

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2010

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2191

Cir. Ct. No. 2008JV3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE INTEREST OF ZACHARY A., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ZACHARY A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J.¹ Zachary A. appeals an order finding him delinquent. Zachary argues the circuit court erred when it rejected his request to order a competency evaluation. We agree. We therefore reverse and remand for the court to order an evaluation.

BACKGROUND

¶2 In April 2008, the State filed a delinquency petition charging Zachary, then thirteen-years-old, with first-degree sexual assault of a child. At a preliminary hearing, Zachary's counsel requested the court order a competency evaluation because she believed, after reviewing the petition with Zachary, that he was not competent to understand it or the delinquency proceedings. She also stated that Zachary has been diagnosed with Asberger's Disorder and that a report by Dr. Joel Schirvar, a psychologist who evaluated Zachary at the county's request, indicates he has limited cognitive abilities. The court scheduled a hearing on the motion.

¶3 At the motion hearing, the court denied Zachary's request to present Schirvar's testimony, asking instead for a summary of his conclusions as an offer of proof. Zachary's counsel told the court Schirvar would testify he believes Zachary does not understand the effect of his decisions or the nature and consequences of the delinquency proceedings. The court concluded it was unnecessary for Schirvar to testify, but his report was entered into the record. The report had been prepared for an earlier CHIPS proceeding. Among other things, the report concluded Zachary has difficulty acquiring information, appears to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

expect other people to know his thoughts and opinions, and functions at the level of an eight-year-old child.

¶4 The court then denied Zachary’s request for an evaluation, characterizing his argument as essentially that anyone under the age of thirteen or with Asberger’s Disorder is per se incompetent. It expressed its concern that this would lead to “a concerted effort by the Public Defender’s Office ... to raise the issue of competency on a very far-reaching, ongoing basis” It opined that “there is nothing ... I’ve seen, or appears about him in my dealings with him that ... separates him out from any other juvenile that comes in this courtroom. ... I think we have to keep competency to the very few cases where, clearly, this person doesn’t have a clue what’s going on.” The court concluded, “I also have to be very honest with you ... resources are extremely scarce. These [evaluations] are extremely expensive.”

DISCUSSION

¶5 The only issue in this appeal is whether the circuit court erred when it denied Zachary’s request for a competency evaluation. An evaluation is required “[i]f there is probable cause to believe that the juvenile has committed the alleged offense and if there is reason to doubt the juvenile’s competency to proceed” WIS. STAT. § 938.295(2)(a). Competency to stand trial requires that the juvenile possess (1) sufficient present ability to consult with his or her lawyer and (2) a factual understanding of the proceeding against him or her. *See State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). We review a circuit court’s determination of whether there is reason to doubt a juvenile’s competence for the erroneous exercise of discretion. *See id.* at 223-24.

¶6 Zachary argues the circuit court erroneously exercised its discretion because it declined to consider relevant expert testimony and relied instead on irrelevant considerations. We agree.²

¶7 A circuit court certainly is not required to conduct competency evaluations every time one is requested. *See State v. McKnight*, 65 Wis. 2d 582, 595, 223 N.W.2d 550 (1974). Rather, “[T]here must be some evidence raising doubt as to [the juvenile’s] competence” *Id.* The juvenile’s counsel’s opinion is a consideration, *State v. Haskins*, 139 Wis. 2d 257, 266, 407 N.W.2d 309 (Ct. App. 1987), but it is not the controlling factor. *State v. Weber*, 146 Wis. 2d 817, 826-27, 433 N.W.2d 583 (Ct. App. 1988). The juvenile’s mental health is also relevant. *Id.* The circuit court may base its determination “in part upon its firsthand observations of the [juvenile. But where] expert testimony or medical reports counter the court’s impression, we have held that further proceedings are necessary.” *Id.* at 828 (citing *Haskins*, 139 Wis. 2d at 266).

¶8 Here, the circuit court rejected Zachary’s request to present expert testimony, though it received the expert’s report. While the court was entitled to form an impression of Zachary’s abilities, it was not entitled to disregard expert evidence to the contrary. *See Haskins*, 139 Wis. 2d at 266; *see also State v. Johnson*, 133 Wis. 2d 207, 212, 395 N.W.2d 176 (1986) (letters from physician expressing “serious concerns regarding [defendant’s] competency to stand trial” created reason to doubt competency).

² The court also discussed an article pertaining to the competence of children under the age of thirteen. We do not address the court’s discussion of this article, however, because it was never entered into the record. In any event, whatever the content of the article may have been, it is not the focus of Zachary’s argument. Zachary presented evidence he functions at the level of a child much younger than he actually is; he does not argue his actual age renders him incompetent.

¶9 We also agree with Zachary that the circuit court erred by relying on irrelevant considerations. The court’s concern that ordering a competency evaluation would lead to “a concerted effort by the Public Defender’s Office ... to raise the issue of competency on a very far-reaching ... basis” is not relevant to whether Zachary is competent. Rather, whether a person is competent requires inquiry into that particular individual’s abilities. *See* WIS. STAT. § 938.295(2). That other individuals might also cite age and mental health diagnoses as evidence of incompetence does not preclude considering how those factors specifically impact Zachary’s competence. The cost of evaluations is also not relevant. The statute requires a competency evaluation whenever there is reason to doubt the juvenile’s competency to proceed; cost is not a factor.³

¶10 Finally, the circuit court’s opinion that “we have to keep competency to the very few cases where, clearly, this person doesn’t have a clue what’s going on,” is an incorrect statement of the standard for when an evaluation is required. Reason to doubt a person’s competency does not require definitive proof the individual does not understand the proceedings. All that is required is “some evidence raising doubt as to his competence” *McKnight*, 65 Wis. 2d at 595. Here, Zachary’s counsel opined she did not believe he understood the proceedings. Zachary also presented an expert’s report detailing his cognitive limitations and mental disorder, and concluding he functions at the level of a child almost half his age. He also attempted to present expert testimony relevant to whether he could understand the nature and consequences of the proceedings. We conclude this is sufficient evidence to raise doubt about Zachary’s competence.

³ Instead, WIS. STAT. § 938.295(2)(c) permits the county to recover a reasonable contribution from the juvenile’s parents toward the cost of the evaluation.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

