THE AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE MENTAL HEALTH STANDARDS

(Adopted August, 2016; revised commentary 2017 and 2024)

provided in Part V (specifically standard 7-5.2), which deals generally with situations in which the defendant has authority to make decisions but may be incompetent to do so.

Standard 7-4.3. Responsibility for raising the issue of competence to proceed

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to proceed at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should move for evaluation of the defendant's competence to proceed whenever the prosecutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information that has come to the prosecution's attention relative to defendant's incompetence to proceed.

(c) Defense counsel may seek an ex parte evaluation or move for evaluation of the defendant's competence to proceed whenever counsel has a good faith doubt about the defendant's competence, even if the motion is over the defendant's objection.

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt about the defendant's competence to proceed consistent with (f). Defense counsel should make known to the evaluator the specific facts that have formed the basis for the motion.

(e) Neither party should move for an evaluation of competence in the absence of a good faith doubt that the defendant is competent to proceed. Nor should either party use the incompetence process for purposes unrelated to assessing and adjudicating the defendant's competence to proceed, such as to obtain information for mitigation of sentence, obtain a favorable plea negotiation, or delay the proceedings against the defendant. Nor should the process be used to obtain treatment unrelated to the defendant's competence to proceed; rather such treatment should be sought pursuant to Part II of these Standards, whether the defendant is in jail, the community, or an inpatient facility.

(f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of

defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

Commentary

Standard 7-4.3 addresses the relative obligations of courts, prosecuting attorneys, and defense counsel to raise the issue of competence to proceed and sets forth the appropriate procedure to do so. Paragraph (a) reflects the common law obligation of trial courts to respond to indications that defendants might not be competent, whether or not the issue is raised by a party. This obligation was expressly reaffirmed by the U.S. Supreme Court in *Pate v. Robinson*[49] and *Drope v. Missouri*;[50] in each case, a judgment of guilt was reversed because of the trial court's failure to order an evaluation of the defendant's competence despite observing evidence sufficient to raise concerns about it. The standard adopts "good faith doubt" as the prerequisite criterion for initiating such an evaluation, a standard that is intended to be equivalent to the "bona fide doubt" standard of *Robinson* and *Drope*. The court need not be convinced that a defendant is incompetent to proceed before ordering an evaluation, because the objective of an evaluation is to help make that determination.

Paragraph (b) permits the prosecution to move for a competence evaluation on the same good faith ground. While the introduction to Part VI noted that abuses of this power are possible, it also pointed out that the government owes a duty to courts and society at large to ensure fair and dignified criminal proceedings, which aligns with the prosecutor's role as a minister of justice whose interests go beyond mere criminal convictions. Potential abuses can be minimized through protections against disclosure of incriminating information obtained during the evaluation (see standard 7-3.2), prohibiting misuse of competency inquiries (see standard 7-4.3(e)); imposing time limits on evaluations (see standard 7-4.4(e)), and preferencing outpatient evaluations (see standard 7-4.5). Paragraph (b) also makes clear that the prosecuting attorney has a duty to disclose information indicating incompetence, which may well be required by the Constitution.[51] This obligation, once again reflecting the prosecutor's obligation to seek justice and the society interest in ensuring reliable and fair trials, flows both to the court and to defense if the information does not appear to be in defense counsel's possession.

Standard 7-4.3(c) deals with one of the most difficult ethical questions addressed in these Standards, because it involves a potential conflict between the

[49] 383 U.S. 375 (1966).
[50] 420 U.S. 162 (1975).
[51] Brady v. Maryland, 373 U.S. 83 (1963) (holding a due process right to exculpatory information in the possession of the prosecution). See also standard 11-2.1, explicating the prosecutorial duty to disclose.

obligation of defense counsel to represent a client's best interests and counsel's duty to reflect candor toward the tribunal. The standard provides that defense counsel may seek an evaluation, even over a client's objection, whenever a good faith doubt arises about a client's competence to proceed. This evaluation can be ex parte (that is, privately arranged, with the results forwarded only to defense counsel) or it can be "court-ordered," with the results to go to the prosecution and the court. However, in contrast to the previous version of this standard, this version leaves the decision to move for a court-ordered evaluation to counsel's discretion.

Defense counsel might decide against officially raising the competency issue even in the face of a bona fide belief the defendant is incompetent for several reasons. First, if the defendant insists, despite the motion, that no evaluation is necessary and refuses to cooperate with the evaluator, sanctions can result,[52] given that there is no right to remain silent in a jurisdiction that properly limits use of the evaluations results (see standard 7-3.2). Second, defense counsel might be concerned that, even if the law protects against a prosecutor's *misuse* of statements made during an evaluation, it may not always protect against the prosecutor's *access* to them. Thus, proceeding with an evaluation risks the disclosure of information that may be prejudicial to the defense. Third, if the prosecution's case against a defendant is weak and counsel believes the defendant's assistance will not be necessary to mounting a defense, counsel may be reluctant to raise the competence question. Fourth, should the defendant be found incompetent, it is likely that the court will order commitment to a hospital for restoration services. In all but the most serious felony cases, this confinement could extend beyond the time the defendant would have been confined in jail or prison had the case proceeded directly to adjudication and conviction (see commentary to standard 7-4.14). Even in more serious cases, some defendants may prefer a determinate period of confinement in a correctional facility to an indeterminate period in a psychiatric hospital. They may also regard a finding of incompetence and psychiatric commitment to be more stigmatizing than a criminal conviction. Or they may have had previous unpleasant experiences in psychiatric treatment or fear forcible medication during a hospital stay. Finally, a competence evaluation and a finding of incompetence and subsequent hospitalization could prevent acceptance of a time-limited" plea offer that might result, for instance, in dismissal of all charges in exchange for voluntary treatment.

However, the argument that defense counsel has a duty to raise the competence issue is equally compelling. Because the trial of an incompetent defendant necessarily is invalid as a violation of due process, a defense lawyer's duty to maintain the integrity of judicial proceedings may require that a trial court be advised of the defendant's possible incompetence. Further, to permit defense counsel

[52] Cf. United States v. Greer, 158 F.3d 228 (1998) (permitting enhanced of sentence when defendant "malingered" incompetency).

to proceed to trial with incompetent clients deprives defendants of their personal right to participate in and control the thrust of their defense. It also assumes that defense attorneys have properly determined the best interests of their clients, which may not be furthered even by a deal dismissing charges if, for instance, rearrest occurs, treatment is not obtained, or the deal results in a record of conviction that could enhance future sentences. Concerns about self-incrimination, confinement during competence restoration, and related matters can be dealt with in other ways. For instance, in addition to standard 7-3.2(a)'s restriction on using competency results to prove guilt, standard 7-3.7(a) calls for the segregation of competence and past mental state reports and prohibits inclusion of self-incriminating statements in competency reports; standards 7-4.4(d), 7-4.5(a) and 7-4.14(b) set strict limits on the length and location of evaluations and treatment to restore competence; and standard 7-4.8(e) allows for dismissal of the charges against a defendant found incompetent, pending the defendant's participation in treatment.

Standard 7-4.3(c) attempts to reconcile these competing considerations by allowing defense counsel to seek an ex parte assessment, as an alternative to moving for a court-ordered evaluation. Such an approach protects against disclosure of prejudicial information and hospitalization for evaluation purposes, while providing counsel with more information about the extent of the defendant's impairment and treatment needs before deciding whether to formally raise the issue. Note that if the defense decides to move for a court-ordered evaluation—either after its ex parte evaluation or in the absence of one—and the defendant objects, standard 7-4.8(b) recommends dealing with any resulting conflict of interest through the appointment of special counsel.

While defense attorneys are thus given discretion to avoid making a motion for a competence evaluation even when they think their client is incompetent, they should not have discretion to make such a motion when it is *not* called for. As discussed in the introduction to this part, defense attorneys have been known to misuse the competence evaluation process to delay proceedings, discover information about a client's mental condition for plea negotiation or mitigation of sentence, or secure treatment unrelated to the competence issue. Similarly, as documented in the introduction to this Part, prosecutors have occasionally invoked the incompetence process to forestall trial in cases in which they lack sufficient evidence to convict or to achieve pretrial detention of defendants whom they wish to remove from the streets pending trial. Paragraphs (d) and (e) expressly condemn use of the incompetence evaluation process for any purpose other than determining competence to proceed and state clearly that it is improper conduct for either the prosecuting or defense attorney to move for evaluation for other reasons. To ensure that motions are properly submitted, standard 7-4.3(d) provides that attorneys submit such motions in writing and include facts making clear why the evaluation is needed (excepting, as standard 7-4.3(f) provides, those facts protected by the attorney-client privilege), and also requires that the motion be accompanied by a certificate that it is based on a good faith doubt about the defendant's competence. Standard 7-4.3(e) then lists various purposes for which motions for competency evaluations should not be used.

Standard 7-4.4. Judicial order for competence evaluation

(a) Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to proceed and the requirements below are met, the court should order an evaluation and conduct a hearing into the competence of the defendant to proceed. The court should follow this procedure whether the doubt arises from a motion of counsel, from information supplied by counsel, from the court's own observation of the defendant, or from any information otherwise known to the court.

> **(i) The court should not order an evaluation of a defendant's competence to proceed before there has been a determination of probable cause by a judge, grand jury or prosecutor unless an earlier evaluation is requested by defense counsel. If it is determined that probable cause for criminal prosecution does not exist, there should be no further inquiry into the defendant's competence to proceed.**
>
> **(ii) An evaluation to determine competence to proceed should not be ordered before the defendant is represented by counsel who has had an opportunity to consult with the defendant and to be heard by the court.**

(b) The evaluator(s) appointed to perform the evaluation of the defendant's competence to proceed should be qualified by training and experience to offer testimony to the court on matters affecting competence. A mental health professional who is appointed as an evaluator should have the qualifications set forth in Standard 7-3.9.

(c) The order for evaluation should specify the nature of the evaluation to be conducted and should specify the legal criteria to be addressed by the evaluator in accordance with the requirements set forth in Standard 7-3.4(e). Unless requested by the defendant, or for good cause shown in accordance with Standard 7-3.4(d), the evaluation should not include an evaluation into the defendant's mental condition at the time of the offense or other matters collateral to the issues of competence to proceed.

Utah State Bar

Ethics Opinion 17-05

ISSUED MAY 9, 2017

Issue

ISSUE

1 IS IT ETHICAL FOR A CRIMINAL DEFENSE ATTORNEY WHO SUSPECTS HIS CLIENT IS NOT COMPETENT TO ALLOW THAT CLIENT TO ENTER A GUILTY PLEA WITHOUT FIRST FILING FOR A COMPETENCY EVALUATION? WHAT ARE THE DEFENSE ATTORNEY'S ETHICAL OBLIGATIONS TOWARD A CLIENT OF QUESTIONABLE COMPETENCE?

Opinion

ANSWER

2 The criminal defense attorney who questions her client's competence is not obligated to seek a competency evaluation unless she is otherwise unable to proceed in a way that protects her client's interests and autonomy. An attorney who questions the client's competence should first try to carry out a normal client-attorney relationship. When there is risk of substantial harm and the client cannot act in his own interest, the attorney is permitted to take protective action, such as involving family and professionals serving the client to assist. If the attorney needs guidance from a mental health expert, the attorney should generally seek a confidential psychological evaluation protected by attorney-client privilege before asking for a competency evaluation.

Discussion

BACKGROUND FACTS

3 Sometimes a defendant is charged with a serious crime. When the attorney suspects that such a defendant may not be competent, the attorney may request a competency evaluation.[1] This may entail confinement.[2] If the defendant is found not competent to stand trial, the defendant must be committed for treatment intended to restore his competency.[3] This may be for an extended period of time. At some point the court may decide that the defendant's competency will never be restored and dismiss the case in furtherance of justice.[4] At that point, the defendant could be civilly committed if the defendant were a danger to himself or others.[5]

4 In many other cases a defendant is charged with a misdemeanor or infraction and the defendant's attorney believes that the defendant may not be competent. In such a case, the defense attorney could ask for a competency evaluation. However, if the defendant is in custody, further confinement for that evaluation may well exceed the sentence the defendant is likely to receive. If such a defendant is found incompetent, further confinement at a mental hospital to achieve competence may result in confinement that vastly exceeds the sentence that could be imposed for the misdemeanor. If the prosecutor makes a plea offer with little or no jail time, is it proper for defense counsel to urge the client with questionable competence to accept the offer and plead guilty?

ANALYSIS

5 The Utah Rules of Professional Conduct that address these questions are Rule 1.1 Competence, Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer, and Rule 1.14 Client with Diminished Capacity.

6 All clients are entitled to competent representation.[6] "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[7] Competent representation of a criminal defendant includes the ability to recognize and duty to investigate mental health issues.

7 A mentally impaired individual may have been "unable to form the requisite intent to commit the crime" at the time of the alleged offense.[8] This could provide a defense that counsel should pursue. Such a defendant might have diminished capacity that would justify mitigation in sentencing. Alternatively, a mentally ill individual may have an insanity defense to the charge(s). This opinion only addresses whether the client's current competency should be

questioned or raised by defense counsel. There are substantial legal differences between competency for trial and a defendant's mental state at the time of the alleged offense and whether there is a basis for an insanity defense.

8 Rule 1.2 establishes the division of authority between attorney and client. With respect to criminal defendants, it states: In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.[9]

9 Comment 4 to this rule addresses how the attorney should proceed when he questions the client's competence: In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.[10]

10 Rule 1.14 provides a number of important points regarding representing the questionably competent client. First, it establishes that "when a client's capacity to make adequately considered decisions in connection with the representation is diminished, . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[11] The comments expand upon this point: [M]aintaining the ordinary client-attorney relationship may not be possible in all respects. . . . Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.[12]

11 Under this rule, when an attorney suspects the client may have a mental illness or cognitive disability, the first step should not be to seek a mental health evaluation, including for competency, but to attempt to carry out the normal client-attorney relationship. The client may be able to express strong preferences — such as to stay out of jail, or to enter a treatment program, for example.

12 The second point to take away from Rule 1.14 is that the lawyer may take protective action in certain circumstances: When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client . . . .[13] When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest.[14]

13 The comments expand upon the relationship between the values of client autonomy and the need to protect the client: If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless protective action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered

decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, . . . consulting with support groups, professional services, adult-protective services or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.[15]

14 An attorney may reasonably conclude that, while relatively capable of functioning in matters of day-to-day life, a criminal defendant client is insufficiently competent to make informed decisions required in the usual allocation of authority between lawyer and client contemplated by Rule 1.2(a), Utah R. Prof. Conduct. In such circumstances the attorney would be justified in taking limited protective action. The attorney might involve the client's family, caretaker, or therapist in consulting with the client to try to arrive at a decision that is in the client's best interests and acceptable to the client. The attorney and such consultants might work with the client to develop a plan that will allow the client to achieve his goals of avoiding confinement and to comply with the terms of probation.[16]

15 If this limited protective action is ineffective, the next step would be for the attorney to "seek guidance from an appropriate diagnostician."[17] It is preferable for counsel to obtain a confidential psychological evaluation protected by the attorney-client privilege instead of getting an evaluation ordered by the court.[18] As the advisory ABA Standards for Criminal Justice suggest: If defense counsel has a good faith doubt regarding the client's competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.[19]

16 The Comments to Rule 1.14 highlight the possible negative effect of the attorney publically raising an issue of diminished capacity or incompetence: Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, . . . proceedings for involuntary commitment. . . . At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.[20]

17 Raising questions of competence with the court could result in confinement while competence is determined and to restore competence, and further confinement, under civil commitment proceedings, if there is a risk to bodily injury to another or serious damage to the property of another.[21]

18 The ABA Criminal Justice Standards regarding mental health provide that the court and the prosecutor “should” move for an evaluation of the defendant’s incompetence whenever they have a “good faith doubt,” but the defense counsel has no such affirmative obligation: Defense counsel may seek an ex parte evaluation or move for evaluation of the defendant’s competence to proceed whenever counsel has a good faith doubt about the defendant’s competence even if the motion is over the defendant’s objection.[22]

19 The ABA Standards suggest the test for competency to plead[23] should be: whether the defendant has sufficient present ability to consult with defendant’s lawyer with a reasonable degree of rational understanding and whether, given the nature and complexity of the charges and the potential consequences of a conviction, the defendant has a rational as well as factual understanding of the proceedings relating to entry of a plea of guilty or nolo contendere.[24]

20 Some commentators argue that defense counsel has a responsibility to seek appropriate treatment for a mentally impaired client, due to his fiduciary obligations and respect for client autonomy, however, this need not be done through challenging competency.[25]

21 In opining that a defense attorney does not have an affirmative obligation to raise the question of competency, we have also considered Rule 3.3 Candor Toward the Tribunal and Rule 4.1 Truthfulness in Statements to Others.[26] Neither of these rules establish an affirmative duty for a defense attorney to raise questions about his client’s competence with the Court. While Rule 3.3 prohibits knowingly making a “false statement of fact or law to a tribunal,” it places no obligation on the attorney to divulge confidential information about the client which falls under the protection of Rule 1.6. If the court were to pose questions during the plea colloquy, the answers to which defense counsel believed would make it unlikely that the court would accept the plea, counsel must be candid and truthful, but would be entitled to object or decline to respond to any question. Likewise, Rule 4.1 prohibits knowingly making a “false statement of fact or law to a third person” and counsel could respond to any similar inquiry from the prosecutor, but must be candid about any affirmative representation made with respect to the client.[27] Of course, as a practical matter, it may be the most realistic and wise course of action for defense counsel to inform the prosecution and/or the court in advance that, due to the client’s somewhat impaired condition and state of mind, certain accommodations to the typical process of pleading guilty may be needed in light of the client’s diminished capacity and that is the best course of action for all concerned. Most courts and prosecutors will likely be sympathetic to that approach.

22 In some cases the lawyer may and should raise the issue of competence. “When a lawyer has reason to believe that her client may not be mentally competent to stand trial, she does not render ineffective assistance of counsel by making her concerns known to the court” even where the client objects.[28] In some cases a lawyer’s failure to request a competency hearing

may constitute ineffective assistance of counsel and be grounds to overturn the conviction. [29]

23 However, raising competence with the Court should rarely be the first approach a defense attorney takes to address a client's questionable competence. Rather, the attorney should raise the issue of the client's competence with the court only after attempting other approaches and when the attorney is unable to effectively proceed in any other way to protect both her client's interests and autonomy.

BACK TO ALL ETHICS OPINIONS

subdivision 2(a)(2), the subdivision lists offending conduct inclusively rather than exhaustively and the legislature intended to criminalize even picking up a cellphone under this provision. The state relies on subdivision 3(a) exceptions that exempt a driver from punishment under subdivision 2 if the person uses only his cellphone's hands-free feature. The argument cannot overcome two related obstacles. The first is that we read criminal statutes strictly, because only conduct that the legislature has clearly identified as criminal can warrant punishment. *United States v. Lanier*, 520 U.S. 259, 265–66, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (explaining the need to strictly construe criminal statutes as a matter of due process to ensure that persons are fairly warned about conduct for which they might be held criminally liable). And second, the legislature urges us to follow the unambiguous language stated in a statute rather than base our understanding on what we might discern to be the spirit that underlies it. Minn. Stat. § 645.16; *see also State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015). The state's argument therefore fails.

[14] We add that the legislature passed an amendment to Minnesota Statutes section 169.475, subdivision 2, during the pendency of this appeal. The subdivision now prohibits a motorist from even "holding a wireless communications device with one or both hands" while operating a motor vehicle. 2023 Minn. Laws ch. 68, art. 4, § 50 (to be codified at Minn. Stat. § 169.475, subd. 2(a)(1) (Supp. 2023)). When the legislature amends a statute, we presume that it intended to change the law. *Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012). The amendment prohibiting handling a cellphone while driving would be unnecessary if the state were correct that the pre-amended statute already criminalized the conduct.

DECISION

Because the legislature's amendment to the driver's-license-suspension statute did not mitigate punishment for driving with a suspended license, the amelioration doctrine does not apply to Gutzke's conviction of driving with a suspended license. But because the state's evidence did not establish that Gutzke's cellphone use violated Minnesota Statutes section 169.475, subdivision 2(a)(1) or 2(a)(2), we reverse that conviction without addressing Gutzke's other arguments. We remand for the district court to vacate the cellphone-use conviction.

Affirmed in part, reversed in part, and remanded.

STATE of Minnesota, Respondent,

v.

Ron Wesley EPPS, Appellant.

A21-0938

Court of Appeals of Minnesota.

Filed August 28, 2023

Background: Defendant was convicted, following guilty plea, in the District Court, Hennepin County, Paul R. Scoggin, J., for violating domestic-abuse no-contact order (DANCO). Following evidentiary hearing, the district court denied defendant's petition for postconviction relief alleging he was deprived of his constitutional rights to due process and effective assistance of counsel when neither the district court nor defendant's attorney sought an evaluation of his competence to proceed. Defendant appealed.

Holdings: The Court of Appeals, Gaïtas, J., held that:

(1) district court did not err in deciding not to order a competency evaluation on its own initiative, and

(2) defense counsel's failure to investigate defendant's mental-health history and challenge his competence based on that history did not constitute deficient performance.

Affirmed.

1. Constitutional Law ⚷4782

A defendant has a due process right not to be tried and convicted of a criminal charge if the defendant is legally incompetent. U.S. Const. Amend. 14.

2. Mental Health ⚷432

A defendant is competent to stand trial in a criminal matter if the defendant has sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings.

3. Criminal Law ⚷625(1)

A district court must observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial.

4. Criminal Law ⚷625.10(1)

Whether a court observed procedures adequate to protect a defendant's right not to be tried or convicted while incompetent is a different question than whether the defendant is incompetent.

5. Criminal Law ⚷1134.40

In considering whether a district court erred in not ordering a competency evaluation, the appellate court first determines whether the evidence regarding the defendant's mental state is disputed. Minn. R. Crim. P. 20.01.

6. Criminal Law ⚷1134.40

In considering whether a district court erred in not ordering a competency evaluation, when the evidence is undisputed, the appellate court reviews the record to determine whether the district court gave proper weight to the information suggesting incompetence when it came to its conclusion that there was not sufficient doubt of the defendant's competency so as to require further inquiry. Minn. R. Crim. P. 20.01.

7. Criminal Law ⚷1134.40

In considering whether a district court erred in not ordering a competency evaluation, unless the aggregate of the evidence in the record creates a sufficient doubt of the defendant's competence, an appellate court will not find error in the district court's failure to order an evaluation. Minn. R. Crim. P. 20.01.

8. Criminal Law ⚷625.10(4)

District court did not err in deciding not to order a competency evaluation on its own initiative during guilty-plea hearing, in prosecution for violation of a domestic-abuse no-contact order (DANCO); during hearing, which proceeded in a manner similar to many plea hearings, defendant confirmed his understanding of plea agreement and rights he was waiving by pleading guilty, he responded appropriately to questions posed by district court and his attorney, admitted his guilt, and district court found that he entered a knowing, intelligent, and voluntary guilty plea. Minn. R. Crim. P. 20.01.

9. Sentencing and Punishment ⚷256

District court did not err in deciding not to order a competency evaluation on its own initiative at sentencing, in prosecution for violation of a domestic-abuse no-contact order (DANCO), even though defendant expressed unhappiness about sentence, admonished district court to remain independent, and complained he was a victim of government abuse; defendant's remarks showed his understanding of proceedings and district court's decisions and were not unusual for a defendant disappointed by a district court's sentencing decision, and record showed that defendant rationally consulted with his attorney and that attorney explained defendant's positions and presented documents to the district court at defendant's request. Minn. R. Crim. P. 20.01.

10. Criminal Law ⚷273(2)

Sentencing and Punishment ⚷264(6)

District court gave sufficient weight to evidence of defendant's competency to proceed during guilt-plea and sentencing hearings, in prosecution for violation of a domestic-abuse no-contact order (DANCO), even though evidence presented during postconviction hearing showed defendant was previously found incompetent and alleged similarities between his mental state then and at time of DANCO proceedings; evidence at postconviction hearing was unavailable to district court during guilty-plea and sentencing hearings, and during those proceedings, district court properly evaluated defendant's competence to proceed based on his courtroom conduct. Minn. R. Crim. P. 20.01.

11. Criminal Law ⚷1618(5)

District court did not err in postconviction decision that an evaluation of defendant's competence to proceed was unwarranted, in prosecution for violation of a domestic-abuse no-contact order (DANCO), even though evidence presented at postconviction hearing showed defendant was previously found incompetent; defendant was found competent at most recent competency evaluation, defendant's attorney, who was experienced and well-versed in law governing competence, did not believe there was cause to question defendant's competence, defendant's longtime probation officer did not have concerns about his competence, and experienced prosecutor present during proceedings did not question defendant's competence. Minn. R. Crim. P. 20.01.

12. Criminal Law ⚷1656

District court gave sufficient weight to evidence of defendant's competency to proceed presented during postconviction hearing, including evidence that defendant was previously found incompetent and alleged similarities between his mental state then and at time of guilty-plea and sentencing hearings in prosecution for violation of a domestic-abuse no-contact order (DANCO), in denying defendant's motion for postconviction relief claiming district court violated his right to due process by not ordering a competency evaluation; in order denying postconviction relief, district court expressly compared behavior discussed in defendant's previous evaluations to his conduct during DANCO proceedings, and determined none of past behavior was observed at time of DANCO proceedings. Minn. R. Crim. P. 20.01.

13. Criminal Law ⚷625.10(2.1)

There are no fixed or immutable signs which invariably indicate the need for further inquiry to determine a defendant's fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

14. Criminal Law ⚷1870

A criminal defendant's right to assistance of counsel under the federal and state constitutions means the right to effective assistance of counsel. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

15. Criminal Law ⟹1881

In evaluating a claim of ineffective assistance of counsel, a court applies the two-prong test set forth in *Strickland*, under which a defendant must show that (1) counsel's representation was deficient and (2) the deficient performance prejudiced the defense. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

16. Criminal Law ⟹1888

If a claim of ineffective assistance of counsel fails to satisfy one of the requirements of the two-prong test for ineffective assistance set forth in *Strickland*, a court need not consider the other requirement. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

17. Criminal Law ⟹1880

The ultimate consideration in evaluating a claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

18. Criminal Law ⟹1871

A petitioner alleging ineffective assistance of counsel must overcome the strong presumption that counsel's performance fell within a wide range of reasonable assistance. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

19. Criminal Law ⟹1882

For purposes of a claim of ineffective assistance of counsel, an attorney meets the objective reasonableness standard when the attorney provides the client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

20. Criminal Law ⟹1883

Under the prejudice prong of the *Strickland* test for ineffective assistance of counsel, prejudice exists if there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

21. Criminal Law ⟹1139

Because the *Strickland* test for ineffective assistance of counsel involves mixed questions of law and fact, an appellate court reviews a district court's determinations de novo. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

22. Criminal Law ⟹1870

To determine whether a defendant's counsel was ineffective, a reviewing court must look to the merits of the defendant's underlying claims. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6.

23. Criminal Law ⟹1900

When a reasonably skilled attorney would have challenged a defendant's competence under the circumstances, a defense attorney provides deficient representation by failing to do so. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6; Minn. R. Crim. P. 20.01(3).

24. Criminal Law ⟹1900

Defense counsel's failure to investigate defendant's mental-health history and challenge his competence based on that history did not constitute deficient performance, and thus was not ineffective assistance of counsel, in prosecution for violation of a domestic-abuse no-contact order (DANCO), even though evidence presented at postconviction hearing showed defendant was previously found incompetent; defendant's conduct at DANCO proceedings did not provide counsel with an objective reason to doubt his competence, and none of the evidence presented at postconviction hearing suggested that defendant was not competent when he appeared before district court in DANCO proceedings. U.S. Const. Amend. 6; Minn. Const. art. 1, § 6; Minn. R. Crim. P. 20.01(3).

Syllabus by the Court

In a criminal case, a defense attorney's failure to challenge a defendant's competence to proceed is deficient representation if a reasonably skilled attorney would have doubted the defendant's competence under the circumstances.

Hennepin County District Court, File No. 27-CR-21-3778

Keith Ellison, Attorney General, St. Paul, Minnesota; and Mary F. Moriarty, Hennepin County Attorney, Anna R. Light, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Gaïtas, Judge.

OPINION

GAÏTAS, Judge

Appellant Ron Wesley Epps challenges his conviction, following a guilty plea, for violating a domestic-abuse no-contact order (DANCO). He argues that he was deprived of his constitutional rights to due process and the effective assistance of counsel when neither the district court nor his own attorney sought an evaluation of his competence to proceed. Because the district court did not violate Epps's right to due process by not ordering a competency evaluation on its own initiative, and Epps's attorney did not provide ineffective assistance of counsel by not requesting a competency evaluation, we affirm.

FACTS

A DANCO prohibited Epps from having contact with T.R. During the winter of 2021, Epps called T.R. 29 times from jail. Based on these phone calls, respondent State of Minnesota charged Epps with six counts of violating the DANCO.

A public defender represented Epps. With the assistance of his attorney, Epps entered into a guilty-plea agreement with the state. In exchange for Epps's guilty plea to one count of violating the DANCO, the state agreed to dismiss the remaining counts, to recommend Epps's immediate release from jail pending sentencing, and to seek the presumptive sentence of probation at the sentencing hearing. The state would also request a probationary DANCO at sentencing that would prohibit Epps from having contact with T.R. while on probation.

Guilty Plea and Sentencing Hearings

In March 2021, Epps, his attorney, and the prosecutor appeared before the district court for a guilty-plea hearing. Due to the COVID-19 pandemic, the hearing occurred remotely on an online platform.

After the prosecutor placed the plea agreement on the record, Epps's attorney explained the agreement to Epps in more detail and asked Epps whether he understood the terms of the agreement. Epps stated, "Yes, I think I understand," and he told the district court that he wished to go forward with the guilty plea. The district court emphasized to Epps that "it's very important that you understand everything," and encouraged Epps to ask questions at any point during the hearing if he was having difficulty understanding. Epps acknowledged his understanding that he would not be permitted to have contact with T.R. before sentencing, and that the no-contact requirement would likely continue after sentencing, although he questioned the reason for imposing a probationary DANCO if T.R. wanted contact. Nonetheless, he assured the district court that he felt comfortable pleading guilty.

The district court told Epps that it could only accept guilty pleas "from people who really are guilty," and asked, "Are you actually guilty, or are you just pleading to get out of jail?" Epps began to describe the circumstances of his phone calls to T.R., explaining that he believed another lawyer had given him permission to call T.R. But the district court interrupted and asked Epps to answer the question before him. Epps confirmed that he was pleading guilty because he was guilty.

With the assistance of his attorney, Epps then pleaded guilty. After being sworn in, he agreed that he had reviewed a guilty-plea petition with his attorney the preceding day, "line by line and page by page." He acknowledged that he understood everything in the plea petition, including the rights that he was giving up by pleading guilty. During this exchange, Epps again tried to explain that he had "permission to call [T.R.]." But he confirmed his understanding that he was waiving his trial rights and admitting guilt. Epps admitted that he had called T.R. from the jail on December 28 in violation of a DANCO, and that he had prior convictions for violating a DANCO. He told the district court, "I'm pleading guilty because I did place that call."

The district court found that Epps "knowingly, intelligently, voluntarily gave up trial rights and gave [the district court] a sufficient factual basis to find [Epps] guilty." A sentencing hearing was scheduled to occur approximately one month later. The district court told Epps, "I'm going to be releasing you on the agreement of the parties without bail on the conditions that you make your court appearance ... and keep in good contact with your lawyer just in case that changes."

For unknown reasons, Epps was not immediately released from jail as required by his plea agreement; he was released the following day. At Epps's sentencing hearing, which also was held remotely, he was represented by the same attorney who had represented him at the guilty-plea hearing. Epps moved to withdraw his guilty plea, arguing that the state had materially breached the terms of the plea agreement by not ensuring his immediate release from jail. Speaking on his own behalf, Epps told the district court that he was "a victim of government abuse of the Hennepin County judicial system." He noted that he had been treated unfairly in the past, as well. When the district court acknowledged that Epps should have been released from jail immediately following the guilty plea hearing, Epps thanked the district court and directed the district court to "stay independent." He stated, "[j]ust stay independent because a judge is supposed to stay independent. Thank you. The judge has been warned to stay independent. And thank you, Your Honor, for staying independent. That is what you are supposed to do. And your ruling is supposed to be independent."

After this exchange, the district court denied the plea withdrawal motion. Epps again asserted that he was a victim of government abuse, referencing some of his previous cases. He told the district court that he was "so upset [his] mind [was] not functioning."

Epps's attorney explained that Epps was frustrated, in part, due to the continued existence of the DANCO, which was against T.R.'s own wishes. The attorney submitted documents from Epps's previous cases at Epps's request, including a matter that was reversed on appeal. Although the attorney acknowledged that Epps could not challenge the validity of past DANCOs, he asked the district court not to issue another DANCO given T.R.'s wishes and Epps's multiple past violations.

After hearing from Epps and Epps's attorney, the district court sentenced Epps to a 21-month stay of execution and three years of probation. When the district court ordered Epps to participate in a domestic violence program as a condition of probation, Epps interrupted the district court's pronouncement of the sentence, stating, "I've never been convicted of domestic violence." Epps interrupted the district court a few more times, admonishing the district court to "stay independent." When the district court granted the state's request for a probationary DANCO, Epps stated, "I'm gone. Bye. Enough is enough. You guys need to be under investigation by the FBI. You guys are—look at the records. Look at everything that is shown. You guys are crooks." Epps then left the remote hearing.

Appeal and Postconviction Petition

After sentencing, and with the assistance of new appellate counsel, Epps filed a direct appeal to this court and then moved to stay the appeal to pursue postconviction proceedings. After we stayed the appeal, Epps filed a postconviction petition in the district court asserting two constitutional claims. Epps first claimed that, because there was reason to question his competence to proceed, the district court violated his right to due process by not ordering a competency evaluation and by allowing him to plead guilty. Second, Epps claimed that his attorney provided ineffective assistance of trial counsel by not investigating his past mental health and by failing to challenge his competence to plead guilty.

Postconviction Evidentiary Hearing

At an evidentiary hearing held on his petition, Epps called several witnesses in support of his postconviction claims and introduced multiple exhibits, including four prior competency evaluations, the transcripts of his guilty-plea and sentencing hearings, and a 2014 order denying a petition for involuntary commitment to a mental-health facility.

Epps testified first, waiving his attorney-client privilege to enable his appellate counsel to question the attorney who represented him during the guilty plea and at sentencing. After the waiver, Epps rambled during his testimony, criticizing his trial attorney, among other things.

Next, Epps called the probation officer who had supervised him since July 2020. The probation officer testified that Epps was initially "rough" to supervise because he was easily agitated, he was focused on his past cases and injustices in the legal system, he spoke quickly, and he would not allow her to participate in their conversations. But the probation officer noted that Epps's communication, behavior, and emotional regulation improved during the time she worked with him. The probation officer testified that she had not discussed Epps's behavior with his trial attorney or expressed concerns about Epps's competency.

Epps also called his trial attorney. The attorney testified that he had handled thousands of cases during his 21 years as a public defender. He has requested numerous competency evaluations on behalf of clients and has represented clients throughout the competency restoration process.

The attorney explained how he approaches the issue of competence:

> [T]he issue of whether a person's competent, to me, boils down to whether they're actually fully understanding the proceedings, and whether they have a grasp of reality . . . .
>
> And there are situations where I deal with people who have some history of mental illness and who suffer from different conditions that at the present time understand what we're doing, understand who I am and what I'm supposed to do as my job, understand what the prosecutor's job is, understand how the court process works, and are completely fluid in that, and who also have a firm grasp of the facts of their case and [what] their potential defenses are. And when I run into somebody like that, I don't refer that person for a competency evaluation, because I feel like they are competent to proceed. They don't need to sit through competency restoration proceedings and -- while in custody, and -- you know, so that's where I draw the line.
>
> I think there's a line between someone who's legally incompetent and somebody who has some mental health issues or has some mental illness. And that's a line that I have to deal with, you know, probably at least every month or two, and you have to make your judgment calls there.

The attorney also responded to questions from Epps's appellate counsel about how he decides whether to seek a competency evaluation:

> Q: When you're evaluating your clients on the attorney level, are you evaluating whether you believe they're competent, or are you evaluating whether you believe there's reason to doubt their competency?
>
> A: The latter. I don't feel I can make the determination myself. It's -- but I also -- there has to [be] a point where -- preliminary to that, where I make a determination whether to refer them or not.
>
> Q: So, when you're making that preliminary determination, what kinds of things are you factoring in?
>
> A: Exactly what I just said. The legal standard. Does this person -- is this person engaging with me in reality with respect to what our defenses are, what the, you know, potential worst outcomes are, what our best outcomes are, what potentially is a middle outcome, are we fully grasping the facts of the case, do we understand what they are, does everything comport with reality. If we're at a point where we're dealing at arm's-length and on eye-level with those issues, then to me, that's not a person who absolutely must go and get referred for a competency evaluation under [the Minnesota Rules of Criminal Procedure].

As to Epps specifically, the attorney testified that Epps did not present as mentally ill during his representation of Epps. The attorney believed that Epps understood the guilty-plea agreement. There was no indication to him that Epps did not understand what was happening during the plea hearing. Nothing during the attorney's meeting with Epps before sentencing caused him concern about Epps's competence. And the attorney did not question Epps's competence during the sentencing hearing.

The attorney acknowledged that he did not investigate Epps's past mental-health history. He explained that he believed that Epps had sufficient present ability to consult with him, and that Epps had a rational and factual understanding of the proceedings. The attorney testified that if he had any reason to doubt Epps's mental competence during his representation, he simply would have requested a competency evaluation.

Finally, Epps called a forensic psychologist who had evaluated Epps's competence in connection with court proceedings in 2014 and 2015. The psychologist testified that she performed four competency evaluations of Epps during that period. She found Epps incompetent to proceed three times, on January 9, 2014, July 6, 2014, and February 3, 2015, diagnosing him with "Delusional Disorder, Persecutory Type." In making that diagnosis and in determining that Epps was incompetent, the psychologist partly relied on Epps's "paranoid thinking" about the court proceedings, including Epps's concerns that court staff had altered transcripts, that hearings were not legitimately on the record because they were conducted without a court reporter, that the psychologist was secretly communicating with prison staff while interviewing Epps, and that judges were abusing their power. After evaluating Epps again on August 13, 2015, the psychologist found that Epps was competent to proceed.

The psychologist testified that she could not provide an opinion as to Epps's competence in the instant case because she did not evaluate Epps in 2021. According to the psychologist, she cannot provide an opinion about competency based on evaluations from several years earlier. And she cannot retrospectively determine whether there was reason to doubt an individual's competence.

The state's sole witness was the prosecutor who represented the state at Epps's guilty-plea hearing. He recalled handling at least one other prosecution involving Epps. The prosecutor testified that, in his experience, Epps "is a strong-willed individual, and wants people to hear what he has to say." But he had no concerns at the guilty-plea hearing that Epps was not competent to proceed.

Order Denying Postconviction Relief

In January 2023, the district court denied Epps's petition for postconviction relief in a detailed order. The district court made extensive findings of fact and concluded that Epps had failed to establish during the postconviction proceedings that there was reason to doubt his competency at the time of his guilty-plea or sentencing hearing. Based on this determination, the district court rejected Epps's constitutional claims. The district court concluded that it did not violate Epps's right to due process by not sua sponte ordering a competency evaluation. And the district court further concluded that Epps's attorney did not provide ineffective assistance of counsel by not challenging Epps's competence to proceed. The court further concluded that Epps failed to establish that he was deprived of the effective assistance of counsel.

Following the district court's denial of his postconviction petition, Epps moved to dissolve the stay of his appeal and to reinstate the appeal, and we granted the motion.

ISSUES

I. Did the district court deprive Epps of his constitutional right to due process when it did not, on its own initiative, order an evaluation of Epps's competence to proceed?

II. Did Epps's attorney provide ineffective assistance of trial counsel by not investigating Epps's mental-health history and by failing to challenge Epps's competence based on that mental-health history?

ANALYSIS

Epps argues that the district court erred in denying his petition for postconviction relief. He contends that the district court deprived him of his constitutional right to due process by failing to sua sponte order a competency evaluation when there was reason to doubt his competence at the guilty-plea and sentencing hearings. And Epps argues that his attorney violated his constitutional right to the effective assistance of trial counsel by not investigating his mental-health history and by failing to request a competency evaluation.

I. The district court did not deprive Epps of due process when it did not, on its own initiative, order an evaluation of Epps's competence to proceed.

Epps argues that the district court violated his due process right to not be convicted while incompetent by failing to order a competency evaluation when there was reason to doubt his competence to proceed.

[1, 2] "A defendant has a due process right not to be tried [and] convicted of a criminal charge if [the defendant] is legally incompetent." *Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011) (citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)); *see State v. Bauer*, 310 Minn. 103, 245 N.W.2d 848, 854-55 (1976) (applying *Drope* in Minnesota). "[A] defendant is competent to stand trial in a criminal matter if [the defendant] has sufficient present ability to consult with [the defendant's] lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings." *Bonga*, 797 N.W.2d at 718 (quotations omitted).

[3, 4] A district court must "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Drope*, 420 U.S. at 172, 95 S.Ct. 896. "Whether a court observed procedures adequate to protect a defendant's right not to be tried or convicted while incompetent is a different question than whether the defendant is incompetent." *Bonga*, 797 N.W.2d at 718 (citing *Bauer*, 245 N.W.2d at 852).

"Minnesota Rule of Criminal Procedure 20.01 provides the standard for competency in a criminal proceeding and the procedures that state courts must observe to ensure a defendant's competence." *Id.* Under rule 20.01, if a defendant, "due to mental illness or cognitive impairment[,] lacks ability to: (a) rationally consult with counsel; or (b) understand the proceedings or participate in the defense," the defendant is not competent to enter a plea, stand trial, or be sentenced. Minn. R. Crim. P. 20.01, subd. 2. The rule further provides, "If the prosecutor, defense counsel, or the court, at any time, doubts the defendant's competency, the prosecutor or defense counsel must make a motion challenging competency, or the court on its initiative must raise the issue." *Id.*, subd. 3.

[5–7] Epps argues that the district court should have doubted Epps's competence and ordered a competency evaluation on its own initiative. In considering whether a district court erred in not ordering a competency evaluation, the appellate court first determines whether the evidence regarding the defendant's mental state is disputed. *Bonga*, 797 N.W.2d at 720. When, as here, the evidence is undisputed, the appellate court "review[s] the record to determine whether the district court gave 'proper weight to the information suggesting incompetence' when it came to its conclusion that there was not sufficient doubt of the defendant's competency so as to require further inquiry." *Id.* (quoting *State v. Camacho*, 561 N.W.2d 160, 174 (Minn. 1997)). "Unless the aggregate of the evidence in the record creates a sufficient doubt of the defendant's competence, [an appellate court] will not find error in a district court's failure to order a [competency] evaluation." *State v. Hallmark*, 927 N.W.2d 281, 306 (Minn. 2019) (quotations omitted).

[8] Based on our review of the entire record, we discern no error in the district court's decision not to order a competency evaluation on its own initiative. During the guilty-plea hearing, Epps confirmed his understanding of the plea agreement and the rights he was waiving by pleading guilty. He responded appropriately to the questions posed by the district court and his attorney. Epps admitted his guilt of the offense at issue. And the district court found that Epps entered a knowing, intelligent, and voluntary guilty plea. As the district court noted in the postconviction order, the plea hearing "proceeded in a manner similar to many plea hearings."

[9] At sentencing, Epps expressed his unhappiness about the extra day he spent in jail and the district court's sentence, including the district court's imposition of a probationary DANCO. But Epps's remarks showed his understanding of the proceedings and the district court's decisions. The record shows that Epps had rationally consulted with his attorney. During the proceeding, the attorney explained Epps's positions and presented documents to the district court at Epps's request. Although Epps admonished the district court to remain "independent" and complained that he was a "victim of government abuse," these remarks were not unusual for a defendant disappointed by a district court's sentencing decision. Epps's statements and behavior at the sentencing hearing demonstrated his frustration with his case and the district court's decisions. But the record from that hearing did not cast doubt on his competence to proceed.

[10] Epps argues that the district court did not give sufficient weight to the evidence presented during the postconviction hearing, including the evidence that Epps had been found incompetent in 2014 and 2015, and the similarities between his mental state then and at the time of his 2021 guilty-plea and sentencing hearings. We disagree.

Initially, we note that the evidence presented during the postconviction evidentiary hearing was unavailable to the district court during the guilty-plea and sentencing hearings. During those proceedings, the district court properly evaluated Epps's competence to proceed based on Epps's courtroom conduct. *See, e.g.*, *Drope*, 420 U.S. at 180-81, 95 S.Ct. 896 (concluding that the district court was unable to properly assess competence because the district court did not observe the defendant's conduct in the courtroom); *Bonga*, 797 N.W.2d at 720 (concluding that the district court properly assessed competence because the district court observed the defendant's conduct in the courtroom).

[11] We also discern no error in the district court's postconviction decision that, even given the additional evidence presented at the postconviction evidentiary hearing, a competency evaluation was unwarranted. As the district court observed in the order denying postconviction relief, Epps was found competent in the final competency evaluation performed in 2015. Epps's attorney, who was experienced and well versed in the law governing competence, did not believe there was cause to question Epps's competence. His longtime probation officer did not have concerns about his competence. And the experienced prosecutor present at the guilty-plea hearing did not question Epps's competence during that proceeding. None of the evidence presented at the postconviction hearing created sufficient doubt regarding Epps's competence to proceed at the time of his guilty-plea and sentencing hearings.

[12] Epps contends that his behavior described in the 2014 and 2015 evaluations—evaluations that ultimately resulted in findings of incompetence—was similar to the behavior he exhibited at the 2021 guilty-plea and sentencing hearings. He argues that the district court failed to give appropriate weight to the details set forth in the earlier evaluations.

However, in the order denying postconviction relief, the district court expressly compared the behavior discussed in Epps's previous evaluations to his conduct during the 2021 proceedings. The district court stated that the psychologist who evaluated Epps in 2014 had evidence that Epps "believed that transcripts had been fabricated or altered, that various hearings did not happen, that [Epps] recognized [the psychologist] from a different setting, and that there was communication with staff behind [Epps's] back." And the district court determined that "none of this type of evidence was present at the time of the plea hearing and sentencing in this case, nor did [Epps's attorney] observe anything comparable." Contrary to Epps's argument, therefore, the district court meaningfully considered Epps's prior conduct in relation to his conduct in 2021.[1]

Moreover, the district court found that Epps's legal history explained some of the comments that he made during the 2021 guilty-plea and sentencing hearings. The district court observed that "[m]any of [Epps's] cases have resulted in dismissals" and "[o]ther cases have resulted in reversals of [Epps's] convictions," and the district court provided specific examples. Based on Epps's legal history, the district court found "it is not necessarily unreasonable for [Epps] to distrust the court system."

[13] Epps also cites *Drope* for the proposition that a prior finding of incompetence alone can provide reason to doubt a defendant's competence. 420 U.S. at 180, 95 S.Ct. 896 ("[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, *but that even one of these factors standing alone may, in some circumstances, be sufficient.*" (emphasis added)). But, as the Supreme Court explained, "[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, 420 U.S. at 180, 95 S.Ct. 896.

Based on our review of the complete record, we determine that the district court appropriately weighed the evidence and determined that there was no reason to question Epps's competence. Because there was not sufficient doubt as to Epps's competency to warrant further inquiry, the district court did not violate Epps's right to due process by not ordering a competency evaluation on its own initiative.

II. Epps's attorney did not provide ineffective assistance of trial counsel by not investigating Epps's mental-health history and by failing to challenge Epps's competence based on that mental-health history.

Epps argues that the district court erred in denying his postconviction claim of ineffective assistance of trial counsel.

1. Additionally, in support of the argument that the district court failed to appreciate the significance of Epps's prior competency evaluations, he cites a nonprecedential case, *State v. Durschmidt*, A19-0833, 2021 WL 1962880 (Minn. App. May 17, 2021). We conclude that *Durschmidt* is factually distinguishable from the circumstances here, however. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential decisions are not binding but may be considered for their persuasive value).

[14] Under the federal and state constitutions, a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right means "the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (emphasis added).

[15–17] In evaluating a claim of ineffective assistance of counsel, a court applies the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013)). Under that test, a defendant must show that (1) counsel's representation was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "If a claim fails to satisfy one of the *Strickland* requirements, [a court] need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). The ultimate consideration is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052.

[18–20] A petitioner alleging ineffective assistance of counsel must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). An attorney meets the objective reasonableness standard when the attorney "provides [the] client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). Prejudice exists if there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Id.*

[21, 22] Because the *Strickland* test involves mixed questions of law and fact, an appellate court reviews a district court's determinations de novo. *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019). "[T]o determine whether [a defendant's] counsel was ineffective, [a reviewing court] must look to the merits of [the defendant's] underlying claims." *Onyelobi v. State*, 932 N.W.2d 272, 280 (Minn. 2019).

Epps asks us to adopt a new bright-line rule requiring defense counsel to affirmatively investigate a defendant's past mental-health history, and to consider that history in determining whether to challenge the defendant's competence. He argues that his trial attorney's performance was deficient because the attorney failed to investigate his mental-health history, and then failed to request a competency evaluation based on that history.

We decline to adopt Epps's proposed rule for several reasons. First, the proposed rule is in tension with the presumption of reasonableness required by *Strickland*. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). Second, it is inconsistent with rule 20.01 of the criminal procedure rules, which focuses on a defendant's *present* competence. *See* Minn. R. Crim. P. 20.01, subd. 3; *see also Wold v. State*, 430 N.W.2d 171, 178 (Minn. 1988) (explaining that while mental illness may overlap with incompetence, mental illness does not "automatically mandate a finding of incompetence"). Third, Epps's proposed rule would impose a significant burden on defense attorneys, particularly in cases where their clients exhibited no observable signs of mental illness or cognitive impairment.

[23] As noted, rule 20.01 requires a defense attorney to challenge a defendant's competence if the attorney doubts the defendant's competence. Minn. R. Crim. P. 20.01, subd. 3. Extrapolating from this rule, when a reasonably skilled attorney would have challenged a defendant's competence under the circumstances, a defense attorney provides deficient representation by failing to do so. *See Adebayo v. State*, A18-0940, 2019 WL 2415243, at *5 (Minn. App. June 10, 2019), *rev. denied* (Minn. Aug. 20, 2019) (stating that a defense attorney's performance falls below an objective standard of reasonableness "if a reasonably competent attorney would have doubted [the defendant's] competency and requested a competency evaluation under similar circumstances"). Stated otherwise, a defense attorney's failure to challenge a defendant's competence to proceed is deficient representation if a reasonably skilled attorney would have doubted the defendant's competence under the circumstances. This flexible rule, rather than Epps's proposed bright-line rule imposing an affirmative obligation to investigate a defendant's mental health in all cases, incorporates the deference required by *Strickland*, more closely interprets the obligations imposed by rule 20.01, and provides clearer guidance for attorneys.

[24] Applying this rule and reviewing the circumstances here de novo, we conclude that Epps's attorney did not render deficient representation. Based on the record before us, we determine that a reasonably skilled attorney would not have doubted Epps's competence to proceed. As discussed, Epps's conduct at the guilty-plea and sentencing hearings did not provide the attorney with an objective reason to doubt Epps's competence. And none of the evidence presented at the postconviction evidentiary hearing suggested that Epps was not competent when he appeared before the district court in 2021 to plead guilty and to be sentenced. Because a reasonably skilled attorney would not have questioned Epps's competence and would not have requested a competency evaluation, the performance of Epps's attorney was not deficient. Given our determination that the attorney's performance was not deficient, we need not address the second *Strickland* factor—whether Epps was prejudiced by deficient representation. *See Mosley*, 895 N.W.2d at 591.

DECISION

Because the district court did not have reason to doubt Epps's competence, the district court did not violate Epps's constitutional right to due process by not ordering a competency evaluation on its own initiative. And because a reasonably skilled attorney would not have questioned Epps's competence and would not have requested a competency evaluation, Epps's attorney did not deprive Epps of his constitutional right to the effective assistance of trial counsel by failing to challenge Epps's competence. Thus, the district court did not err in denying Epps's petition for postconviction relief.

Affirmed.