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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 25, 1981
vs.	)	1-107 64696
FERDINAND KARL VICK,	)	
Defendant-Appellant.	)	

Appeal from Linn District Court. Ansel J. Chapman.

Defendant appeals from his convictions for attempt to commit murder in violation of section 707.11, The Code, and for carrying a weapon in violation of section 724.4, The Code. AFFIRMED IN PART AND REMANDED.

Jerald W. Kinnamon, of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Ferdinand Karl Vick, appeals from convictions for attempt to commit murder in violation of section 707.11, The Code 1979, and for carrying a weapon in violation of section 724.4, The Code 1979. We affirm in part and remand in part.

Vick was charged with attempting to murder a police officer who had stopped him for a traffic violation. He moved for a psychiatric evaluation to assist in a determination of whether or not he was competent to stand trial. After a diagnostic stay in the Iowa Security Medical Facility, a hearing was held pursuant to section 812.3, The Code 1979, to determine competency. The trial court found Vick competent to stand trial. Vick was found guilty of the weapons offense at the first trial, but the jury was unable to come to an unanimous verdict concerning the attempted murder charge. While awaiting the second trial, Vick made a suicide attempt while in custody. At the second trial Vick, in opposition to his attorneys' advice, sought to reopen the evidence and testify. The trial court allowed this testimony, and the jury found him guilty as charged. Vick appeals both convictions, asserting 1) he was incompetent to stand trial in the first instance; and, 2) a new competency determination should have been ordered sua sponte during the second trial. He also raises a claim of ineffective assistance of counsel.

I. Competency Hearing.

Vick asserts the trial court erred in finding him competent to stand trial following the hearing. Our review of this issue is not de novo, and our inquiry is limited to whether there is support in the record for the competency finding. State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981).

One expert, Dr. Paul Loeffelholtz, stated that regardless of his disorder, Vick could "reasonably assist his attorney in the presentation of his defense." Dr. Loeffelholtz based his opinion on the facts that Vick has a normal I.Q., adequate verbal skills, suffers no seizures, and will cooperate.

We conclude that this expert's opinion constitutes sufficient evidence to uphold the trial court's finding that at the time of the hearing, Vick was competent to stand trial.

II. Second Trial.

Vick further asserts that the trial court erred in failing to order a competency hearing during a point in the second trial when it appeared that Vick was incapacitated

in the manner described in section 812.3, The Code 1979.

Our review of this issue is de novo, and we will look to the totality of the circumstances to determine whether at that point in the second trial a question arose regarding Vick's competency. State v. Kempf, 282 N.W.2d 704, 707 (Iowa 1979). In so doing, we examine all information before the trial court. Id.

Since the trial court judge had also determined Vick to be competent at the original hearing, we presume he was still aware of the evidence presented in that hearing. Therefore, we will initially review the evidence from that hearing which we consider pertinent to our de novo review of this issue and then additionally review the defendant's actions between the time of the competency hearing and his second trial. However, we will first address the dissent's assertion that defendant's concession in his brief that "[a] review of the totality of the circumstances recited above [defendant's suicide attempt, his decision to testify against advise of counsel] must include recognition that testimony at the previous Competency Hearing held some nine months earlier had predicted that exactly such a situation would be likely to arise...[,]" precludes our condiseration of this conduct as new evidence of incompetency. We believe this assertion disregards the obvious fact that trial court rejected this earlier "predictive" testimony from defendant's psychiatrist when it found defendant to be competent. We are not precluded from considering this in light of the additional facts available at the time of the second trial in 1980.

Returning to the merits of the issue before us, we see that the evidence shows Vick was given to obsessive thinking and to relating irrelevant matters to his defense. This obsession and his lack of concentration precluded his ability to make logical and related progressions in recalling relevant events. Dr. Loeffelholtz testified that Vick tended to "ramble" in his communications. He further described Vick as a person who tends to focus on semantic complaints and hypochondriacal-type irrelevant issues, and who is unable to control that tendency.

Dr. Loeffelholtz acknowledged that an attorney's job would be harder having to work with a client who displayed such characteristics, but that he thought an attorney could "shut that off if you tell him," or "could make him come to bear on the issue." The validity of Dr. Loeffelholtz's approach is questionable at best, because Vick's attorney stated that Vick refused to keep "on track," and became irritated when

attempts were made to make him do so.

Defendant's psychiatrist, Dr. Robert W. Shultice, had treated Vick for twelve years. He stated that on a scale of one to ten, with ten being when defendant was most healthy, Vick's mental status at the time of the competency hearing was three. Shultice said Vick was incompetent to stand trial because he had a personality disorder and suffered from severe depression. Since the defendant had these problems, Shultice stated that Vick could not appreciate fully either the consequences of the charge or of the proceedings, and therefore could not assist in his defense.

Prior to the second trial, Vick attempted suicide while in custody. Then, during the second trial, and after the defense had rested, Vick rose in the courtroom and demanded an opportunity to testify. He did this without telling his attorneys and against their advice. When questioned in chambers about his reason for wanting to testify, Vick replied in a mixture of irrelevant and bizarre statements.

We must examine Vick's actions in light of the traditional test given to determine a defendant's competency to stand trial. The test is whether Vick has "sufficient present ability to consult with his lawyer and a reasonable degree of rationality. . ." Dusky v. United States, 362 U.S. 402 (1960).

Furthermore, Vick would not be competent to assist in his own defense unless he could advise his counsel concerning facts and circumstances which lie only within his knowledge and understanding. United States v. Sermon, 228 F. Supp. 972, 977 (W.D. Mo. 1964). This consideration is especially important because a defense is thwarted if the defendant cannot provide needed information. At the heart of Vick's defense was the question whether he intended to commit the crime. Vick possessed the facts and knowledge of his intentions, and his attorneys argue that because of his disorders, they were impeded in their attempt to examine and defend this element of the crime.

As mentioned above, Vick was found competent in the hearing before the first trial. Without more, once competency has been determined, a presumption of competency continues until new and additional information is presented to the court indicating otherwise. State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981). We find that new and additional information is present.

A reasonable person would question Vick's competency knowing the evidence presented at the first hearing, and observing his new and irrational behavior during the

second trial. Under such circumstances, a hearing should have been ordered to determine competency anew. This is a legal question. The trial court's discretion is not involved. State v. Kempf, 282 N.W.2d 704, 706-7 (Iowa 1979).

We, therefore, affirm the first conviction, but remand for a competency hearing pursuant to section 812.3, The Code. If, at this hearing, defendant is found to have been competent as of the time of his second trial in 1980, the second conviction must stand. If defendant is found to have been incompetent, further proceedings shall be governed by section 812.4, The Code.

As to Vick's assertion of ineffective assistance of counsel, we find the record insufficient for a determination of this issue. This issue is preserved for consideration under post-conviction relief procedures, however. State v. Kellogg, 288 N.W.2d 561, 563 (Iowa 1980).

AFFIRMED IN PART AND REMANDED.

Carter, J., dissents joined by Donielson, J.

CARTER, J. (dissenting)

I dissent. The majority correctly concludes that the record of the competency hearing held June 18, 1979 sustains the trial court's finding that defendant was competent at that time to stand trial. It is also correct in stating that once competency of the accused to stand trial has been thus determined, there is a presumption that such competency continues until something indicates to the court that reasonable grounds exist for believing otherwise. I cannot agree that if these principles are accepted (as they should be) defendant is entitled to any relief on this appeal.

Defendant asserts, and the majority finds, that the trial court should have suspected defendant's incompetency at his February, 1980, trial because of information gleaned from the competency hearing held nine months earlier. I submit that an opposite conclusion is much more tenable. Because of what the trial court had learned at the June 1979 competency hearing, it was in a position to validly conclude at the subsequent trial proceeding that the defendant, although given to irrational conduct, was legally competent to stand trial. This circumstance militates against rather than in favor of the necessity of another competency hearing at a later time.

If there were any doubt on this point, it is removed by a significant concession contained in defendant's brief on appeal. In identifying defendant's conduct at the time of the second trial, which, it is claimed, should have alerted the trial court to defendant's potential incompetency, the following statement is made: "A review of the totality of the circumstances recited above must include recognition that testimony at the previous Competency Hearing held some nine months earlier had predicted that exactly such a situation would be likely to arise." (Brief of defendant at page 12.) Because the majority accepts the correctness of the initial finding of competency (as it must under the limited review standard of State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981)), logic dictates that it also recognize that conduct identified as likely to occur in the future cannot be considered to be new evidence of incompetency.

In light of the expert testimony received at the June 1979 competency hearing, and the conclusion made at that time, defendant's situation is similar to that discussed in McCune v. Estelle, 534 F.2d 611, 612 (5th Cir. 1976), where the court states:

> There was abundant evidence that McCune had a lifelong history of severe mental deficiency and bizarre, volatile, irrational behavior, that he had been adjudged feeble-minded, and that he consistently scored at very low levels on mental capacity tests. But, low intelligence or weird behavior can not be equated with mental incompetency to stand trial.

Testimony which seems peculiar to others or which contains descriptions of prior instances of irrational behavior does not necessarily suggest incompetency to stand

trial. United States v. Clark, 617 F.2d 180, 186 (9th Cir. 1980). In the present case this is all the more true in view of the prior determination that defendant was competent in spite of his tendency for bizarre behavior.

Nor is the claimed failure to cooperate with counsel at the second trial sufficient reason for requiring a second competency hearing. Faced with an analogous situation, the court in People v. Woods, 84 Ill. App. 3d 938, 946, 405 N.E.2d 1238, 1244 (1980), states:

> We find no merit to defendant's contention that he was denied due process by the trial court's failure to conduct a hearing on his fitness to stand trial and be sentenced. A fitness hearing is required when a bona fide doubt of defendant's fitness to stand trial or be sentenced is raised. (Ill. Rev.Stat.1977, ch. 38, par. 1005-2-1.) But, no bona fide doubt has been raised in this case. Prior to trial, a psychiatric examination was conducted on defendant and he was found to be fit to stand trial. Before sentencing, another psychiatric examination of defendant was conducted and he was found to be fit to be sentenced. Despite defendant's protestations that his conduct during trial, including his failure to cooperate with the public defender, raises a bona fide doubt of his fitness, we cannot say that his conduct when viewed in light of the [prior] results of the psychiatric examinations was sufficient to raise a bona fide doubt of his fitness. (emphasis supplied.)

If defendant has any remedy as a result of prejudice to his case caused by his trial conduct, it lies elsewhere than a claim of entitlement to a second competency hearing.[1]

Based on the foregoing considerations relating to the issue of competency and the conclusion of the majority (which I share) that there is no basis for presently granting relief on the ground of incompetent counsel, I would affirm the defendant's conviction and sentence on both offenses.[2]

Donielson, J., also joins in this dissent.

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[1] Compare, People v. Superior Court, 51 Cal. App.3d 459, 464, 124 Cal. Rptr. 158, 160 (1975), where the court states: "The trial court seems to have been in some confusion as to the effect of the obvious fact that defendant was a most uncooperative client, insisting on interfering with his counsel's presentations and on interjecting matters that his counsel thought were well ignored. The trial court remarked at length on that subject. But the test, in a . . . [competency] proceeding is competency to cooperate not cooperation. As his appellant counsel points out, other procedures under other provisions of law, apply if a defendant becomes too obstreperous or too uncooperative."

[2] Although not directly bearing on grounds relevant to this dissent, I find the relief ordered by the majority to be entirely impractical and unfair to both the State and the defendant. It will be next to impossible to determine as of the present time whether defendant was competent in February of 1980.