COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1172-CR **Cir. Ct. No. 1998CF6567**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY J. MEEKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge.[1] *Affirmed*.

[1] The Honorable Elsa C. Lamelas presided over the initial competency proceedings and issued the first order finding Jerry J. Meeks competent. The Honorable Daniel L. Konkol issued the judgment convicting Meeks of felony murder. The Honorable Mary M. Kuhnmuench presided over the supplemental competency proceedings and issued the second order finding Meeks competent. This appeal concerns the order entered by Judge Kuhnmuench.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Jerry J. Meeks was convicted in 2000 on his guilty plea to felony-murder as an habitual criminal. He claims that the trial court erred when it determined that he was competent. We affirm.

I.

¶2 This is Meeks's second trip to Wisconsin's appellate courts challenging his competency. On Meeks's first appeal, we affirmed the trial court's determination that Meeks was competent, even though the trial court relied, in part, on testimony by Meeks's trial lawyer in an earlier criminal matter, Mary Scholle. ***State v. Meeks***, 2002 WI App 65, 251 Wis. 2d 361, 643 N.W.2d 526. The supreme court reversed, holding that the trial court had improperly invaded Meeks's attorney/client privilege. ***State v. Meeks***, 2003 WI 104, ¶¶18–60, 263 Wis. 2d 794, 806–823, 666 N.W.2d 859, 865–874. The supreme court remanded the case to the trial court with directions "to conduct a competency hearing nunc pro tunc." ***Id.***, 2003 WI 104, ¶61, 263 Wis. 2d at 823, 666 N.W.2d at 874. On remand, the trial court held an evidentiary hearing and again found that Meeks was competent when he pled guilty years before.

¶3 Detective Charles Childs testified at the post-remand evidentiary hearing that he had spoken with Meeks a few hours after the murder. Childs told the court that Meeks appeared to understand his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), but that Meeks refused to sign a statement that said that Childs had given Meeks the ***Miranda*** warnings. According to Childs, Meeks then confessed, but also refused to sign the writing reifying his confession. At that point, according to Childs, Meeks asked for a lawyer. Childs agreed with the prosecutor's characterization that during the interview Meeks "was making

decisions about what he would and wouldn't do and whether or not he would talk to [Childs], whether or not he would sign the document, [and] whether or not he wanted a lawyer."

¶4 Assistant District Attorney Thomas Potter testified that he spoke with Meeks in August of 1994 about allegations that Meeks had hit his then pregnant girlfriend with a board. Potter told the trial court that Meeks was:

> exceptionally able to communicate his version. I'm not saying he used big words or precise legal language, but he very clearly and emphatically communicated to me why he did what he did and why he felt that he was justified in swinging the board at the chair that the victim was holding, emphasizing the pain he was in because of having just been struck, emphasizing that he was only trying to strike the chair, and -- and hit her arm, not meaning to, and he was quite able to communicate his position to me.

Potter also testified that he was at Meeks's plea and sentencing hearing in the matter involving Meeks's pregnant girlfriend, and that Meeks's lawyer told the trial court that Meeks was pleading guilty to substantial battery against her advice. According to Potter: "Mr. Meeks was very forceful in what he wanted to do, and made it clear to [his lawyer] that it was his choice to proceed and resolve the case very quickly on a plea to a lesser included offense with a very favorable recommendation." Potter testified that the trial court "did a very extensive colloquy with Mr. Meeks, and just like he did in the charging conference, Mr. Meeks was able to communicate quite effectively with" the trial court. The trial court in this case took judicial notice of the plea-and-sentencing-hearing transcript in the substantial battery case.

¶5 Assistant District Attorney James Frisch testified that he spoke with Meeks in May of 1997 about allegations that Meeks had operated a car without the owner's consent. According to Frisch, Meeks told the trial court at his plea

hearing: "I would like to say one thing, Your Honor. Is I am just pleading guilty to this charge. Ain't no way I can see myself winning." Frisch told the trial court that he did not "see any indication in … the plea colloquy … to suggest any type of mental issue at all." The trial court also took judicial notice of this transcript.

¶6 Psychiatrist Gary J. Maier, M.D., and psychologist Kent Berney, Ph.D., testified on Meeks's behalf. They had also testified at the 1999/2000 competency hearings, and, in essence, reiterated their testimony that they did not believe that Meeks was competent as of January 4, 2000. Dr. Maier also adhered to his earlier testimony that different standards of competence applied to different crimes. Further, when asked by the prosecutor how Meeks was able to explain why he pled guilty in 1997, Dr. Maier testified: "he must have had a good day. … [H]e's been in court before, and now he was in court again and he was making pretty good discriminations. I'm proud of him actually."

¶7 Dr. Berney reiterated his view that Meeks had an IQ of 58, and opined that a person with that level of intelligence was able to learn. Although he believed that in January of 2000, Meeks was able to understand the proceedings against him and discuss the relevant facts with his lawyer, he did not believe that Meeks was competent to "go to the next level" and help his lawyer develop strategies.

¶8 At end of the hearing, the trial court asked Meeks whether he believed he was competent. Meeks replied that he knew about what had happened at the shooting and that he "fel[t] kind of bad" because, he said, he did not intend to hurt the victim. Meeks told the trial court that if he had taken his medication and had stayed at home rather than using drugs the shooting probably would not have happened.

¶9 After excluding Scholle's testimony from its consideration, the trial court concluded on remand that Meeks was competent on January 4, 2000.

II.

¶10 As an initial matter, Meeks claims that the trial court's attempt to determine in 2004 whether he was competent in 2000 is contrary to the interest of justice. As we have seen, however, the supreme court remanded this case to the trial court to do precisely that. ***Meeks***, 2003 WI 104, ¶61, 263 Wis. 2d at 823, 666 N.W.2d at 874. We thus turn to the trial court's determination that Meeks was competent on January 4, 2000.

¶11 WISCONSIN STAT. § 971.13(1) codifies a paradigm constitutional principle: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense as long as the incapacity endures." *See* ***State v. Byrge***, 2000 WI 101, ¶¶26–29, 237 Wis. 2d 197, 213–215, 614 N.W.2d 477, 484–485.

> [M]ental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial. However, a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.

State v. Garfoot, 207 Wis. 2d 214, 226–227, 558 N.W.2d 626, 632 (1997) (footnote omitted).

¶12 A competency hearing is a judicial inquiry guided by evidence and legal standards, not a clinical inquiry. ***Byrge***, 2000 WI 101, ¶48, 237 Wis. 2d at 229, 614 N.W.2d at 491–492. The State has to prove "by the greater weight of the credible evidence that the defendant is competent." WIS. STAT. § 971.14(4)(b). In

determining whether the State has met that burden, a trial court is "in the best position to make decisions that require conflicting evidence to be weighed." ***Garfoot***, 207 Wis. 2d at 221–223, 558 N.W.2d at 630. "Although the court must ultimately apply a legal test, its determination is functionally a factual one: either the state has convinced the court that the defendant has the skills and abilities to be considered 'competent' or it has not." ***Id.***, 207 Wis. 2d at 223, 558 N.W.2d at 630. As such, we will not reverse the trial court's competency determination unless it is clearly erroneous. ***Byrge***, 2000 WI 101, ¶45, 237 Wis. 2d at 227, 614 N.W.2d at 491.

¶13 Meeks claims that the trial court erred because it: (1) applied the wrong legal standard; (2) did not accurately weigh what Meeks says is the "unrebutted" medical evidence that he was incompetent; and (3) questioned Meeks at the end of the competency hearing. We disagree.

¶14 The trial court applied the correct legal standard. In its oral decision, the trial court quoted the definition of competence from WIS. STAT. § 971.13(1), acknowledged that "mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence" but may support such a finding "if the condition is so severe as to render [the defendant] incapable of functioning in critical areas," and recognized that the State had to prove by clear and convincing evidence that Meeks was competent as of January 4, 2000. The trial court also acknowledged the experts' conclusions that Meeks was not competent, but correctly noted that whether a defendant is competent is a legal determination for the trial court. *See* ***Byrge***, 2000 WI 101, ¶48, 237 Wis. 2d at 229, 614 N.W.2d at 491–492; ***Krueger v. Tappan Co.***, 104 Wis. 2d 199, 203, 311 N.W.2d 219, 222 (Ct. App. 1981) (fact-finder not bound by unrebutted expert opinions).

¶15 The trial court also thoroughly reviewed the evidence. It opined that the experts had not fully considered how Meeks made decisions in other areas of his life, and concluded, based on the evidence and its discussion with Meeks at the end of the hearing, *see* WIS. STAT. RULE 906.14(2) ("The judge may interrogate witnesses, whether called by the judge or by a party."); ***State v. Carprue***, 2004 WI 111, ¶¶31–44, 274 Wis. 2d 656, 671–677, 683 N.W.2d 31, 38–41 (judge's authority to call and interrogate witnesses under RULE 906.14),[2] that Meeks was able to function in "critical areas," including:

- Meeks was able to understand and make choices about where he was incarcerated. Meeks was "able to say I … like these places very specifically for these reasons and I don't like these other ones."

- Meeks told the trial court that he wished he had stayed on his medications and stayed at home instead of using drugs. This showed that Meeks was able to "understand the benefits … and the problems with the decisions that [he's] made in life."

- Meeks was able to "understand[]" what his medications were for.

[2] Meeks does not separately contend that the questions the trial court asked him at the end of the evidentiary hearing on remand violated his Fifth-Amendment right against self-incrimination, beyond the following wholly undeveloped single sentence: "This questioning is conducted at a point where the defendant may be subjecting himself to self incrimination." We do not consider arguments that are insufficiently presented or developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed"). Moreover, it is generally accepted that the Fifth-Amendment privilege against self-incrimination does not apply at hearings to determine whether a defendant is competent to stand trial. *See* ***Huu Thanh Nguyen v. Garcia***, No. 05-56595, 2007 WL 430432, at *7, ___F.3d ___, ___ (9th Cir. Feb. 9, 2007)

The trial court also noted that Meeks had made "important decisions" in past criminal proceedings, including:

- Meeks "was able to think for himself" when he pled guilty to substantial battery against his lawyer's advice.
- Meeks "stood up for himself" and refused to sign a statement he gave to an investigating officer.
- Meeks pled guilty to operating a vehicle without the owner's consent because he did not think there was any way he could win.

¶16 The trial court weighed this evidence against the expert reports and testimony. It questioned Dr. Maier's assertion that a higher standard of competence applied to more serious crimes, and correctly concluded that the same standard applies to all crimes: "The law doesn't say that you got one standard of competence for a jay walking ticket and a different one for felony murder. It is what it is. And so as well intentioned as Dr. Maier is, he's just simply incorrect." Although it is true that *more complex* matters may require a higher level of understanding to make "competent" choices than matters that involve only simple decision-trees, *see* ***State v. Debra A.E.***, 188 Wis. 2d 111, 124–125, 523 N.W.2d 727, 732 (1994) ("Competency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made. Whether a person is competent depends on the mental capacity that the task at issue requires.[8]"[3]) (one footnote

[3] Footnote eight in ***Debra A.E.*** reads: "For example, a person may be competent to refuse medication at a psychiatric hospital but not competent to execute a will."

omitted), this is not a gradient that *ipso facto* varies with the penalty level assessed by the legislature. The trial court also pointed out that Dr. Berney agreed, after considering how Meeks had acted in earlier court proceedings, that Meeks could make important choices concerning his defense, and disagreed with Dr. Berney's conclusion that Meeks was not capable of assisting his lawyer.

¶17 After considering all of the evidence, the trial court determined that Meeks was competent on January 4, 2000:

> You're able to make choices. You've shown it in every fundamental aspect of your life. And that evidence is so persuasive it -- it -- it colors everything else that the doctors have told me. And so while the doctors, I think, in good faith have given me their best impression and their best opinion, it is just not consistent with everything else that I've seen. You get it. You've demonstrated it in other ways. And so yeah, I think you've got some learning disabilities. I think it takes a while for you to discuss things. But I think you're able to do it if you choose to do it. Not just because I'm telling you to, Mr. Meeks, but because you can do it all on your own. You don't need me to tell you to do it. You don't need me to prompt you. You don't need to repeat things back to me because I'm telling you. You eventually, it may be slow, but you eventually are able to make choices and decisions for yourself in very critical areas, and I think this record demonstrates that.
>
> All of your real world history I think is what [the prosecutor] called it. Your real world history. How do you function in critical areas of life? What kinds of decisions have you made? Is he able to do that in a court? Yes. You know I'm the judge. You know [the prosecutor], you don't -- I guess you know who [the prosecutor] is 'cause you turned around and you said [prosecutor], I'm not angry at you. You know who [your lawyer] is, you said he's a good guy, I just haven't told him these things 'cause I just haven't. It's up to … your lawyer, to talk to you so that you are able to tell him those things, so that he's able to represent you.
>
> I think based on, as I said, everything that I've read, all the reports, listening to the doctors, reading their reports, listening to you, reading the things that you've said to other judges in the past, as I said, I think that not only under the

> Garfoot case but under the statute, under the law, you do have, even as Dr. Jens has said, you have the -- the mental capacity, your -- even though your IQ is, as I said, 54, 58 or 65, whatever it is at any point, you're in a range that allows you to be educated. To learn. The capacity to learn, to remember, to retain things. You get it.
>
> Dr. Maier, as I said, wanted something more. The law doesn't require something more. Dr. Berney said he gets it in that area, Judge, I just don't think he can take it to that next level, and, you know, he's not able to talk to his -- and communicate and strategize with his lawyer. I don't see that. You've been able to do that and make some critical decisions in other aspects of your life. Very important aspects of your life.
>
> And so for all of those reasons and the totality of this record, I find that the State has met its burden of providing clear and convincing evidence that you are in fact competent under 971.13 sub (1).

We affirm.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.