STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2025AP000387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

T.R.T.,

Defendant-Appellant.

Appeal from Order of Commitment for Treatment (Incompetency) entered in the Monroe County Circuit Court, the Honorable Richard A. Radcliffe, presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the circuit court err in finding that T.R.T. was likely to be restored to competency?

The court found T.R.T. would likely be restored to competency, despite one expert opining that he was not restorable, and the other opining he was competent.

POSITION ON ORAL ARGUMENT AND PUBLICATION

T.R.T. does not request oral argument but would welcome it if the Court believes it helpful to decide the issue. There are no standards or case law guiding circuit courts on the issue of restorability in criminal competency cases; additionally, there is no established standard of review.[1] Publication is warranted for both of these reasons.

STATEMENT OF THE FACTS AND CASE

T.R.T. was charged with multiple counts related to sexual abuse of a child, which allegedly occurred between September 2017 and September 2020, and one count of felony bail jumping. (R.2:1-3). During the

[1] The circuit court noted during its ruling: "I'm not sure there's as clear a determination about the restoration issue, but certainly as to competency 971.14(4)(b) establishes that burden and places [it on the State]." (R.114:6; App.11).

proceedings, trial counsel raised the issue of T.R.T.'s competency to proceed in a letter to the circuit court. (R.78).

Two competency evaluations were completed. Dr. Dileep Borra was appointed by the court, (R.82; 84:1), while Dr. Steven Benson was retained by defense counsel. (R.86:1; App.26). The opinions given were opposite. Dr. Borra opined that T.R.T. was feigning impairment, due to repeatedly answering "I don't know" during the interview. (R.84:5). Dr. Benson's opinion was that T.R.T. has primary diagnoses of "Schizoaffective Disorder, Bipolar type and Major Neurocognitive Disorder, due to chronic inhalant abuse and traumatic brain injury," and that he was not competent and not likely to be restored. (R.86:18-19; App.43-44).

While the court agreed with and primarily relied on Dr. Benson's opinion to find T.R.T. incompetent, it found T.R.T. was likely to be restored to competency. That finding was based on purported inconsistencies in Dr. Benson's report and evidence in the record that the court felt suggested restorability.

Dr. Benson's Report and Testimony[2]

As part of his examination, Dr. Benson met with T.R.T. twice at the jail, administered numerous tests, consulted with trial counsel, interviewed jail staff, and

[2] Given the court's lack of reliance on or discussion of Dr. Borra's opinion, his report and testimony are largely omitted from this brief.

reviewed numerous medical records as well as the criminal complaint and CCAP notes. (R.86:1-2; App.25-26). Dr. Benson also talked with T.R.T.'s wife and mother. (R.86:7; App.32).

In discussing T.R.T.'s history, Dr. Benson's report notes T.R.T. failed second grade and was referred for special education classes. (R.86:4; App.29). T.R.T. was also involved in a motor vehicle accident that may have caused a traumatic brain injury. (R.86:5; App.30). T.R.T. also reported abusing inhalants beginning at age 12, the frequency of which was confirmed by his mother and wife. (R.86:7; App.32). Additionally, per T.R.T.'s wife, he was determined to be disabled in 2017 or 2018 and received disability benefits. (R.86:4; App.29).

According to Dr. Benson, T.R.T.'s mental health records contained the following diagnoses:

> Schizoaffective Disorder, Bipolar type, with paranoid ideation; Cognitive Impairment in the Context of Emerging Schizophrenia; Post-Traumatic Stress Disorder; Major Depressive Disorder, recurrent; Unspecified Mood Disorder; Adjustment Disorder with mixed features; and Childhood Sexual Abuse.

(R.86:5; App.30). The report also notes a history of symptoms of a "schizophrenia spectrum disorder" and numerous medications were listed as having been prescribed to T.R.T. in the past. (R.86:5-6; App.30-31).

The report went on to describe a number of psychological tests that Dr. Benson administered to T.R.T. (R.86:7-14; App.32-39). Notably, on the Wechsler Adult Intelligence Scale-IV (WAIS-IV), T.R.T. was estimated to have an IQ of 53, putting him in the range of moderate intellectual disability. (R.86:9; App.34). Dr. Benson interpreted another test, the Wisconsin Card Sorting Test (WCST), to indicate that T.R.T. was unable to benefit from feedback, meaning "he *effectively lacks* the capacity to learn from experience or modify his behaviors in response to feedback from others or situations." (R.86:13; App.38; *see also* 110:84-85; App.155-56) (emphasis in original).

Dr. Benson offered a number of diagnoses for T.R.T.:

> Schizoaffective Disorder, Bipolar type; Major Neurocognitive Disorder due to multiple causes (chronic inhalant abuse and traumatic brain injury); Intellectual Developmental Disorder, moderate; Post-Traumatic Stress Disorder, childhood onset; Inhalant Use Disorder, severe, in forced remission due to current incarceration; history of physical, psychological, and sexual abuse as a child; and history of child sexual abuse.

(R.86:14; App.39).

The report also discussed the Competency Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)—a competency specific tool for defendants with intellectual disability. T.R.T. performed well below the average scores for adults with cognitive issues who were opined to be competent. (R.86:17-18; App.42-43).

In finding T.R.T. incompetent to stand trial, Dr. Benson's report notes:

> there is an empirical basis for the clinical signs of a schizoaffective disorder—hallucinations, delusions, disjointed speech, grossly disorganized behaviors, and the previously specified negative signs of schizophrenia—in addition to major cognitive and executive deficits that reliably and consistently result in impaired perceptions, reasoning, problem-solving, and the inability to benefit from life experience.

(R.86:19; App.44). In opining that T.R.T. was not likely to be restored to competency, the report states:

> These conditions have adversely affected the ability to learn and retain essential information, and to provide relevant details to his attorney during legal proceedings. This opinion recognizes the presence of significant neurocognitive deficits from inhalant abuse that are neither reversible nor amenable to treatment.

(R.86:19; App.44).

Regarding treatment, Dr. Benson noted that schizoaffective disorder can be treated effectively with antipsychotic medication, but T.R.T.'s "ability to benefit from treatment is extremely limited by virtue of his extremely inefficient intellectual functions."

(R.110:76; App.147). According to Dr. Benson, the treatment record showed that T.R.T. had previously been prescribed antipsychotic medications, but was inconsistently compliant or noncompliant with that treatment. (R.110:82-83; App.154-55). Dr. Benson also testified that the progression of major neurocognitive disorders can sometimes be slowed by treatment, but cannot be reversed or improved with time. (R.110:79-80; App.150-51).

When asked directly if T.R.T. would benefit from medication, Dr. Benson said he would not, and referred the court and parties to the references that accompanied his report regarding the "significant and pervasive and not remediable deficits of neurocognitive functioning in response to prolonged inhalant abuse." (R.110:93; App.164). On re-cross, Dr. Benson explained:

> [I]f it was schizoaffective disorder without the other disorders present, that that could be treated, but you can't look at this—this is not an all-or-none case. . . . This is not a black or white case. This is a case in which there are significant and severe and multiple mental disorders and it's the weight of those combined mental disorders that form the basis of my opinion that he—these are permanent, they cannot be treated, and that they are not in any way going to be restorable.

(R.110:95; App.166).

Testimony of Todd Evers

Todd Evers, a correctional sergeant at the Monroe County jail described certain jail procedures, including that inmates have access to a mental health professional, that they do not have to request. (R.102:58-59; App.50-51). Sgt. Evers testified that inmates can receive medications while in the jail. (R.102:59; App.51).

In discussing T.R.T.'s presentation in the jail, Sgt. Evers testified there were no issues with T.R.T. eating his meals. (R.102:62; App.54). He stated that T.R.T. "had a few minor violations" while in the jail, estimating no more than six to eight violations. (R.102:62; App.54). Sgt. Evers went on to describe T.R.T. presenting differently "the day of the evaluation" and when he has seen T.R.T. in court than when he is in the jail. (R.102:63-64; App.55-56).

Sgt. Evers noted that T.R.T. complained about a number of things in his cell being broken, and Sgt. Evers disagreed. (R.102:65-66; App.57-58). He also testified T.R.T. requested to be transferred to a cell without a camera. (R.102:66; App.58). He further described T.R.T. being able to maintain eye contact and hold a "normal conversation." (R.102:67-68; App.59-60). Sgt. Evers also described T.R.T. properly maintaining his cell and hygiene. (R.102:69-70; App.61-62).

Circuit Court Ruling

After the two-day evidentiary hearing and briefing by the parties, the circuit court held an oral ruling where it found T.R.T. not competent, but likely to regain. The circuit court found both doctors credible, (R.114:7; App.12), but gave more weight to Dr. Benson's testimony, (R.114:7; App.12), noting how it was more comprehensive. (R.114:10, 12; App.15, 17). The court stated that it was "relying primarily on [Dr. Benson's] opinion as it relates to competency." (R.114:16; App.21).

Despite relying on Dr. Benson's opinion to find T.R.T. not competent, the court diverged when it found that he could be restored to competency. In doing so, the court specifically noted Dr. Benson's opinion was:

> inconsistent with the other evidence in this case, including jail staff, nursing staff, the chronic mental health issues that the defendant has had which are treatable.

(R.114:16; App.21). The court went on to say:

> Doctor Benson's opinion is a little bit contradictory because he relies upon the mental health history and the schizophrenia and the PTSD when determining that he's not competent to proceed, but when it comes to restoration, he doesn't mention the potential impact of restorative treatment.

(R.114:17; App.22).

Ultimately, the court found T.R.T. was likely to be restored to competency in the appropriate timeframe. (R.114:17; App.22). The court committed T.R.T. to an inpatient facility for competency restoration. (R.114:17; App.22; 113; App.3-5).

This appeal follows.

ARGUMENT

The circuit court's finding that T.R.T. could be restored to competency was unsupported by the record.

The circuit court relied on Dr. Benson's testimony to find that T.R.T. was not competent, but disregarded his opinion on restorability because schizoaffective disorder on its own is treatable. Despite the court's claims, Dr. Benson addressed why treatment of T.R.T.'s schizoaffective disorder would not be sufficient to restore him to competency. Moreover, nothing the court relied on to find T.R.T. restorable reasonably supports that conclusion.

A. Standard of review.

T.R.T. has been unable to locate any cases in which this Court has reviewed a circuit court's determination that a defendant will be restored to competency, thus there is no case law addressing the proper standard of review in such circumstances.[3]

Competency itself is "a judicial inquiry, not a medical determination," and the court's job at a contested competency hearing is to determine whether the evidence shows "the defendant can understand the proceedings and assist counsel with a reasonable degree of rational understanding." *Byrge*, 237 Wis. 2d 197, ¶31 (internal quotations omitted). Appellate courts review the circuit court's competency determination under the clearly erroneous standard. *Id.* at ¶45. A decision is clearly erroneous "if it is against the great weight and clear preponderance of the evidence," *Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8, ¶25, 405 Wis. 2d 616, 985 N.W.2d 69, or if it is "unsupported by the record." *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

T.R.T. argues that the circuit court's determination of competency restoration should be treated differently than the finding of competency. Specifically, he asserts that it should be reviewed similar to the question of treatability in mental health commitment cases—as a mixed question of law and fact. *See Waukesha Cnty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783 (noting the standard of review was mixed when the only issue raised was

[3] Determination of the proper standard of review is itself a legal question this Court reviews *de novo*. *See State v. Byrge*, 2000 WI 101, ¶32, 237 Wis. 2d 197, 614 N.W.2d 477.

the subject individual's treatability). Thus, the Court would defer to the circuit court's finding of fact, unless clearly erroneous, but would independently decide if a defendant is likely to be restored to competency.

In order to commit a mentally ill individual the government must prove that the person is a "proper subject for treatment." Wis. Stat. § 51.20(1)(a)1. An individual is treatable if the underlying condition can be controlled or improved (i.e. rehabilitated), rather than simply having their individual functioning maximized and maintained (i.e. managed). *See Fond du Lac Cnty. v. Helen E.F.*, 2012 WI 50, ¶¶35-36, 340 Wis. 2d 500, 814 N.W.2d 179.[4]

While restoration in the criminal competency context requires improving, rather than simply controlling a defendant's condition, the legal question is substantially the same: are there facts sufficient to support a legal conclusion that an individual's condition can be managed to the degree required by law. As such, the standard of review should be the same in both case types.

Finally, unlike a competency determination, there is nothing about restorability that puts the circuit court at an advantage over this Court. While the circuit court is in a position to observe the defendant and gauge whether or not they are competent, *Byrge*, 237 Wis. 2d 197, ¶33, when the

[4] In commitment cases, counties must demonstrate treatability by clear and convincing evidence. Wis. Stat. § 51.20(13)(e).

decision about competency and restoration is based upon an expert's diagnosis, the circuit court cannot reasonably substitute its judgment for an expert's—absent support in the record. This Court is in as good a position as the circuit court to review the record to determine if the evidence presented meets the legal standard.

While T.R.T. believes restorability should be reviewed as a mixed question of law and fact, the circuit court's decision also fails under the higher clearly erroneous standard. As such, the argument is framed using the higher standard.[5]

B. The record does not support a finding that T.R.T. can be restored to competency.

The court's findings were not supported by the record. The circuit court acknowledged primarily relying on Dr. Benson's testimony to find T.R.T. competent, but criticized Dr. Benson for alleged inconsistencies between his opinions regarding competency and restorability. Additionally, the court did not point to any specific evidence to support a finding that T.R.T. is likely to be restored to competency, and the things the court did note do not support its conclusion.

[5] Additionally, in this case, the standards seem to dovetail, as the question is ultimately whether the record supports the court's determination.

1. Dr. Benson's opinions on competency and restorability were consistent.

The court faulted Dr. Benson for purportedly relying on the schizoaffective disorder and PTSD to form his opinion as to T.R.T.'s competency, but disregarding it when considering restorability. (R.114:17; App.22). This assertion is contradicted by the record, as Dr. Benson addressed it directly. Dr. Benson acknowledged that if the only issue was schizoaffective disorder, it could be treated—the reasonable inference being that T.R.T. would be restorable. (R.110:95; App.166). However, Dr. Benson stated that with the multiple diagnoses (i.e. schizoaffective disorder, PTSD, and the neurocognitive disorder) T.R.T. could not be treated and was not restorable. (R.110:95; App.166).

The court effectively cherry-picked one aspect of Dr. Benson's testimony to find that because schizoaffective disorder is normally treatable on its own, T.R.T. was likely to be restored if treated for his schizoaffective disorder. In doing so, the court ignored that T.R.T.'s restorability "is an individualized, fact-specific decision." *See State v. Garfoot*, 207 Wis. 2d 214, 227, 558 N.W.2d 626 (1997). In fact, the sort of individualized determination provided by Dr. Benson is why "expert testimony regarding a particular defendant's mental capabilities is necessary." *Id.*

The court also misinterpreted Dr. Benson's competency opinion. The court correctly noted the "attention problems for a person with schizophrenia [spectrum disorders] tend to cause altered perceptions not based on reality which results in the symptoms of delusions, disjointed speech, disorganized behavior, et cetera." (R.114:13; App.18; 86:16-17; App.41-42). However, this is not why Dr. Benson believed T.R.T. was not competent. As with Dr. Benson's opinion on restorability, his opinion as to competency was informed by the combination of T.R.T.'s mental illness and neurocognitive disorder. Specifically, Dr. Benson noted how both contributed to T.R.T.'s deficiencies including:

> problems with visual, auditory, and somatic hallucinations, paranoid delusions, sustained attention, severe deficits of immediate recall, and working memory, acquiring and retaining relevant or new information, abstract reasoning, and adaptive problem-solving.

(R.86:18; App.43). It is arguable that Dr. Benson's opinion was driven more by the presence of the neurocognitive disorder than by the mental illnesses. This is evidenced by the focus on memory impairment and information recall combined with no discussion of specific delusions or hallucinations that affect T.R.T.'s competency. (R.86:19; App.44).

2. Nothing the court referenced suggests T.R.T. could be restored.

In addition to citing T.R.T.'s diagnosis of schizoaffective disorder, the circuit court stated Dr. Benson's opinion was "inconsistent with the other evidence in this case, including jail staff [and] nursing staff" and referenced "significant facts about the defendant's behaviors during the pendency of this proceeding which is evidence that I can consider on the issue of restoration." (R.114:16; App.21).

The court did not explain what specific testimony or information in the record it was relying on that supported the idea that T.R.T. could be restored to competency. The only member of jail staff who testified regarding T.R.T.'s presentation was Sgt. Evers.[6] Sgt. Evers' testimony was largely intended to indicate that T.R.T. did not suffer from a mental illness—describing T.R.T. not having issues eating meals, only having a handful of minor rule violations, and presenting differently in situations that might suggest malingering. (R.102:62-64; App.54-56); *supra* at 10.

At most, it could be extrapolated that T.R.T.'s schizoaffective disorder (i.e. paranoia or delusions) was evidenced by his desire to be transferred to a cell without a camera and complaints about things in his cell being broken when they were not. (R:102:65-66; App.57-58); *supra* at 10. Even if one relies on that extrapolation, it is unclear how that suggests that T.R.T. is restorable—it just reaffirms that he has schizoaffective disorder.

[6] Jail administrator Stan Hendrickson did testify, but his testimony was limited to the timeline of Dr. Borra's time at the Monroe County Jail. *See generally* (R.102:82-85).

The circuit court also referenced "nursing staff." Presumably, this is meant to refer to the jail nurse. First, there was no testimony from any jail nurses. However, Dr. Borra did testify that he spoke with the jail nurse. According to Dr. Borra, the nurse stated that T.R.T. was not prescribed any psychiatric medications and did not express any concerns that T.R.T. was "someone who's experiencing a lot of mental health symptoms or any mental health symptoms." (R.102:20-21). Dr. Borra reaffirmed that in speaking to both jail staff and nursing staff, over a two-year period they did not observe T.R.T. behave in a way that would suggest he was experiencing psychosis or mania. (R.102:36).[7]

Per the court's statements: it believed T.R.T. could be restored to competency because he was diagnosed with a treatable mental illness. The support in the record for this according to the court is various jail staff providing testimony suggesting that T.R.T. was not suffering from his mental illness. If anything, this further supports the conclusion that T.R.T.'s incompetence—and restorability—was primarily driven by his neurocognitive disorder, rather than his coexisting mental illness.

The circuit court's finding that T.R.T. was restorable is not supported by the record. Both

[7] Dr. Borra's report details his review of jail records and additional conversations with staff. (R.84:3-5). However, nothing in these conversations suggest T.R.T. is restorable, just that he was not suffering from a mental illness—which the circuit court disagreed with. (R.114:14).

Dr. Benson's opinion and the other evidence the court relied on all indicate that T.R.T.'s mental illness is secondary to his neurocognitive disorder in regards to affecting his competency to proceed. Because the court's finding is completely unsupported by the record, it is clearly erroneous. *Royster-Clark, Inc.*, 290 Wis. 2d 264, ¶11.

CONCLUSION

Because T.R.T. was diagnosed with a treatable mental illness, the circuit court found T.R.T. could be restored to competency. However, this finding was clearly erroneous as the totality of the record suggested that T.R.T.'s major neurocognitive disorder was not treatable, and was the primary driver of his incompetency. This Court should reverse and direct the court to find that T.R.T. is not likely to be restored to competency.

Dated this 25th day of April, 2025.

Respectfully submitted,

Electronically signed by
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CERTIFICATIONS

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 3,045 words.

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 25th day of April, 2025.

Signed:
Electronically signed by Lucas Swank
LUCAS SWANK
Assistant State Public Defender