

**IN THE
MISSOURI SUPREME COURT**

| | | |
|---------------------------|---|---------------------|
| STATE OF MISSOURI, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | No. SC 84621 |
| |) | |
| GERALD M. ELAM, |) | |
| |) | |
| Appellant. |) | |

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE KENNETH R. LEWIS, JUDGE**

APPELLANT'S SUBSTITUTE REPLY BRIEF

**KENT DENZEL, Mobar #46030
Assistant State Public Defender
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
(573) 882-9855**

INDEX

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | 2 |
| JURISDICTIONAL STATEMENT | 3 |
| STATEMENT OF FACTS | 3 |
| POINTS RELIED ON | 4 |
| ARGUMENT | |
| POINT I | |
| <i>Gerald was not competent to assist in his defense</i> | 6 |
| CONCLUSION | 16 |
| CERTIFICATE OF COMPLIANCE AND SERVICE | 17 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|-------------|
| <u>CASES:</u> | |
| <i>Hinnah v. Director Of Revenue</i> , 77 S.W.3d 616 (Mo. banc 2002) | 14 |
| <i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) | 13, 14 |
| <i>Lewis v. Gibbons</i> , 80 S.W.3d 461 (Mo. banc 2002) | 12 |
| <i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976) | 11, 12, 14 |
| <i>Speiser v. Randall</i> , 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) | 13 |
| <i>State ex rel. Sisco v. Buford</i> , 559 S.W.2d 747 (Mo. banc 1978) | 12 |
| <i>State v. Terrance L. Anderson</i> , No. SC83680 (2002 WL 1894866) (Mo. banc May 14, 2002, as modified June 25, 2002) | 12 |
| <i>State v. Frezzell</i> , 958 S.W.2d 101 (Mo. App., W.D. 1998) | 12 |
| <u>CONSTITUTIONAL PROVISIONS:</u> | |
| U.S. Const., Amend. XIV | 6, 13 |
| Mo. Const., Art. I, Sec. 10 | 6 |
| <u>STATUTES:</u> | |
| Section 552.020 | 6 |

JURISDICTIONAL STATEMENT

Appellant, Gerald Elam, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Gerald incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

POINTS RELIED ON

I.¹

The trial court erred in finding Gerald competent to stand trial because this ruling denied Gerald his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, Article I, Section 10, of the Missouri Constitution, and his rights under § 552.020.1, in that Gerald suffered from schizoaffective disorder, bipolar type, and paranoid schizophrenia, which left him without a rational understanding of the proceedings or the ability to assist in his defense, and he was therefore incompetent to stand trial. The court ignored the uniform expert evidence that Gerald was not competent without medication, and based its ruling that Gerald did not have “any mental disease or defect or inability to proceed” on its own and a lay police officer’s observations of Gerald’s behavior.

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976);

Lewis v. Gibbons, 80 S.W.3d 461 (Mo. banc 2002);

State ex rel. Sisco v. Buford, 559 S.W.2d 747 (Mo. banc 1978);

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);

U.S. Const., Amend. XIV;

¹ Gerald replies only to Point I of the State’s argument. He does not concede that the State is correct as to Points II and III, but relies on his opening brief as to those Points.

Mo. Const., Art. I, Sec. 10; and

§ 552.020.

ARGUMENT

I.

The trial court erred in finding Gerald competent to stand trial because this ruling denied Gerald his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, Article I, Section 10, of the Missouri Constitution, and his rights under § 552.020.1, in that Gerald suffered from schizoaffective disorder, bipolar type, and paranoid schizophrenia, which left him without a rational understanding of the proceedings or the ability to assist in his defense, and he was therefore incompetent to stand trial. The court ignored the uniform expert evidence that Gerald was not competent without medication, and based its ruling that Gerald did not have “any mental disease or defect or inability to proceed” on its own and a lay police officer’s observations of Gerald’s behavior.

The State fails to understand that this case does not involve a “battle of the experts” -- there is really no difference between the opinions of the four experts.

Summary of Experts’ Opinions

| | <u>Zimmerschied</u> | <u>Mojdehi/Stacy</u> | <u>Inniss</u> |
|----------------------------|--|---|---|
| 1. <u>Diagnosis</u> | schizoaffective disorder, bipolar type (Supp.L.F. 8) | schizoaffective disorder, bipolar type (Supp.L.F. 17) | schizoaffective disorder, bipolar type & paranoid schizo- phrenia (StayTr. 11) |

| | <u>Zimmerschied</u> | <u>Mojdehi/Stacy</u> | <u>Inniss</u> |
|--|---|--|--|
| <u>2. Understanding of Dr.'s Role in Evaluation</u> | Understood (Supp.L.F. 1) | Understood (Supp.L.F. 13-14) | Understood (StayTr. 27-28) |
| <u>3. Understanding of Charges</u> | Understood; claimed self-defense (Supp.L.F. 8) | Understood; murder charge not justified (Supp.L.F. 16) | Not specifically addressed |
| <u>4. Medication Status</u> | Not taking; recommended he begin (Supp.L.F. 11) | On Zyprexa (increased from 10 to 20 mg) (Supp.L.F. 14-15) | Not taking; recommended he resume (StayTr. 17) |
| <u>5. Thought processes; Ideation</u> | delusional; tangential; pushed speech (Supp.L.F. 6) | delusional; pressured speech; tendency to digress; but logical (Supp.L.F. 15) | disorganized; very tangential; delusions have broadened since first meeting; (StayTr. 13-14) |
| <u>6. Understanding of Process/Roles of Judge & Attys</u> | Understood (though he digressed when discussing judge's role) (Supp.L.F. 8) | Understood (Supp.L.F. 16) | limited ability to fully understand proceedings (StayTr. 14) |

| | <u>Zimmerschied</u> | <u>Mojdehi/Stacy</u> | <u>Inniss</u> |
|---|------------------------------------|---------------------------------|---|
| 7. <u>Ability to Assist in Defense</u> | Not able - 3/2/98 (Supp.L.F. 9) | Able - 4/8/99 (Supp.L.F. 17) | Not able without medication - 9/26/00 (StayTr. 14-16) |
| 8. <u>Medication recommendation</u> | Recommended (Supp.L.F. 10-11) | Recommended (Supp.L.F. 8) | Recommended (StayTr. 17) |

The State demonstrates its confusion by concentrating on perceived differences that are of no significance, and on factors that “prove” Gerald to be competent -- factors that were present at the time of Dr. Zimmerschied’s initial evaluation and report and were not of sufficient import to him at the time to consider Gerald competent. For example, the State points out that Gerald was able to discover that fellow inmates of the county jail, discussing their haul from a burglary, were describing his own property (Resp. Br. 22). But the State fails to include that Dr. Zimmerschied *specifically* reviewed this information (Supp.L.F. 2), in finding Gerald incompetent (Supp.L.F. 9). Thus the State’s doctor did not find it compelling.

Nor did he find decisive the facts that Gerald was cooperative and friendly; that he could correctly identify the day of the week, month and year, knew where he was and who was president (Supp.L.F. 6);² could name the charge against him, his attorney, the judge and the prosecutor, and define the roles of the two attorneys

² Identified by Gerald as “Slick Willie”, who he claimed to have met (Supp.L.F. 6).

(Supp.L.F. 8).³ None of this made Gerald competent in 1998 -- without medication -- and the State is unjustified in relying on it to argue that Gerald was competent in 2000 -- again, without medication.

Similarly, the State relies heavily on the report of Drs. Mojdehi and Stacy but fails to note that it was based entirely on the fact that Gerald had been on the psychotropic drug Zyprexa for some months at the time of their interviews (Supp.L.F. 13-15). This is again an example of a factor that is *not* different between the doctors. Even Drs. Zimmerschied and Inniss agreed that Gerald could be *made* competent with medication (Supp.L.F. 10-11; StayTr. 17-18). There was, however, *no* evidence that he was competent in the absence of the medication -- and he had not taken it for more than a year at the time of trial (StayTr. 14).

It is thus incredible that the State can assert that Gerald “provided no evidence to refute the findings of Drs. Mojdehi and Stacy in 1999. . . .” (Resp. Br. 27). First of all, this ignores the evidence from Drs. Zimmerschied and Inniss. Further, it ignores what Drs. Mojdehi and Stacy actually said. And it ignores that their report came a year and a half before trial, and was based on Gerald taking Zyprexa for months before their evaluation.

Drs. Mojdehi and Stacy described Gerald as preoccupied with his grandfather, with religion, and with being spied on and threatened by various people (Supp.L.F.

³ When asked to define the judge’s role, Gerald told Dr. Zimmerschied a story of dating the judge’s daughter when he was younger (Supp.L.F. 8).

15-16). They said he had a tendency to digress and he displayed excitement, pressured speech and delusional beliefs (Supp.L.F. 15). This was also much the same as how Dr. Zimmerschied (Supp.L.F. 6-8), and Dr. Inniss described Gerald (StayTr. 11-14).

It does not matter that Drs. Mojdehi and Stacy did not use the phrase, “Gerald is competent as long as he takes his medication.” They said this in other words. They said it by noting that Gerald began taking 10 mg of Zyprexa daily when he was admitted to Fulton State Hospital, which was increased to 20 mg before they interviewed him (Supp.L.F. 14-15). They said it by declaring that he should continue his medication regimen, though Gerald believed he did not need it (Supp.L.F. 17-18). They said it by reporting that, even on medication, Gerald continued to have delusions, “pressured speech”, and a tendency to digress (Supp.L.F. 15). Their report *does* mean that Gerald needs his medication to be competent for trial, but as of the trial, Gerald had not been taking that medication for more than a year (StayTr. 14).

Even the observations of Gerald’s behavior in court -- by both the judge and the police officer who witnessed Gerald’s facial expressions during the suppression hearing (StayTr. 60-62), are entirely consistent with the doctors’ findings. This is because, as Dr. Inniss explained, Gerald was “most challenged in the area of being able to give reasonable assistance to counsel in the process of his own defense.” (Tr. 14). Being able to understand the purpose of a suppression hearing, and even understand when it appears to be going in his favor or against him is not the same as being able to assist counsel in presenting what happened in Minis Elam’s house.

Gerald could not give counsel feedback about the reality of those events, as opposed to his own delusional point of view (StayTr. 15).

There was no significant difference in the experts' opinions and this is not a battle of the experts. There was but one dissenting voice: "Court finds there is nothing in the record, in the statements of the defendant, in his correspondence to the Court, that would indicate any mental disease or defect or inability to proceed." (StayTr. 64-65). Far from being "no evidence" to refute the April 1999 report -- a report that needs no refutation -- *all* the evidence shows that Gerald was incompetent.

Standard of Review

This case also presents this Court with the issue of the proper standard to apply in reviewing the circuit court's ruling. Recently, this Court reaffirmed the rule of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), in cases tried without a jury, as this competency issue was:

The judgment of the trial court must be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. [citing *Murphy*]. In considering whether the judgment of the trial court is "against the weight of the evidence," this Court may exercise its power to set aside the judgment of the trial court only with caution and only if it possesses a firm belief that the judgment is wrong. *Id.* In undertaking this review, this Court is mindful of the opportunity

of the trial court to have judged the credibility of the witnesses and gives due regard thereto. Rule 73.01(c)(2).

Lewis v. Gibbons, 80 S.W.3d 461, 466 (Mo. banc 2002). This Court applied the *Murphy v. Carron* standard to competency issues in *State ex rel. Sisco v. Buford*, 559 S.W.2d 747, 748 (Mo. banc 1978).

On the other hand, the State argues for a restricted version of the *Murphy v. Carron* standard. It argues that the rule of *State v. Frezzell*, 958 S.W.2d 101, 104 (Mo. App., W.D. 1998), applies -- that the trial court's finding as to competency "must stand unless no substantial evidence exists to support it." (Resp. Br. 24). This Court has also made this statement in *State v. Terrance L. Anderson*, No. SC83680 (2002 WL 1894866) (Mo. banc May 14, 2002, as modified June 25, 2002); Slip Op. at 14.

Thus, to the extent that there is a difference between the *Murphy v. Carron* standard and that stated in *Anderson*, the issue is whether this Court will continue to apply a more liberal standard of review in civil cases -- that typically concern only whether money is owed -- than it provides to criminal defendants whose lives and liberty are at stake. Such an anomaly -- civil cases will be reversed where the judgment is "against the weight of the evidence," but criminal cases may be reversed only when "no substantial evidence exists to support the judgment"-- offends notions of fundamental fairness, of due process of law, and of equal protection of the law.

In the landmark case of *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), the United States Supreme Court said that:

a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.’ [citation omitted]

Thus, the Court held that the “beyond a reasonable doubt” standard was mandated by the Due Process Clause in criminal cases. *Id.*, 397 U.S. at 364, 90 S.Ct. at 1073. Also instructive is Justice Harlan’s concurring opinion in *Winship*. He said:

In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.

* * *

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As Mr. Justice Brennan wrote for the Court in *Speiser v. Randall*, 357 U.S. 513, 525-26, 78 S.Ct. 1332, 1341-42, 2 L.Ed.2d 1460 (1958):

“There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value --as a

criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.”

In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

In re Winship, 397 U.S. at 371-72, 90 S.Ct. at 1076-77 (Harlan, J., concurring).

The proper standard of review in this case presents a similar issue. The interest of Gerald Elam in not being convicted at a trial in which he was not competent to assist counsel in his defense is “bottomed” on the same fundamental value determination. That interest far outweighs the interests of civil litigants seeking money damages, or driving offenders who challenge the decisions of the trial courts about whether to uphold the rulings of the Department of Revenue.⁴ He is entitled to the same heightened review as any civil litigant who comes before this Court.

The trial court’s finding of competency was erroneous, because the mental health experts’ opinions were uniform that without medication, Gerald was not

⁴ See, *Hinnah v. Director Of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002), applying *Murphy v. Carron* in the context of a driver’s license revocation.

mentally competent to proceed and assist in his defense. Therefore, this Court must vacate Gerald's convictions and sentences.

CONCLUSION

For the reasons set forth in Point I herein and in his opening brief, appellant Gerald Elam respectfully requests that this Court vacate his convictions and sentence. In the alternative, for the reasons set forth in Points II and III in his opening brief, Gerald respectfully requests that this Court reverse his convictions and sentence and remand this cause for a new trial.

Respectfully submitted,

Kent Denzel, MOBar #46030
Assistant State Public Defender
3402 Buttonwood
Columbia, Missouri 65201-3722
(573) 882-9855

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,651 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in October, 2002. According to that program, these disks are virus-free.

On the _____ day of October, 2002, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

Kent Denzel