COURT OF APPEALS
DECISION
DATED AND RELEASED

November 9, 1995

No. 94-1817-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEAN GARFOOT,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Reversed and remanded with directions*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

GARTZKE, P.J. The State appeals from an order dismissing a criminal complaint against Dean Garfoot, a mentally retarded man. We conclude that when ruling that the State failed to prove that Garfoot was competent to stand trial, the trial court did not apply the statutory standard to determine Garfoot's competency, and relied too heavily on the medical testimony. The court should have considered Garfoot's competency in view of the kind of trial likely to take place and possible modifications to the trial

procedure to improve his understanding of the proceedings and his ability to assist in his defense. We therefore reverse and remand for further proceedings.

1. FACTUAL BACKGROUND

The complaint charges Garfoot with attempted first-degree sexual assault, §§ 940.225(1)(b) and 939.32(1), STATS., as a result of an incident that took place on April 27, 1993. Dr. Spierer, one of the two court-appointed competency evaluators, described the incident on the basis of police reports he reviewed as follows:

Donna W. went to Garfoot's family home in response to Garfoot's invitation. She was a family friend. Garfoot, then age 27, had said he had a present for her. At his request, she went alone. When she arrived, Garfoot handed her a note written in a child-like scrawl instructing her:

1) not tell no one about it
2) to go to my bedroom and set on it
3) to take your shoe and socks off
because my gift go on your feet
4) to close your eyes
5) to not say noth
6) to do every thing I tell you to do.
Dean Garfoot

Garfoot accompanied her to the bedroom. After she removed her shoes and socks, closed her eyes, and stood next to the bed, he grabbed her around the neck. She opened her eyes and saw that he held a knife. She unsuccessfully tried to pull his arm away, and asked him to give her the knife but he refused. Then she said she had a present for him in her car and promised to return with it. Garfoot let her go to get the present. She got to her car and drove home.

At the preliminary hearing, when defense counsel questioned Garfoot's competency to stand trial, the trial court ordered a competency examination by Dr. Patricia Jens, a psychiatrist. Dr. Jens concluded that Garfoot lacks competency to stand trial. The court then granted the State's motion for an

examination by Dr. Michael Spierer, a psychologist. Dr. Spierer concluded that Garfoot is marginally competent to stand trial.

At the competency hearing Garfoot claimed he is not competent to stand trial. Dr. Jens and Dr. Spierer testified regarding their examinations of Garfoot and their opinions.

The trial court summarized Dr. Spierer's testimony as follows: Garfoot scored eighteen on a competency test on which a score below twenty suggests incompetency. Based on Garfoot's performance on a different competency test, and despite his impaired intellectual functioning, he showed a rudimentary understanding of the judicial process and an adequate ability to participate in a trial. Although Garfoot's memory is acceptable, his fund of knowledge is limited. Unless defense counsel prompts Garfoot, no response would be forthcoming. Because Garfoot has less grasp of the abstract than the concrete, the best his attorney could anticipate is a marginal understanding of possible defenses. Dr. Spierer concluded that Garfoot is competent to stand trial but only marginally so.

The trial court summarized Dr. Jens's testimony as follows: Garfoot has difficulty understanding the meaning of a no contest plea and a plea of not guilty by reason of mental disease or defect. While able to express an understanding of the role of the courtroom participants, Garfoot has difficulty with the sequence of courtroom events. He comprehends the best and worst outcomes of trial but lacks understanding of other possibilities such as plea bargains. After numerous repetitions, his grasp of information improves but his retention ability is suspect. He cannot understand what is going on in the courtroom. Garfoot's retardation will prevent him from following and understanding testimony. He cannot process testimony without long pauses for his lawyer to repeat and explain it. He can perceive simplistic concepts, but he cannot grasp their implications--in other words, while he can make a choice, he cannot understand the implications or ramifications of his choice. He lacks the ability to think abstractly. He is incapable of telling his attorney if something stated by a witness is false. Dr. Jens concluded Garfoot is not competent to stand trial.

We add that Dr. Spierer and Dr. Jens agreed that if Garfoot testifies he can recount the facts of the incident, but he would have difficulty responding

to rapid-fire cross-examination. Dr. Jens reported that during her evaluation, Garfoot could not grasp information when it was offered at a faster pace. Dr. Spierer testified Garfoot would have difficulty comprehending "higher order questions, complicated questions," and there "will be certain issues that he may not follow. There may be certain lines of testimony that he may not follow."

Dr. Jens testified that Garfoot could not assist his attorney on points to challenge during the trial. She stated that he might be able to if he had weeks to go over it with his attorney step by step, but not in the courtroom. The trial court noted that Garfoot's attorney stated that his client "cannot process information as fast as it comes in at a trial even if I slow down the proceedings...."

After the competency hearing, the trial court found that Garfoot functions in the intellectually deficient range, the lowest 2.2% of the population. He has an IQ of 64 and functions below the level of a third grader except that he functions as a beginning fourth grader in mathematics. He is oriented to time, place and person. His thoughts appear to be organized and not psychotic. He does not appear confused even when questioning shows that he is. He cannot interpret proverbs and is not capable of doing serial sevens. He has little understanding of the implications of what he has done and cannot comprehend any motivation for his behavior. When the pace of judicial proceedings increases, he cannot grasp information as it is presented. He understands the roles of the various courtroom participants and he has great confidence in his attorney. During the competency proceedings, Garfoot frequently put his head down on the table or fell asleep.

The trial court concluded that given the testimony of both doctors, the State had failed to meet its burden of proof to overcome Garfoot's assertion of incompetency. The court held that the State had met its burden with respect to "the objective criteria," but had not met its burden to prove that Garfoot was competent. The court said:

> I don't believe the testimony today convinces me of that as to the second part, which is Mr. Garfoot's ability to assimilate information and have a meaningful import or meaningful discussion during the course of a trial with Mr. Connors [his attorney] has been met ....

> [T]he facts of this case as they've been presented by the professionals don't meet that burden, and what we have here is a battle of professionals, and in a battle of professionals where I have one doctor that says "X" and another doctor that says "Y," I'm in no position to choose. That's what the burden of proof is about, and at least in my mind on a factual basis, I don't believe that the State has met the burden of proof by the greater weight of the credible evidence that the defendant is competent.

At a later hearing the trial court took testimony on whether Garfoot is likely to become competent with appropriate treatment within the period specified in § 971.14(5)(a), STATS.,[1] and concluded he will not. After noting that the State could seek Garfoot's involuntary commitment under ch. 51, STATS., a guardianship under ch. 880, STATS., or protective services and placement under ch. 55, STATS., the court dismissed the complaint. The State appeals.

2. STATUTORY STANDARD FOR COMPETENCY AND BURDEN OF PROOF

Section 971.13(1), STATS., provides: "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 commission of an offense

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[1] Section 971.14(5)(a), STATS., provides in relevant part as follows:

> If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department of health and social services for placement in an appropriate institution for a period of time not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less.

so long as the incapacity exists."[2] Competency proceedings must be initiated whenever reason exists to doubt a defendant's competency to proceed. Section 971.14(1)(a), STATS.

The law requires competency to safeguard the integrity and legitimacy of the judicial process, ensure the accuracy of verdicts, protect apparent fairness by ensuring defendants themselves can make important decisions, avoid bizarre behavior in the courtroom, and comply with an ethical imperative that the defendant understand why he is being punished. NOTE, *Incompetency to Stand Trial*, 81 HARV. L. REV., 454, 457-59 (1967).

To determine competency, the court must appoint one or more examiners who must report to the court in writing their clinical findings and their opinion regarding the defendant's "present mental capacity to understand the proceedings and assist in his or her defense." Sections 971.14(2) and (3), STATS. The matter then proceeds to hearing. If, as here, defendant claims to be incompetent, the State must prove the defendant is competent "by the greater weight of the credible evidence." Section 971.14(4)(b).

Whether the State met its burden of proof in a competency hearing is a question of law. ***State v. Leach***, 122 Wis.2d 339, 346, 363 N.W.2d 234, 237 (Ct. App. 1984), *overruled on other grounds*, 124 Wis.2d 648, 370 N.W.2d 240 (1985). Our review of the trial court's ruling is therefore *de novo*.

We nevertheless decline to make the competency determination without giving the trial court the opportunity to apply the proper standard to the facts. Competency determination is not a pure question of law. It is

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[2] The competency standard in § 971.13, STATS., conforms with ***Dusky v. United States***, 362 U.S. 402 (1960) (per curiam) (test for competency to stand trial is whether defendant "has 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"). Section 971.13, Judicial Council Committee's Note, 1981. In ***Godinez v. Moran***, ___ U.S. ___, ___, 113 S.Ct. 2680, 2685 (1993), the Court cited ***Dusky*** as in accord with the competency definition used in ***Drope v. Missouri***, 420 U.S. 161, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist him in preparing his defense may not be subjected to trial.").

intertwined with the facts. When a trial court is required to make an intertwined finding of fact and law, we give weight to the trial court's decision, even though the decision is not controlling. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983) (reasonableness).[3]

3. EXPERT TESTIMONY

Judges determine competency to stand trial, not psychiatrists or psychologists. *See* ***State ex rel. Haskins v. Dodge County Court***, 62 Wis.2d 250, 264-66, 214 N.W.2d 575, 582-83 (1974) (a competency determination is a judicial decision not to be made by rubber stamping the report of a psychiatrist). *See also* § 971.13, STATS., Judicial Council Note, 1981 ("Competency is a judicial rather than a medical determination."). Competency to stand trial is therefore a legal rather than a medical issue. For that reason, a trial court may not rely so extensively upon medical testimony as to commit the competency issue to a physician. ***State v. Bennett***, 345 So.2d 1129, 1137 (La. 1977).

The defendant should understand the substance of the charge, the defenses available to him, and the essentials of criminal trial proceedings. ***State v. Leach***, 122 Wis.2d 339, 345, 363 N.W.2d 234, 237 (Ct. App. 1984). The constitutional scope of competency includes such conditions as are discussed in ***United States v. Passman***, 455 F.Supp. 794, 796-97 (1978). ***Leach***, 122 Wis.2d at 344 n.1, 362 N.W.2d at 236. The ***Passman*** court lists the following conditions as indicative of competency: the defendant's ability to remember, to review and evaluate written evidence, to appreciate, with the help of counsel, the strength of the government's case and the wisdom of standing trial, to testify in an intelligent, coherent and relevant manner, to follow and recognize discrepancies in the testimony of witnesses, to discuss testimony with his attorneys, and to postulate questions, through counsel, to the witnesses.

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[3] It may be that the special nature of a competency finding is the reason why only two published cases appear to exist in which an appellate court has reversed a trial court's determination that a defendant is incompetent to stand trial. ***State v. Hebert***, 174 So. 369 (La. 1937); ***State v. Guatney***, 299 N.W.2d 538 (Neb. 1980). In our view, the scope of review of a trial court's intertwined findings of fact and law is such that we should treat the trial court's finding, one way or the other, with a greater regard, if the trial court applied the appropriate legal standard.

When ruling that the State had not met its burden of proof, the trial court in effect adopted Dr. Jens's standard of competency. Her standard is too high for judicial purposes. Dr. Jens testified that to be competent, defendants must

> have an understanding in a basic way of ... certain concrete ideas about the legal system which many people can be taught, and in addition to that, they have to be able to use that information in, as they think about the problems that they are involved in in terms of the law. They have to be able to use that concrete information and *then act in their own best interest* and cooperate with their attorney. (Emphasis added.)

She concluded that Garfoot's ability to help his attorney and "*behave in a way that's in his own best interest* is substantially impaired...." (Emphasis added.) Jens contrasted her views on Garfoot's competency with those held by Dr. Spierer as follows:

> I think that Dr. Spierer and I have the same opinion about the degree of intellectual functioning. Dr. Spierer did the IQ testing, and Dean Garfoot tested as mild mental retardation. I think that where we differ is the effect that that developmental delay has on his functioning.... I place importance on the ability ... to understand the gray, and *then to be able to act in your own best interest*. And my understanding in listening to Dr. Spierer is that he places importance on the abilities of the client to understand the facts and to behave in a way which indicates that he has a rational understanding. (Emphasis added.)

She testified that Garfoot could decide whether to testify at trial, but he would not understand the implications and ramifications of making such a decision.

In her written competency evaluation, Dr. Jens concludes that Garfoot is incompetent. "[T]he level of intellect and sophistication required to be effective in a courtroom is far beyond his grasp intellectually."

For purposes of determining competency to stand trial, the competency threshold is neither demanding nor exacting. ***State v. Shields***, 593 A.2d 986, 1012 (Sup. Ct. Del. 1990). "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." ***Godinez***, 509 U.S. at ___, 113 S.Ct. at 2688 (1993). The standard is not that of the reasonable person.

> Incompetency must be a relative judgment which takes into account the average level of ability of criminal defendants. Many defendants lack the intelligence or the legal sophistication to participate actively in the conduct of their defense. But enlarging the class of persons considered incompetent to stand trial to include all such defendants would fundamentally alter the administration of the criminal law. The standard of rational understanding emphasized in ***Dusky*** must be taken to mean no more than that the defendant be able to confer coherently with counsel and have some appreciation of the significance of the proceeding and his involvement in it. Many defendants who have some intellectual or physical handicap or emotional disturbance preventing them from functioning at their normal level of effectiveness can still meet such a standard. The question is one of degree; the purpose of the law is not to attempt to compensate all the inevitable disparities in innate abilities among defendants, but to identify those instances where the purposes of incompetency law are most directly relevant.
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> Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 459 (1967).

We conclude that the level of rational understanding required of Garfoot is whether he can confer with counsel and have some appreciation of the significance of the proceeding and his involvement in it. His rational understanding need not reach the higher level of "effectiveness in the courtroom" or the ability to act "in his best interest."

4. TYPE OF TRIAL

"Competency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made." ***State v. Debra A.E.***, 188 Wis.2d 111, 124-25, 523 N.W.2d 727, 732 (1994). Numerous authorities have agreed with that proposition.

> The decision as to a defendant's competency to stand trial should not turn solely upon whether he suffers from a mental disease or defect, but must be made with specific reference to the nature of the charge, the complexity of the case and the gravity of the decisions with which he is faced.

State v. Bennett, 345 So.2d at 1138, *citing* Note, 6 LOYOLA UNIV. L.J. at 684; Note, 4 COLUMB. HUM. RIGHTS L.REV. at 245. *See also* ***United States v. Passman***, 455 F.Supp. 794, 796-97 (1978) (factors used to weigh defendant's competence "merit different rankings of importance, depending on the factual and legal complexity of the particular case, the projected length of the trial and the number of witnesses to be called").

"[P]sychiatrists have little familiarity with either trial procedure or the complexities of a particular indictment." ***State v. Bennett***, 345 So.2d at 1138, *quoting* Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 470 (1967). The record again reveals the dangers of over-reliance on expert testimony. Dr. Jens testified as follows:

> But the part that I think for me was the thing that made me decide he was not competent is the fact that I don't think that he is ever going to be able to be part of a proceeding that is sophisticated, that goes quickly, that he really was to understand and be able to respond to so that he can defend himself.

The factual issues appear straightforward. Police reports indicate that Garfoot described to them the details of the incident. Few witnesses will

likely be called. This is not likely to be a sophisticated proceeding. The trial court should consider Garfoot's abilities with reference to the trial likely to take place.

5. MODIFICATIONS TO TRIAL PROCEEDING

The expert witnesses agreed that the type and pace of questions and testimony could affect Garfoot's ability to testify and comprehend the trial. The trial court did not fully consider its power to modify the proceedings to compensate for Garfoot's disability.

On remand, the court should determine guidelines for counsel when examining and cross-examining Garfoot, should he take the stand. Just as courts have the "power, within constitutional limits, to alter courtroom procedures to protect the emotional well-being of the child witness," ***State v. Gilbert***, 109 Wis.2d 501, 517, 326 N.W.2d 744, 752 (1982), so courts may alter those procedures to protect the rights of mentally retarded persons.

The court, for instance, may fashion rules to protect the defendant "from unduly vigorous cross-examination." *See* ***State v. Gollon***, 115 Wis.2d 592, 601-02, 340 N.W.2d 912, 916 (Ct. App. 1983). The court may direct that the proceedings be slowed and that simple language be used. *See* ***Sims v. State of South Carolina***, 438 S.E.2d 253, 256 (S.C. 1993), ***United States v. Glover***, 596 F.2d 857, 867 (1979) (that defendant might not understand the proceedings around him unless they are explained to him in simple language would burden counsel, but does not establish that defendant is incompetent to stand trial).

6. MODIFICATION OF COMPETENCY FINDING

At this stage the burden is on the State to prove Garfoot's competency to stand trial by "the greater weight of the credible evidence." Section 971.14(4)(b), STATS. If the trial court concludes at this stage that the State has met this least onerous of all burdens, it can later change its decision during the course of the trial.

Just as the trial court should consider the type and complexity of the future trial, if on remand the court finds that Garfoot is competent, the trial itself at any stage may cause the court to change its conclusion and to dismiss the action on grounds that he is incompetent to stand trial.

Thus, the court should take into account that a finding that Garfoot possesses capacity to understand the proceedings and to assist in his own defense, as required by § 971.13(1), STATS., is not only a statement of his present condition but a prediction. If the prediction, based upon a finding of competency, is proved wrong during the trial, the court may declare the defendant incompetent to stand trial and dismiss the proceedings.

7. CONCLUSION

We conclude that the trial court did not apply the appropriate standard to the testimony by the expert witnesses concerning Garfoot's competency, did not consider Garfoot's abilities with reference to the trial likely to take place, and did not consider fully its power to modify the proceedings. We reverse and remand for further proceedings.

By the Court.—Order reversed and remanded with directions.

Recommended for publication in the official reports.

SUNDBY, J. (*dissenting*). In these criminal proceedings against defendant Dean Garfoot, reason to doubt his competence to proceed arose. The trial court therefore proceeded under § 971.14, STATS., to determine his competence and, if incompetent, the likelihood that he would become competent to proceed within the time prescribed in § 971.14(5)(a). Pursuant to that procedure, the trial court appointed Dr. Patricia Jens, a psychiatrist, to examine Garfoot and report her conclusions to the court. Upon the State's motion, the trial court also ordered that Garfoot be examined by Dr. Michael J. Spierer, a psychologist.

A competency hearing was held February 4, 1994, at which Dr. Jens and Dr. Spierer testified. The trial court concluded that the State did not prove by the greater weight of the credible evidence that Garfoot was competent to proceed. Section 971.14(4)(b), STATS., provides in part: "If the defendant ... 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." The trial court then held a second hearing at which the issue was whether Garfoot was likely to become competent within the period specified in § 971.14(5)(a) if provided with appropriate treatment.[4] The trial court determined that it was unlikely that Garfoot would become competent within the commitment period and suspended the proceedings and released Garfoot. Section 971.14(4)(d) provides: "If the court determines that the defendant is not competent and not likely to become competent within the time period provided in sub. (5)(a), the proceedings shall be suspended and the defendant released, except as provided in sub. (6)(b)." Subsection (6)(b) does not apply.

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[4] Section 971.14(5)(a), STATS., provides in part:

> If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department of health and social services for placement in an appropriate institution for a period of time not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less....

At the likelihood-of-competency hearing, Dr. Spierer, Dr. Gary Maier, a forensic psychiatrist employed at Mendota Mental Health Institute, and Gail Ann Brown, a sex offender treatment specialist, testified on the question of whether it was likely that Garfoot could, with appropriate treatment, gain competency to proceed. Garfoot offered no evidence. The trial court found that the State had not met its burden to prove that Garfoot could gain competency to proceed, even with appropriate treatment. The trial court stated, "and that's a finding of fact."

The trial court assumed that the State had the same burden of proof--the greater weight of the credible evidence--that it was likely that Garfoot would gain competence as it had with respect to the determination of competency. That seems to be a sensible construction of the competency proceedings prescribed in § 971.14, STATS.

GARFOOT'S COMPETENCE TO PROCEED

The State does not question the factual conclusions of Dr. Patricia Jens, the court-appointed psychiatrist. However, it argues that the trial court applied the wrong legal standard. The majority concludes that the trial court committed the determination of Garfoot's competency to Dr. Jens. Maj. Op. at 9-10. I disagree.

The State argues that the standard for competency in Wisconsin "is minimal and not optimal." That standard is derived from ***Dusky v. United States***, 362 U.S. 402 (1960), and is stated in ***State v. Leach***, 122 Wis.2d 339, 344, 363 N.W.2d 234, 236-37 (Ct. App. 1984), *overruled on other grounds*, 124 Wis.2d 648, 370 N.W.2d 240 (1985), as follows: "[T]he test for competency is whether the accused `has 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.'" (Quoting ***Dusky***, 362 U.S. at 402). The ***Leach*** court said: "At the very least, the accused ought to understand the essence of the charge against him, the defenses available, and the essentials of the criminal proceeding." 122 Wis.2d at 345, 363 N.W.2d at 237. Garfoot and the majority agree that ***Dusky/Leach*** state the test for competency to proceed. The trial court concluded, however, that since ***Leach***,

> Wisconsin courts have provided little more guidance on how to evaluate whether a person has the requisite capacity to assist in and understand legal proceedings against him. Other state courts and federal courts that have struggled with the issue of competency may help inform our court.

The trial court relied extensively on ***United States v. Passman***, 455 F. Supp. 794, 796 (D.D.C. 1978). The majority adopts the ***Passman*** factors to determine competence. Maj. Op. at 10.

It is, however, very important to keep in mind that the trial court did not determine whether Garfoot was competent to proceed; the trial court concluded that the State had failed to prove by the greater weight of the credible evidence that Garfoot was competent; there is a difference. Section 971.14(4)(b), STATS., provides in part: "If the defendant ... 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*." (Emphasis added.) The majority faults the trial court for not "fully consider[ing] its power to modify the proceedings to compensate for Garfoot's disability." Maj. Op. at 14. The majority instructs the trial court on remand to alter the courtroom procedures to protect the rights of mentally retarded persons. ***Id***. at 15. There is nothing in § 971.14 which requires (or permits) the trial court to alter trial procedures to accommodate defendant's lack of competence to proceed. Section

971.14(4)(d) provides: "If the court determines that the defendant is not competent and not likely to become competent within the time period provided in sub. (5)(a), the proceedings shall be suspended and the defendant released, except as provided in sub. (6)(b)." Section 971.14(6)(a) provides:

> If the court determines that it is unlikely that the defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him or her, except as provided in par. (b). The court may order the defendant to appear in court at specified intervals for redetermination of his or her competency to proceed.

Paragraph (b) permits the trial court to order the defendant to be taken into custody by a law enforcement official and detained for treatment.

On the question of Garfoot's competence, the trial court applied the ***Passman*** test that whether, "in the light of the personal, intellectual or emotional deficiencies of the accused, he can perform the functions essential to the fairness and accuracy of the particular proceedings in which he is presently involved." 455 F. Supp. at 796 (quoting ***Wilson v. United States***, 391 F.2d 460, 463 (D.C. Cir. 1968)). The trial court reviewed the testimony of the expert witnesses, who concluded that Garfoot's overall functioning is in the intellectually deficient range, the lowest 2.2% of the population. The court concluded that Garfoot has little understanding of the implications of what he has done and cannot assign any motivation for his behavior; he needs careful instruction as to what is going on in a criminal trial. The State's witness administered to Garfoot a Competency To Stand Trial Screening Test. The test related to courtroom procedures. A score below twenty suggests incompetency; Garfoot scored eighteen. The State's witness also administered a Competency To Stand Trial Assessment Test. This test evaluates a defendant's

overall understanding of the charges against him, the potential penalties, courtroom practices, roles of the participants, and ability to relate in a meaningful way to defense counsel. The State's witness concluded that Garfoot showed a rudimentary level of understanding of the judicial process and a marginal ability to participate in a trial.

The court-appointed witness, Dr. Jens, employed more verbal tests. She testified that Garfoot has difficulty understanding the meaning of pleas, particularly a not guilty plea based upon mental disease or defect. While he understands the role of the parties, he has difficulty with the sequence of courtroom events. His retention ability is suspect and in order to process information, he requires numerous repetitions. Dr. Jens concluded that Garfoot was not competent to proceed because he would not be able to understand what was going on in the courtroom and would not be able to relate in a meaningful way with his attorney.

It is not necessary to recite the further testimony of the witnesses; it is sufficient to conclude, as I do, that the trial court clearly understood the State's burden and concluded that the State had failed to meet its burden, based on the testimony not only of Dr. Jens but of the State's psychological witness.

LIKELIHOOD OF GAINING COMPETENCE

A determination of incompetence does not end the trial court's inquiry. The majority emphasizes the alteration of the trial proceedings to accommodate Garfoot's deficiencies. However, I find nothing in § 971.14, STATS., which requires (or permits) a trial court to make such modifications of the trial procedure. If the trial court finds the defendant is not competent to proceed and is not likely to become competent within the time specified in § 971.14(5)(a), it must release the defendant.

DISPOSITION OF CHARGES

The State argues that the trial court's Order For Dismissal entered May 31, 1994, precludes the State from ever again raising the issue of Garfoot's competence to proceed in this matter. The order reads in part: "NOW, THEREFORE, it is hereby ordered that this matter *be suspended* and the defendant be released *pending any further legal action by the State*." (Emphasis added.) Assertions such as the State makes with respect to this order can lead this court into error. We have not had twenty years of experience in this field, as has the trial court. Therefore, before we conclude that the trial court erred when it entered its Order For Dismissal, we should carefully examine the trial court's oral explanation of the effect of its order. At the hearing on the question of the likelihood of Garfoot becoming competent to proceed, the trial court stated:

> If there were another doctor who had come in here today and said, "I've interviewed Mr. Garfoot, and it is my opinion that if he receives additional education, he will be able to assist [his lawyer]," then I've got something more than I had before, but all I have here is Dr. Spierer ... saying, "I think Mr.

> Garfoot is competent," and today he comes in and says, "I think he's really competent."

The trial court plainly was aware that in possible future proceedings evidence could be introduced which would prove Garfoot was competent to defend himself against criminal charges.

BATTLE OF PROFESSIONALS

There is another area in which I believe the State has unfairly characterized the trial court's decision. At the dispositional hearing, the trial court stated: "What we have here is a battle of professionals, and in a battle of professionals where I have one doctor that says `X' and another doctor that says `Y,' I'm in no position to choose. That's what the burden of proof is about ...." The State says that the trial court thus "revealed that it abused its discretion by essentially failing to exercise its discretion." The statement of the trial court as presented in the State's brief is incomplete. The trial court's complete statement was:

> At least in my mind, based on over twenty years of working in the mental health area, the facts of this case as they've been presented by the professionals don't meet [the State's] burden, and what we have here is a battle of professionals, and in a battle of professionals where I have one doctor that says "X" and another doctor that says "Y," I'm in no position to choose. That's what the burden of proof is about, and at least in my mind on a factual basis, I don't believe that the State has met the burden of proof by the greater weight of the credible evidence that the defendant is competent as it relates to both prongs.

Plainly, the trial court was saying: "I do not have to decide that Garfoot is competent to proceed; the State has to prove to me by the greater weight of the credible evidence that Garfoot is competent to proceed; it has failed to meet its burden."

Because I agree with the trial court, I respectfully dissent.