STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP000440

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

A.M.N.,

Defendant-Appellant.

Appeal of an Order for Commitment and Treatment, Entered in the Marinette County Circuit Court, the Honorable Jane Sequin, Presiding

---

BRIEF OF DEFENDANT-APPELLANT

MATTHEW W. GIESFELDT
Assistant State Public Defender
State Bar No. 1091111

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 261-0629
giesfeldtm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ISSUE PRESENTED 5

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 5

STATEMENT OF THE CASE AND FACTS 6

ARGUMENT 10

Austin is entitled to a new competency hearing based on a violation of his statutory right to appear in person. 10

A. Standard of Review. 10

B. The court violated Austin's statutory right to be physically present when it forced Austin to appear by video for the evidentiary hearing on Austin's competency. 10

CONCLUSION 16

CASES CITED

Kentucky v. Stincer,
482 U.S. 730 (1987) 13

Racine County v. P.B.,
2022 WI App 62, 405 Wis. 2d 383,
983 N.W.2d 721 13

Rasmussen v. Gen. Motors Corp.,
2011 WI 52, 335 Wis. 2d 1,
803 N.W.2d 923 10

State v. Alexander,
2013 WI 70, 349 Wis. 2d 327,
833 N.W.2d 126 13

State v. Anderson,
2012 WI App 17, 374 Wis. 2d 372,
896 N.W.2d 364 ..... 14, 15

State v. Guck,
176 Wis. 2d 845, 500 N.W.2d 910 (1993) 11

State v. Koopmans,
210 Wis. 2d 670,
563 N.W.2d 528 (1997) 11, 14, 15

State v. Ndina,
2009 WI 21, 315 Wis. 2d 654,
761 N.W.2d 612 14

State v. Soto,
2012 WI 93, 343 Wis. 2d 43,
817 N.W.2d 949, 953 .....10 passim

State v. Venneman,
180 Wis. 2d 81, 508 N.W.2d 404 (1993) 11

State v. Ward,
2009 WI 60, 318 Wis. 2d 301,
767 N.W.2d 236 10

STATUTES CITED

<u>Wisconsin Statutes</u>

809.22(2)(b) 5

809.23(1)(b)1 5

809.81(8) 5

967.08(2) 12, 13

967.08(4) 12

971.04(1) 10, 12, 13, 14

971.04(1)(d)..... 10, 11

971.04(2) 11

971.04(3) 12

971.14 13

971.14(4) 11, 12

Chapters 968 to 973..... 12

ISSUE PRESENTED

Did the circuit court err by denying Austin's[1] repeated requests to appear in person at the competency hearing at which the circuit court found Austin incompetent and entered an order for commitment and treatment?

The circuit court denied Austin's requests to appear in person.

This Court should reverse and vacate the circuit court's findings and order for commitment and treatment.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. *See* Wis. Stat. § (Rule) 809.22(2)(b). Publication is not warranted because the case can be resolved by applying established legal precedent to the facts. *See* Wis. Stat. § (Rule) 809.23(1)(b)1.

[1] Pursuant to Wis. Stat. § 809.81(8), this reply refers to A.M.N. as "Austin," a pseudonym.

STATEMENT OF THE CASE AND FACTS

On October 24, 2023, the state charged Austin with two misdemeanors. (2:1). The next day, after Austin was taken into custody, the court held an initial bail/bond hearing. (25). On its own motion, the circuit court entered an order for a competency evaluation and determination. (6; 25:4). Pursuant to that order, Dr. Brandon Reintjes conducted a competency evaluation and submitted a report to the court. (10). Dr. Reintjes opined that Austin "lacks substantial mental capacity to understand the proceedings and assist in his own defense but the attainment of competency is likely within the remaining commitment period." (10:6).

On November 29, 2023, the circuit court presided over a status conference to ensure that Austin could obtain counsel. (23:2; App. 4). Austin appeared by videoconferencing. (23:2; App. 4). Austin told the court, "I don't approve of any type of Zoom conference as a day in court. It's not acceptable to me." (23:3; App. 5). The court replied, "Okay. Well, it's acceptable – it's acceptable to the Court, so we're going to proceed by Zoom today." (23:3; App. 5). The court scheduled a competency hearing and indicated it would contact the public defender's office to obtain counsel for Austin. (23:4; App. 6). The state asked the court's permission to allow the competency doctor to appear by Zoom at the competency hearing. (23:5; App. 7). The court granted that request. (23:5; App. 7). Then, the state indicated it would "coordinate with

[Austin's] attorney about . . . Austin's appearance" at the upcoming competency hearing. (23:5; App. 7).

On December 11, 2023, the court presided over a hearing at which Austin appeared by videoconferencing. (24:2). The circuit court asked Austin whether he had contacted the public defender's office; he had not. (24:2-3). The court adjourned the hearing to allow the public defender's office to contact Austin. (24:5).

On December 19, 2023, the circuit court presided over the competency hearing. (19:1; App. 10). Austin appeared by videoconferencing. (19:3; App. 12). His defense counsel, Attorney Bradley Schraven, and the prosecutor appeared with the judge in the courtroom. (19:3; App. 12). The circuit court asked Austin whether he objected to a finding that he was incompetent as opined by Dr. Reintjes. (10; 19:4; App. 13). Austin objected. (19:5; App. 14).

Then, the court asked "And so, you agree that you're asking the doctor to give testimony today because you disagree with what's in the report, correct?" (19:5; App. 14). Austin replied, "So, for – for testimony, I would like to be there in person because I believe I have the right to confront my witnesses in person." (19:5; App. 14). The court responded, "[t]he Court's going to deny that request. You – you are able to appear via the videoconference, so I'm going to continue that." (19:5; App. 14).

Austin then asked the court, "So, is this a trial?" (19:5). The court replied, "It's not a trial. . . . It's a hearing to determine the status of competency." (19:5; App. 14).

With this explanation from the court, Austin renewed his request to appear in person, citing his confrontation right. (19:6; App. 15). Specifically, he said, "I believe it's a constitutional right to be able to confront my witness, so my constitutional rights are being violated with your denial of [his request to appear in person]." (19:6). The court asked Austin's defense attorney to weigh-in on Austin's confrontation argument. (19:6). Attorney Schraven merely explained that the right of confrontation was "a separate standard" from that which applies to Austin's in-person appearance. (19:6; App. 15).

The circuit court then said to Austin, "[Y]ou're appearing via the Zoom conference. You're going to be able to hear and see all of the testimony from Dr. Reintjes. You're represented by Mr. Schraven. Mr. Schraven will be able to cross-examine." (19:6; App. 15). The court proceeded with the hearing. (19:6-7; App. 15-16).

The first witness was Dr. Reintjes, who testified that he conducted an evaluation of Austin. (19:7-11; App. 16-20). Consistent with his report, he testified that he believed Austin currently lacked substantial mental capacity to understand the proceedings and assist in his defense. (19:17-18; App. 26-27).

During Dr. Reintjes's testimony, Austin interjected, "Excuse me. I was disconnected from the conference. . . . I missed a lot of what the doctor said." (19:18; App. 27). Austin added, "This – this is a problem, and . . . I'm not content with having a Zoom conference as a court date. It's not appropriate." (19:18; App. 27). The circuit court responded, "And, again, I've already entered my ruling on that, that we're proceeding with the Zoom conference." (19:18; App. 27).

After Dr. Reintjes testified, neither the state nor Austin presented any additional evidence. (19:27; App. 36). After arguments from the parties, the court concluded "that the State has met its burden of proof . . . [and] I am going to find that the defendant is not competent but is likely to become competent within the statutory timeline. So, I – as a result of that, I will suspend the proceedings, and [Austin] will be committed to the Department for treatment in an inpatient facility." (19:27-33; App. 36-42). The court signed an order consistent with its oral ruling. (17; App. 49-51).

This appeal follows.

ARGUMENT

Austin is entitled to a new competency hearing based on a violation of his statutory right to appear in person.

A. Standard of Review.

"The interpretation of a statute and its application to a particular set of facts present questions of law that we review independently of the circuit court's decision, but benefitting from its analysis." *State v. Soto*, 2012 WI 93, ¶14, 343 Wis. 2d 43, 53, 817 N.W.2d 949, 953 (citing *Rasmussen v. Gen. Motors Corp.*, 2011 WI 52, ¶14, 335 Wis. 2d 1, 803 N.W.2d 923). "Additionally, whether a defendant's undisputed statements and actions in a criminal proceeding constitute a waiver of a statutory right is a question of law for our independent review." *Soto*, 343 Wis. 2d 43, ¶14 (citing *State v. Ward*, 2009 WI 60, ¶17, 318 Wis. 2d 301, 767 N.W.2d 236).

B. The court violated Austin's statutory right to be physically present when it forced Austin to appear by video for the evidentiary hearing on Austin's competency.

Criminal defendants have the right to be physically present in the courtroom at any evidentiary hearing. Wis. Stat. § 971.04(1)(d). Specifically, Wis. Stat. §§ 971.04(1) and (1)(d) state: "Except as provided in subs. (2) and (3), the defendant shall be present . . . [a]t any evidentiary hearing." *See also*

State v. Koopmans, 210 Wis. 2d 670, 680, 563 N.W.2d 528 (1997); *see also Soto*, 343 Wis. 2d 43, ¶¶15-34; *but see, generally, State v. Venneman*, 180 Wis. 2d 81, 508 N.W.2d 404 (1993) (holding that Wis. Stat. § 971.04(1)(d) does not apply to *post*-conviction evidentiary hearings).

A competency hearing is an evidentiary hearing at which a defendant is entitled to personally appear. *See* Wis. Stat. § 971.04(1)(d); *see also* Wis. Stat. § 971.14(4) ("In the absence of [waivers of the opportunity to present evidence], the court shall hold an evidentiary hearing[.]"); *see also State v. Guck*, 176 Wis. 2d 845, 858, 500 N.W.2d 910, 915 (1993) (describing the hearing at which a circuit court receives evidence on the issue of competency as an "evidentiary hearing"). While there are exceptions to the requirement that a defendant be physically present, none of these exceptions apply here, and Austin was entitled to be present at his competency hearing. Those exceptions are as follows:

First, a defendant charged with only a misdemeanor "may authorize his or her attorney in writing to act on his or her behalf . . . and be excused from attendance at any or all proceedings." Wis. Stat. § 971.04(2). Austin could have authorized his attorney to appear on his behalf given that he was only charged with two misdemeanors. (2:1); Wis. Stat. § 971.04(2). However, the record is void of the required written authorization that would allow Attorney Schraven to appear on Austin's behalf, and Austin's repeated requests to appear in person make it clear that he

would not have provided such authorization. (19:5-6, 18).

Second, if at a trial, a defendant "voluntarily absents himself or herself from the presence of the court without leave of the court" at trial, then the trial may proceed without the defendant. Wis. Stat. § 971.04(3). Austin's competency hearing was not a trial, and he did not voluntarily absent himself from the proceedings. (19). Therefore, the exception in Wis. Stat. § 971.04(3) does not apply.

Third, a court may conduct proceedings by telephone or live audiovisual means "in any criminal proceedings under chs. 968 to 973[.]"[2] Wis. Stat. § 967.08(2). But, this authorization has three caveats of its own, none of which apply to Austin's situation:

The first caveat provides that the use of telephone or live audiovisual means is only permitted "if both parties consent to do so[.]" Wis. Stat. §§ 967.08(2); 971.04(1). Given Austin's repeated and consistent objections to the use of videoconferencing (19:5-6, 18), it is clear that both parties did not consent to the use of videoconferencing.

The second caveat provides that a court is required to sustain any objection by any party to the use of telephone or live audiovisual means at any critical stage of the proceeding. Wis. Stat. § 967.08(4).

[2] This includes competency hearings under Wis. Stat. § 971.14(4).

Austin unambiguously objected to his remote appearance. (19:5-6, 18). A competency hearing is a "critical stage of the proceedings." *See* Wis. Stat. § 967.08(2). "Due process guarantees a defendant 'the right to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.'" *State v. Alexander*, 2013 WI 70, ¶20, 349 Wis. 2d 327, 833 N.W.2d 126 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). At a competency hearing, a court determines whether it will enter a commitment order, with the possibility of forced medication, or whether the criminal case will continue to proceed. Wis. Stat. § 971.14. Such potential consequences are clearly critical such that the defendant has a right to be present. *See, cf., Racine County v. P.B.*, 2022 WI App 62, ¶17, n. 5, 405 Wis. 2d 383, 983 N.W.2d 721 (describing the right to be present at a guardianship and protective placement hearing, where the subject could be protectively placed and forced to take medication). Given that the competency hearing was a critical stage of the proceeding, the circuit court was required to sustain Austin's objections to his remote appearance. *See* Wis. Stat. § 967.08(2).

The third caveat provides that even if a criminal defendant consents to appear by audiovisual means for any type of appearance contemplated by Wis. Stat. § 971.04(1), the court must still conduct a colloquy to ensure that the defendant's consent to waive the right to be present is given knowingly, intelligently, and voluntarily *Soto*, 343 Wis. 2d 43, ¶¶15-34; *see also*

Koopmans, 210 Wis. 2d at 680.[3] A waiver is "the intentional relinquishment of a known right." *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 654, 761 N.W.2d 612. A proper waiver "must be predicated upon a colloquy that unambiguously informs the defendant that he or she has a right to be physically present" and the court must specifically inquire whether the defendant is able to hear and understand the court and the other participants. *Anderson*, 374 Wis. 2d 372, ¶42.

In *Anderson*, the circuit court asked the defendant whether it was "okay that we do this [plea hearing] by phone today?" 374 Wis. 2d 372, ¶5. The defendant responded, "Yes." *Id.* Yet, the court of appeals held that this waiver was insufficient and granted the defendant plea withdrawal. *Id.* at ¶43. In *State v. Koopmans*, the defendant failed to show up at her sentencing hearing, and the circuit court found this to constitute a waiver of the right to be present. 210 Wis. 2d 670, 673, 563 N.W.2d 528 (1997). The Wisconsin Supreme Court granted the defendant a

[3] *Soto* and *Anderson* address circumstances in which the defendant was not physically present to enter a plea, but the analysis in each addresses the application of waiving a statutory right to be present, generally, not the specific right to be present *at a plea hearing*. *See, generally, Soto,* 343 Wis. 2d 43; *see also, generally, State v. Anderson*, 2012 WI App 17, 374 Wis. 2d 372, 896 N.W.2d 364. Therefore, Austin applies each case to his where he was denied his right to be present at an evidentiary hearing, at which he has a statutory right to be physically present, just like at a plea hearing. *See* Wis. Stat. § 971.04(1).

new hearing, saying that the statute did not permit waiver of the right to be present. *Koopmans*, 210 Wis. 2d at 672. The *Soto* Court clarified *Koopmans* to say that a defendant may waive, but cannot forfeit, the statutory right to be physically present. 2012 WI 93, ¶44, 343 Wis. 2d 43, 817 N.W.2d 848. There, the defendant was not granted a new hearing because he had repeatedly told the circuit court that he agreed to appear remotely and that he could still hear, see, and understand the proceedings from his remote location. *Soto*, 343 Wis. 2d 43, ¶¶6-8. This constituted a valid waiver of the right to be present. *Id.* at ¶¶44-50.

Austin's case is distinguishable from this case law insomuch as Austin's actions, and the circuit court's interactions with him, constitute a clear *absence* of a waiver of his right to be present when compared to the facts in *Anderson*, *Koopmans*, and *Soto*. In those cases, the defendants expressed a waiver of the right to be present, but the appellate courts found such waivers to be insufficient. Austin did not waive his right to appear by videoconferencing, nor did the circuit court engage in the proper inquiries to obtain such a waiver. (19). On the contrary, Austin affirmatively, clearly, repeatedly, and expressly demanded that the court honor his right to be physically present. Under the existing caselaw, if a defendant who answers "yes" when asked if the court may conduct a hearing by phone could still be found to have not properly waived his right to be present, which entitles him to a new hearing, then it follows that a defendant who repeatedly and explicitly demands to be present cannot be found to have waived that right.

Austin's express desire to be present certainly entitles him to a new competency hearing.

Austin had a right to appear in person at his competency hearing. None of the three exceptions to that right applied. The circuit court erred in denying Austin's repeated requests to appear in person.

CONCLUSION

Based on the reasons set forth herein, Austin respectfully requests that this Court vacate the findings and commitment order and remand to readdress competency.

Dated this 9th day of May, 2024.

Respectfully submitted,

Electronically signed by Matthew W. Giesfeldt

MATTHEW W. GIESFELDT
Assistant State Public Defender
State Bar No. 1091111

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 261-0629
giesfeldtm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,480 words.

CERTIFICATION AS TO APPENDIX

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 rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of May, 2024.

Signed:
Electronically signed by
Matthew W. Giesfeldt
MATTHEW W. GIESFELDT
Assistant State Public Defender