IN THE COURT OF APPEALS OF IOWA

No. 3-128 / 92-811

FILED
MAY 25 1993
CLERK SUPREME COURT
000755

STATE OF IOWA,

Appellee,

vs.

SHERMAN RHEA DUBOIS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Joseph C. Keefe, and Roger F. Peterson, Judges.

DuBois appeals trial court's finding he was competent to stand trial. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Raymond Walton, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

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HAYDEN, J.

In this appeal we address whether Sherman Rhea DuBois was mentally competent to stand trial.

Sherman Rhea DuBois was arrested for second-degree sexual abuse in January 1990 and transported to the Black Hawk County jail. The State was still attempting to collect past competency evaluations and to conduct new ones in November 1990 when DuBois was committed to the Mental Health Institute (MHI) in Independence. DuBois had become a disciplinary problem at jail because he refused to wash or dress and frequently urinated on himself. At MHI, DuBois stabilized and was transferred back to the county jail.

A competency hearing was held September 19, 1991. The district court found DuBois had an IQ in the range of borderline mental retardation. The court noted DuBois had been diagnosed as suffering from atypical psychosis, but his mental illness was well controlled at the time of the competency hearing.

Testimony from two expert witnesses was received at the hearing. The prosecution's expert witness, Dr. Michael Taylor, testified DuBois was capable of understanding the nature and purpose of the proceedings and cooperating with counsel in presenting a defense. The defense expert, Dr. Marvin F. Piburn, Jr., strongly disagreed. Dr. Piburn testified while massive doses of antipsychotic medication might control DuBois's hallucinations, he was still

incapable of rendering assistance because his memory and thought process did not function. Although Dr. Piburn believed DuBois might be able to identify the sexual abuse charge, he felt DuBois could never provide any useful information concerning it. The district court found the defense failed to carry its burden in rebutting the presumption of competency. DuBois was found competent.

In March 1992 the matter was submitted to the court on stipulated evidence. DuBois, however, requested the court reconsider his competency based on the record already made. The district court found DuBois competent and guilty as charged. On April 23, 1992, the court sentenced DuBois to a term not to exceed twenty-five years.

DuBois appeals. He contends our review should be de novo.

Our standard of review in this appeal is set forth in State v. Jackson:

> Contrary to defendant's assertion, we do not review the evidence de novo where a determination of competency has been made below. That is the case only where no hearing is held below and we are examining the propriety of trial court's determination that no hearing was necessary.

State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981) (citation omitted). The record shows a determination of competency has been made in the district court. Our review is limited to whether there is support in the record for the competency finding. Id.

A defendant is not competent to stand trial if he "is suffering from a mental disorder which prevents the

defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3 (1991).

A defendant is initially presumed to be competent. State v. Pederson, 309 N.W.2d 490, 496 (Iowa 1981). Defendant bears the burden to prove incompetence by a preponderance of evidence. Id. Once a defendant is found competent, the presumption of competency continues until contrary evidence is produced. Id. (citation omitted).

The question of competency is for the trier of fact where a conflict in the testimony exists at the competency hearing and defendant challenges the district court's determination on appeal. Jackson, 305 N.W.2d at 425. Dr. Taylor, a psychiatrist, testified on behalf of the State. Dr. Taylor testified at the present time DuBois is capable of understanding the nature and purpose of the proceedings and cooperating with his counsel in presenting a rational defense. Dr. Piburn's evaluation and testimony are not sufficient to overcome the presumption of legal competence. We conclude there is insufficient evidence in the record to rebut the presumption of defendant's competency. Evidence supports a finding DuBois was legally competent to stand trial. DuBois has failed to establish by a preponderance of evidence he was incompetent. We affirm the district court.

AFFIRMED.