

right to counsel or suggest that he had a severe mental illness which rendered him not competent to conduct trial proceedings by himself. The court also cited *Faretta*, stating that defendants' choice to represent themselves must be honored, "although [Mr. Rivera] may conduct his own defense ultimately to his own detriment" (*Faretta*, p 834). The court, thus, concluded that the district court did not err by allowing Mr. Rivera to represent himself.

Discussion

In *Garrett*, the Second Circuit addressed whether, under *Edwards*, district courts are required to obtain a competency evaluation in addition to a *Faretta* hearing before allowing a defendant to proceed *pro se*. Mr. Rivera's case differs from *Edwards* in that Mr. Edwards had schizophrenia and underwent competency restoration on three prior occasions before requesting to represent himself. There was reason to believe that Mr. Edwards was not capable of conducting his own trial proceedings despite being found competent to proceed. In contrast, in the present case, no concerns had been raised about Mr. Garrett's competency and the district court, on the basis of its own observations, did not believe a psychiatric evaluation to assess his ability to represent himself was required.

The *Garrett* case underscores that the purpose of psychiatric evaluations is to assist district courts only when needed but that these evaluations are neither mandatory nor determinative. The final determination is left to the discretion of the trial judge, who is the final arbiter of facts.

Authority to Determine Competence to Proceed

Joseph C. Korevec, PsyD
Forensic Psychology Fellow

Meagan McKenna, PsyD, LP
Forensic Psychologist

Jacob X. Chavez, PsyD, LP
Forensic Psychology Fellowship Director & Supervising
Forensic Psychologist

Forensic Psychology Department
Direct Care and Treatment Forensic Services
Minnesota Department of Human Services
St. Peter, Minnesota

Finder of Fact Possesses Ultimate Authority in Determining Competency to Proceed Based on Perceived Weight of the Evidence

DOI:10.29158/JAAPL.230037-23

Key words: competency to proceed; incompetent; sufficient ability; expert opinion

In *State v. Surber*, 972 N.W.2d 64 (Neb. 2022), the Nebraska Supreme Court ruled the finder of fact is responsible for weighing and considering all evidence related to trial competence to proceed. Furthermore, the power to rule whether an individual is competent rests with the finder of fact regardless of an expert's opinion, provided the determination is based on sufficient evidence. The court must find an individual has a "sufficient" ability to consult with counsel with a "reasonable degree" of understanding.

Facts of the Case

On November 2, 2016, police conducted a welfare check on Kraig Kubik after his son reported Mr. Kubik was dead. At the residence, Mr. Kubik's girlfriend showed the officer what appeared to be a blood patch, drag marks, and surveillance footage of Andres Surber and Brayon Galvan leaving with Mr. Kubik the previous evening. When police arrived at Mr. Galvan's residence, he attempted to flee, was apprehended, and permitted officers to search the residence; they found Mr. Surber and blood-stained clothing. Police were notified that Mr. Surber was at the Surber family farm earlier that day, obtained consent to search the property, and located blood, possible human flesh, a burn barrel, bloody knife, and other items. After obtaining a warrant to search a vehicle located on the property, a human leg and arm were found in the trunk. On November 5, 2016, additional remains of Mr. Kubik were found nearby. It was determined he died of a gunshot to the head, with postmortem dismemberment. Additional evidence suggested Mr. Surber was responsible, and he was charged with murder. Mr. Surber moved to suppress evidence obtained from the residence and vehicle searches. The trial court held the contested evidence was admissible.

In March 2017, Mr. Surber's competence to proceed was evaluated. The psychiatric evaluator from the Lincoln Regional Center (LRC), Dr. Klaus Hartmann, opined Mr. Surber was incompetent but noted a "reasonable likelihood" of restorability was

present. Mr. Surber was uncooperative with treatment and involuntary medications were administered emergently for 14 days. Mr. Surber voluntarily continued to take medications, but later refused because of side effects, resulting in the state seeking a court order for involuntary treatment. Another LRC psychiatrist, Dr. Farid Karimi, testified Mr. Surber's symptom presentation was inconsistent with conventional psychosis and concluded he was malingering. Specifically, Mr. Surber began to mimic selective symptoms of other patients (e.g., barking like a dog, drooling, talking to himself), and changed his symptom presentation over time. Dr. Karimi noted symptoms of psychosis typically remain consistent; however, he was unable to determine if a genuine mental illness was also present because of Mr. Surber's lack of treatment compliance. Dr. Karimi recommended continued treatment to ensure restoration. The defense asserted Mr. Surber was competent and that proceedings should resume. The court found Mr. Surber incompetent and ordered involuntary treatment. In August 2018, Dr. Karimi evaluated Mr. Surber again and determined he was malingering and competent. The court concurred.

In April 2019, the defense requested another competency assessment. Two treatment providers testified but were uncertain about the nature and origin of Mr. Surber's observed difficulties. In May 2019, Mr. Surber was again found incompetent. By July 2019, Mr. Surber was refusing medications and requesting narcotics. The state filed for involuntary treatment, which was granted. In January 2020, he was found competent, and trial was set for August. In August 2020, Mr. Surber moved to proceed *pro se*, which was initially granted but later reversed. Five days before trial, his competency was again questioned. Dr. Hartmann opined Mr. Surber was incompetent, as he was unable to adequately communicate with counsel because of delusional mistrust, despite observations of Mr. Surber and his attorney's communicating appropriately. Although prior evaluations found evidence of malingering, Dr. Hartmann concluded there were no indications of malingering currently. The court ruled Mr. Surber was competent, as he understood the proceedings, and noted if distrust hindered his ability to assist counsel, this was unrelated to competency. Mr. Surber testified at trial, claimed self-defense, and admitted to dismembering the body. He was found guilty and sentenced to life in prison. Mr. Surber appealed to the Nebraska Supreme Court,

arguing the trial court erroneously found him competent and erred in finding certain evidence admissible. The Nebraska Supreme Court conducted a harmless error review of these claims.

Ruling and Reasoning

The Nebraska Supreme Court ruled the power to determine competency is maintained by the district court unless based on insufficient evidence. The court noted competency includes a rational and factual understanding and an ability to rationally consult with counsel and referenced *State v. Jenkins*, 931 N.W.2d 851 (Neb. 2019). Citing *State v. Lang*, 942 N.W.2d 388 (Neb. 2020), the Nebraska Supreme Court said an individual can meet this standard despite symptoms of mental illness.

The court indicated Mr. Surber had undergone multiple competency evaluations, with the most recent opining he was incompetent because of an insufficient ability to rationally consult with counsel. Indeed, the court acknowledged Mr. Surber endorsed mistrust of counsel that may have been based, at least in part, on delusional beliefs. But the trial court found he demonstrated the ability to adequately consult with his attorneys during competency proceedings and observed him actively follow the proceedings as they occurred. The court reasoned this demonstrated Mr. Surber could control his actions, noting an individual who is able to control his actions is not incompetent because he chooses not to exercise that control. Similarly, the court noted delusional beliefs and subscribing to bizarre legal theories do not necessarily preclude competence. Ultimately, the court ruled Mr. Surber's claim was meritless and affirmed the trial court's ability to determine competence despite an expert's contrary opinion. The court highlighted that the trial court's consideration of multiple competency evaluations, prior evidence of malingering, treatment records, and its own observations of the defendant, was sufficient to rule in contrast to the expert's opinion. Appeals on the basis of additional assignments of error were raised on the admissibility of evidence; however, the court ruled these were also meritless.

Discussion

The Nebraska standard for competency stems from *Dusky v. U.S.*, 362 U.S. 402 (1960) and is similar to most states' competency standards. Namely, the test for competency includes "whether the defendant has a rational as well as factual understanding

of the proceedings against him or her” and “whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding” (*Surber*, p 72). This determination rests with the finder of fact, and Nebraska has established case law and statutory law detailing this responsibility. An individual must have a “sufficient” ability to consult with a “reasonable degree” of understanding. Therefore, the presence of psychotic thought processes, even if they interfere with an individual’s understanding or ability to consult with counsel, do not necessarily require a finding of incompetence. Indeed, Nebraska case law holds, “There are no fixed or immutable signs of incompetence, and a defendant can meet the modest aim of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies” (*Surber*, p 72; citing *State v. Lang*, p 401).

It is solely within the purview of the fact finder to weigh all evidence and determine which evidence holds the greater probative value. In the present case, despite Dr. Hartmann’s opinion that Mr. Surber’s delusional mistrust rendered him unable to consult with and assist counsel with a “reasonable degree” of understanding, the expert opinion was merely one piece of evidence weighed by the fact finder, particularly given Mr. Surber’s history of malingering and the court’s direct observation of his capacity to work with counsel. Courts have held that even in the case of uncontradicted expert opinion, the trier of fact makes the final determination, such as in *McDonald v. U.S.*, 312 F.2d 847 (D.C. Cir. 1962). In Nebraska, it is not only the responsibility of the fact finder to assess what evidence holds more weight when determining competency, but also to conclude what constitutes a sufficient ability and reasonable degree of understanding. Although agreement between the courts and mental health professional opinion occurs in more than 90 percent of cases (*Zapf et al. Have the Courts Abandoned Their Responsibility for Determination of Competency to Stand Trial to Clinicians?* *J Forensic Psychology Practice*. 2008 Oct; 4(1): 27–44), the court is not bound by a mental health expert’s opinion.

Withdrawal of No Contest Plea

Ellen R. Castillo, PhD
Forensic Psychology Fellow

Elizabeth Egbert, PsyD, LP
Forensic Psychologist

Brie Pileggi, PsyD, LP
Supervising Forensic Psychologist

Forensic Psychology Department
Direct Care and Treatment Forensic Services
Minnesota Department of Human Services
St. Peter, Minnesota

Defendant Did Not Present a Fair and Just Reason for His Withdrawal of His No Contest Plea

DOI:10.29158/JAAPL.230037L1-23

Key words: close assistance; ineffective assistance; fair and just reason; plea withdrawal; not guilty by reason of mental illness

In *Delgado v. State*, 509 P.3d 913 (Wyo., 2022) the Wyoming Supreme Court considered whether the defendant could withdraw his no contest plea. The court ruled he did not have a “fair and just reason,” nor did he receive ineffective assistance of counsel. Thus, his withdrawal was not permitted.

Facts of the Case

On November 24, 2019, Gilber Aldolfo Delgado, Jr., was charged with aggravated assault and battery after threatening his wife. Mr. Delgado’s father told defense counsel Mr. Delgado was “not behaving normally” and appeared depressed. While meeting in jail, defense counsel observed the defendant making statements she believed were delusional. She advised him to pursue a not guilty by reason of mental illness (NGMI) defense, but he declined. At his first hearing, Mr. Delgado entered a plea of not guilty; his defense attorney did not mention her concerns about his mental state, nor did she request a competency evaluation.

Mr. Delgado met with his attorney again after being released on bond. His attorney observed he was no longer actively symptomatic, and she had no concerns about his competency-related abilities. Prior to their meeting, Mr. Delgado’s attorney consulted with his wife about his mental state on the day of the alleged incident and reviewed the 911 call. She again proposed an NGMI defense. Mr. Delgado again declined, citing the stigma attached to that plea, and the possibility of indefinite hospitalization. His counsel negotiated a deal involving a no contest plea for a reduced charge and a suspended prison sentence. Mr. Delgado’s plea was accepted after it was