

Judge's Discretion in Competence to Stand Trial Determinations

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No Clear Error Where Judge Determines Competency Based on Consideration of Evidence from Three Expert Witnesses

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In *United States v. Wessel*, 2 F.4th 1043 (7th Cir. 2021), Jacob Wessel appealed a lower court's finding of trial competency, challenging the judge's use of an incorrect competency standard, her weighing of available evidence, and her declining his jury trial waiver. The U.S. Court of Appeals for the Seventh Circuit found no error in this ruling.

Facts of the Case

In August, 2016, Mr. Wessel was charged as a felon in possession of a firearm after someone reported to police that he had talked about suicide and stolen a car. When police located him, he told officers to shoot him in the head. When they did not, he drew his gun, and officers shot the gun out of his hand and shot him in the shoulder.

At the start of trial, Mr. Wessel's attorney raised doubt regarding his competency, and the judge ordered PsyD, an evaluation. The defense hired Stephanie Callaway, PsyD, an expert evaluator, who conducted two jail-based interviews and reviewed records. She opined that he exhibited deficits in his rational understanding and ability to assist counsel due to depression and delusional beliefs. The court ordered Mr. Wessel to the Lexington Federal Medical Center for evaluation by Dr. Judith Campbell, a

government expert psychologist who evaluated him over forty-six days. She relied on staff observations and her own interviews. Staff did not observe acute symptoms, although Mr. Wessel was prescribed bupropion for reported ADHD and depression. Psychological testing also suggested he may have exaggerated his symptoms. Dr. Campbell gave him the diagnosis of borderline personality disorder (BPD) with antisocial features and ruled out schizoaffective disorder, which had been listed in a prior record. She opined Mr. Wessel had adequate factual understanding of the proceedings and could assist his attorney if he so chose. Dr. Callaway evaluated Mr. Wessel once more in 2017. Mr. Wessel was no longer taking bupropion, and Dr. Callaway reported he exhibited paranoia about others trying to harm him and deficits in attention. She diagnosed schizoaffective disorder and BPD traits and, again, opined he lacked trial competence.

The court held the first competency hearing in January 2018, during which the judge found sufficient evidence to suggest incompetency, ordering an additional evaluation at Chicago's Metropolitan Correctional Center (MCC Chicago). Over forty-four days, Mr. Wessel refused to speak with Dr. Allison Schenk, the evaluator. Staff reported he showed no symptoms of psychosis or mania, and the content of his paranoid beliefs changed over time. Dr. Schenk gave him the diagnosis of antisocial personality disorder (ASPD) and BPD, and she ruled out schizoaffective disorder. She opined that, while his personality traits may prevent him from working effectively with counsel, his decision to participate was volitional and unrelated to a serious mental illness. The court held a second competency hearing during which all three experts testified, and the judge ultimately determined that he was competent, relying on several notable factors. Specifically, she relied on testimony that his paranoid beliefs fluctuated over time and across settings, which is inconsistent with typical delusions, and on Mr. Wessel's conduct across evaluations, noting his participation at some points to be volitional. The judge disregarded Dr. Callaway's schizoaffective disorder diagnosis, as the other two experts ruled it out.

In October 2018, Mr. Wessel attempted to waive a trial by jury. When the judge conducted a colloquy to determine whether his waiver was knowing and voluntary, Mr. Wessel engaged only minimally, and the judge declined his waiver. Defense counsel

argued if he was not competent to waive a jury trial, he was not competent to stand trial. The judge disagreed, noting the standard is different, given the waiver must be knowing and voluntary. Defense counsel again moved to determine Mr. Wessel's competency, and the judge ordered Mr. Wessel back to MCC Chicago for evaluation. Dr. Schenk conducted another evaluation, in which Mr. Wessel declined to participate, and her opinion remained unchanged. At the final competency hearing in May 2019, only Dr. Schenk testified. The judge adjudicated Mr. Wessel competent to stand trial, noting he exhibited traits of borderline and antisocial personality disorders (*Wessel*, p. 1054), and his conduct was volitional and manipulative, rather than compulsive.

At trial one month later, Mr. Wessel exhibited several incidents of problematic behavior, including often being nonresponsive to the judge and having two verbal outbursts, one during *voir dire*. When the judge asked if he wanted to attend the trial, he was nonresponsive, and she determined that he had waived his presence and that his behavior was volitional. The trial proceeded, and Mr. Wessel was found guilty. He appealed, arguing the judge erred in finding him competent to stand trial.

Ruling and Reasoning

The Seventh Circuit Court of Appeals determined the trial judge did not commit reversible error in finding Mr. Wessel competent to stand trial. In coming to its conclusion, the court considered whether the court applied an incorrect competency standard; whether the judge relied on scientifically unreliable evidence; and whether the judge ignored evidence of incompetency. Mr. Wessel first argued that the trial judge relied on the incorrect standard for competency. The appeals court found that the judge used the correct standard, having stated the *Dusky* standard at the outset of her determination and referenced it throughout.

Mr. Wessel additionally argued the court erred in finding that he had ASPD and not a qualifying mental disorder for the purposes of incompetence to stand trial. First, he argued that the trial judge relied on scientifically unreliable evidence by relying on Dr. Schenk's diagnosis of ASPD without clear evidence of conduct disorder before age 15. The court noted Dr. Schenk described a pattern of behavioral problems that likely began before age 15, and Dr. Callaway opined in testimony that Mr. Wessel reported

behavioral problems in childhood. The court deferred to the trial judge's conclusion, determined she could have concluded that he exhibited conduct problems in childhood, and found the diagnosis of ASPD to be scientifically reliable. Next, Mr. Wessel argued the court could not have found him to have ASPD because ASPD cannot occur exclusively during an episode of schizophrenia or bipolar disorder, as Dr. Schenk testified. He argued he was given the diagnosis of schizoaffective disorder around the same time he engaged in antisocial behavior. The court noted, however, that Dr. Schenk disagreed he was exhibiting symptoms of schizoaffective disorder, and the judge could have found similarly. Finally, Mr. Wessel argued the judge could not have found him to have ASPD because Dr. Campbell explicitly ruled out the diagnosis. The appeals court highlighted that the judge found he was given a diagnosis of personality disorders generally, noting BPD and ASPD, and Mr. Wessel cannot argue that this finding lacked merit.

Mr. Wessel finally asserted that if he was incompetent to waive a jury trial, he was also incompetent to stand trial because the same standard applies to both. The court ruled that, although the standard for both competencies is the same, the standard of pleading for waiving a jury trial is different in that a waiver must be knowing, voluntary, and intelligent. While Mr. Wessel was competent, his lack of participation in the colloquy prevented the judge from determining whether his waiver was knowing and voluntary. Thus, she did not err in declining his waiver.

Discussion

The ruling in *Wessel* highlights a judge's discretion in weighing relevant evidence presented by expert witnesses, especially when the experts provide contradicting opinions. When reviewing a judge's decision regarding competence to stand trial, the appeals court heavily defers to the trial judge's findings. Here, the trial judge relied on elements from all three experts' opinions in drawing her conclusions related to Mr. Wessel's competence. She appeared to more heavily weigh the opinions of Dr. Schenk and Dr. Campbell, who generally agreed on Mr. Wessel's diagnostic presentation, including the volitional nature of his variable participation. Notably, these two experts were able to observe Mr. Wessel over extended evaluation periods, including relying on staff observations, rather than conducting several brief interviews. Thus, the judge may have determined that extended observation

provided a more accurate assessment of Mr. Wessel's clinical symptoms, rather than brief observation periods during direct interviews. Regarding the diagnosis itself, the judge effectively incorporated diagnostic information from all three experts to inform her own conclusion.

Additionally, the judge ultimately determined that Mr. Wessel's conduct, including his inconsistent participation in evaluations and courtroom behavior, was volitional and manipulative. This appeared to be informed by testimony from experts that he was able to participate appropriately in his defense if he so chose, as well as by examining his patterns of behavior across evaluations and in court during trial. It illustrates how judges may incorporate expert evidence with their own observations to determine the volitional nature of one's behavior.

Finally, this case outlines the differing standards for competence to stand trial and waiving a jury trial, stating that waiving a jury trial requires a determination of whether the waiver is knowing, voluntary, and intelligent. The case demonstrates how even a competent waiver of a jury trial may not be accepted by a judge.

Systemic Inequities in Death Penalty and As-Applied Constitutional Challenges

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Systemic Inequities Are Inadequate As-Applied Challenges in Death Penalty Cases Unless Directly Applicable to the Defendant

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In *Commonwealth v. Hairston*, 249 A.3d 1046 (Pa. 2021), the Supreme Court of Pennsylvania affirmed a trial court's denial of postconviction relief. In a

challenge to the constitutionality of the state's death penalty, the court ruled that an "as-applied" challenge requires the defendant to assert personal impact from the state's capital punishment system.

Facts of the Case

Defendant Kenneth Hairston was initially charged with rape, attempted rape, attempted escape, and other crimes in May 2000 related to allegations that he had raped his stepdaughter numerous times throughout a six-year period and then attempted to flee upon arrest. Following his arrest, Mr. Hairston threatened to harm himself and his family if his stepdaughter revealed the past assaults. Two weeks prior to trial, Mr. Hairston, who had self-inflicted injuries, and his wife and child, who both died of blunt force head trauma, were found in their burning home. Mr. Hairston later admitted that he killed his wife and son using a sledgehammer and started the fire. Mr. Hairston was subsequently convicted of rape, sexual assault, burglary, attempted escape, and related charges, as well as two counts of criminal homicide in a separate proceeding. The jury found two aggravating circumstances and two mitigating circumstances in the penalty phase of the bifurcated trial, and Mr. Hairston was sentenced to death.

The time which Mr. Hairston had to file postsentence motions lapsed and trial counsel withdrew. New counsel was appointed and requested additional time for postsentence motions, which was granted. The postsentence motions were denied by the trial court. Mr. Hairston then appealed, but all claims not associated with the automatic review conducted in capital cases were not preserved because the time to file an appeal had lapsed.

Mr. Hairston then filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. 9541-9546 (1997), arguing his prior counsel was ineffective by failing to file timely motions following sentencing. This request was granted. He then filed an appeal *nunc pro tunc*, yet the matters raised were denied and his judgment was again affirmed. The U.S. Supreme Court denied a petition for writ of *certiorari* in October 2014.

Mr. Hairston's counsel again filed a PCRA (as a petition to amend the petition) and a motion for stay of execution. Following several extensions and receipt of two notices of intention to dismiss the petition, Mr. Hairston's counsel filed a supplemental amended petition which, citing the Joint State