State of Wisconsin
Court of Appeals
District 4
Appeal No. 2024AP001877-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

L.J.T., Jr.,

Defendant-Appellant.

On appeal from a judgment of the Dane County Circuit Court, The Honorable Nicholas J. McNamara, presiding

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

LJT was charged with disorderly conduct and misdemeanor bail jumping. At the initial appearance, his lawyer questioned LJT's competency to proceed, so the court ordered a psychological evaluation, and set the matter for a hearing. At the start of the hearing, LJT told the court that he did not want to be represented by his attorney. The court conducted a brief colloquy with LJT, who answered most of the judge's leading questions in the affirmative, and then the judge found that LJT knowingly, voluntarily, and intelligently waived his right to counsel. The matter then proceeded to a hearing. The doctor testified that, due to schizophrenia, LJT was not competent to proceed; but, with involuntary medication, he was likely to be restored to competency within the statutory period. As the judge noted, LJT's performance at the hearing raised serious concerns about his mental health and his ability to represent himself in court. Based on that, and the doctor's report, the court found that LJT was not competent to proceed, but found

that LJT was likely to regain competency within the statutory period, and committed him for treatment.

I. Therefore, the first issue is whether LJT validly waived his right to counsel.

Answered by the circuit court: Yes.

II. The second issue presented by the appeal is, in the alternative, whether the court properly found that LJT was likely to regain competency within the statutory period where the doctor's opinion in that regard was predicated on involuntarily medicating LJT; and, because LJT is not charged with a serious criminal offense, it would be unconstitutional to involuntarily medicate him.

Answered by the circuit court: LJT was likely to regain competency

Summary of the Argument

I. LJT's waiver of counsel was invalid. Before the court may find that a defendant's waiver of counsel is valid, the court must conduct a colloquy on the record to determine that the defendant (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on

him. Then, if the waiver is freely, voluntarily, and intelligently made, the court must determine that the defendant is minimally competent to represent himself in court.

Here, the court asked LJT whether he knew he had a right to an attorney, LJT said he knew that he had signed "anti-counterfeiting" documents in his home. LJT then answered affirmatively to the judge's leading questions about the remaining issue.

The colloquy, then, was not sufficient. LJT did not acknowledge that he knew he had the right to an attorney.

More importantly, though, at the conclusion of the hearing the court found that LJT was not competent to proceed. This means, of course, that he was incapable of understanding the proceedings. Certainly this was the case as well during the waiver of counsel colloquy.

Finally, LJT's performance at the competency hearing overwhelmingly demonstrates that he is not minimally competent to represent himself in court.

For these reasons, the circuit court erred in finding that LJT validly waived his right to counsel.

II. The circuit court erred in finding that LJT was likely to regain competency within the statutory time frame. The doctor's report, admitted as an exhibit at the competency hearing, indicated that with medication, LJT was likely to be

restored to competency within the statutory time frame. The report further noted, though, that LJT will not voluntarily take medication; and, therefore, he will have to be ordered to do so.

The constitution does not permit the court to order involuntary medication to restore a defendant to competency on a non-serious criminal offense. Here, LJT was charged with bail jumping, which is, by definition, not a serious crime.

Therefore, since LJT cannot be involuntarily medicated, there is no likelihood that he will be restored to competency within the statutory time frame.

Statement of the Case

On June 7, 2024, the defendant-appellant, L.J.T., Jr., (hereinafter "LJT") was charged in a criminal complaint filed in Dane County with (1) disorderly conduct, and (2) misdemeanor bail jumping. [R:2] In a nutshell, the complaint alleged that LJT was creating a disturbance at a gas station.

On that date, LJT made his initial appearance with appointed counsel who raised the issue of competency. The court ordered a competency evaluation [R:8], and set the matter for hearing on July 18, 2024.

On July 11, 2024, Dr. Amelia A. Fystrom, Ph.D., filed a report of her competency examination of LJT. [R:13] Dr. Fystrom found that, due to schizophrenia, LJT was not

competent to proceed; however, she opined that, with medication, LJT could be restored to competency within the statutory time frame[1]. She acknowledged, though, that LJT will not voluntarily take medication. [R:13-]

LJT appeared with an attorney at the competency hearing. At the start of the hearing, LJT informed the court that he did not want to be represented by an attorney, and that he wanted to represent himself. [R:26-2] Specifically, LJT explained that he wanted to represent himself because, "[L]ike I've said -- in simple matter, I signed anticounterfeiting documents in May of 2016 at my residence -" *Id.*

Consequently, the court engaged LJT in a waiver of counsel colloquy. The judge asked LJT whether he understood that he had a right to have a lawyer represent him. LJT again said, "I understand that I signed anti-counterfeiting documents at my residence - - " [R:26-3] LJT acknowledged that he understood that if he could not afford a lawyer, one would be appointed for him. *Id.* Further, LJT acknowledged that he understood that there are advantages to having a lawyer. *Id.* Significantly, though, LJT told the judge that he was a lawyer, but he did not get his law degree from a university, but, nevertheless, "I'm licensed to practice law with the United States Secret Service, the United States Navy." [R:26-4] When

[1] LJT had two cases pending at the time. The other case had a maximum sentence of 90 days, and the doctor was of the opinion that LJT could not be returned to competency within that time, so the state dismissed that case.

the judge pointed out that those agencies "do not do law", LJT responded, "Yes, they do." *Id.* Finally, LJT acknowledged that no one was threatening him to waive his right to a lawyer, and that he is making the decision freely and voluntarily. *Id.*

Following the colloquy, the judge found:

> I'm going to find [LJT] has made a knowing, intelligent and voluntary waiver. This is somewhat provisional, but he, not likely to be clear on this record, [LJT] is very, very adamant, I'll say strident, almost angrily rejecting the assistance of a lawyer at this point. And for purposes of this hearing, I'm satisfied that he's made a knowing, intelligent and voluntary waiver.

[R:26-4].

The matter then proceeded to an evidentiary hearing on the competency issue.

The state called Dr. Fystrom, who testified that she interviewed LJT at the Dane County Jail on June 25, 20-24. [R:26-9] Based on that evaluation, Dr. Fystrom diagnosed LJT with schizophrenia, and said that, "[I]t's my opinion to a reasonable degree of professional certainty that at the present time [LJT] lacks substantial mental capacity to understand the proceedings and to assist in his own defense." [R:26-9, 10] Regarding the present case, Dr. Fystrom said that with treatment and medication, LJT could be restored to competence within six months, which is within statutory time-frame. [R:26-13] During the course of the hearing, the state offered and the court received Dr. Fystrom's written report.

[R:26-8; R:13]. Significant to the issues on this appeal, the report stated that LJT will refuse to take medication, and that, "I do strongly suspect that he will require an Order to Treat . . . with involuntary medications given . . ." [R:13-9]

LJT also testified at the hearing. He said that as of August 3, 2000 he was enlisted in the United States Navy. [R:26-18, 19] LJT then talked about his college girlfriend and the prosecutor obtaining Navy records. *Id.* The judge stopped LJT saying, "Okay. This is not pertinent to your competency." *Id.* LJT objected, saying, "Yes, it is. In terms of what it is being the 911 whistleblower. Being the 911 whistleblower -"[2] *Id.*

At the conclusion of the hearing, the court made the following findings:

> THE COURT: Okay. During approximately three minutes off the record the court allowed [LJT] to just speak freely. He was basically stream of consciousness on various conspiracy theories involving politicians, local prosecutors and national conspiracy (inaudible). Based on the record here, um, all of the information available to me, primarily the testimony of the doctor, I do find the State's established by evidence that's clear and convincing that right now [LJT] is not competent. I find also he'd likely be restored to competency in case 24 CM 1291, but not likely restored within the statutory time limits of 931. 931 will be dismissed. 931 is dismissed pursuant to statute on competency. I'm committing [LJT] to the Department of Health Services for restoration to competency.

[R:26-19, 20]

[2] Arguably, LJT was right. His inability to understand what is relevant is highly relevant to the question of his competence to represent himself.

Thereafter, LJT timely filed a notice of intent to pursue post-disposition relief. [R:21] He then timely filed a notice of appeal. [R:36]

Argument

I. The circuit court erred in finding that LJT freely, voluntarily, and intelligently waived his right to counsel at the competency hearing.

The circuit court erred in finding that LJT validly waived his right to counsel. First off, LJT did not acknowledge that he knew he had the right to counsel. But, of greater concern is the fact that LJT was ultimately found to be not competent to proceed. Certainly, then, he was not competent to represent himself in court.

A. Standard of appellate review

On appeal, "Whether a defendant has knowingly, intelligently and voluntarily waived his right to counsel requires the application of constitutional principles to the facts of the case, which we review independent of the circuit court. [internal citation omitted] Whether an individual is denied a constitutional right is a question of constitutional fact that this court reviews independently as a question of law. [internal citation omitted]. Non-waiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary." *State v. Klessig,* 211

Wis. 2d 194, 204, 564 N.W.2d 716, 720-721, 1997 Wisc. LEXIS 80, *11

B. Standard for waiver of right to counsel

There are two aspects to the standard for waiver of counsel. First, the court must conduct a colloquy to establish that the defendant's decision to waive counsel is being freely, voluntarily, and intelligently made. If so, then the court must determine whether the defendant is minimally competent to represent himself.

"The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law, and ultimately that justice is served. *Klessig,* 211 Wis. 2d at 201, 564 N.W.2d at 719.

Thus, the court in *Klessig* wrote, "[W]e mandate the use of a colloquy in every case where a defendant seeks to proceed *pro se* to prove knowing and voluntary waiver of the right to counsel. Conducting such an examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions." *Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721, 1997 Wisc. LEXIS

80, *13-14; *overruling State v. Pickens* insofar as *Pickens* held that the colloquy is not mandatory.

Thus, "To prove . . . a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721, 1997 Wisc. LEXIS 80, *14

Recently, the Wisconsin Supreme Court reaffirmed the *Klessig* requirements. The court wrote:

> At times, we have employed our superintending authority in an effort to ensure a defendant's right to counsel is protected. Most notably, in *State v. Klessig*, we mandated the use of a colloquy before a defendant may proceed pro se. [internal citation omitted]. Under *Klessig*, the circuit court must conduct a colloquy to ensure that the defendant understands the right to counsel and the drawbacks to proceeding pro se. Id. If challenged postconviction, the State is required to demonstrate by clear and convincing evidence that the defendant properly waived the right to counsel.

State v. Clark, 2022 WI 21, P11, 401 Wis. 2d 344, 351, 972 N.W.2d 533, 536-537, 2022 Wisc. LEXIS 38, *6-7, 2022 WL 1159583

Concerning the requirement that the defendant be minimally competent to represent himself, the Wisconsin Supreme Court has explained, "After carefully considering the question, we have concluded that competency to stand trial is not the same as competency to proceed *pro se* and that, even though he has knowingly waived counsel and elected to do so, a defendant may be prevented from representing himself." *Pickens v. State*, 96 Wis. 2d 549, 567, 292 N.W.2d 601, 610, 1980 Wisc. LEXIS 2604, *27, *reversed by Klessig insofar as Pickens held that a colloquy is not mandatory.*

The court further explained that, "The standard for determining competency to stand trial is whether one is able to understand the proceedings against him and to assist in his own defense. Sec. 971.13, Stats. This test assumes the defendant will have representation and that he will be required only to assist in his defense. Certainly more is required where the defendant is to actually conduct his own defense and not merely assist in it." *Pickens*, 96 Wis. 2d at 567, 292 N.W.2d at 610.

C. LJT did not freely, voluntarily, and intelligently waive his right to counsel.

To begin with, the record does not establish that LJT knew that he had a right to have a lawyer represent him. When the judge asked LJT that question, he said, "I understand that I

signed anti-counterfeiting documents at my residence - - " [R:26-3] This is far from an acknowledgement by LJT that he understood the court's question.

More concerning, though, is the painfully obvious question of whether LJT could possibly have understood the questions where, moments later, the judge found that LJT was not competent to proceed? By statute, a finding that the defendant is not competent to proceed is a finding that LJT "lacks substantial mental capacity to *understand the proceedings*." *See,* § 971.13(1), Stats Since the court found at the end of the competency hearing that LJT could not understand the proceedings, he certainly could not have understood the waiver colloquy conducted at the start of the hearing. He did not become incompetent during the course of the hearing. He was incompetent all along.

This point becomes even more compelling when one asks the next question: does the record demonstrate that LJT is *competent to represent himself?*

It is one thing for LJT to be able answer "yes" to the judge's leading questions during the waiver colloquy. It is quite another thing to expect LJT to demonstrate even the most minimal competence in representing himself in court. During LJT's testimony, for example, the court interrupted the proceedings and had an off-the-record conversation with LJT. Here is how the judge summarized it, "He was basically stream

of consciousness on various conspiracy theories involving politicians, local prosecutors and national conspiracy." [R:26-20]

For these reasons, the circuit court erred in finding that LJT freely, voluntarily, and intelligently waived his right to court.

II. The circuit court erred in finding that LJT could be restored to competency within the statutory time frame.

If the court finds that LJT validly waived his right to counsel, then the court must reverse the circuit court's order committing LJT for treatment in order to restore him to competency. The court's finding that LJT could be restored to competency within the statutory time period was based upon the doctor's testimony that, in order to restore LJT to competency, it would require involuntary medication. LJT is not charged with "serious offenses", and, therefore, he cannot be involuntarily medicated.

A. Standard of appellate review

"Because we find that the trial court is in the best position to weigh all the evidence necessary to make a competency determination, we hold that a court reviewing such a determination should apply a "clearly erroneous" standard of review. We further hold that because the state bears the burden of proving a defendant's competency when it is put at issue by

the defendant, a defendant shall not be subjected to a criminal trial when the state fails to prove by the greater weight of the credible evidence that the defendant is capable of understanding the fundamental nature of the trial process and of meaningfully assisting his or her counsel." *State v. Garfoot*, 207 Wis. 2d 214, 217, 558 N.W.2d 626, 628, 1997 Wisc. LEXIS 13, *2

B. The statutory frame-work

If the examiner finds that the defendant is not competent to proceed, § 971.14(3)(d), Stats, requires the examiner to offer an opinion, "[R]egarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5) (a)."[3] Here, the maximum period is nine months.

Here, concerning restoring LJT to competency, Dr. Fystrom testified that within the time frame for the bail jumping charge, LJT could be restored to competency.[4] [R:26-13] During her testimony at the hearing, though, the doctor did not elaborate on the method of treatment that would be used to

[3] "If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months, *or the maximum sentence specified for the most serious offense."* (emphasis provided) Here, the most serious offense is Count 2 charging misdemeanor bail jumping, which has a maximum penalty of nine (9) months in jail.

[4] According to Dr. Fystrom, the statutory period is the nine month maximum penalty less 25% for good time; or, in other words, about six months. [R:26-13]

treat LJT. In her report, though, she did. She wrote, "[LJT's] mental health symptoms are very poorly controlled at this time. He also has poor insight into his mental health needs and treatment. He does not believe that he has a mental illness and *is adamant that he will refuse to take any psychotropic medications*." (emphasis provided) [R:13-9] According to Dr. Fystrom, though, medication is the key to restoring LJT to competency. She wrote, "Once admitted to one of the State mental health hospitals he will work with an interdisciplinary team, including a psychiatrist, who will make medication recommendations and treatment plans. I do strongly suspect that he will require an Order to Treat (OTT) with involuntary medications given he has required an OTT in the past to be restored to competency and his poor insight and judgment into his mental health symptoms . . . " [R:13-9]

So the question becomes: may LJT be involuntarily medicated in order to restore him to competency to face two misdemeanor charges?

C. The constitution does not permit the government to involuntarily medical LJT in order to restore him to competency to face trial.

A criminal defendant, such as LJT, "[P]ossesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process

Clause of the Fourteenth Amendment." *Washington v. Harper*, 494 U.S. 210, 221-222, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198, 1990 U.S. LEXIS 1174, *24, 58 U.S.L.W. 4249

However, "T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing *serious criminal charges* in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Sell v. United States,* 539 U.S. 166, 179, 123 S. Ct. 2174, 2184-2185, 156 L. Ed. 2d 197, 211 (2003) Concerning what is a "serious crime", the Supreme Court explained, "[A] court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security." (emphasis in the original) *Sell,* 539 U.S. at 180.

The supreme court repeatedly uses the phrase "serious crime" without ever giving a usable definition. The court did offer some guidance, though. The court noted that (1) an important governmental interest must be at stake; (2) the crime

must be against a person or property; and, (3) the law violated must be intended to protect the basic human need for security.

Remember that, here, LJT is charged with misdemeanor bail jumping.[5] To be sure, the government has some cognizable interest in making sure that defendants who are released on bond for misdemeanor charges do follow the rules placed upon them by the court. Whether, in a misdemeanor case, that governmental "interest" may be characterized as "important" or not is somewhat beside the point. This is because the crime of misdemeanor bail jumping does not in any way protect any basic human need for security.[6] Rather, the bail jumping law addresses the government's need for efficient and orderly proceedings in the courts (primarily that the defendant returns to court when he is supposed to). There is no cognizable personal security issue involved. Thus, misdemeanor bail jumping simply is not a "serious offense" for which LJT may be involuntarily medicated in order to return him to competency.

[5] He is also charged with disorderly conduct, but that offense is irrelevant. The statutory time frame is for the more offense with the longest period of incarceration which, in this case, is bail jumping.

[6] In writing this sentence, the author can already imagine the state's response elaborating on how conditions of bond-- such as a no contact order-- are intended to provide security to the alleged victim of the offense. It certainly would be accurate that the *condition of bond* may be intended to provide security to the alleged victim; but it is not accurate that the bail jumping law addresses a personal security issue.

Conclusion

For these reasons, it is respectfully requested that the court reverse the order of the circuit court finding that LJT properly waived his right to counsel, and to vacate the order finding that he is not competent to proceed, and to remand the matter to the circuit court with instructions to conduct a new hearing at which LJT shall be represented by counsel unless the court can find, based upon a proper colloquy, that LJT voluntarily and intelligently waives his right to counsel

In the alternative, in the court of appeals finds that LJT's waiver of counsel was valid, to vacate the order of commitment and remand the matter to the circuit court with instructions to dismiss the case because, in the absence of involuntary medication, LJT is not likely to be restored to competency within the statutory time period.

Dated at Milwaukee, Wisconsin, this 24th day of October, 2024.

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Certification as to Length and E-Filing

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 4039 words.

Dated at Milwaukee, Wisconsin, this 24th day of October, 2024.

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