COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2770-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN R. LEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

ROGGENSACK, J.[1] In this interlocutory appeal, Shawn Lee seeks to overturn an order finding him competent to stand trial, contrary to the recommendation of the court-appointed psychologist, Dr. Hurlbut. Lee contends that the circuit court erred by engaging him in a colloquy which rose to the level of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

a hearing regarding his competency and then continuing that hearing, rather than basing its decision solely on Hurlbut's report, after the State and defense counsel had each represented to the court that they had no further evidence to present. Lee contends in the alternative, that if this court determines that a hearing was appropriate, given the posture of the case, that the colloquy initiated by the circuit court was inadequate to satisfy Lee's due process rights. Finally, Lee argues that the court erred when it selected the burden of proof based on Lee's assertion of competency, rather than his defense counsel's assertion of his incompetency. Because we conclude that the circuit court's finding that Lee was competent to stand trial is not clearly erroneous and because the procedure used by the court did not prejudice any right asserted by or on behalf of Lee, we affirm.

BACKGROUND

On March 8, 1996, Lee was charged with three misdemeanor counts of sexual contact with a child in violation of §§ 940.225(3m), 947.01, and 948.40(1), STATS. At the request of defense counsel, the circuit court ordered a mental competency examination under § 971.14, STATS., to determine whether Lee could properly stand trial. Clinical psychologist Richard Hurlbut examined Lee and issued a report which concluded that Lee lacked substantial mental capacity to understand the proceedings or assist in his own defense.

Hurlbut's report explained that Lee was a possible victim of fetal alcohol syndrome, and that his difficulties "almost certainly involve neurological impairment and significant retardation in the area of verbal impairment."[2]

[2] Hurlbut noted that a neuropsychological evaluation of Lee had resulted in a diagnosis of intermittent explosive disorder, adjustment disorder with mixed emotional features, post traumatic stress disorder, and attention deficit hyperactivity disorder, for which he was being medicated with Lithium and Paxil.

However, Hurlbut also reported that Lee could relate the factual description of his own conduct which had resulted in the charges against him and that he knew his conduct with the young girl was wrong. Hurlbut concluded Lee was oriented as to person, place and time and that he knew that he was to have a trial. Lee told Hurlbut that at trial, "[t]hey have [a] jury." His understanding of a jury's function was to"[s]ee if you are guilty or not." When Hurlbut asked Lee what his attorney's role was, he said, "Helps you out, you talk about your problems," although he could not name his own attorney or remember what she had discussed with him. Lee told Hurlbut that a judge was someone "[t]hat sends you to jail or something." He relayed to Hurlbut that the worst thing that could happen to him after a trial was "[g]oing to jail, probably."

The circuit court received Hurlbut's report and held a competency proceeding on September 9, 1996, at which both the State and defense counsel waived the right to present additional evidence. After engaging Lee in a colloquy during which he affirmatively asserted that he was competent to proceed and answered questions put to him by the court, which were similar to the questions asked by Hurlbut, the following occurred:

> THE COURT: I asked for your comments regarding Mr. Lee on, for instance, the statements he's made here today in response to my questions, the same questions that were given, some of the same questions that were made to him by Dr. Hurlbut.
>
> ….
>
> [Do his answers] square with Dr. Hurlbut's report or make a difference in light of Dr. Hurlbut's report, or doesn't it mean anything?
>
> ….

> MR. HENKELMANN: Well, however, his comment indicating that he is competent, I think, puts the court's (sic) in a tougher position.
>
> MS. POGAINIS: I think at the very least the court should ask him to define that term.
>
> MR. HENKELMANN: I think the court has.

The court then adjourned the matter, commenting:

> I am perplexed regarding what to do with Mr. Lee's comments which I find indicate some basic knowledge regarding the function of the trial.
>
> The information contained in the Hurlbut report, which to me doesn't indicate as unlikely an understanding of Mr. Lee as it does to Dr. Hurlbut; and by that I mean the comments that are made on Page 2.
>
> Nevertheless the comments that you offer, Attorney Poganis (sic) [defense counsel], and that Dr. Hurlbut offers on Page 5 regarding the loss of memory, of inadequacy of memory of Mr. Lee, give me a good deal of concern.

When the competency proceeding was continued on September 25, 1996, Lee did not have any evidence to present on his own behalf, nor did his attorney. Both the court and the prosecutor questioned Lee, who was not under oath. Defense counsel did not object to the questioning but continued to assert that the court should rule based solely on Hurlbut's report. The court then stated,

> I want to tell you that I find you are competent to stand trial, and I consider the report that has been made by Dr. Hurlibut (sic) being one of the primary bases for it.
>
> He asked you lots of questions that I thought were important, and those very questions that he asked you and relied upon to indicate that you are not competent to stand trial, I think indicate that you know what is going on regarding the process of a criminal charge.

Defense counsel moved for reconsideration; briefs were submitted and further oral argument was held December 3, 1996. On February 13, 1997, the

court denied the motion. It reasoned that Lee had asserted that he was competent to assist in his own defense in two separate court appearances and when asked if there was additional evidence to present, he presented none. Further, neither defense counsel nor the State asked to present any evidence in addition to the Hurlbut report and Lee's hospital records. It concluded that § 971.14(4)(b), STATS., gives the burden of proof to the participant who is seeking to disprove the position maintained by the defendant, on his own behalf. He found that the burden to prove Lee incompetent by clear and convincing evidence had not been met.

Lee petitioned for interlocutory appeal, which we granted, together with a stay of the proceedings in circuit court. Lee advances several theories on appeal. First, he claims that the circuit court erred when it questioned him regarding his competency and based its decision in part on his answers, instead of relying exclusively on the Hurlbut report. Next, he argues that he was denied a meaningful hearing because neither he nor Hurlbut testified under oath or were cross-examined as to their opinions. And, lastly, he contends that the circuit court used the wrong burden of proof.

DISCUSSION

Standard of Review.

The ultimate determination of competence to stand trial is a factual question: either the defendant possesses the ability to assist in his own defense and to understand the nature of the charges against him, or he does not. ***State v. Garfoot***, 207 Wis.2d 214, 223, 558 N.W.2d 626, 630 (1997); § 971.13(3), STATS. Because the circuit court is in the best position to evaluate factual evidence, this

court will not reverse a competency determination unless it is clearly erroneous. ***Id.*** at 223-24, 558 N.W.2d at 631.

The construction of a statute, or its application to undisputed facts, is a question of law which we decide *de novo*, without deference to the circuit court's determination. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 233, 568 N.W.2d 31, 34 (Ct. App. 1997).

Competency Determination.

"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 so long as the incapacity endures." Section 971.13(1), STATS.; ***Garfoot***, 207 Wis.2d at 225, 558 N.W.2d at 631; ***Dusky v. United States***, 362 U.S. 402 (1960). Whenever the issue of competency is raised, § 971.14(2), STATS., directs that the court "appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant." However, the determination of competence is an individualized, fact-specific decision. ***Garfoot***, 207 Wis.2d at 228, 558 N.W.2d at 632. And while expert opinion is important, the determination of competency to stand trial is a judicial factual finding, which should not to be made by merely rubber stamping an expert's opinion. *See* ***id.*** at 227, 558 N.W.2d at 632; § 971.14 (4)(b), STATS.

1. Circuit court's factual findings.

On appeal, Lee asserts the circuit court exceeded its authority when it questioned him, rather than basing its finding in regard to competency solely on Hurlbut's report. Lee maintains that § 971.14(4)(b), STATS., establishes the Hurlbut report as the only evidence which the court can consider in making its findings in regard to competency because both defense counsel and the State waived the right to go beyond the Hurlbut report.

This argument presents a question of the construction of § 971.14(4)(b), STATS. When we are asked to apply a statute whose meaning is in dispute, our efforts are directed at determining legislative intent. ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language used in the statute. If the language of the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and we must apply that language to the facts of the case. ***Id***. Section 971.14(4)(b), states in relevant part:

> If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report filed under sub. (3) or (5). In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. … At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent ….

We cannot accord Lee the statutory construction he seeks for three reasons: First, to do so would ignore the plain wording of the statute; second, it would ignore precedent bearing on the obligation of the circuit court in

competency proceedings; and, third, it would misconstrue what actually occurred at two hearings.

There is nothing in the statute which limits what a court may consider in a competency proceeding where the defendant and the State assert the defendant is competent to stand trial and defense counsel asserts the defendant is incompetent. The report is an item of evidence for the court's consideration, but the statute does not direct that it shall be the sole basis for the court's decision. Furthermore, because the burden of proof varies, depending on the position of the defendant in regard to his own competency to proceed, the trial court must question the defendant, at least in regard to his position relative to his own competency.[3]

Additionally, in ***State ex rel. Haskins v. County Court of Dodge County***, 62 Wis.2d 250, 264, 214 N.W.2d 575, 582 (1974), the supreme court concluded that the "determination of competency to stand trial is a judicial matter, and a finding is not to be made on the basis of rubber stamping the report of a psychiatrist." Although the wording of § 971.14(4), STATS., has changed since the decision in ***Haskins***, the change does not affect the circuit court's obligation to make findings relative to competency to stand trial based on its own independent review of the evidence. *See* ***Garfoot***, 207 Wis.2d at 229, 558 N.W.2d at 633. Accepting the expert's conclusion of incompetency without an independent analysis by the court would be "rubber stamping," which is impermissible.

[3] *See* ***State ex rel. Matalik v. Schubert***, 57 Wis.2d 315, 326-27, 204 N.W.2d 13, 18-19 (1973).

And finally, the court did rely on the facts set out in the Hurlbut report, such as Lee's ability to relate what had occurred with the child to the charges that resulted against him, and his awareness of the potential outcomes of the trial. It rejected only the report's conclusion on the ultimate fact of competency to stand trial. It did so after concluding that the report was ambiguous in that the facts the report set forth as the responses Lee made to Hurlbut's direct questions indicated Lee was competent, yet the report reached the opposite conclusion in its final sentence. The court did have an informal colloquy with Lee at two separate hearings, asking him questions very similar to those asked by Hurlbut. The answers Lee gave were consistent with those set out in Hurlbut's report. The court also asked Lee if he was competent and he assured the court that he was. Under § 971.14(4), STATS., and the common law, *see* ***State v. Guck***, 176 Wis.2d 845, 500 N.W.2d 910 (1993), Lee had an independent right to assert his competence to stand trial. Lee clearly and unequivocally maintained his competence during two separate appearances before the circuit court. Therefore, we conclude § 971.14(4)(b), does not prevent the circuit court from making its own independent review of the evidence and that ***Haskins*** and ***Garfoot*** require that it do so. We also conclude that the circuit court's colloquy with Hurlbut did not violate any provision designed to protect Lee's rights.

2. Right to hearing.

Lee also objects to the court's failure to provide him an evidentiary hearing pursuant to the provisions of § 971.14(4)(b), STATS., claiming his due process rights were violated. However, on September 9th, both Lee's attorney and the State waived the right to present further evidence. And notwithstanding the fact that there were hearings on September 25th and December 3rd, no request was made by defense counsel, Lee or the State to convene an evidentiary hearing.

Defense counsel's waiver of the right to present evidence beyond the psychiatrist's report is valid so long as the defendant does not assert that the waiver was made against his will. ***Guck***, 176 Wis.2d at 853, 500 N.W.2d at 912-13. ***Guck*** established that counsel can waive the right to hold an evidentiary hearing on behalf of a defendant, unless the defendant objects on the record and requests to present further evidence on the issue of his competence. "[T]he current version of the statute does not require a personal statement by a criminal defendant waiving the opportunity to present additional evidence on the issue of competency." ***Id.*** at 857, 500 N.W.2d at 914. Here, Lee's trial counsel waived the right to present any additional evidence on the issue of competency and Lee did not object or ask to present additional evidence. Therefore, the court did not err when it did not hold an additional evidentiary hearing. We also decline Lee's invitation to turn the court's colloquy with Lee, which was not conducted under oath, into an evidentiary hearing.

3. Burden of proof.

Lee contends on appeal that the circuit court should have concluded that the State must prove him competent by the greater weight of the credible evidence because defense counsel had asserted his incompetence on his behalf. Lee asserts the circuit court applied the incorrect burden of proof when it concluded that neither defense counsel nor the State had proved Lee incompetent by clear and convincing evidence, based on Lee's assertion of his own competence. The burden of proof is established by statute and it varies, depending on the position that is maintained by the defendant before the court:

> If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be

> competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent ….

Section 971.14(4)(b), STATS.

Section 971.14(4)(b), STATS., was revised[4] in 1982 and 1989, to reflect the supreme court's interpretation of para. 4 by permitting the defendant to take a position relative to his own competency different from that of his counsel. (The supreme court had held that failing to provide the defendant with an opportunity to assert his personal position on competency was insufficient to meet the "meaningful hearing" requirement of the due process clause. ***State ex rel. Matalik v. Schubert***, 57 Wis.2d 315, 326-27, 204 N.W.2d 13, 18-19 (1973)). Because Lee maintained he was competent, the circuit court concluded that the State was required to prove that he was incompetent, a position opposite to that which the State asserted at the competency proceeding. Or, the court concluded that in the alternative, Lee's attorney was required to prove incompetency, a position consistent with that which she maintained in the competency proceedings. Neither the State nor Lee's attorney presented any evidence in addition to the Hurlbut report, and both waived the right to do so. Neither asked the court to hold an evidentiary hearing on competency. Based on the positions presented to the court, it concluded that the facts contained in Hurlbut's report and its

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[4] Prior to revision, § 971.14(4), STATS., provided:

> The defendant's competency to proceed shall be promptly determined by the court. If neither the district attorney, the defendant nor the counsel for the defendant contest the finding of the report filed pursuant to sub. (2), the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue.

See Laws of 1981, ch. 367, § 4, eff. Sept. 1, 1982 *and* 1989 Wis. Act 31, § 2848t, eff. Aug. 9, 1989.

understanding of them in light of Lee's responses to the court, demonstrated that Lee understood the nature of the charges against him and that he could assist his counsel in his defense. Because we conclude that, given the position of all the participants at the competency proceedings, the circuit court's finding of competency is not clearly erroneous, we affirm that finding.

CONCLUSION

We conclude that based on the evidence before the court, the positions of the defendant, his counsel and the district attorney relative to competency and waivers of further evidentiary proceedings, the circuit court applied the burden of proof established by statute. We also conclude that its finding that Lee was competent to stand trial was not clearly erroneous.

By the Court.—Order affirmed.

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