COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1282 **Cir. Ct. No. 90CF902946**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN HENRY BALSEWICZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. John Henry Balsewicz appeals *pro se* from the trial court's order denying his postconviction motion seeking to vacate his conviction and obtain a new trial. Balsewicz contends: (1) the trial court lacked

jurisdiction pursuant to WIS. STAT. § 971.14 (1999-2000)[1] to hold a *nunc pro tunc* competency hearing;[2] (2) the *nunc pro tunc* competency hearing was not meaningful or adequate; (3) the trial court erred in finding him competent to proceed at the time of his trial; and (4) his trial counsel was ineffective for failing to pursue a plea of not guilty by reason of mental disease or defect (NGI). We disagree and affirm.

I. BACKGROUND.[3]

¶2 In the early morning hours of August 24, 1990, witnesses saw Balsewicz and an accomplice, Garceia Coleman, chase and savagely beat Richard Terry to death in an alley. Terry had escaped his pursuers several times, but after each escape they caught and beat him again. The final time the two defendants caught Terry, they kicked him repeatedly and beat him with a doorframe found in the alley. When the witnesses attempted to intervene they were threatened. One of the witnesses testified that Coleman took a wallet out of the back pocket of the victim.

¶3 Balsewicz was convicted of first-degree intentional homicide, party to a crime, and robbery, party to a crime. The trial court imposed the maximum sentence of ten years for the robbery conviction and a life sentence for the

---

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] *Nunc pro tunc* literally means "now for then." BLACK'S LAW DICTIONARY 1097 (7th ed. 1999). In a *nunc pro tunc* proceeding, the court does something in the present that should have been done in the past. Thus, the *nunc pro tunc* proceeding has retroactive effect.

[3] A number of the facts surrounding Balsewicz's case are taken from ***State v. Balsewicz***, No. 92-2140-CR, unpublished slip. op. (Wis. Ct. App. April 19, 1994) and ***State v. Balsewicz***, No. 99-0676-CR, unpublished slip. op. (WI App May 23, 2000).

homicide conviction. In 1994, Balsewicz appealed from the judgments of conviction. We rejected his claims on appeal; *see* ***State v. Balsewicz***, No. 92-2140-CR, unpublished slip. op. (Wis. Ct. App. April 19, 1994). Then, in 2000, Balsewicz appealed from the trial court's denial of his motion for postconviction relief, arguing that he was denied effective assistance of counsel because, among other claims, his trial attorney: (1) failed to investigate or present a NGI defense; and (2) failed to request a competency hearing. In ***State v. Balsewicz***, No. 99-0676-CR, unpublished slip. op. (WI App May 23, 2000), we concluded:

> [T]he trial court erred in failing to provide Balsewicz the competency hearing to which he was statutorily entitled, and that counsel was ineffective for failing to object on that basis; and (2) the trial court erred in precluding Balsewicz from attempting to enter a plea of not guilty by reason of mental disease or defect, and that counsel may have been ineffective for failing to object on that basis, as well.

Accordingly, we reversed and remanded the matter for the trial court to conduct a *nunc pro tunc* hearing to determine: (1) whether Balsewicz was competent at the time of his trial; and (2) whether trial counsel was ineffective for failing to enter a NGI plea.

¶4 Before Balsewicz's trial in 1991, Attorney David Berman, his trial counsel, had sought a psychiatric evaluation of Balsewicz. The 1991 evaluation was completed by Dr. Robert D. Miller, who concluded that Balsewicz was competent to stand trial.[4] On remand, the trial court held two hearings in accordance with our decision. The witnesses called at those hearings were Dr. Miller and Attorney Berman. Based on the testimony of Berman and Dr. Miller,

[4] In 1991, the trial court did not conduct a competency hearing, but rather, concluded that Balsewicz was competent to stand trial based on the psychiatric evaluation.

the trial court determined *nunc pro tunc* that Balsewicz was competent to stand trial in 1991. The trial court also determined that Balsewicz did not receive ineffective assistance of counsel as a result of Berman's failure to investigate and enter a NGI plea.

II. ANALYSIS.

A. The trial court had jurisdiction pursuant to WIS. STAT. § 971.14 to hold a nunc pro tunc competency hearing.

¶5 Balsewicz claims that the *nunc pro tunc* hearing held in 2001 was impermissible under WIS. STAT. § 971.14(4)(b), because it was held ten years after his original trial. We disagree.

¶6 WISCONSIN STAT. § 971.13(1) defines competency to stand trial and outlines the effects of being deemed incompetent to stand trial: "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 the commission of an offense so long as the incapacity endures." WISCONSIN STAT. § 971.14 outlines the requirements for determining a defendant's competency to stand trial. Specifically, § 971.14(4) deals with competency hearings:

> **(4)** HEARING. (a) The court shall cause copies of the report to be delivered forthwith to the district attorney and the defense counsel, or the defendant personally if not represented by counsel. The report shall not be otherwise disclosed prior to the hearing under this subsection.
>
> (b) If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report…. In the absence of these waivers, the court shall hold an evidentiary hearing on the issue…. If the defendant is found incompetent and if the state proves by evidence that

> is clear and convincing that the defendant is not competent … the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.
>
> (c) If the court determines that the defendant is competent, the criminal proceeding shall be resumed.
>
> (d) If the court determines that the defendant is not competent and not likely to become competent … the proceedings shall be suspended….

¶7 Although it is recognized that a *nunc pro tunc* determination of a defendant's competency is inherently difficult, such retroactive procedures have been sanctioned in numerous criminal contexts. *See* ***State v. Nelson***, 138 Wis. 2d 418, 440-41, 406 N.W.2d 385 (1987) (supreme court approved the use of a retrospective determination of a child's availability in a sexual assault case made eight months after the trial); ***State v. Johnson***, 133 Wis. 2d 207, 224-25, 395 N.W.2d 176 (1986) (supreme court remanded case for retrospective determination of defendant's competency to stand trial although three or four years had passed since trial); ***Renner v. State***, 39 Wis. 2d 631, 637, 159 N.W.2d 618 (1968) (supreme court remanded case for retrospective determination of whether defendants' confessions were voluntary); ***State v. Haskins***, 139 Wis. 2d 257, 267, 407 N.W.2d 309 (Ct. App. 1987) (court of appeals remanded case for retrospective determination of competency); ***State v. Middleton***, 135 Wis. 2d 297, 323, 399 N.W.2d 917 (Ct. App. 1986) (court of appeals remanded case for retrospective findings of whether defendant's trial testimony was compelled by his admissions to police).

¶8 Further, although obvious hazards attend retrospective competency hearings, including the passage of time, "mere passage of time may not make the

effort meaningless." ***Johnson***, 133 Wis. 2d at 225 (citation omitted). In fact, "[t]he passage of even a considerable amount of time may not be an insurmountable obstacle if there is sufficient evidence in the record derived from knowledge contemporaneous to trial." ***Id.*** (citations omitted).

¶9 Here, the time between the initial trial and the *nunc pro tunc* hearing was ten years – a significant amount of time. However, Balsewicz is partly responsible for this time lapse.[5] Additionally, sufficient evidence, including the testimony of Dr. Miller and Attorney Berman, was presented at the competency hearing for the trial court to determine whether Balsewicz lacked the mental capacity to understand the proceedings and assist in his 1991 defense. Accordingly, we affirm the trial court's exercise of jurisdiction under WIS. STAT. § 971.14(4) to conduct a *nunc pro tunc* competency hearing.

B. Balsewicz has failed to demonstrate that the competency hearing was meaningless.

¶10 Balsewicz claims that the competency hearing was inadequate because, although Dr. Miller testified in person, his report was over ten years old. Thus, Balsewicz concludes because "Dr. Miller brought [no] new information to the hearing," a meaningful inquiry could not be held.

¶11 Balsewicz's argument is contradictory and confusing. First, in order to conduct a meaningful inquiry, the trial court was required to rely on evidence "derived from knowledge contemporaneous to trial." ***Johnson***, 133 Wis. 2d at 225. In this case, the trial court relied upon the report of Dr. Miller, which was

[5] Balsewicz waited until February 5, 1999 to file his postconviction motion under WIS. STAT. § 974.06.

made contemporaneous to Balsewicz's 1991 trial. Thus, to conduct "an adequate and meaningful *nunc pro tunc* inquiry" into the question of Balsewicz's competence, the trial court was required to rely on this evidence. *See* ***State v. Klessig***, 211 Wis. 2d 194, 213, 564 N.W.2d 716 (1997).

¶12 Second, the reason the trial court relied on a ten-year-old report is that Balsewicz waited nearly eight years after his conviction to file his postconviction motion. We will not allow Balsewicz to create his own error by deliberate choice and then ask to receive the benefit from that strategy on appeal. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

¶13 Outside of his argument regarding the age of Dr. Miller's report, Balsewicz offers no other claim as to why he was denied a meaningful inquiry into his competence. Because the trial court relied on Dr. Miller's 1991 report as well as his 2002 testimony in assessing Balsewicz's competence, we conclude that the competency inquiry was both adequate and meaningful.

C. Balsewicz has failed to demonstrate that he was incompetent.

¶14 Next, Balsewicz argues that the trial court erred in concluding that he was competent to stand to trial in 1991. "[C]ompetency to stand trial must be reviewed under the deferential clearly erroneous standard." ***State v. Byrge***, 2000 WI 101, ¶33, 237 Wis. 2d 197, 614 N.W.2d 477.

> [T]he Supreme Court classifies competency to stand trial within a discrete category in which the resolution of the legal issue is better left to the trial court. Although more than the "what happened" types of historical facts arise in a competency determination, the decision pivots on factors only a trial court can appraise. In a competency proceeding, the ultimate resolution of the legal issue rests on the court's observation of witness credibility and demeanor. "An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional

> challenge." We therefore are persuaded that the circuit court is the judicial actor best positioned to apply a legal standard to the facts of a competency decision.

Id. at ¶44 (citations and footnotes omitted).

¶15 "In Wisconsin, '[n]o 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 the commission of an offense so long as the incapacity endures.'" ***State v. Garfoot***, 207 Wis. 2d 214, 221, 558 N.W.2d 626 (1997); *see also* WIS. STAT. § 971.13(1). "[A] person whose mental condition is such that he [or she] lacks the capacity to understand the nature and object of the proceedings against him [or her], to consult with counsel, and to assist in preparing [a] defense may not be subjected to a trial." ***Id.*** at 222 (citation omitted). Conversely, "[a] person is competent to proceed if: 1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and 2) he or she possesses a rational as well as factual understanding of a proceeding against him or her." ***Id.***

¶16 Here, we cannot conclude that the trial court's determination of Balsewicz's competency was clearly erroneous. Dr. Miller's 1991 report unequivocally indicated that Balsewicz was competent to stand trial:

> Mr. Balsewicz was aware of the charges against him and of the potential penalties he could suffer if convicted. He was able to define and discuss the pleas of guilty, not guilty, and not guilty by reason of mental disease, and was able to understand the plea of no contest after I explained it to him. He was able to discuss the roles of judge, jury, prosecutor, and defense attorney. He was also able to discuss procedural issues, such as plea bargaining, with an adequate understanding.
>
> Therefore, it is my opinion, within a reasonable medical certainty, that at this time, Mr. Balsewicz possesses the requisite mental capacities to understand the nature of the

> proceedings against him and to cooperate with counsel in the preparation of a defense. There has been no evidence of significant mental disorder during his evaluation period; he would therefore be expected to maintain his present level of competency throughout the proceedings against him.

We are convinced, based on Dr. Miller's 1991 report, as well as his 2002 testimony, that Balsewicz possessed more than the minimal competence necessary to stand trial. Accordingly, the trial court's competency determination is affirmed.

D. Balsewicz did not receive ineffective assistance from his trial counsel.

¶17 Finally, Balsewicz contends that his trial counsel was ineffective for failing to investigate and enter a NGI plea. The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687.

¶18 However, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Id.*** at 691. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶19 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687.

¶20 WISCONSIN STAT. § 971.15 states:

> **Mental responsibility of defendant. (1)** A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.
>
> **(2)** As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> **(3)** Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

Under § 971.15(1), "a defendant who suffers from a mental disease or a mental defect is not automatically excused from the legal consequences of his or her conduct." ***State v. Duychak***, 133 Wis. 2d 307, 316, 395 N.W.2d 795 (Ct. App. 1986). "Rather, the critical inquiry under sec. 971.15 is whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law." ***Id.*** A defendant who pleads not guilty by reason of mental disease or defect has the burden at trial of proving to reasonable

certainty by greater weight of credible evidence that defendant was not responsible for the crimes charged. *See* ***State v. Kazee***, 192 Wis. 2d 213, 223, 531 N.W.2d 332 (Ct. App. 1995).

¶21 On remand, Balsewicz never sufficiently established that he suffered from a mental disease or a mental defect such that he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. Thus, he has failed to satisfy the requirements of WIS. STAT. § 971.15. Balsewicz has also failed to show a reasonable probability that the result of the proceeding would have been different if his trial counsel had pursued a NGI plea. Therefore, because Balsewicz fails to establish prejudice under ***Strickland***, we need not determine whether his counsel's performance was deficient. *See* ***Strickland***, 466 U.S. 697 (stating that if a court concludes that the defendant has failed to prove one prong, it need not address the other prong).

¶22 Based upon the foregoing reasons, the trial court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.