COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1857 **Cir. Ct. No. 2013CF136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACKIE E. LOTT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jackie Lott, pro se, appeals an order denying his request for a competency evaluation.[1] Lott argues the circuit court erred by failing to order competency proceedings under WIS. STAT. § 971.14. We reject Lott's arguments and affirm the order.

BACKGROUND

¶2 Lott was convicted, upon a jury's verdict, of second-degree sexual assault of an unconscious victim, incest, and the administration of a dangerous or stupefying drug. In October 2013, the circuit court sentenced Lott to fifteen years' initial confinement and ten years' extended supervision, followed by ten years' probation. Lott filed a notice of intent to seek postconviction relief, and the State Public Defender appointed counsel to represent him.

¶3 In August 2014, appointed counsel moved to withdraw from representation, indicating Lott refused to accept counsel's conclusions as to the merits of legal issues and continued to disagree with counsel's handling of the matter. Attached to the withdrawal motion was an affidavit in which Lott averred that he wanted counsel to withdraw; he understood he had only one opportunity to directly appeal his conviction; he understood successor counsel would not be

[1] Lott's September 8, 2015 notice of appeal indicates he is also appealing a June 9, 2015 order that denied his motion for appointment of counsel and access to legal materials. The State suggests the notice of appeal was not timely filed as to that order, utilizing a forty-five-day appeal time. The time to appeal is shortened from ninety to forty-five days after entry of judgment if proper notice of entry of judgment is given. WIS. STAT. § 808.04(1) (2015-16). It does not appear notice of entry of judgment was given in this case; therefore, the shortened appeal time does not apply. In any event, Lott fails to develop any argument on appeal to dispute the June 9 order. Therefore, any challenge to that order is deemed abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised before the circuit court but not raised on appeal are deemed abandoned).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise stated.

appointed; he had been instructed that he would be responsible for all court filings; and he understood he could retain counsel at his own expense. At a hearing, the circuit court engaged Lott in a colloquy regarding some of the difficulties and disadvantages of proceeding pro se. Lott confirmed that he wanted counsel to withdraw, and the circuit court granted the motion.

¶4 After this court granted several extensions of the time for Lott to file a postconviction motion or notice of appeal, Lott filed the underlying motion for a competency hearing. Lott alleged that he had been heavily medicated with prescribed psychotropic medications during the 2014 hearing on appointed counsel's motion to withdraw, yet the circuit court failed to inquire whether he was on medication at the time. Lott further claimed he "was still medicated with mental health medications" and the side effects from his medications prevented him from researching and preparing a postconviction motion without the assistance of counsel. The circuit court denied the motion after a hearing, and this appeal follows.

DISCUSSION

¶5 WISCONSIN STAT. § 971.13(1) provides that "[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." Once there is a "reason to doubt a defendant's competency to proceed[,]" there must be a competency examination. WIS. STAT. § 971.14. Although these statutes, by their terms, apply only through sentencing, the right to a competency determination extends through postconviction proceedings. ***State v. Debra A.E.***, 188 Wis. 2d 111, 128 n.14, 131, 523 N.W.2d 727 (1994).

¶6 Lott asserts that he gave the circuit court reason to doubt his competency and, therefore, "triggered a requirement" that the court "initiate a competency proceeding under statute and precedent case law." When competency is challenged in the postconviction setting, the method of evaluating whether there is a reason to doubt a defendant's competency will vary depending on the facts and on whether and where the defendant is incarcerated. ***Id.*** at 132. The circuit court may rely on the affidavits of counsel, a stipulation, the court's observations of the defendant, or may order an examination by a person with specialized knowledge. ***Id.*** The circuit court may also, in its discretion, hold a hearing as set forth in WIS. STAT. § 971.14(4) before determining a defendant's competency. ***Id.***

¶7 This court will uphold the circuit court's determination of a defendant's competency unless the circuit court erroneously exercised its discretion or its decision was clearly erroneous. ***State v. Garfoot***, 207 Wis. 2d 214, 223-24, 558 N.W.2d 626 (1997). To warrant reversal, the circuit court's decision must be "totally unsupported by the facts apparent in the record." ***Id.*** at 224 (citation omitted). This standard is utilized because the circuit court is in the best position to observe the defendant's conduct and demeanor. ***Id.***

¶8 The basic test of competency is whether a person can consult with his or her lawyer with a reasonable degree of rational understanding and whether he or she has a rational and factual understanding of the present proceedings. ***Id.*** at 222. Lott's motion for a competency hearing claimed that his medications put him in a "zombie-like state" that prevented him "from researching and preparing a postconviction motion without the assistance of counsel." The motion, however, did not allege an inability to understand the proceedings. At a hearing on Lott's motion, the circuit court further engaged Lott on the details of his claimed lack of competency. Although Lott stated that he had a hard time concentrating and that

he did not "understand some stuff," he again failed to provide evidence to doubt his understanding of the proceedings. To the extent Lott intimates that his mental illness itself establishes his incompetency, the circuit court properly recognized a distinction between incompetency and mental illness. Our supreme court has recognized that "[a]lthough a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial." ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477.

¶9 Here, the record shows that Lott filed numerous pro se motions seeking extensions, additional information, and appointment of counsel, which suggests he generally knew what proceedings were ongoing and how to participate in them. In fact, as noted above, he asked his postconviction counsel to withdraw because he disagreed with counsel's strategy moving forward.[2] The circuit court determined that if it were to conclude a defendant may proceed pro se but then change his mind when he determines he is "really not competent … because [he does not] have the skills of an attorney, it would make a mockery of the system because it would make a joke out of [him] giving up [the] right to [have] an attorney in the first place." A defendant need not have the skill and experience of a lawyer in order to competently and intelligently choose self-representation. *See* ***Faretta v. California***, 422 U.S. 806, 835 (1975). That Lott, in hindsight, may second guess his decision to proceed pro se does not establish incompetency under WIS. STAT. § 971.13(1). The circuit court ultimately determined Lott's motion did

[2] We note that, while Lott mentions that the circuit court did not inquire into his mental health at the hearing on postconviction counsel's motion to withdraw, Lott does not develop an argument challenging the validity of his waiver of postconviction counsel. Therefore, we will not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider on appeal undeveloped arguments).

not "rise to the threshold of tripping the question of competency for legal proceedings," and the record supports this discretionary decision. We therefore affirm the order.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).