

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 11, 1998

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. 97-0699-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ARMANDO HERNANDEZ-DIAZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Armando Hernandez-Diaz appeals a judgment convicting him of first-degree intentional homicide and an order denying him postconviction relief. He claims that trial counsel was ineffective for failing to raise the issue of Hernandez-Diaz's competency to stand trial, and that the trial court should have ordered a competency evaluation before denying his

postconviction motion. The record does not support either contention, and we therefore affirm.

Hernandez-Diaz lived in the same house with Jose Santos and a number of other immigrants from Mexico. The State presented evidence that in the early morning hours of August 28, 1994, after both men had been drinking, Santos physically attacked Hernandez-Diaz for kicking or stepping on his cat. Hernandez-Diaz then ran to his room to grab an axe from under his bed and struck his housemate three or four times with the axe, killing him. Police apprehended the defendant after a tip that he had checked into a motel under an assumed name, and he was charged with first-degree intentional homicide.

Hernandez-Diaz was assigned an attorney through the Public Defender's program. A Spanish interpreter translated for the defendant all communication with counsel, as well as all of the court proceedings. Hernandez-Diaz had problems with his first three assigned attorneys, however, and substituted counsel twice<sup>1</sup> before trial. The fourth attorney, Walter Isaacson, testified that he found the defendant to be cooperative at first. Hernandez-Diaz told Isaacson that he wanted to go straight to the Court of Appeals, and Isaacson responded that was not possible given the posture of his case. Hernandez-Diaz then refused to further discuss the case with counsel, and he ultimately refused to testify in his own defense, despite the fact that the defense theory rested upon showing self-defense, imperfect self-defense, or provocation. None of the defendant's attorneys ever raised the issue of competency to the trial court.

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<sup>1</sup> The first appointment included two attorneys.

Psychologist Michael Kaye testified at the postconviction hearing that he did not believe that Hernandez-Diaz had been competent to stand trial, or that he was competent to participate in postconviction proceedings. He based his conclusions on a number of factors, including the defendant's borderline-retarded IQ, his lack of knowledge about the legal system, and the fact that Spanish was his primary language. Kaye explained his belief that Hernandez-Diaz had withdrawn from interaction with counsel because he mistrusted him, based partly on cultural differences and partly on his limited understanding of the proceedings. Kaye further opined that Hernandez-Diaz could have become "more competent" to stand trial with education about the legal system. The trial court gave no weight to Kaye's opinion, and determined that counsel had no reason to doubt the defendant's competency at trial. It also found the defendant competent to participate in postconviction proceedings, without ordering any further mental examinations.

We first consider the claim that counsel was ineffective for failing to raise the issue of competency at or before trial. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. *Id.* at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS; *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985). However, ultimately whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination which this court decides de novo. *Id.* at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her attorney “‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” *State v. (Edward) Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (quoting *Strickland*, 466 U.S. at 687). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *(Edward) Johnson*, 153 Wis.2d at 127, 449 N.W.2d at 847-48. To satisfy the prejudice prong, the defendant must show that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. A defense attorney who has reason to doubt the defendant’s competency is independently obligated to raise the issue regardless of strategic considerations, and the failure to do so violates both prongs of the test. *State v. Oliver Ross Johnson*, 133 Wis.2d 207, 219-21, 395 N.W.2d 176, 182-83 (1986).

The threshold question here, then, is whether counsel had any reason to doubt the defendant’s competency. The federal test for competency to stand trial is whether a defendant possesses “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960). In Wisconsin, “[n]o 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 so long as the incapacity endures.” Section 971.13(1), STATS.; *see also State v. Garfoot*, 207 Wis.2d 214, 225, 558 N.W.2d 626, 631 (1997) (noting that the Wisconsin statutes have codified *Dusky*).

Hernandez-Diaz asserts that his refusal to cooperate with four defense attorneys in a row or to testify on his own behalf raised a doubt as to his

competency. Refusing to cooperate with counsel, however, is an entirely separate matter from having the ability to cooperate. Trial counsel's testimony that the defendant had in fact cooperated with him at first demonstrates that he did have the ability to do so. As the trial court noted, and as the fact that four trial attorneys did not raise the competency issue indicates, there was no reason to think that Hernandez-Diaz did not rationally understand the charge against him or that his guilt was to be determined by a jury. Therefore, counsel was not deficient for failing to raise the competency issue. Also, given the trial court's postconviction finding that the defendant was competent at the time of trial, no prejudice resulted from counsel's decision not to raise the issue.

Hernandez-Diaz's complaint that the trial court erred when it determined his competency for postconviction proceedings without ordering an examination is also without merit. First of all, § 971.14, STATS., does not apply to postconviction proceedings. *State v. Debra A.E.*, 188 Wis.2d 111, 128 n.14, 523 N.W.2d 727, 733 (1994). Therefore, a court dealing with a postconviction competency issue has discretion as to the method it will use to evaluate the defendant's competency. *Id.* at 131-32, 523 N.W.2d at 734.

The standard of competence for postconviction proceedings is that the defendant be able to "assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." *Id.* at 126, 523 N.W.2d at 732. Although a competency determination requires the application of a legal test, it is still essentially factual in nature: either the defendant possesses the skills and abilities necessary to be considered competent, or he does not. *Garfoot*, 207 Wis.2d at 223, 558 N.W.2d at 630. Because the circuit court is in the best position to weigh any conflicting evidence in this regard, this court will not ordinarily reverse a competency determination unless it was

clearly erroneous. *Id.* at 223-24, 558 N.W.2d at 631. The trial court's determination here was not clearly erroneous. In addition to trial counsel's testimony that the defendant had been able to cooperate with him, Kaye's suggestion that Hernandez-Diaz could become competent with education reinforced the fact that he possessed the ability to assist in his own defense, had he chosen to do so.

*By the Court.*— Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

