STATE OF WISCONSIN

IN SUPREME COURT

Appeal Nos. 2024AP0591-CR, 2024AP0592-CR,
2024AP0593-CR, 2024AP0594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

M.M.K.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

During the pendency of four criminal cases, M.M.K.'s competency was questioned, and she was eventually ordered for an inpatient examination. During that examination, the State also requested an involuntary medication order. The circuit court held a competency hearing, and later a hearing on the motion for involuntary medication.

In determining whether M.M.K. was competent, the circuit court made repeated references to the filing of the motion for involuntary medication—suggesting the request was evidence that M.M.K. was not competent. The court would then find M.M.K. not competent. Shortly thereafter, the circuit court held another hearing and ordered involuntary medication.

The court of appeals agreed with M.M.K. that the State did not have an important interest in prosecuting her for these misdemeanor cases and vacated that order. The court of appeals disagreed with M.M.K. and stated that the circuit court did not rely on the filing of the motion for involuntary medication in finding her incompetent—although the court seemed to agree that such reliance was improper.

M.M.K. believes the court of appeals' reading of the record is unreasonable, and believes this Court should decide whether reliance on an improper factor in this context requires remand or if the court of

appeals can ignore the reliance and independently determine whether the competency finding was proper.

ISSUES PRESENTED

1. Was the circuit court's finding that M.M.K. was incompetent to assist counsel clearly erroneous?

The circuit court did not address this question, but, presumably, it did not believe its finding was clearly erroneous.

The court of appeals affirmed, stating that while the circuit court "commented on" an improper factor, it did not believe the circuit court relied on that factor in its competency determination. *State v. M.M.K.*, No.2024AP591-CR, unpublished slip op., ¶¶19, 21; (App. 11, 13). Thus, the circuit court did not erroneously exercise discretion.

CRITERIA FOR REVIEW

Despite the recent flurry of appeals related to involuntary medication orders in competency restoration proceedings, there have been few cases reviewing the underlying competency determinations. As a result, there is little guidance regarding review of these cases. The jurisprudence in this area consists largely of this Court reiterating that competency is essentially a factual determination, meaning circuit court decisions are to be reviewed to see if they are clearly erroneous. *State v. Smith*, 2016 WI 23, ¶¶26-

29, 367 Wis. 2d 483, 878 N.W.2d 135; *State v. Byrge*, 2000 WI 101, ¶ 33, 237 Wis. 2d 197, 614 N.W.2d 477; *State v. Garfoot*, 207 Wis. 2d 214, 223-24, 558 N.W.2d 626 (1997).

However, none of the cases in this area address the situation presented here: how do appellate courts review a circuit court's competency determination when that determination is inextricably entwined with reliance upon an improper factor?

This question is novel. Based on undersigned counsels' research, it has not been addressed by any appellate court in Wisconsin. It will have statewide impact moving forward, because it will clarify how appellate courts review competency findings when circuit courts rely upon an improper factor. *See* Wis. Stat. § 809.62(1r)(c)2.

The question is also a purely legal question, as it involves the standard of review and remedy on appeal. *In re Commitment of Brown*, 2005 WI 29, ¶8, 279 Wis. 2d 102, 693 N.W.2d 715; *Matter of Commitment of M.R.M.*, 2023 WI 59, ¶8, 408 Wis.2d 316, 992 N.W.2d 809. If not resolved by this Court, the issue is likely to arise in the future, as the issue of competency is being increasingly litigated due to numerous factors, including better understanding of mental illness by courts and practitioners. *See* Wis. Stat. § 809.62(1r)(c)3.

Because reliance on an improper factor comes up across different case types, and this Court has applied differing standards based on the particular situation,

guidance to appellate courts is needed regarding how to review a circuit court's reliance on an improper factor when making a competency determination.

When issuing an injunction, a court erroneously exercises discretion when it "(1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant factors or improper factors; and (3) clearly gives too much weight to one factor." *Hoffman v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶25, 262 Wis. 2d 264, 664 N.W.2d 55. The remedy is remand to the circuit court to properly exercise discretion based on appropriate factors. *Id.*, ¶30.

In the criminal sentencing context, defendants must show that the court actually relied on an improper factor which cannot be cured by relying on other unrelated proper factors. *State v. Whitaker*, 2022 WI 54, ¶¶11, 13, 402 Wis. 2d 735, 976 N.W.2d 304. The remedy in those cases is resentencing. *Id.*, ¶2.

Given the multiple standards that currently exist for reviewing consideration of an improper factor, and that only one includes a built-in harmlessness consideration, it is appropriate for this Court to establish how reliance on an improper factor in a competency determination should be reviewed by appellate courts.

STATEMENT OF FACTS

Between July and October of 2023, M.M.K. was charged in Portage County with five counts (spread across four cases) of violating an injunction—a Class A misdemeanor—contrary to Wis. Stat. §§ 813.125(4)&(7).[1] (App. 24-33). At the time, there was an ongoing injunction prohibiting M.M.K. from contacting her husband or posting on social media about her husband or children. (2:4[2]; App. 27). Four of the counts alleged that M.M.K. either made or edited Facebook posts about her husband. (2:2-3; 2:1; 2:2[3]; App. 24-29, 32-33). The final count alleged M.M.K. sent two emails to her husband. (2:1;[4] App. 30-31).

Pretrial, the circuit court issued an Order for Competency Examination by the Department of Health Services ("DHS"). The court then scheduled an initial appearance and competency hearing for January 8, 2024. In the meantime, Dr. Craig Schoenecker, a psychiatrist, conducted an examination of M.M.K. via Zoom videoconference. (22:2; App. 35). Dr. Schoenecker diagnosed M.M.K. with rule out delusional disorder, but was otherwise unable to make a competency determination and

[1] The four complaints are all document (2) in the records for 2024AP000591, 2024AP000592, 2024AP000593, and 2024AP000594. For the purposes of this petition, M.M.K. refers to the record cites in 2024AP000591, unless otherwise noted.

[2] Cite to 2024AP000592.

[3] Cite to 2024AP000592, 2024AP000593, and 2024AP000594, respectively.

[4] Cite to 2024AP000594.

suggested an inpatient evaluation, which the court ordered. (22:3, 5; App. 36, 38)

After M.M.K. was transported to Mendota Mental Health Institute ("MMHI"), Dr. Danielle Calas, a psychologist, examined M.M.K. In her report, Dr. Calas opined that M.M.K. was incompetent and recommended inpatient treatment to restore M.M.K. to competency. (42:7-9; App. 45-47). Dr. Calas also recommended an order for involuntary administration of medication and treatment. (42:9; App. 47).

Following submission of Dr. Calas' report, DHS moved the court to order involuntary administration of medication and/or treatment. (44:1). Along with the notice was an Individual Treatment Plan and a letter, both authored by Dr. Candace Cohen, a psychiatrist at MMHI. (44:3-8).

On March 12, 2024, the court held a contested competency hearing. Dr. Calas testified that M.M.K. had been polite during her time at MMHI and took "care of her activities of daily living." (76:11-12; App. 58-59). When discussing competency, Dr. Calas explained that M.M.K. understood the legal proceedings and court process. (76:9-11; App. 56-58). However, Dr. Calas opined that M.M.K had a mental illness that made her unable to apply the legal information to her case. (76:9-11; App. 56-58). In particular, Dr. Calas diagnosed M.M.K. with unspecified schizophrenia and other psychotic disorder. (76:18; App. 65). As a result, Dr. Calas believed M.M.K. was incompetent to proceed.

After arguments from the parties, the court noted that M.M.K. "is a smart person" who "understands proceedings." (76:25; App. 72). Despite this, the court expressed concern that M.M.K. lacked the capacity to assist in her defense. (76:26-27; App. 73-74). While addressing this concern, the court noted that DHS had filed a motion for involuntary medication which "indicat[es] that there is something significant going on for [M.M.K.]." (76:25; App. 72). The court later explained that

> there is a substantial competency issue such that the doctors have already requested that she be involuntarily treated…[and] to file this motion under the statute, you have to have a legal basis under 971.14(5) that she is not competent, cannot rationalize the benefits, the pros/cons of taking medication, pros/cons of being treated such that it's clinically affecting her stability and the mental health at this stage in this criminal case, that there is a level of–there is an inference the Court can take from that.

(76:26-27; App. 73-74).

Finally, the court found that Dr. Calas' opinion that M.M.K. lacks the capacity to understand the proceedings and/or assist in her defense also showed the M.M.K. was not competent but was likely to regain within the statutory time frame. (76: 27, 30; App. 74, 77). As a result, the circuit court found M.M.K. not competent to proceed and issued an Order of Commitment for Treatment. (52:1-3; 76:27, 30; App. 21-23, 74, 77).

Two weeks later, on March 26th, the court held a hearing on the motion for involuntary medication. After testimony from Dr. Cohen, the court ordered involuntary medication. (67). The next day, M.M.K. filed a motion to stay the order pending appeal. On March 28th, the court of appeals issued a stay of the medication order pending further order.[5]

M.M.K. appealed both the competency and involuntary medication orders.[6] First, M.M.K. argued the circuit court erroneously exercised its discretion by relying on the mere filing of a motion for involuntary medication as evidence that M.M.K. is not competent to proceed. M.M.K. then argued that ordering involuntary medication was improper because the State failed to meets its burden under all four of the *Sell* factors. *See Sell v. U.S.*, 539 U.S. 166 (2003).

After briefing from both parties, the court of appeals issued an opinion upholding the circuit court's competency determination but reversing the court's

[5] On April 18th, the court of appeals then granted M.M.K.'s motion for a continuation of the stay pending appeal.

[6] In the interim, M.M.K. was found not competent, not likely to regain and has been released from MMHI. The pending charges have been dismissed without prejudice. This information, while not in the record, is reflected in CCAP. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (Courts may take judicial notice of CCAP records when requested by a party). Despite this, both parties agreed on appeal that the case should still be decided on the merits. (App. 4).

involuntary medication order. (App. 3-20). Regarding the medication order, the court of appeals held that the State had failed to prove "that the crimes at issue here and the individual facts of these cases are sufficiently serious to satisfy the first *Sell* factor." (App. 17).[7]

Addressing the circuit court's competency determination, the court of appeals found that "had the court based its determination that M.M.K. was incompetent on the mere filing of an involuntary medication request, that might constitute an erroneous exercise of discretion." (App. 11). However, the court of appeals claimed that the circuit court did not do that here. (App. 13). Instead, the court of appeals interpreted the court's comments, *see supra* at 9, as "merely anticipating that Dr. Cohen's future testimony regarding involuntary medication might provide additional support for a determination that M.M.K. was not competent to assist in her defense." (App. 13). The court of appeals ruled that anticipating that future evidence may support involuntary medication was permissible. (App. 13). As a result, the court held the circuit court did not erroneously exercise its discretion given it then "relied on Dr. Calas' testimony in finding M.M.K. incompetent". (App. 13).

This petition follows.

[7] The court of appeals did not address the final three *Sell* factors. M.M.K. does not petition this court to review the court of appeals' decision vacating M.M.K.'s involuntary medication order.

ARGUMENT

The circuit court's reliance on Dr. Cohen's filing of a motion to involuntarily medicate M.M.K. was not a proper basis for finding her incompetent to stand trial. The circuit court's decision repeatedly referenced the existence of the motion and explicitly relied upon it in finding M.M.K. incompetent.[8] M.M.K. believes that because competency is largely a factual determination, when a court relies on an improper factor in determining competency, remand is required so the court can properly exercise discretion.

This is so, because the standard of review does not allow appellate courts to disregard the reliance on an improper factor and independently decide whether the circuit court's competency determination should stand.

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[8] While not the focus of this petition for review, because it is simply error-correction, M.M.K. contends that the court of appeals' finding that the circuit court did not rely on Dr. Calas' motion is wholly unsupported by the record.

Specifically, the circuit court made repeated references to it, stating "the Court considers [] that a medical doctor, filing this motion under the statute, is indicating that there is something significant going on for Ms. Keck," (76:25; App. 72), "the Court is finding that there is a substantial competency issue such that the doctors have already requested that she be involuntarily treated," (76:26-27; App. 73-74), and "there is an inference the Court can take from . . . Dr. Cohen's request, that that is assisting this Court[.]" (76:27; App. 74).

Regardless of if this Court ultimately agrees with M.M.K. regarding what the standard of review requires and the proper remedy, it should accept review and provide guidance on this novel question of law.

I. The circuit court relied upon an improper factor.

As a threshold matter, the circuit court's reliance on the filing of a motion for involuntary medication was an improper factor to consider in determining M.M.K.'s competency to stand trial. An improper factor is one that is "totally irrelevant or immaterial to the type of decision to be made." *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980).

The fact Dr. Cohen filed a motion to involuntarily medicate M.M.K. is not evidence and is irrelevant and immaterial. *See* Wis. J.I.—Criminal 103 (2000); Wis. J.I.—Criminal 145 (2000). Attributing probative evidentiary value to the act of filing the request would allow the State to meet their burden to involuntarily commit an individual simply by filing a motion alleging they can meet their burden. Such a circular result would eviscerate the defendant's due process protections and render the evidentiary hearing required by §971.14(4)(b) to nothing more than a show. *See Addington v. Texas*, 441 U.S. 418, 425 (1979); *Sell v. U.S.*, 539 U.S. 166, 178-80 (2003).

The court of appeals agreed that such a consideration is improper. *M.M.K.*, No. 2024AP591-CR, ¶19; (App. 11) ("Generally speaking, I agree that,

had the court based its determination that M.M.K. was incompetent on the mere filing of an involuntary medication request, that might constitute an erroneous exercise of discretion."). As stated, M.M.K. believes the record is clear that the circuit court not only relied on the filing of Dr. Cohen's motion, but did so substantially, and it was unreasonable for the court of appeals to find otherwise. *Supra* at 12.

The outstanding question is whether the court of appeals was required to remand the matter for further factual findings.

II. The standard of review requires remand when the circuit court relies on an improper factor.

Failing to order remand when the circuit court relies on an improper factor would rewrite the standard of review for competency determinations. The Court has been clear that a defendant's competency is largely a factual determination. *Supra* at 4-5. As a result, this Court has twice held, first in *Garfoot* and then in *Byrge,* that the clearly erroneous standard of review was appropriate. *Byrge*, 237 Wis. 2d 197, ¶45; *Garfoot*, 207 Wis. 2d at 223-24.

The competing standard of review advocated for in both cases was that of a mixed question of law and fact. *Id.*, ¶45. The concurring justices in *Byrge* and *Garfoot* viewed the issue of competency as one of constitutional fact, meaning that appellate courts would benefit from the analysis of the circuit court, but would independently determine if the record

demonstrated that a defendant was competent. *Id.*, ¶76 (Abrahamson, C.J. concurring); *Garfoot*, 207 Wis. 2d 214, 231-32 (Abrahamson, C.J. concurring).

If remand is not required, appellate courts will be able to determine whether the circuit court's reliance on an improper factor was either harmless or somehow offset by other facts in the record. *See, e.g. Whitaker*, 402 Wis. 2d 735, ¶¶11, 13. In this scenario, appellate courts would be independently determining whether the record supported the circuit court's findings—despite an improper factor. This no different than mixed question of law and fact standard that this Court rejected in both *Garfoot* and *Byrge*.

In order to maintain a meaningful and consistent standard of review in competency cases, when a circuit court relies on improper facts, appellate courts should order remand with instructions to only rely on proper factors. *See Hoffman*, 262 Wis. 2d 264, ¶30.

Given the lack of guidance, this Court should grant review to clarify what must happen when the circuit court relies on an improper factor in making a competency determination.

CONCLUSION

When a circuit court relies on an improper factor, the standard of review does not allow appellate courts to independently determine whether or not a defendant is competent. Therefore, remand is required when the circuit court relies on an improper factor. M.M.K. believes this outcome is the logical product of the standard of review and believes this Court should grant review to confirm the same.

For the reasons stated above, M.M.K. respectfully requests that this Court grant her petition for review.

Dated this 2nd day of December, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 2,938 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 2nd day of December, 2024.

Signed:
Electronically signed by
Lucas Swank
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