

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 24, 2004**

Cornelia G. Clark  
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. 03-0403-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 00CF00007**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL J. BURNETT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Judgment affirmed; order reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Burnett appeals an order denying his request for a postconviction competency evaluation following his conviction on seven counts of failure to pay child support. He argues the trial court used an erroneous standard in finding that there was no reason to doubt Burnett's

postconviction competency. We conclude the court not only erroneously exercised its discretion by applying an improper standard, but that its finding was clearly erroneous. We reverse the order and remand for a new hearing on whether a competency evaluation is necessary.

## BACKGROUND

¶2 Burnett was charged with eight counts of failure to pay child support.<sup>1</sup> Early in the proceedings, Burnett's trial attorney raised the issue of Burnett's competence. The court ordered a competency evaluation. Dr. Victor Boekama issued a report concluding Burnett was competent. Based on this report, the trial court found Burnett competent to stand trial.

¶3 Burnett declined a plea bargain and the case proceeded to jury trial. The jury found him guilty on seven counts. The court sentenced him to four consecutive two-year prison terms on four of the counts. On each of the remaining three counts, the court imposed five years' probation. The probation terms were concurrent with each other and consecutive to the prison sentences.

¶4 Postconviction counsel was appointed for Burnett. Burnett filed a motion for a postconviction competency exam. The State did not object to the examination, but asked that the evaluation be done at the Winnebago Mental Health Institute. Burnett responded that it would be more expedient to do the evaluation at the Racine Correctional Institute.

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<sup>1</sup> Burnett also appeals his judgment of conviction, but does not make any argument in his brief regarding that issue; therefore, we do not address the judgment of conviction.

¶5 A hearing was held on December 2, 2002. The court stated that an evaluation was unnecessary because the only decision Burnett would need to make during postconviction proceedings was whether to appeal. The court stated: “I don’t see where we have to have a mental evaluation of an individual to see whether he wants to appeal or not.” Further, the court factored into its decision that Burnett’s counsel was appointed rather than privately retained:

For the task at hand, and his task is limited by his ability to control the defense, because on a public defender system, there’s a different standard there. If this was a private pay case, I think he’d have an argument, you know. But I have to look at the overall duties here.

The court denied Burnett’s motion. Burnett sought reconsideration and filed reports from doctors at the Department of Corrections. One of these doctors diagnosed Burnett with a delusional disorder.

¶6 The court denied reconsideration, in part on the conclusion that the medical records did not demonstrate a significant difference in Burnett’s mental state since he had been found competent to stand trial. Relying on *State v. Meeks*, 2002 WI App 65, 251 Wis. 2d 361, 643 N.W.2d 526, the court stated that “a secondary evidentiary hearing concerning competency to stand trial can be summarily denied if medical evidence in both time frames is substantially similar, and the individual was previously found competent to stand trial.”

¶7 In addition, the court cited *Roe v. Flores-Ortega*, 528 U.S. 470, 475-76 (2000), stating, “The Supreme Court pointed out in *Roe* the scope of potentially appealable issues is more narrow following a guilty plea than following a trial. Because of the broader scope of issues, less competence on the part of the defendant is required to decide to appeal.” Thus, the court denied Burnett’s motion for a competency evaluation.

## DISCUSSION

¶8 We will not disturb a trial court's determination whether there is reason to doubt a defendant's competence and order a competency evaluation unless the court exhibited an erroneous exercise of discretion or the court's decision was clearly erroneous. *State v. Weber*, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). Under either standard, we conclude the court erred.<sup>2</sup>

¶9 Burnett argues that the trial court relied on improper criteria when making its decision whether to order a competency evaluation. Specifically, Burnett maintains the court erroneously based its decision in part on the fact that Burnett's postconviction counsel was appointed. The State concedes this was error, stating, "the trial court was wrong in thinking that the standard for competency differs depending on whether a defendant has court-appointed as opposed to retained counsel." We agree.

¶10 The correct standard is stated in *State v. Debra A.E.*, 188 Wis. 2d 111, 126, 523 N.W.2d 727 (1994): "a defendant is incompetent to pursue postconviction relief under sec. 809.30 ... when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." Here, the court failed to consider whether Burnett was able to assist his attorney. Rather, the court stated the only thing Burnett needed to do was decide whether to appeal. There are other issues Burnett

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<sup>2</sup> Burnett urges us to use an independent standard of review. However, he also states that should we use the standard of review from *State v. Weber*, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988), the result is the same and the order should be reversed.

may be required to decide as well, such as what issues to raise and how to factually develop those issues.

¶11 Burnett also argues the court erroneously relied on *Roe*. The State agrees. That case did not deal with competency but with ineffective assistance of counsel based on counsel's failure to file a notice of appeal after the client pled guilty. The case provides no guidance here.

¶12 Finally, Burnett argues the court erroneously based its decision on *Meeks*, 2002 WI App 65 (*Meeks I*). Relying on *Meeks*, the court focused on whether Burnett's competency had changed since his evaluation before trial. Burnett claims the supreme court has since overruled the case. See *State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859 (*Meeks II*). However, as the State points out, the issue the supreme court reversed was "whether an attorney's opinions, perceptions, and impressions of a former client's mental competency are confidential communications within the meaning of WIS. STAT. § 905.03(2) and SCR 20:1.6." *Id.*, ¶18. The supreme court concluded there was no violation of attorney-client privilege and reversed that portion of *Meeks I*. *Meeks II*, 263 Wis. 2d 794, ¶¶60-61. The portion of *Meeks* the trial court relied on here is still valid law. See *State v. Byrge*, 225 Wis. 2d 702, 717-18, n.7, 594 N.W.2d 388 (Ct. App. 1999) ("holdings not specifically reversed on appeal retain precedential value"), *aff'd* 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

¶13 The trial court determined that Burnett's competency had not changed since his pre-trial evaluation. In reaching this conclusion, the trial court properly compared the prior evaluation with the more current reports. However, the court failed to consider other factors such as Burnett's opinion, his attorney's opinion, and the State's agreement to an evaluation. In the ordinary case this

might not be enough to reverse. Here the error is compounded by the trial court's consideration of improper factors—the fact that counsel was appointed at public expense and that Burnett's postconviction input was limited— and inapplicable case law—*Roe*.

¶14 We conclude the court's denial of Burnett's motion for a competency evaluation was both an erroneous exercise of discretion and clearly erroneous. We remand the case to the trial court for a new hearing on whether a competency evaluation is necessary.

*By the Court.*—Judgment affirmed; order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

