

Competency And The Courtroom: *If you give a Mouse a Cookie.....*

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"HE'S COMPETENT IN EVERY REGARD EXCEPT TO STAND TRIAL."

§29-1823 Mental Competency of Defendant before or during trial.

- (1) If at *any time* prior to or during trial it appears that the defendant has become mentally incompetent to stand trial, such disability may be called to the attention of the district or county court by the county attorney or city attorney, by the defendant, or by any person for the defendant. The judge of the district or county court of the county where the defendant is to be tried shall have the authority to determine whether or not the defendant is competent to stand trial.
- Misdemeanor Case-County Court Judge has authority
- Felony Case-District Court Judge has authority.
 - County Court Judge who presides over the preliminary hearing does not have the authority.
 - What do you do in this situation? You can't have client waive if they are not competent.
 - Have the preliminary hearing
 - Do a stipulated hearing on the reports
 - May have to stipulate to identification, jurisdiction, etc.

§29-1823 Mental Incompetency Continued

- The judge may also cause such medical, psychiatric, or psychological examination of the defendant to be made as he or she deems warranted and hold such hearing as he or she deems necessary.

The Judge upon receiving a motion to determine competency will order an evaluation to be completed.

Currently Dr. Ourada is contracted to do complete these evaluations. He is a licensed Psychiatrist.

Once motion is filed, speedy trial stops under 29-1207 until a determination/finding of competency is made on record by the court.

Competency evaluation is ordered, what happens next?

- Judge signs an order that is sent to Department of Health and Human Services to perform an evaluation.
- DHHS contacts Psychiatrist, Psychologist, etc.. to perform evaluation.
- County Attorney's office usually just sends down a copy of the police reports and client's record.
- You as attorney should collect as many medical records/mental health records as you can and send them also.
- Reach out to evaluator and let them know your general and specific concerns regarding competency.

An antiquated dinosaur: State v. Guatney 299 N.W.2d. (1980)- Guatney Factors:

- State v. Crenshaw 205 N.W.2d 517 (1973)
- State v. Klatt 299 N.W.2d 821 (1971)
- Wieter v Settle 193 F. Supp 318 W.D.Mo (1961)
- Raithel v. State 280 Md 291, 372 A.2d 1069 (1977)
- Incompetency to Stand Trial 81 Harv. L. Rev 454 (1967)

Competency Factors (1-5)

- (1) That the defendant has sufficient mental capacity to appreciate his presence in relation to time, place, and things
- (2) That his elementary mental processes are such that he understands that he is in a court of law charged with a criminal offense
- (3) That he realizes there is a judge on the bench
- (4) That he understands that there is a prosecutor present who will try to convict him of a criminal charge
- (5) That he has a lawyer who will undertake to defend him against the charge;

Competency Factors (6-10)

- 6) That he knows that he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged crime
- (7) That he understands that there will be a jury present to pass upon evidence in determining his guilt or innocence
- (8) That he has sufficient memory to relate answers to questions posed to him
- (9) That he has established rapport with his lawyer
- (10) That he can follow the testimony reasonably well

Competency Factors (11-15)

- (11) That he has the ability to meet stresses without his rationality or judgment breaking down
- (12) That he has at least minimal contact with reality
- (13) That he has the minimum intelligence necessary to grasp the events taking place
- (14) That he can confer coherently with some appreciation of proceedings
- (15) That he can both give and receive advice from his attorneys

Competency (16-20)

- (16) That he can divulge facts without paranoid distress
- (17) That he can decide upon a plea
- (18) That he can testify, if necessary
- (19) That he can make simple decisions
- (20) That he has a desire for justice rather than undeserved punishment

What is the test?

- It should be kept in mind that, in order to establish competency, it is not necessary that an accused meet *all* of the above factors but only that, considering the various factors as a whole, one is compelled to conclude that the accused has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. By using some or all of the enumerated factors, a trial court should be aided in arriving at an appropriate conclusion.

How is competency applied within the courts?

- The question of competency to stand trial is to be determined by the court and the means are discretionary. State v. Crenshaw, 189 Neb. 780, 205 N.W.2d 517 (1973).
- The issue of competency is one of fact, and the means used to resolve it are discretionary with the court. State v. Hittle, 257 Neb. 344, 598 N.W.2d 20 (1999).
- Proceeding to determine the competency of the accused to stand trial is a "special proceeding" and an order finding the defendant incompetent to stand trial and ordering him confined until such time as he is competent is a "final order" from which an appeal may be taken. State v. Guatney, 207 Neb. 501, 299 N.W.2d 538 (1980).

Competency – Failure to assert as defendant

- Failure to assert competency by defendant does not waive right to assert on appeal.
- A conviction of a mentally incompetent accused is a violation of substantive due process. *Id.* (citing *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975))

Competency-Failure to assert as attorney

- Failure to assert as an attorney is ineffective assistance of counsel when...
- Due process requires that a hearing be held whenever **there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial.** *Drope v. Missouri, supra; Pate v. Robinson, supra.* The Eighth Circuit points out that “[t]he latter principle operates as a safeguard to ensure that the former principle is not violated.” *Griffin v. Lockhart*, 935 F.2d at 929.

Court's findings- Generally 3 types:

- Competent
- Not competent but “substantial probability of competency within the foreseeable future”.
- Not competent, competency abilities cannot be restored in the “reasonably foreseeable future”

Client is found to be competent

- Evaluation is sent to the Court and then disseminated to the parties- (In your Order, request that a copy be sent to you directly from the evaluator)
- Under §29-1823, once the court has received the evaluation, the court must set the matter for hearing and make findings on the record.
- Options as Attorney:
 - Stipulate to evaluation- court makes findings on the record and case resumes.
 - Challenge the findings of competency either through testimony of the evaluator and/or obtain 2nd evaluation – “*Battle of the Experts!!!*”

Judge makes determination of competence and then sets the next hearing.
(Statutory speedy trial starts back up)

The “shell game” of §29-1823: not competent but “substantial probability of competence within the foreseeable future”...

- Judge finds defendant not competent, but restorable, the judge *shall* order the defendant to be committed to the Department of Health and Human Services to provide appropriate treatment to restore competency. This may include commitment to a state hospital for the mentally ill, another appropriate state-owned or state-operated facility, or a contract facility or provider pursuant to an alternative treatment plan proposed by the department and approved by the court under subsection (2) of this section until such time as the disability may be removed. Neb. Rev. Stat. §29-1823(1)

Treatment available: *the times they are a-changin'...*

- Lincoln Regional Center (Long waiting list, average of 4 months)
- Medication and treatment at Jail (Some clients after being on medication can be restored prior to being shipped off to the LRC)
- Outpatient-New trend
 - Dr. Ourada can indicate if restorability can occur in a less restrictive manner with an alternative plan to commitment to state hospital or state operated facility
 - (2)(a) If the department determines that treatment by a contract facility or provider is appropriate, the department shall file a report outlining its determination and such alternative treatment plan with the court. Within twenty-one days after the filing of such report, the court shall hold a hearing to determine whether such treatment is appropriate. The court may approve or deny such alternative treatment plan

Review Hearings on Competency

- (3) Within sixty days after entry of the order committing the defendant to the department, and every sixty days thereafter until either the disability is removed or other disposition of the defendant has been made, the court shall hold a hearing to determine (a) whether the defendant is competent to stand trial or (b) whether or not there is a substantial probability that the defendant will become competent within the reasonably foreseeable future.
- If it is the opinion of the department that the defendant is competent to stand trial, the department shall file a report outlining its opinion with the court and within seven days after such report being filed the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

Not competent, competency abilities cannot be restored in the “reasonably foreseeable future”

- 4) If it is determined that there is not a substantial probability that the defendant will become competent within the reasonably foreseeable future, then the state *shall* either **(a) commence the applicable civil commitment proceeding that would be required to commit any other person for an indefinite period of time or (b) release the defendant.**

Prior findings of incompetence – Res Judicata?

- State v. Cabanilla-
- Decompensation- a 2nd bite at the competency/restorability apple:
- State. Moody
- State v. Glebavicius
- State v. Matherne

Speedy Trial implications

- 29-1207
- (4) The following periods shall be **excluded** in computing the time for trial:
 - (a) **The period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial;** the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement, and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;

The “diamond in the rough” of speedy trial: 29-1823 (5)(6)-speedy trial exception

- (5) The defendant, by and through counsel, may move to be discharged from the offenses charged in the complaint or information for the reason that there is not a substantial probability that the defendant will become competent within the reasonably foreseeable future.
- (6) In determining whether there is a substantial probability that a defendant will become competent in the reasonably foreseeable future, the court shall take into consideration the likely length of any sentence that would be imposed upon the defendant. If the court discharges the defendant, the court shall state whether such discharge is with or without prejudice.

Who pays for treatment?

- The state shall pay the cost of maintenance and care of the defendant during the period of time ordered by the court for treatment to remove the disability.
- (7)(a) If a judge orders a defendant to be committed to the Department of Health and Human Services to receive treatment to restore competency and such defendant remains lodged in the county jail, the department shall reimburse the county for lodging the defendant.
- (b) Costs of lodging the defendant shall include the daily rate of lodging the defendant, food, medical services, transportation, and any other necessary costs incurred by the county to lodge the defendant.
- (c) The daily rate of lodging the defendant shall be one hundred dollars per day for each day or portion thereof after the first thirty days that the defendant is lodged in the county jail after a determination by a judge that the defendant is required to be restored to competency. On July 1, 2023, and each July 1 thereafter, the department shall adjust the amount to be reimbursed to the county jails by an amount equal to the percentage increase, if any, in the Consumer Price Index for All Urban Consumers, as published by the United States Department of Labor, Bureau of Labor Statistics, for the twelve months ending on June 30 of such year.

Neb. Rev. Stat 71-1101- Developmental Disability (DDCOCA)

- **Diagnosis –IQ lower than 70** (must've been tested/documentated before 18)
 - autism spectrum disorder
 - -genetic disorders
 - -TBI
 - -developmental- other than mental health based
 - -cognitive
 - -manifest before age 22
- AND
- **Adaptive Skills (post 3-5 years)**
- Vinelands Test/ABAS

Austin Powers Take on Competency

<https://youtu.be/3J6iKRn7Sj0>