, and Ford's competency was again raised. At a hearing on August 19, 2022, the parties did not challenge the doctor's report, and the proceedings were again suspended. Ford was remanded to the Department of Health and Family Services. On October 17, 2022, the circuit court received one final doctor's report, opining that Ford was not competent but likely to regain competency. However, because the maximum penalty time has been used to restore Ford to competency, the circuit court ordered Ford's cases administratively closed.

[2] This information and the other information subsequent to the record's compilation are taken from Wisconsin's Circuit Court Automation Programs, or CCAP. This Court can take judicial notice of CCAP records. *See* Wis. Stat. §

STANDARD OF REVIEW

A timely notice of appeal is necessary to confer jurisdiction on this court. *See Helmrick v. Helmrick*, 95 Wis.2d 554, 557, 291 N.W.2d 582, 583 (Ct.App.1980). The Court has an independent duty to determine jurisdiction. *See State ex rel. Teaching Assistants Ass'n v. University of Wisconsin–Madison,* 96 Wis.2d 492, 495, 292 N.W.2d 657, 659 (Ct.App.1980).

Whether a case is moot presents a question of law that is decided *de novo. McFarland Bank v. Sherry,* 2012 WI App 4, ¶9, 338 Wis. 2d 462, 809 N.W.2d 58. The question of mootness should be determined without reference to the merits of the appellant's contentions on appeal. *Treat v. Puckett,* 2002 WI App 58,¶19, 252 Wis. 2d 404, 643 N.W.2d 515.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court . . . generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *see also State v. Dietzen*, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991) (issues raised for the first time on appeal are deemed waived). "Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *Huebner*, 235 Wis. 2d 486, ¶ 12.

ARGUMENT

I. The notice of appeal was not filed timely.

In her notice of appeal, Ford stated, "[p]ersuant to Wis. Stat. § 808.04(1), the deadline for filing a notice of appeal is February 9, 2022. (R49:1). The order finding incompetency was signed and filed on November 12, 2021. (R25:1). Ford appears to believe she had 90 days to file the notice of appeal, but, as will be explained, the 45 day deadline applied.

Under Wis. Stat. § 809.10(1)(e)**,** "[t]he notice of appeal must be filed within the time specified by law. The filing of a

902.01; *Kirk v. Credit Acceptance Corp*., 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

timely notice of appeal is necessary to give the court jurisdiction over the appeal."

A proceeding to determine whether a defendant is competent is separate and distinct from the defendant's underlying criminal proceeding. Thus, an order that a defendant is not competent to proceed is a final order issued in a special proceeding and is appealable as of right pursuant to Wis. Stat. § 808.03(1). *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141.

Therefore, the timeline for filing a notice of appeal from an order determining incompetency is found under Wis. Stat. § 808.04(1), "[a]n appeal to the court of appeals must be initiated within 45 days of entry of a final judgment or order appealed from if written notice of the entry of a final judgment or order is given within 21 days of the final judgment or order as provided in s. 806.06 (5), or within 90 days of entry if notice is not given[.]"

Thus, the question of whether Ford had 45 days or 90 days to file a notice of appeal hinges on whether notice was given of the order. Criminal cases now use electronic filing, and Wis. Stat. § 967.12[3] states that electronic filing in criminal cases is governed by Wis. Stat. § 801.18, which originally applied to civil cases.

> The electronic filing system shall generate a notice of activity to the other users in the case when documents other than initiating documents are filed. Users shall access filed documents through the electronic filing system. For documents that do not require personal service, the notice of activity is valid and effective service on the other users and shall have the same effect as traditional service of a paper document, except as provided in par. (b).

Wisconsin. Stat. § 801.18(6)(a)

[3] "Electronic filing. Section 801.18 shall govern the electronic filing of documents in criminal actions. Electronic filing may be made through a custom data exchange between the court case management system and the automated information system used by district attorneys."

Attorney Corey Flynn was appointed on October 18, 2021. (R15:1). Per CCAP, Attorney Corey Flynn was Ford's attorney from October 19, 2021 to February 2, 2022, and Attorney Paige Styler was Ford's attorney from December 21, 2021 to February 22, 2022. Attorney Styler electronically filed a document with the circuit court on December 3, 2021. (R28:1). The order determining incompetency was filed on November 12, 2021 and it specifically states "DISTRIBUTION: […] 5. Defendant/Attorney." (R. 25:2). The order also specifically lists Attorneys Corey Flynn and Paige Styler as "Defense Attorney". (R25:2). Furthermore, those attorneys were present when the circuit court found Ford not competent to stand trial. (R87:1).

Therefore, the only possible conclusion is that Ford had notice of the circuit court's order finding her not competent to stand trial. That being the case, the 45 day deadline to file a notice of appeal applies. Wis. Stat. § 808.04(1). Forty-five days from November 12, 2021 was December 27, 2021. The notice of appeal is therefore untimely and this Court should find that it lacks jurisdiction and, consequently, dismiss this appeal.

II. The order determining incompetency is moot.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. As a general rule, a court "will not consider a question the answer to which cannot have any practical effect upon an existing controversy." *State v. Leitner*, 2002 WI 77, ¶ 13, 253 Wis. 2d 449, 646 N.W.2d 341 (citation omitted).

Nonetheless, the reviewing court may otherwise address a moot issue when the issue:

> (1) is of great public importance;
> (2) occurs so frequently that a definitive decision is necessary to guide circuit courts;
> (3) is likely to arise again and a decision of the court would alleviate uncertainty; or
> (4) will likely be repeated, but evades appellate review because the appellate review process cannot

> be completed or even undertaken in time to have a practical effect on the parties.

State v. Morford, 2004 WI 5, ¶ 7, 268 Wis. 2d 300.

This appeal is moot. Ford has been restored to competency and the underlying cases are administratively closed due to the amount of time it took to restore Ford to competency. Additionally, none of the exceptions to mootness apply.

On January 24, 2022, before Ford even filed her notice of appeal, Dr. Johnson had filed a new report with the circuit court opining that Ford "d[id] not lack substantial capacity to understand the proceedings and assist in her own defense." (R41:6)(emphasis removed). In a hearing on January 31, 2022, the Court found Ford competent to proceed and reinstated the proceedings. (R50:6). Thus, this appeal is moot. There is no possible relief available to Ford that this Court can grant. Ford asks the Court to "reverse the finding of incompetency". (Ford's Br., p. 13). However, that order was already superseded by the circuit court reinstating the proceedings. (R50:6). Ford was released from Mendota and the proceedings were reinstated. (*See* R50:6). The order finding incompetency failed to have any force, meaning, or impact after that hearing.

Furthermore, these cases are now administratively closed. Ford did not come to court on June 24, 2022, and a bench warrant was issued.[4] Ford was returned on the bench warrant on July 29, 2022, and Ford's competency was again raised. On August 19, 2022, the proceedings were again suspended. On October 17, 2022, the circuit court received one final doctor's report, opining that Ford was not competent but likely to regain competency. However, due to expired maximum penalty time, the circuit court ordered Ford's cases administratively closed. This further shows how resolution of this appeal will have no possible impact on the underlying cases.

[4] Again, this information comes from CCAP. This Court can take judicial notice of CCAP records. *See* Wis. Stat. § 902.01; *Kirk v. Credit Acceptance Corp*., 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

None of the exceptions to mootness apply. The issue raised is not of great public importance, it is merely of personal significance to Ford. This is unlikely to recur, as the impugned counsels have withdrawn. (R46; R48). Nor is this an issue that evades review. *State v. Scott* specifically enshrines an order determining incompetency as a final order for the purpose of appellate review. 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. *Scott* makes a finding of incompetency a final order so that the defendant may appeal the findings so as to protect their right to be free from unwanted competency restoration. *Id*., at ¶¶ 33, 44. That logic does not hold after the defendant has been restored to competency. This is doubly so after the case is administratively closed because the time to restore a defendant to competency has expired.

Consequently, this Court should find that these appeals are moot and affirm.

III. Ford raises ineffective assistance for the first time on appeal

Ford did not file a motion in the circuit court alleging ineffective assistance of counsel. Instead, for the first time, she raises the issue of their effectiveness on appeal. (Ford's Br., p. 3). For this reason alone, the Court can dispose of Ford's appeal. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 ("It is well-established law in Wisconsin that those issues not presented to the trial court will not be considered for the first time at the appellate level."); *State v. Caban*, 210 Wis.2d 597, 604, 563 N.W.2d 501, 505 (1997) ("The party raising [an] issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court."). By failing to make a motion in the circuit court, Ford has not preserved the issue of ineffective assistance of counsel for review by this Court, so this Court should affirm the circuit court.[5]

Ford claims that, in the case of appealing a competency order, "[t]here is no provision […] for post-conviction

[5] Ford believed she was competent and trial counsel argued against finding her incompetent. (R87:8-17). This was sufficient to preserve for appeal the issue of whether the circuit court erroneously exercised its discretion. But Ford has not raised that issue.

proceedings before a Notice of Appeal must be filed." (Ford's Br., p. 12). However, the law is clear that ineffective assistance claims must be raised before being appealed. To start, the court where an alleged ineffective assistance of counsel occurred is the proper forum in which to seek relief unless that forum is unable to provide the relief necessary to address the ineffectiveness claim. *State ex rel. Kyles v. Pollard*, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805. In this instance, that would be the circuit court, and Ford made no argument why the circuit court is unable to provide relief.

There are many good reasons for this policy of raising ineffective assistance in the circuit court. First, the Court of Appeals is not a fact-finding court. *See Wurtz v. Fleishman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). It has long been the law that a hearing on ineffective assistance is required before an appeal is undertaken so counsel's testimony can be preserved. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–09 (Ct. App. 1979);[6] *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (evidentiary hearing required for ineffective assistance of counsel claims).

Ford argues that no hearing is required as "[t]estimony 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." (Ford's Br., pp 11-12). Ford cites no law for this proposition and confuses several issues.

First, Ford needs a finding of fact that confidentiality was breached in order to even argue deficient performance. Ford appears to presume that, if there was a breach of the duty of confidentiality or "duty to pursue the client's goals", that would *per se* be deficient performance. The law says that is not the case. *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 993, 89 L. Ed. 2d 123 (1986) ("Under the *Strickland* standard,

[6] "We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case." *Id*.

breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."). Even where our Supreme Court has disciplined an attorney for mishandling a defendant's case, that finding does not necessarily establish ineffective assistance. *State v. Cooper*, 2019 WI 73, ¶ 22, 387 Wis. 2d 439, 457, 929 N.W.2d 192, 201.[7]

Ford also needs a finding that she suffered prejudice from trial counsels' deficient performance. While Ford argues that she does not need to demonstrate prejudice, she cites no law for the proposition that a breach of confidentiality is a structural error. (Ford's Br., p. 9). The case Ford cites, *Weaver v. Massachusetts*, expressly found that a failure to object to what would have been structural error did not amount, *per se*, to fundamental unfairness such that no showing of prejudice was required. 198 L. Ed. 2d 420, 137 S. Ct. 1899, 1911 (2017).[8] *Weaver* does not, then, stand for the proposition that Ford does not need to demonstrate prejudice. Ford needs a hearing where she would bear the burden of demonstrating that she would not have been found incompetent but for the statements by her trial counsel to the examiner. *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068–69, 80 L. Ed. 2d 674 (1984) (defining prejudice as "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

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[7] "Although it is possible for an attorney's misconduct to be so grave that it deprives a defendant of the effective assistance of counsel, the causal link between the two is not one of necessity, but of possibility. That is to say, it is possible that an attorney could violate SCR 20:1.4(a)(2) without running afoul of *Strickland*; not every violation of the Rules will rise to the level of ineffective assistance of counsel. That is so because the standards established by the Rules do not necessarily correlate exactly with those described in substantive areas of the law." *State v. Cooper*, 2019 WI 73, ¶ 21, 387 Wis. 2d 439, 456, 929 N.W.2d 192, 200.

[8] *Weaver* did, though, list the existing forms of structural error where no showing of prejudice is required:

> *Sullivan v. Louisiana,* 508 U.S., at 278–279, 113 S.Ct. 2078 (failure to give a reasonable-doubt instruction); *Tumey v. Ohio,* 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased judge); and *Vasquez v. Hillery,* 474 U.S., at 261–264, 106 S.Ct. 617 (exclusion of grand jurors on the basis of race). […] This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, see *Batson v. Kentucky,* 476 U.S. 79, 100, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 145–146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

137 S. Ct. at 1911.

Therefore, if the Court believes that it can entertain Ford's ineffective assistance claim, it should remand the case to the circuit court for an evidentiary hearing where trial counsel testifies.

CONCLUSION

For the foregoing reasons, the State asks the Court to dismiss the appeal for lack of jurisdiction and mootness, or affirm the circuit court for Ford's failure to preserve the ineffective assistance claim. In the alternative, the Court should remand for an evidentiary hearing.

Dated this 30th day of December, 2022.

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 word count of this brief is 4133.

Electronically signed by:

December 30, 2022
Date

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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