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September 28, 2016

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

2015AP2143

State v. Terry L. Gorichs (L.C. # 2003CF6370)

Before Kessler and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

Terry L. Gorichs, *pro se*, appeals from an order of the circuit court that denied his motion for postconviction relief. 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 (2013-14).¹ The order is summarily affirmed.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Background

In 2004, a jury convicted Gorichs of one count of first-degree sexual assault of a child and one count of repeated sexual assault of the same child. The circuit court sentenced Gorichs to fifteen years' initial confinement and ten years' extended supervision on each count, to be served concurrently. While Gorichs filed a notice of intent to pursue postconviction relief, he later wrote to his attorney and indicated he did not wish to pursue an appeal.

In September 2015, Gorichs filed a motion for postconviction relief under WIS. STAT. § 974.06, claiming he had been incompetent to stand trial and asserting that trial counsel was ineffective for failing to request a competency hearing. The circuit court denied the motion, explaining that Gorichs' 2011 diagnosis of mental illness shed no light on his mental condition at the time of trial in 2004. Thus, the motion was conclusory. Gorichs appeals.²

² Gorichs also purports to be appealing an order of the circuit court, the Honorable M. Joseph Donald, presiding, that "refus[ed] to grant indigency as to obtaining a copy of transcripts for appeal." Gorichs had moved the circuit court for free transcripts in April 2015 and July 2015, but it was the Honorable Daniel L. Konkol who denied those motions because Gorichs had failed to present a meritorious claim that would warrant providing the transcripts at no cost. *See State ex rel. Girouard v. Circuit Court for Jackson Cty.*, 155 Wis. 2d 148, 159, 454 N.W.2d 792 (1990).

However, the last of Judge Konkol's orders denying transcripts was entered on July 9, 2015, so any notice of appeal was due on or about October 7, 2015. *See* WIS. STAT. § 808.04(1). Gorichs' notice of appeal is dated October 15, 2015. We therefore have no jurisdiction over an appeal from that order. *See* WIS. STAT. RULE 809.10(1)(e) ("The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal."). Judge Donald's order does not address transcripts.

Even if we had jurisdiction over the transcript issue, we would affirm the circuit court's denial of the motion. As noted, to be entitled to free transcripts at this stage, Gorichs must show he had an arguably meritorious issue. The issue Gorichs identified to explain his need for the transcripts is the same competency argument we reject herein.

Discussion

Gorichs' main substantive argument for postconviction relief was "that he was not competent to stand trial and that trial counsel was ineffective for failing to request a competency evaluation." Gorichs also claimed that trial counsel's failure to investigate his competency "prejudiced [his] defense of not guilty by reason of mental disease or defect."

WISCONSIN STAT. § 971.13(1) prohibits the trial of incompetent defendants. To be competent, a defendant must possess: (1) "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding"; and (2) "a rational as well as factual understanding of a proceeding against him or her." *State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). "To determine legal competency, the court considers a defendant's present mental capacity to understand and assist *at the time of the proceedings*." *State v. Byrge*, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (emphasis added).

To support his postconviction motion, Gorichs offered documentation of a schizophrenia diagnosis made in 2011, which was approximately seven years after his conviction, and subsequent orders for civil commitment for involuntary medication. He reasoned that if he has a diagnosed mental illness now, he must have had an undiagnosed mental illness in 2004, as his mental illness "did not manifest it[self] over night." However, "a mental illness diagnosis ... made *subsequent* to the proceeding in question is a factor that may create a reason to doubt

competency, but it does not categorically create reason to doubt[.]”³ *State v. Farrell*, 226 Wis. 2d 447, 454-55, 595 N.W.2d 64 (Ct. App. 1999).

Further, the only evidence Gorichs offered in the postconviction motion to show his mental capacity at the time of trial was claims that he heard voices, self-medicated with drugs and alcohol, and believed that “everyone was out to get [him].” But these claims are conclusory—Gorichs does not elaborate on how these symptoms or experiences prohibited him from previously consulting with counsel or understanding the proceedings against him.⁴ Contrary to Gorichs’ apparent belief that mental illness itself equals incompetency, “[a]lthough a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial.” *Byrge*, 237 Wis. 2d 197, ¶31.

In short, there is nothing in Gorichs’ postconviction motion that objectively calls his competency at the time of trial into question. See *State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (recommending how to sufficiently allege “the kind of material factual objectivity ... for reviewing courts to meaningfully assess” postconviction claims). A postconviction motion that alleges only conclusory allegations does not warrant an evidentiary hearing. See *id.*, ¶9.

Gorichs also believes that trial counsel’s failure to raise competency deprived him of a not-guilty-by-reason-of-mental-disease-or-defect (NGI) verdict. We note, however, that the

³ Indeed, as Gorichs was in custody for seven years before the Department of Corrections diagnosed him with a mental disorder and saw fit to obtain a medication order, one inference is that Gorichs’ mental health was stable at the time of trial and has only recently decompensated.

⁴ Failure to understand a “motive” for the victim to allege sexual assault is not demonstrative of incompetency.

standards for incompetency and an NGI defense are entirely different.⁵ A defendant may establish an NGI defense by showing he lacked substantial capacity at the time of the offenses to either: (1) appreciate the wrongfulness of his conduct or (2) conform his behavior to the requirements of the law. *See* WIS. STAT. § 971.15(1); *State v. Anderson*, 2014 WI 93, ¶21, 357 Wis. 2d 337, 851 N.W.2d 760. Nowhere in his postconviction motion or even in his appellate brief does Gorichs address the requirements of an NGI defense. He therefore fails to show that an NGI defense would have succeeded, even if trial counsel had sought a competency evaluation at the time of trial.

Because Gorichs' postconviction motion made only conclusory allegations, the circuit court was free to grant or deny a hearing at its discretion. *See State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. We discern no error in its decision to deny a hearing on insufficient pleadings.

IT IS ORDERED that the order denying Gorichs' postconviction motion is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

⁵ We would further note that a finding of incompetency to stand trial also does not guarantee acquittal, release, or dismissal of the charges. Incompetent defendants who are expected to become competent within a period of time may be committed for treatment to restore competency. *See* WIS. STAT. § 971.14(5)(a)-(c). When competency is restored, the prosecution resumes. *See* WIS. STAT. § 971.14(4).