

Dane County Criminal Justice Council Behavioral Health Sub- Committee

Competency 101

Competency vs. NGI

Competency

Legal standard: “No person who lacks substantial mental capacity to understand the proceeding 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.” Wis. Stat. § 971.13(1).

NGI

Legal standard: “A person is not legally responsible for criminal conduct as a result of a 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.” Wis. Stat. § 971.15(1).

Competency and NGI

Competency

- Person's understanding of the proceedings NOW
- **Ethical obligation:** anyone who has reason to doubt competency must raise the issue regardless of client's consent or other considerations

NGI

- Person's ability to control their behavior THEN
- **Strategic decision:** Person chooses and consents to pursue NGI plea. Defendant's call.

What is competency?

- **Doesn't require mental health diagnosis** (State ex. rel. Haskins v. County, Court of Dodge County, 62 Wis.2d 250, 214 N.W.2d 575 (1975). (deaf and incapable of speech); State v. Leach, 122 Wis.2d 339, 363 N.W.2d 235 (19 (amnesia); State v. McIntosh, 139 Wis.2d 339, 412 N.W.2d 894 (1986) (amnesia))
- **Requisite degree of understanding and assistance: “to consult with attorney with a reasonable degree of rational understanding”; to understand at least “the essence of the charge, the defenses available, the essentials of criminal proceedings”; ability “to rationally communicate”** State ex. rel. Haskins, supra 263, fn. 2; Dusky v. United States, 362 U.S. 402(1969); “to rationally aid in preparation of defense.” State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986); Drope v. Missouri, supra, 420 U.S. at 171.

What is Competency? (Cont'd)

- Understand what is happening, assist attorney, able to make decisions:
 - Relay facts of case to attorney – i.e. who, what, why, when and how of the case
 - Understand what happens at trial and make decision of whether to have a trial – Make decision of jury or Court trial
 - Testify/subject to cross examination
 - Collateral consequences
 - Assess the favorability of any offers, plea negotiations

Competency and Confidentiality

Defense counsel is NOT ALLOWED TO REVEAL CLIENT CONFIDENCES in the context of a competency proceeding, unless the client gives permission. ***State v. Meeks***, 2003 WI 104.

Raising the Issue of Competency

- 1) Raise the issue, orally or in writing
- 2) Judge finds probable cause person committed a crime based on criminal complaint, preliminary hearing
- 3) Court orders examination
- 4) Wisconsin Forensic Unit is contractor who does evaluations:
 - Evaluation is outpatient unless person does not cooperate or inpatient observation is necessary to complete evaluation 971.14(2)(b) – if person is released on bail, the evaluation happens in the community, if not, the evaluation happens in the jail
 - Time limits for evaluations: 15 days if inpatient, 30 days if outpatient 971.14(2)(c)

Competency Report

- Competent.
- Not competent, likely to regain competency.
- Not competent, likely to regain competency, but not competent to refuse medication.
- Not competent, not likely to regain competency.
- Unable to render an opinion. Referral to inpatient facility: Mendota or Winnebago.

Competency Hearing

- Prosecutor can argue for what they think is right
- Defense attorney must argue for what defendant wants, even if defense attorney disagrees – not a GAL
- If the defense asserts competency, the accused shall be found competent unless the state proves incompetency by **clear and convincing evidence**.
- •If the defense asserts incompetency or stands mute, the accused shall be found incompetent unless the state proves competency by the **greater weight of credible evidence**. Parties may stipulate to competency or incompetency.
- Wis. Stat. § 971.14(4)(b).

Possible Outcomes

- Competent. Prosecution continues.
-

- Not competent, likely to regain. Commitment of up to 12 months or statutory maximum sentence, whichever is less. Can be in the “community” or inpatient. 971.14(5)(a)1
 - If defendant regains competency, prosecution continues; possibility of re-commitment for cumulative 18 months
 - Court can order medications if client not competent to refuse. Requires special findings. 971.14(5)(am)
 - Evaluations/updates are done every 90 days
 - If defendant does not regain, case is suspended
 - If prosecution has reason to believe that the defendant has regained competency, can motion court for hearing/reevaluation
-

- Not competent, not likely to regain. Can convert to Chapter 51 or 54/55.
- Case is suspended.

Issues to Consider

- Although there are time limits for completing evaluations, there are no time limits for setting hearings – “promptly” 971.14(4)(a)
- Actual inpatient bed waiting lists at MMHI and WMHI extremely long – currently between 6 months and 1 year
- Clunky interplay between criminal system and Chapter 51 system when a person is found not competent and not likely to regain competency
- Involuntary medication requires specific findings similar to Chapter 51 cases