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May 18, 2021

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

2020AP893-CR

State of Wisconsin v. Robert Joseph Waldemarsen
(L. C. No. 2018CF383)

Before Stark, P.J., Hruz and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robert Waldemarsen appeals from an order that found him competent to stand trial for the criminal offenses in this action. 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 (2019-20). We affirm.

Waldemarsen’s central argument on appeal is that the circuit court improperly weighed the evidence by relying in part upon competency evaluations from an earlier proceeding, rather than focusing on his current condition. Relatedly, he argues that the court appeared to reject the concept that competency is fluid and improperly ignored his counsel’s arguments that Waldemarsen had decompensated over the nine months he had served in jail since his prior competency evaluations. Waldemarsen further contends the court’s reluctance to order a new competency evaluation and its reliance upon information from prior proceedings “infected” its decision-making process. These arguments fail for three reasons.

First, Waldemarsen appears to be treating our review of the circuit court’s decision that he is competent to stand trial as discretionary in nature, asking this court to weigh the evidence favoring a determination of competence against that favoring a determination of incompetence. However, we review a court’s determination that a defendant is competent to stand trial under the clearly erroneous standard applicable to factual findings. *State v. Smith*, 2016 WI 23, ¶¶26, 29, 367 Wis. 2d 483, 878 N.W.2d 135. We will uphold the court’s competency determination unless it is “totally unsupported by facts in the record.” *Id.*, ¶29. We do not consider whether other evidence might have supported a contrary finding.

Second, Waldemarsen cites no authority that would bar a circuit court’s consideration of the entire record, including historical competency evaluations, when evaluating a defendant’s current ability to stand trial. To the contrary, a defendant’s “history of irrational behavior and prior medical opinions about [his or her] condition ... can serve as indicia” of his or her current status. *State v. Byrge*, 2000 WI 101, ¶48, 237 Wis. 2d 197, 614 N.W.2d 477. It follows that a court may properly consider whether a defendant’s current behavior is consistent with, or a departure from, his or her past behavior. We therefore reject any suggestion that the circuit court’s

repeated references to Waldemarsen's prior competency evaluations and its reluctance to order his further evaluation until the State joined in his request "infected" the court's decision-making with an improper factor or bias.

Third, information gathered during Waldemarsen's past evaluations was integral to the circuit court's determination that Waldemarsen is currently competent. Neuropsychologist Donna Minter conducted a court-ordered evaluation of Waldemarsen for the current competency proceeding. Minter interviewed Waldemarsen for two hours, throughout which time Waldemarsen was able to follow Minter's instructions without any difficulty. During the interview, Waldemarsen denied any knowledge or understanding of why he was in jail, what he was standing trial for, or the functions of various individuals in the criminal justice system. He also claimed not to know the year of his birth or any of his medical history, but he repeatedly asserted that he had learning disabilities as the result of fetal alcohol syndrome. He further claimed not to know how many legs a dog has. Minter viewed several of Waldemarsen's responses as implausible, and she administered the Test of Memory Malingering (TOMM) to assess whether Waldemarsen was attempting to feign memory deficits. On each phase of the test, Waldemarsen scored lower than chance, indicating a strong possibility that he was intentionally picking wrong answers.

Minter's evaluation included information from sources other than her interview and testing of Waldemarsen. Minter spoke with a licensed counselor who had interacted with Waldemarsen while he was incarcerated over the past few years. The counselor relayed her opinion that Waldemarsen had some mild cognitive delays, but she observed that he was able to remember daily routines and pertinent information. Minter also reviewed the reports from two competency evaluations that had been performed the prior year. Psychologist Rebecca Seifert Lynch had conducted one of those evaluations. During Seifert Lynch's examination, Waldemarsen

self-reported a history of a learning disability specific to reading, but he was able to discuss his case and to learn new concepts and repeat them back to Seifert Lynch. Seifert Lynch determined that Waldemarsen's cognitive deficits did not rise to a level that would impair his ability to understand court proceedings and assist with his defense, and she concluded that he was competent to stand trial at that time.

Minter saw no evidence that Waldemarsen had suffered a severe brain injury, tumor, or stroke that would lead to an aphasia, or acquired language deficit, since the time of his interview with Seifert Lynch. She also saw no evidence that Waldemarsen suffered from of any type of mental illness, such as psychosis, that could lead a person to decompensate if they were not taking the appropriate medications. She concluded that Waldemarsen was still competent to stand trial.

Minter's testimony and report, in conjunction with Seifert Lynch's prior report, fully supported the circuit court's determination that Waldemarsen is currently competent to stand trial. If Waldemarsen had severe cognitive difficulties stemming from fetal alcohol syndrome (a syndrome not previously disclosed in his medical history), those difficulties would have been present in prior examinations. Because Waldemarsen was able to rationally discuss his case with Seifert Lynch a year earlier, the circuit court could properly conclude that the memory deficit symptoms Waldemarsen was currently claiming were not the result of a lifelong learning disability. The court could further conclude that Waldemarsen was feigning his current memory deficit symptoms based upon the TOMM results and the lack of any credible medical explanation for why he would have developed such symptoms in the past year. These conclusions are not based upon the court's refusal to recognize that competency is fluid. To the contrary, by comparing Waldemarsen's current and prior symptoms, the court implicitly recognized that competency could

fluctuate over time. In sum, the court's determination that Waldemarsen is currently competent to stand trial is not clearly erroneous.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals