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DISTRICT IV

August 15, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1070 State of Wisconsin v. Richard L. Johnson (L.C. # 2012CF79)

Before Lundsten, Sherman and Kloppenburg, JJ.

Richard Johnson appeals a judgment of conviction and an order denying postconviction relief. Johnson contends that he was entitled to an evidentiary hearing on his postconviction motion seeking plea withdrawal. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In April 2012, Johnson pled guilty to armed robbery. He was convicted and sentenced to three years of initial confinement and five years of extended supervision.

In April 2013, Johnson moved to withdraw his plea. Johnson argued that he was incompetent at the time the plea was entered and thus the plea was not knowing, intelligent, and voluntary. In support, Johnson asserted that he had been found incompetent in a separate case based on a competency evaluation undertaken in December 2012. The circuit court denied the motion without a hearing, finding that Johnson had not alleged sufficient facts that would entitle him to relief.

"Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The first step of our inquiry is whether the motion, on its face, alleges sufficient material facts that, if true, would entitle the defendant to relief. ***Id.*** This step is a question of law that we review independently. ***Id.*** If the motion does raise sufficient facts, the circuit court must hold an evidentiary hearing; if not, the circuit court has the discretion to grant or deny a hearing. ***Id.*** We review a circuit court's discretionary decisions for an erroneous exercise of discretion. ***Id.***

Johnson argues that he is entitled to a hearing on his postconviction motion because the motion alleged that the December 2012 competency report found Johnson incompetent eight

months after sentencing.[2] Johnson argues that the subsequent finding of incompetency raises doubt as to whether Johnson was competent at the time he entered his plea, requiring the circuit court to hold an evidentiary hearing on that issue. We disagree.

In ***State v. Farrell***, 226 Wis. 2d 447, 595 N.W.2d 64 (Ct. App. 1999), we affirmed a circuit court order that denied a motion for plea withdrawal that was based on a claim that a subsequent finding of incompetency created doubt as to the defendant's competency at the time of his plea. There, Farrell sought to withdraw his plea on grounds that the circuit court had found Farrell incompetent to proceed for a period of time between the plea and sentencing. ***Id.*** at 451-52. The circuit court held an evidentiary hearing, and Farrell did not present any new evidence or testimony as to his competency at the time of his plea. ***Id.*** at 452-53. The court determined that Farrell had not demonstrated that a manifest injustice would occur absent plea withdrawal, and denied Farrell's motion. ***Id.*** at 452-53.

We rejected Farrell's argument "that a trial court should examine a defendant's competency in prior proceedings if the court later determines the defendant to be incompetent,"

[2] The State argues that we may not consider the December 2012 competency report because it is not in the record. In reply, Johnson does not contest that the report is not in the record of this appeal, but argues that we may consider it because it was submitted to the circuit court in Johnson's other case. However, our review in this appeal is limited to the record in this case. See ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) ("The rule is well established that reviewing courts are limited to the record, and are bound by the record. The record is not to be enlarged by material which neither the trial court, nor the appellate court, acting within their respective jurisdictions, have ordered incorporated in the record."). It was Johnson's obligation to include the report in the record of this appeal if he wished this court to consider it.

In any event, for purposes of this opinion, we consider whether the facts alleged in the postconviction motion, if true, would entitle Johnson to relief. Johnson's postconviction motion asserts that there was a December 2012 competency evaluation report, and sets forth its pertinent findings as to Johnson's mental health history and competency. Accordingly, we rely on those facts in determining whether Johnson's postconviction motion entitles him to a hearing.

as well as his assertion "that the subsequent incompetency declaration alone is sufficient reason to doubt the defendant's competency at the time of the previous proceeding." ***Id.*** at 454. Rather, we explained, "a competency inquiry focuses on a defendant's ability at the time of the *present* proceeding." ***Id.*** (alteration in original). Thus, we concluded "that a mental illness diagnosis or an incompetency determination made *subsequent* to the proceeding in question is a factor that may create a reason to doubt competency, but it does not categorically create a reason to doubt." ***Id.*** at 454-55 (alteration in original). We explained that "[n]ot only [did] Farrell fail[] to offer any additional evidence that brings his competence at the time of his plea hearing into question, the record … indicated that he had the capacity to understand the nature and object of the proceedings against him when he entered his guilty pleas." ***Id.*** at 455. We therefore determined that Farrell had not met his burden to establish that he was entitled to plea withdrawal to avoid a manifest injustice. ***Id.***

In ***Farrell***, 226 Wis. 2d at 453, the circuit court held an evidentiary hearing on Farrell's motion. However, our reasoning in ***Farrell*** applies equally in this case. That is, because a subsequent finding of incompetency does not categorically create a reason to doubt competency at the time a plea was entered, a defendant must allege more than a subsequent finding of incompetency to entitle him to an evidentiary hearing.

Here, Johnson's postconviction motion asserted the following facts. Eight months after Johnson pled guilty, Johnson was found incompetent in a separate case. The competency report noted that Johnson had "'documented substantial cognitive limitations [and] placed with the borderline range of intelligence.'" It indicated that Johnson began receiving mental health treatment when he was ten or eleven years old, and that he had been repeatedly hospitalized for mental health treatment. It indicated that his last mental health hospitalization had been in 2009.

Tests from the 2009 hospitalization showed that Johnson was "'at the cusp of the ranges of mild mental retardation and borderline intellectual functioning.'" The competency report diagnosed Johnson with "'mood disorder, not otherwise specified, polysubstance abuse, and borderline intellectual functioning.'" It determined that Johnson was incompetent to proceed but, with medication and treatment, more than likely to become competent.

We conclude that these facts, if true, do not entitle Johnson to relief. They establish only that Johnson has a history of mental illness, and that he was found incompetent eight months after he entered his plea. The postconviction motion contains no facts calling into doubt Johnson's competency at the time of the plea hearing. As we explained in ***Farrell***, while a subsequent finding of incompetency is one factor that may create a doubt as to previous competency, the inquiry must focus on competency at the time the plea was entered. Because no facts were offered to call into doubt Johnson's competency at the time he entered his plea, the circuit court was not required to hold a hearing on the motion.

Having determined that the circuit court was not required to hold an evidentiary hearing on Johnson's motion, we also conclude that the circuit court properly exercised its discretion by denying Johnson's motion without a hearing. The circuit court explained that it had determined at the plea hearing that the plea was knowingly and voluntarily entered, and had not observed any signs that Johnson was incompetent. The circuit court also noted that competency is a dynamic rather than a static factor, and determined that the facts in the postconviction motion were insufficient to call Johnson's competency at the time of the plea into question. Moreover, our review of the plea hearing transcript indicates that Johnson was able to respond appropriately to questions by the circuit court during the plea colloquy and to indicate when he did not

understand a question. We discern no basis to disturb the circuit court's exercise of discretion in denying Johnson's postconviction motion without a hearing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals