

characteristics and behavior. There are primarily two accepted approaches to assessing risk for sexual violence: the nondiscretionary approach and structured professional judgment (SPJ). The nondiscretionary approach relies on prior rules and statistical methods of weighing risk factors and prevents consideration of personal, situational, or idiosyncratic factors on risk. In contrast, a SPJ approach allows professionals to weigh each risk factor based on the frequency and severity of behavior, an evaluatee's personal idiosyncrasies, and the overall context of the situation.

In this case, the district court heard testimony and reviewed evaluations from experts that presented conflicting opinions regarding Mr. Vandivere's sexual violence risk. All agreed that existing research indicated individuals older than age 60, like Mr. Vandivere, have a reduced rate of reoffending. But, the government's experts also considered Mr. Vandivere's personal factors, such as lack of remorse, ongoing deviant sexual beliefs, and refusal to participate in sex offender treatment, in concluding he remained an SDP, despite advanced age. The case is instructive for forensic mental health evaluators who are involved in SDP cases. Following *Vandivere*, it is prudent for clinicians, especially in the Fourth Circuit, to consider additional factors beyond diagnosis and consider any personal proclivities of the offender that bear on likelihood of reoffending.

Competence to Stand Trial and Due Process Rights

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The Kansas Supreme Court Clarifies Procedural and Substantive Requirements in Competence to Stand Trial Proceedings

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Key words: competence; standard of proof; procedural and substantive due process; discretion; *sua sponte*

In the case of *State v. Mitchell*, 539 P.3d 218 (Kan. 2023), the Kansas Supreme Court reviewed the appeal of a defendant who asserted that he had been tried while incompetent to stand trial. Devawn T. Mitchell was convicted of felony murder and other charges following his involvement in a fatal collision with another vehicle during a police pursuit. Despite initial concerns about his psychiatric history, Mr. Mitchell was found competent to stand trial in a post-conviction hearing. The Supreme Court of Kansas upheld his conviction and sentence, ruling that the lower court complied with the state's statute for competency hearings.

Facts of the Case

Mr. Mitchell was allegedly involved in various traffic infractions that resulted in numerous pursuits by law enforcement. He was ultimately involved in a fatal collision with another vehicle. Mr. Mitchell was convicted on charges of felony murder, aggravated assault on a law enforcement officer, and fleeing and eluding after a bench trial in the District Court of Lyon County, Kansas.

Mr. Mitchell's defense initially raised concerns about his psychiatric history and competency to stand trial and filed a pretrial notice of lack of intent due to mental disease or defect. He was evaluated by a psychologist contracted by his defense attorney. After hearing back from this psychologist, Mr. Mitchell's defense withdrew this filing. The court held a two-day bench trial, during which Mr. Mitchell presented no evidence. He was found guilty on all charges.

After the trial, Mr. Mitchell's defense attorney filed a motion to determine competency. Crosswinds Counseling performed a competency evaluation. The forensic evaluator opined that Mr. Mitchell had symptoms consistent with a diagnosis of schizophrenia but was able to participate in his defense with "coaching and support." The evaluator explained that Mr. Mitchell was coached to identify methods to remain calm to work toward treatment goals with good effect, indicating behavioral control when he is offered relevant incentives. At this competency hearing, Mr. Mitchell again presented no additional evidence and was found competent to stand trial. The district court ordered a life sentence with a minimum of 554 months before parole eligibility, followed by a consecutive controlling 39-month sentence. Mr. Mitchell appealed directly to the Kansas Supreme Court, arguing that the district

court erred in finding him competent on procedural and substantive grounds.

Ruling and Reasoning

The Supreme Court of Kansas upheld the conviction and sentence of Mr. Mitchell for felony murder and his related offenses. The Kansas Supreme Court noted that the defendant bears the burden of proof via a preponderance of the evidence in demonstrating incompetence to stand trial (relying on *State v. Cellier*, 948 P.2d 616 (Kan. 1997)), and is otherwise presumed competent (relying on *State v. Woods*, 348 P.3d 583 (Kan. 2015)).

The court found that procedural due process was satisfied when Mr. Mitchell's attorney requested and received a court-ordered competency evaluation followed by a hearing on Mr. Mitchell's competence. Mr. Mitchell argued for substantive error in that his assessment recommended he should be given "coaching and support" to understand the legal process and participate in his defense, which he did not receive. The Kansas Supreme Court noted that, as the defendant bears the burden of proof, it was on Mr. Mitchell and his attorney to prove that he was not given coaching and support. During his competency hearing, they offered no such evidence.

Mr. Mitchell stated he requested a competency evaluation at "Larned" (Larned State Hospital), which was denied. In reviewing the district court transcripts, the court interpreted Mr. Mitchell's statements about Larned as a request for clarification; thus, no request for evaluation was denied. Mr. Mitchell had already been evaluated at Crosswinds Counseling.

Furthermore, the court delved into Mr. Mitchell's claim that the district court erred by not recognizing its discretion to order an evaluation *sua sponte* prior to sentencing. The court clarified that the trial court's decision not to order a presentence mental evaluation was within its discretion. Despite Mr. Mitchell's mental health history and involuntary commitments, the court was not obligated to provide compelling reasons for not ordering the evaluation (citing *State v. Hilyard*, 515 P.3d 267 (Kan. 2022)). The Kansas Supreme Court explained that the district court's statements during sentencing did not indicate a lack of awareness of its discretion. Rather, it referred to the discretion in imposing a sentence without an evaluation, affirming the overall legality of the conviction and sentencing decisions in the case.

Discussion

Mental health conditions can exert a major effect on a defendant's factual and rational understanding of legal proceedings and individual rights. Forensic experts play an essential role in protecting the rights of people with mental health conditions whose competence abilities are impaired. Competence evaluations are a critical component of ensuring substantive due process, namely in reducing the likelihood that defendants will be tried while incompetent. In this case, the defendant was opined to experience schizophrenia, a psychotic disorder that can impair many different abilities required for competence to stand trial. Some of these deficits and their connection to a mental illness may not be readily apparent, hence the importance of utilizing an expert forensic professional to assist the court in understanding a defendant's mental status and competence abilities.

The Kansas Supreme Court held that the trial court did not abuse its discretion in not ordering a competence evaluation in Mr. Mitchell's case. The court placed the burden on the defendant and his attorney to establish the basis for a finding of incompetence. Court personnel are not trained in diagnosing mental illness and often request evaluations based on odd mannerisms or difficulty communicating with the defendant. This difference in training increases the value of a forensic evaluation in the legal process. Requesting an evaluation itself demonstrates a degree of concern for the defendant's abilities. In this case, Mr. Mitchell was evaluated on two separate occasions, pretrial by a psychologist hired by his attorney and post-conviction and presentencing by a court-ordered evaluator. Mr. Mitchell believed he had requested another evaluation, but because of ambiguity in this exchange, the court decided this was not a request. The post-conviction evaluation was used in a competency hearing held by the trial court.

A forensic evaluator's expertise is invaluable to the court in identifying a defendant's symptoms and connecting them to specific deficits in competence abilities that attorneys and judges can appreciate. Such deficits may include a defendant's difficulty communicating with the attorney related to a delusional belief that the attorney is an imposter, or not understanding a charge of breaking and entering because the defendant believes the defendant owns the property. If a defendant seems withdrawn and inattentive, a forensic mental health evaluator can explore for a connection to hallucinations or disordered thoughts. As mental

health experts, they are trained to recognize the nuance of a defendant's presentation and explain how it affects various aspects of cognition, ultimately providing the court with the information material to addressing the ultimate problem.

Evaluators must take care to be clear and precise in their explanations. In this case, there was noted ambiguity in the interpretation of Mr. Mitchell's need for "coaching and support" in relation to his competence abilities. When providing such recommendations, evaluators should be specific regarding what supports are needed, how often, and how the court may accommodate them. For example, a defendant may be easily overwhelmed and benefit from short breaks. In a system that puts the burden on the defendant and the attorney to prove incompetence, a forensic evaluator serves a crucial role in protecting a defendant's constitutional rights.

Parental Substance Abuse and Harm to Child in California Dependency Law

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In Child Welfare Cases in California, Substance Abuse Not Determined by DSM or Professional Diagnosis; Substance Abuse Alone Insufficient as Basis for Dependency Finding

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Key words: dependency proceeding; substance abuse; tender years; child abuse; neglect

In *In re N.R.*, 539 P.3d 417 (Cal. 2023), the California Supreme Court reviewed a challenge to the definition of substance abuse delineated in the state's Welfare and Institutions Code § 300 (2019) brought by a father whose infant was removed from his custody. The court defined "substance abuse" in the more general sense of meaning excessive use of alcohol or drugs and additionally held that substance

abuse alone is not sufficient evidence of a parent's inability to provide regular care to a child.

Facts of the Case

In November 2020, N.R., a 12-month-old, was transferred to the care of his father after a Los Angeles Department of Children and Families (DCFS) social worker had safety concerns about the conditions at N.R.'s mother's home. The father allowed the social worker to tour his residence and agreed to submit to a drug test, which returned positive for cocaine. He denied he was a regular user of the substance and stated that he had used cocaine recently for several days to celebrate his birthday. N.R. remained in his father's care with no other concerns noted by social workers.

In December 2020, DCFS filed a petition in Los Angeles County Superior Court alleging that N.R. was in danger of physical harm as a result of inappropriate supervision or care by his father because of his father's substance abuse. Specifically, the petition alleged that the father had a history of substance abuse, noting the positive toxicology result, and as a result was unable to provide regular care for N.R. The child was subsequently removed from his father's custody.

The father reported to social workers that he did not regularly use drugs and never used drugs while taking care of N.R. He agreed to submit to drug testing and had three negative drug tests between January and March 2021.

In April 2021, the district court ordered that N.R. be removed from his father's custody because of the father's "substantial drug abuse history" (*In re N.R.*, p 424). The father was granted monitored visitation and ordered to participate in drug treatment services.

The father appealed, arguing that his cocaine use did not amount to substance abuse. Noting discrepancies in the definition of the term "substance abuse," the father asked the court to utilize the definition provided in *In re Drake M.*, 149 Cal. Rptr. 3d 875 (Cal. Ct. App. 2012)). There, the appeals court clarified that the term "substance abuse" must be based on evidence that "(1) show[s] that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional or (2) establish that the parent or guardian at issue has a current substance abuse problem" as defined in the current edition of the DSM (*In re Drake M.*, p 885). The father also argued against the *prima facie* finding in *Drake M.*, which found that substance abuse itself was "evidence of the inability