
*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

KENNETH BAUMRUK,

Appellant.

**Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Lucy D. Rauch, Judge**

RESPONDENT’S SUPPLEMENTAL BRIEF

**JEREMIAH W. (JAY) NIXON
Attorney General**

**DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT 3

STATEMENT OF FACTS 3

ARGUMENT..... 4

 Point I – Appellant was not competent to represent himself..... 4

CONCLUSION 18

CERTIFICATE OF COMPLIANCE 19

TABLE OF AUTHORITIES

Cases

<i>Carnley v. Cochran</i> , 369 U.S. 506 (1962).....	16
<i>Indiana v. Edwards</i> , 128 S. Ct. 2379 (2008).....	4, 5, 10, 11, 12, 13, 14, 16
<i>State v. Black</i> , 223 S.W.3d 149 (Mo. banc 2007)	17
<i>State v. Dixon</i> , 916 S.W.2d 834 (Mo. App. W.D. 1995).....	16
<i>State v. Hampton</i> , 959 S.W.2d 444 (Mo. banc 1997).....	16
<i>Wheat v. United States</i> , 486 U.S. 153 (1988).....	13

Other Authority

<i>Indiana v. Edwards</i> , Resp.’s Brf., 2008 WL 649230 (Mar. 5, 2008).....	15
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JURISDICTIONAL STATEMENT

Respondent incorporates the Jurisdictional Statement from page 7 of its initial brief.

STATEMENT OF FACTS

Respondent incorporates the Statement of Facts from pages 8 through 20 of its initial brief.

ARGUMENT

Supplement to Point I.¹

The trial court did not abuse its discretion in determining that Appellant was not competent to represent himself at trial.

In *Indiana v. Edwards*, the United States Supreme Court concluded that the Constitution permits a State to insist that a criminal defendant proceed to trial with counsel where that defendant is mentally competent to stand trial, but not mentally competent to conduct the trial himself. *Indiana v. Edwards*, 128 S. Ct. 2379, 2381 (2008). The Court's holding does not rely on the facts of the underlying case. The opinion provides only a cursory review of those facts, and the Court did not attempt to establish any sort of test or guideline for determining when a defendant lacks the mental capacity for self-representation. Indeed, it recognized that mental illness varies in degree and can interfere with an individual's functioning at different times in different ways. *Id.* at 2386. Because of those variations, the Court found that in certain circumstances, a defendant may be competent in the sense that he is able to work with counsel at trial, yet

¹ This Point is intended to supplement, not replace, Point I of Respondent's initial brief. In particular, Respondent is not waiving the argument that Appellant failed to make an unequivocal, timely, and knowing and intelligent request to represent himself at trial. Respondent is also maintaining the argument presented in Point VI of its initial brief that Appellant was competent to stand trial.

at the same time be unable to carry out the basic tasks needed to present his own defense.

Id.

Accordingly, the Court noted that, “the trial judge . . . will often prove best able to make fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.” *Id.* at 2387. The Court went on to conclude that, “the Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.” *Id.* at 2387-88. *Edwards* thus appears to set forth an abuse of discretion standard for evaluating a trial court’s determination of a defendant’s competency for self-representation.

The trial court in this case did not have the benefit of *Edwards* when it denied Appellant’s motion to discharge his attorneys. The question that *Edwards* thus presents in the context of this case is whether the record contains sufficient evidence showing that Appellant was not competent to represent himself at trial, so that the trial court would have properly exercised its discretion in denying self-representation had an *Edwards* question been squarely before it.

A. Evidence relating to Appellant's mental condition.

The trial court conducted a competency hearing on June 28-29, 2005, where it heard testimony from one witness for the State and four witnesses for the defense. (L.F. 41; Comp. Tr. 2-3). The court also reviewed numerous reports and transcripts from a previous competency hearing. (Comp. Tr. 4-5). All of the expert witnesses who testified at the 2005 competency hearing diagnosed Appellant with dementia resulting from the brain injuries that he received when he was shot. (Comp. Tr. 97-98, 269-71, 367-69, 387, 408, 422-23, 513-14). One psychiatrist also made a diagnosis of amnesic disorder due to a penetrating gunshot wound to the head. (Comp. Tr. 520). While Appellant now claims that he does not suffer from any mental illness, the diagnoses made by the expert witnesses – three of whom were called by Appellant – were “Axis I” diagnoses, which describe “medically based mental illness symptoms.” (Comp. Tr. 97, 367, 391, 408, 513, 520).

In addition to the memory deficits that were the focus of the competency hearing, there was testimony that the brain damage Appellant suffered created problems in his ability to process visual information. (Comp. Tr. 126, 396, 527-28, 538). IQ tests administered to Appellant showed that he had difficulty with visual and spatial skills, and that those difficulties were consistent with where Appellant suffered brain damage. (Comp. Tr. 366). One of Appellant's experts testified that Appellant would not be able to process visual evidence or information like photographs or diagrams as effectively as other people. (Comp. Tr. 538).

The court also heard evidence that Appellant suffered from a personality disorder with some dependant and narcissistic traits, and that such a disorder could affect how he related to other people. (Comp. Tr. 106-07). While the State's expert was unable to conclude that the personality disorder was caused entirely by the brain damage suffered by Appellant, he did testify that some aspects of Appellant's personality could have been affected by the injury. (Comp. Tr. 192). One of Appellant's experts, Dr. Parwatikar, had given Appellant an Axis I diagnosis of organic personality disorder in 2003. (Def. Ex. G, p. 17).

One of Appellant's experts testified at the competency hearing that Appellant was apathetic about contesting the charges against him, and seemed only to be interested in being found incompetent to stand trial. (Comp. Tr. 309). An attorney who represented Appellant in his first trial testified that Appellant consistently, over an eight to ten year period, failed to appreciate the seriousness of his situation and seemed more concerned about other matters. (Comp. Tr. 241-43, 261-62; 2d Supp. L.F. 8). One of the previous evaluations that was admitted into evidence also indicated that Appellant was more concerned with a civil case involving his house than with the criminal charges against him. (Def. Ex. G, p. 16). The examiner stated that Appellant summarily discounted eyewitness evidence against him and concluded that, "such an attitude demonstrates an impaired judgment and lack of insight." (Def. Ex. G, p. 16). Another of the previous evaluations admitted into evidence stated flatly that Appellant's mental condition left him unable to confront witnesses. (Def. Ex. L, p. 6). The court also heard testimony at the

competency hearing that Appellant might not be able to cross-examine the witnesses testifying against him due to his memory loss. (Comp. Tr. 275).

The court also had the opportunity to observe Appellant through the course of numerous pre-trial proceedings, and to review various *pro se* filings made by Appellant. Those filings included endorsements of witnesses who would not appear to have any relevant evidence to offer at trial, including the present and former trial court judges, and medical personnel at the St. Louis County Jail. (L.F. 488-91). Appellant even attempted to endorse a lap-top computer. (L.F. 490). Appellant also filed two motions to take a deposition concerning his medical treatment at the jail. (L.F. 522).

Appellant's own attorneys suggested to the trial court that a delusional disorder could be the cause of Appellant's failure to cooperate with them, his insistence on preparing to relitigate his competency to stand trial, and his "steadfast but irrational" determination to prove to a jury that he was justified in assaulting a nurse at the jail. (L.F. 523). Appellant's uncooperative behavior and the nature of his *pro se* filings prompted the attorneys to seek a re-evaluation of his competency to stand trial. (1/17/07 Tr. 25-26).

At a pretrial hearing on January 17, 2007, the court had to admonish Appellant when he continually tried to interrupt as the attorneys argued a motion in limine to prevent any reference before the jury to the court's competency findings. (L.F. 547-49; 1/17/07 Tr. 4-6). Appellant gave "angry," "unresponsive," and "irrelevant" answers when the court tried to advise him on the perils of self-representation. (1/17/07 Tr. 45-47). Appellant indicated that his main disagreement with his attorneys stemmed from their handling of evidence at the competency hearing. (1/17/07 Tr. 49). Appellant also

said that he continued to maintain that he was incompetent to stand trial, and that if he was found incompetent, it was possible that he would eventually go home. (1/17/07 Tr. 50).

In denying Appellant's request to discharge his attorneys, the court noted the nature of the proceedings, the extensive proceedings that had already taken place, the quality of representation provided by defense counsel, the complexity of the case, and Appellant's clinging to his stance of being incompetent to proceed. (1/17/07 Tr. 51).

The court also found the request to be untimely due to the size and complexity of the case, which was set to go to trial in one week. (1/17/07 Tr. 51).

B. Evidence shows Appellant not competent to represent himself.

One of the concerns motivating the Supreme Court's decision in *Edwards* was the possibility that a defendant's lack of capacity could lead to an improper conviction or sentence. *Edwards*, 128 S. Ct. at 2387. The Court noted that "self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* The evidence that was available to the trial court demonstrated legitimate concerns that Appellant would not have received a fair trial if he were allowed to represent himself.

While any memory loss that Appellant suffered would not prevent him from working with his attorneys, it would have a far more profound effect on his ability to develop and carry-out a trial strategy. *See id.* at 2386 (recognizing the difference between a defendant's ability to work with counsel and his ability to perform basic trial tasks himself). More than one of the experts who evaluated Appellant questioned his

ability to confront and cross-examine witnesses as a result of memory impairments. (Def. Ex. L, p. 6; Comp. Tr. 275). Added to that would be Appellant's impaired visual and spatial skills that would compromise his ability to process evidence presented in the form of photographs or diagrams. (Comp. Tr. 126, 366, 396, 527-28, 538). The State entered numerous photographs into evidence. (Tr. 16-24). Because of the effect his injuries had on his mental condition, Appellant would have been at a severe disadvantage in assessing the significance of that evidence and in devising a strategy for dealing with it.

Perhaps more troublesome than the potential effects of memory loss was the attitude that Appellant exhibited towards the case. There was evidence before the trial court suggesting that Appellant's attitude stemmed from his mental condition. Experts for both the State and the defense indicated that the brain injuries suffered by Appellant may have had an effect on his personality. (Comp. Tr. 192; Def. Ex. G., p. 17). There was also expert opinion that Appellant's brain injuries had impaired his judgment. (Def.'s Ex. G, p. 16). *See Edwards*, 128 S. Ct. at 2387 (citing American Psychiatric Association *amicus* brief that noted that the ability for self-representation can be impaired by common symptoms of mental illness).

Throughout the course of the proceedings, Appellant showed more concern over collateral matters than over the primary issues of trying to avoid a conviction, or at least trying to avoid a death sentence. Because there were so many witnesses to the shootings and because there was so much evidence of deliberation, Appellant's only real chance at avoiding a conviction was to present an NGRI defense. Appellant was not remotely

prepared to put on such a defense. Nor did he demonstrate any interest in that defense. Based on the witnesses he tried to endorse, the depositions he wanted to take, and the comments made during the pretrial hearings, it appears Appellant's trial strategy would have been focused on his competency to stand trial, the conditions at the jail, and in justifying his assault on a nurse at the jail. There is also evidence in the record that could have led the trial court to conclude that Appellant would not always have been able to conduct himself appropriately during the course of the trial, particularly when the court made rulings with which he disagreed. (11/27/06 Tr. 20-22; 1/17/07 Tr. 45-47).

The evidence cited in the above paragraph goes directly to the Supreme Court's concern that allowing self-representation will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. *Id.* at 2387. "To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." *Id.* There is a high likelihood that Appellant would have suffered a humiliating experience had he gone to trial on his own. It is reasonable to believe he would have pursued issues totally unrelated to the case, been unable to respond to issues that were relevant, and probably would have had emotional outbursts at various points during the trial. Counsel's assistance was vital to ensure not only that the trial itself remained on the right track, but also to keep Appellant on his best behavior and to focus his attention on the issues that were relevant to the case.

Appellant might argue that he would have been no worse off had he represented himself, since counsel's efforts resulted in a conviction and death sentence. However, the

Supreme Court noted in *Edwards* that “proceedings must not only be fair, they must ‘appear fair to all who observe them.’” *Id.* (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)). Allowing a defendant who has unquestionably suffered extensive injuries to his brain to represent himself in a capital case does not provide an appearance of fairness. Had Appellant been allowed to represent himself, the reaction might well have been similar to that of the psychiatrist quoted in *Edwards* who, after observing a defendant (who had been found competent to stand trial) try to conduct his own defense, said: “[H]ow in the world can our legal system allow an insane man to defend himself?” *Edwards*, 128 S. Ct. at 2387.

Appellant tries to distinguish *Edwards* by pointing to the facts of the underlying case and arguing that, unlike the defendant in *Edwards*, his mental health issues did not rise to the level of a “severe” mental illness.² Appellant is relying on a passage in *Edwards* where the Court makes a reference to defendants who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. *Id.* at 2388. Appellant’s argument misses the point. As noted above, the Court did not attempt to articulate a standard for finding incompetency to conduct a trial,³

² A review of the briefs filed with the Supreme Court shows that the extent of Edwards’s impairment was sharply contested.

³ The Court explicitly declined to adopt Indiana’s proposed standard that would have denied the right of self-representation to a criminal defendant who cannot communicate coherently with the jury. *Id.* at 2388.

but rather left that determination to the sound discretion of trial courts, based on the individualized circumstances of the particular defendant. *Id.* at 2387. The Court did not engage in an extensive discussion of the facts and did not apply those facts to the legal principles articulated. There is thus nothing in the opinion to suggest that the impairments displayed by Edwards represent the minimum level of mental illness that must be present before a defendant can be denied self-representation.

C. *Edwards* does not require the trial court to make a record.

Appellant claims that reversal is required because the trial court did not make findings specifying his mental illness and how it would affect his ability to represent himself. In *Edwards*, the trial court questioned the defendant about various points of law, including his understanding of particular rules of evidence. (*Edwards* Resp.'s Brf., 2008 WL649230 at *7). Some of Edwards's answers displayed at least a rudimentary knowledge of those points of law and trial procedure. (*Id.* at *7-*8). The trial court did not dispute that Edwards's waiver was timely, knowing, and intelligent. (*Id.* at *9). The court nevertheless found that counsel could be imposed based on a defendant's lack of other (unspecified) self-representation "abilities." (*Id.*). Edwards complained in his Supreme Court brief about the trial court's failure to "make a single finding regarding [his] abilities as of his December 2005 retrial," or to engage in any kind of "particularized analysis" before "extinguishing Edwards's constitutional right" to represent himself. (*Id.* at *50).

The Supreme Court did not consider the lack of specific findings to be a problem, since it did not address the issue in its opinion. Nor did the Court even go so far as to suggest the need for specific findings in future cases. The Court appears to have been satisfied that there was sufficient evidence in the record to support the trial court's decision. As noted above, the trial court in the instant case did not have the benefit of *Edwards* when ruling on the issue of whether Appellant should be allowed to discharge his attorneys and represent himself. That ruling should be upheld so long as sufficient evidence exists in the record to support it in light of *Edwards*.

Appellant's analogy to cases requiring a sufficient record when a court permits a defendant to waive counsel are inapposite. The right to counsel has been described as the most pervasive right that an accused person has, because it affects his ability to assert any other right. *State v. Dixon*, 916 S.W.2d 834, 837 (Mo. App. W.D. 1995). The right to counsel is so important that it is triggered even if no request for counsel is made. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962). Because of the importance of the right, a trial court must indulge in every reasonable presumption against a defendant's waiver of the right to counsel. *State v. Hampton*, 959 S.W.2d 444, 447 (Mo. banc 1997). It is appropriate to require a detailed record before allowing a defendant to relinquish his "pervasive" right to counsel. By contrast, the right to self-representation is not absolute. *Edwards*, 128 S. Ct. at 2384. A trial court's denial of a waiver of counsel would therefore not require the same level of detail as the granting of a waiver of counsel.

Appellant erroneously relies on this Court's opinion in *State v. Black* for the proposition that reversal is warranted where a court denies self-representation without making a record of why the waiver of counsel was invalid. The cited portion of *Black* does not fault the trial court for failing to make a record, but merely states that the record did not support the trial court's decision. *State v. Black*, 223 S.W.3d 149, 154-55 (Mo. banc 2007). The record in this case does contain sufficient evidence to sustain the trial court's decision, and that ruling should stand.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,216 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 25th day of August, 2008, to:

Rosemary E. Percival
Office of the State Public Defender
818 Grand Blvd., Suite 200
Kansas City, MO 64106

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI