COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2833-CR **Cir. Ct. No. 2007CF50**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY R. DOMINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Danny Domine appeals a judgment of conviction for one count of arson of a building. Domine argues the circuit court violated his due process right to present evidence of incompetence to stand trial when it

prevented Domine's attorney from testifying. We conclude the court properly precluded counsel's testimony and therefore affirm.

BACKGROUND

¶2 Approximately one month after Domine was charged, the circuit court ordered a competency exam. Dr. Michael Galli, a clinical psychologist, met with Domine and filed a report opining that Domine was competent to stand trial. Domine, through counsel, continued to contest his competence at the subsequent competency hearing. Galli was then called to testify. He explained he met with Domine at the county jail and asked him a number of questions. Galli testified:

> My conclusion was that he had a ... thorough understanding of the charge he is facing. He knew what it was he was alleged to have done. He knew when it was supposed to have taken place. He had a good understanding of how that case would proceed through the court system. He knew what would have to be proven in order for him to be convicted of that. He had his own version of those events that he thought would exonerate him when he got to court.
>
> He knew who the judge was. He knew what his various plea options were, and he knew what was likely to happen should he be convicted of those charges.

¶3 On cross-examination, Galli stated he came to the meeting prepared to administer two tests, the WAISS-3 Intelligence Test and the McArthur Competency to Proceed Evaluation. He testified, however, that Domine's answers "were clear enough that I did not do any of those evaluations ...." In response to further questioning, Galli then explained Domine's various responses in more detail.

¶4 Domine's counsel then called himself to testify, and the State objected as a violation of SCR 20:3.7, Lawyer as witness. The court agreed with the State and also raised the issue decided in ***State v. Meeks***, 2003 WI 104, 263

Wis. 2d 794, 666 N.W.2d 859, that defense counsel could not testify regarding competence unless the client first waived the attorney-client privilege. After Domine's attorney asserted Domine was incompetent to waive the privilege, the court prohibited counsel from testifying pursuant to ***Meeks***. The court subsequently found Domine competent. Domine later pled guilty pursuant to a plea agreement.[1]

DISCUSSION

¶5 Domine argues the circuit court violated his due process right to present evidence of incompetence to stand trial. Whether a violation of due process has occurred is a question of law that this court reviews independently. ***State v. Aufderhaar***, 2005 WI 108, ¶10, 283 Wis. 2d 336, 700 N.W.2d 4. The due process clause mandates that an accused person not be tried, convicted, or sentenced while mentally incompetent. ***Cooper v. Oklahoma***, 517 U.S. 348, 354 (1996); ***State v. Guck***, 176 Wis. 2d 845, 850-51, 500 N.W.2d 910 (1993). That tenet is codified in WIS. STAT. § 971.13(1).[2]

¶6 A circuit court must conduct a competency inquiry "whenever there is reason to doubt a defendant's competency to proceed." WIS. STAT. § 971.14(1)(a). In fact, a "defense attorney who has reason to doubt his client's competency to stand trial must raise the issue of competency, regardless of

[1] The State does not argue, and therefore we do not address, whether Domine's guilty plea waived the issue raised on appeal.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

strategic considerations." ***Guck***, 176 Wis. 2d at 851 (citing ***State v. Johnson***, 133 Wis. 2d 207, 219-21, 395 N.W.2d 176 (1986)).

¶7 Domine argues ***Johnson*** stands for the proposition that defense counsel must not only raise the issue, but also provide evidence to assist in making the ultimate competency determination. Regardless of whether this is correct, it misses the point. The court here did not prohibit Domine's attorney from providing testimony relevant to his competency under any and all circumstances. Rather, it held counsel could not do so unless Domine first waived his attorney-client privilege. That holding was compelled by ***Meeks***, 263 Wis. 2d 794, ¶¶1-2, which was decided after ***Johnson***.

¶8 Domine is correct, however, that the facts of this case are substantially different than in ***Meeks***. There, Meeks was initially found incompetent by the examiner and the court. At his next competency hearing, Meeks maintained he was still incompetent, and the State subpoenaed his attorney from previous cases to testify. *See* ***id.***, ¶7. Here, Domine's then-current attorney volunteered to testify why he thought Domine was incompetent, but he was prohibited because he asserted Domine could not waive the privilege. The holding in ***Meeks***, however, was not expressly limited to the facts in that case. Further, the holding turned not on whether defense counsel wished to testify, but on whether the defendant waived the privilege.

¶9 Domine argues he was denied his right to present evidence of incompetence because of the Catch-22 presented in this case. That is, Domine asserts his counsel could not demonstrate Domine was incompetent unless Domine waived the privilege, but Domine could not waive the privilege because, according

to his counsel, he was incompetent. The situation, however, could have been resolved simply.

¶10 Two factors contributed to the perceived Catch-22. First, the court never personally addressed Domine to inquire whether he claimed to be competent or incompetent. WISCONSIN STAT. § 971.14(4)(b) states:

> At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. 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.

Instead, the court only asked Domine's attorney, who responded that Domine was claiming incompetence.[3]

¶11 Second, regarding counsel's representation to the circuit court, there is no authority stating that a defendant may not waive the attorney-client privilege until a court finds him competent.[4] Every indication is to the contrary. For instance, the statutory language recited above indicates the defendant must state whether or not he claims to be incompetent. That statement then dictates both the burden of proof and the presumption of either competence or incompetence.

[3] Domine does not raise this issue on appeal nor did he do so in the circuit court. Nor has Domine argued his attorney was ineffective for allowing the error to go uncorrected. We therefore do not address whether the court's failure to personally address Domine constitutes reversible error. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (unpreserved issues generally will not be considered on appeal).

[4] Again, Domine has not argued his counsel was ineffective for failing to determine whether Domine in fact wished to waive his attorney-client privilege.

Clearly, if Domine could decide whether to claim incompetence, then he could also decide whether to waive the attorney-client privilege in support of an incompetence claim.[5] Additionally, wisely or not, the holding in ***Meeks*** is premised on the assumption that a defendant may claim to be incompetent and nonetheless waive the attorney-client privilege.

¶12 Because Domine was never asked whether he claimed to be incompetent or whether he wished to waive his attorney-client privilege, under ***Meeks*** the circuit court had no choice but to prevent his attorney from testifying. *See* ***Meeks***, 263 Wis. 2d 794, ¶28 (no evidence in the record that defendant consented to attorney's testimony or waived the privilege). There was no evidence indicating Domine wanted his attorney to argue incompetence, much less testify about the issue. Domine was present at the hearing. He could have spoken up at the start of the hearing to contradict his attorney's position, or he could have spoken up later to waive his privilege in support of his attorney's position. Domine's silence was contradictory. Thus, any Catch-22 was of Domine's and his counsel's own making.

¶13 Domine also argues the State had no standing to object and assert Domine's attorney-client privilege. However, it was not the State but the court that raised the ***Meeks*** privilege issue. Domine presents no authority in support of his standing argument, nor in support of any argument that the court could not

[5] We merely observe there is no presumption of incapacity to make such decisions. We do not intend to disregard any requirement that waivers be knowing, intelligent, and voluntary. Indeed, we are not being asked to review whether the attorney-client privilege was properly waived. Because counsel did not testify, the only issue presented in this case is whether Domine was per se incompetent to decide *not* to waive the privilege.

address the issue sua sponte. We therefore decline to further address the matter. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.