

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0932-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF REFUGIO A.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

REFUGIO A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
S. MICHAEL WILK, Judge. *Reversed and cause remanded with directions.*

SNYDER, P.J. Refugio A. appeals from an order denying his postconviction motion to vacate his delinquency adjudication. He contends that he was not competent during the delinquency proceedings and that his counsel was ineffective in not raising the competency issue. Refugio moved the trial court to vacate the § 938.12, STATS., judgment of delinquency and order a petition to be

filed under § 938.13, STATS., alleging that he is a juvenile in need of protection or services. In the alternative, he requested a *Machner*¹ evidentiary hearing. The trial court denied the motion without a hearing. Refugio appeals.

On June 4, 1997, a delinquency petition was filed against Refugio, age ten. He was adjudicated delinquent on December 30, 1997, after a bench trial. On January 18, 1999, Refugio filed a motion alleging that he is not competent because “[h]is extreme youth, his ADHD² disability, and his disadvantaged family background mean that he lacks substantial mental capacity to understand the proceedings or assist in his defense as required by sec. 971.13(1), Stats.” His motion relied upon a report by Dr. Lynn Maskel, dated January 13, 1999,³ and an article from the JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW published in 1998. Maskel opined that “Refugio lacked substantial mental capacity to both understand the proceedings as well as assist in his defense through the time period subsequent to investigation of the [delinquency] charges (April, 1997) through trial (January, 1998).”

The trial court denied Refugio’s motion to vacate his delinquency adjudication in its written decision as follows:

[Refugio] claims that he was not competent at the time of the trial. This court disagrees. This court had ample opportunity to observe [Refugio] in court, at the counsel table, on the witness stand, for a number of hours at

¹ *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

² ADHD is the acronym for attention deficit hyperactivity disorder, described in Dr. Lynn Maskel’s report attached to Refugio’s motion as follows: “There is a history of Attention Deficit Disorder (ADHD), marked by hyperactivity, poor frustration tolerance, impulsivity, poor attention span, distractibility and difficulty completing tasks.”

³ Maskel’s five-page report is dated “1/13/98” but refers to an interview of Refugio on December 30, 1998. We conclude that this was a typographical error.

hearings and two partial days of trial. The court observed the respondent to be attentive, interested in the proceedings, alert, and occasionally engaged in private conversation with his defense counsel. He testified clearly, and positively about the day in question. He was clearly oriented as to time, place and space. He had a grasp of dates and relationships. He was with friends and relatives that day and clearly understood the charge against him. He accused several of the young boys with him that day of engaging in the sexual acts that [Refugio] was accused of performing. The court is satisfied that [Refugio] was competent. MOTION DENIED.

Refugio first contends that the facts alleged in support of his motion are sufficient and that the trial court erred as a matter of law in denying him an evidentiary hearing. If Refugio's motion on its face alleged facts which would entitle him to relief, the trial court has no discretion to exercise and must hold an evidentiary hearing. *See State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether a motion alleges facts which, if true, would entitle Refugio to relief is a question of law that we review de novo. *See id.*

Refugio also contends that the trial court erroneously exercised its discretion in denying his motion without an evidentiary hearing. If a motion fails to allege sufficient facts, the trial court has discretion to deny a postconviction motion without a hearing based on any one of three factors enumerated in *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629 (1972). *See Bentley*, 201 Wis.2d at 310-11, 548 N.W.2d at 53. Those factors are failure to allege sufficient facts in the motion to raise a question of fact, presentation of only conclusory allegations and conclusive demonstration from the record that the defendant is not entitled to relief. *See Nelson*, 54 Wis.2d at 497-98, 195 N.W.2d at 633.

The trial court did not address the facial merits of Refugio's motion but found that Refugio was competent based upon its own observations of Refugio

during the § 938.12, STATS., proceedings. Because of its competency finding, the trial court denied Refugio's postconviction motion for relief and did so without a hearing. The State frames the dispositive appellate issue as whether Refugio was entitled to an evidentiary hearing on his ineffective assistance of counsel motion. We conclude that he was.

An appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). When deciding a motion without a hearing, "[i]t is incumbent upon the trial court to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis.2d at 498, 195 N.W.2d at 633.

The trial court must find that the facts in Refugio's motion are insufficient or are conclusory in order to deny a hearing under the first two *Nelson* factors. The trial court never addressed the sufficiency or nature of the factual allegations contained in Refugio's postconviction motion for relief in its written decision, but found that Refugio was competent based upon its own observations and recollections during the delinquency proceedings. We are unable to conclude from the trial court's written opinion that it examined the facts relevant to the determination of whether Refugio's motion raised a question of fact requiring an evidentiary hearing. The trial court's exercise of discretion is not supported by applying the first two *Nelson* factors.

Under the third *Nelson* factor, the trial court may also exercise its discretion to deny a motion without a hearing if the record conclusively demonstrates that Refugio is not entitled to relief. While the trial court denied Refugio's motion and request for an evidentiary hearing, it did so based on its own observations and recollections, not upon the record. Our review of the record does not disclose support for the trial court's independent finding of competency, nor does the trial court's opinion or the appellate briefs cite to any such record support. While Refugio's "demeanor at trial might be relevant to the ultimate decision as to his sanity [or competency], it cannot be relied upon to dispense with a hearing on that very issue." *Pate v. Robinson*, 383 U.S. 375, 386 (1966). We must conclude that the trial court's written opinion fails to conclusively demonstrate from the record that Refugio is not entitled to relief.

Applying the three *Nelson* factors to the trial court's denial of Refugio's request for an evidentiary hearing to address his motion, we conclude that the trial court erroneously exercised its discretion in denying Refugio an evidentiary hearing. We are therefore compelled to reverse the order and remand this matter to the trial court with instructions to hold an evidentiary hearing on the postconviction motion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

