IN THE COURT OF APPEALS OF IOWA

No. 5-139 / 94-0450

FILED
MAY 30 1995
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ARTHUR BLACK,

Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak and Glenn E. Pille, Judges.

Black appeals the judgment and sentence, following jury trial, entered upon his conviction of first-degree robbery. **AFFIRMED.**

Barbara J. Diment of Diment Law Office, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and James Ramey and Steve Foritano, Assistant County Attorneys, for appellee.

Heard by Donielson, C.J., and Hayden and Sackett, JJ.

PER CURIAM

At about 10 p.m. on April 4, 1993, Angela Sharkey was locking the door of a Kentucky Fried Chicken store when two African-American men appeared. Sharkey informed the men the store was closed. However, the men pushed their way into the store, displayed a handgun, and told her it was a stickup. One man vaulted over the service counter and went directly to the store's office. The other man walked around the counter. The store manager put the day's receipts into a backpack provided by the men.

Although another employee pushed a silent alarm button, the police arrived after the men left the store. Sharkey described the robbers, and the description was broadcast. Latent shoeprints were recovered from the service counter.

Officer Michael West heard the radio dispatch about the robbery as he began his patrol in a police van that evening. He was in the area of the robbery and saw a taxi cab pull into an apartment complex. He noted two men matching the general description enter the cab. West followed the cab. He noted the passengers were slumped down in the cab's rear seat and they kept looking back at the police van. West called for assistance and stopped the cab. Arthur Black was one of the cab passengers. A backpack full of cash and deposit bags containing Kentucky Fried Chicken receipts was seized from the back seat of the cab. Black informed officers the handgun could be found in a bedroom closet between some t-shirts in his wife's apartment.

Sharkey was brought to the location of the stop and was asked if she could identify either of the men. Sharkey stated that "was them." Black was arrested and transported to the police station where he made a tape recorded statement admitting to his participation in the robbery.

Black was charged with first-degree robbery. Black, by attorney Robert Wright Sr., filed a notice of intent to rely upon a defense of diminished responsibility. Black was ordered to report for a complete psychiatric evaluation pertaining to a drug or alcohol addiction defense. Broadlawns Medical Center performed only a competency evaluation. Attorney Wright filed an application for Black's discharge from the hospital alleging he had completed all chemical testing and no further tests were needed. The application was granted.

Attorney Wright withdrew from representation. Eventually, attorney James Benzoni was appointed. Black then filed a notice of intent to rely upon the defenses of diminished capacity and intoxication. His application to obtain a new medical examination was granted. However, Black failed to complete the scheduled examination at Broadlawns. Also Black did not attend a scheduled examination with a doctor at Lutheran Hospital.

On the morning of trial, Black asked for attorney Benzoni to be replaced. The request was denied and the matter proceeded to trial.

Sharkey identified Black as one of the men who robbed the store. She testified she had been wrong to identify the second man at the cab stop location as she did not get a good look at the second man. An officer testified Black's shoe matched the latent print found on the store service counter.

During trial Black requested a hearing on the voluntariness and admissibility of his taped confession. The motion was denied as untimely. Black presented witnesses who testified about his drug problems since the death of his infant son. After a lengthy discussion between the court, counsel, and Black, he stated on the record he wished to testify. Black's objections to the jury instructions were overruled. The jury found Black guilty as charged. Black's motion for a new trial was denied: the court confirmed its earlier evidentiary rulings and found other matters raised for the first time untimely.

Black now appeals. He argues: (1) he was denied a fair trial because he was not given an objective and complete psychological evaluation; (2) he was denied a fair trial because he was denied counsel and competency evaluation before trial; (3) the trial court erred in instructing the jury; (4) the trial court should not have admitted his confession; and (5) he was denied effective assistance of counsel.

I. <u>Psychological Evaluation</u>.

Defendant claims he did not receive a fair trial because he was allegedly denied an objective and complete psychological examination pertaining to his defenses of

diminished responsibility and intoxication. Our scope of review is for errors at law Iowa R. App. P. 4. To the extent defendant raises a constitutional issue of the right to psychiatric assistance, review is de novo. *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980) (citations omitted).

In support of his argument, defendant cites to the United States Supreme Court decision in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). *Ake* held "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S. Ct. at 1096, 84 L. Ed. 2d at 66.

We hold the trial court more than complied with *Ake*. The trial court ordered an evaluation not once, but twice. The first time defendant told the court the evaluation had been done, although it had not. The second time the court indulged a belated motion that forced another continuance in the trial. When defendant balked at being evaluated at Broadlawns the second time, the trial court apparently approved an appointment with a private doctor at Iowa Lutheran Hospital.

Defendant on his own applied to leave Broadlawns Hospital in September 1993 without a complete examination. He also elected not to be evaluated at Broadlawns in January of 1994 and missed a subsequent appointment with another psychiatrist. Our supreme court has repeatedly held a defendant may not both cause and complain of

error. *Cf. State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992) (admission of evidence); *State v. DeWitt*, 286 N.W.2d 379, 383 (Iowa 1979) (same). Consequently, defendant's claim lacks merit. We affirm the trial court on this issue.

II. Competency to Stand Trial.

Defendant next argues he was denied a fair trial because he was denied a competency evaluation before trial. Our review of this issue is de novo. *State v. Mann*, 512 N.W.2d 528, 531 (Iowa 1994) (citation omitted).

Due process requires a hearing be held to determine the competency of a defendant when there is sufficient doubt of defendant's mental capacity to show a need for further inquiry. *See Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 103, 118 (1975). When "sufficient doubt" exists as to defendant's competency, the trial court has an absolute responsibility to order a hearing sua sponte. Id. at 181, 95 S. Ct. at 908, 43 L. Ed. 2d at 119.

Our legislature has spoken on this matter. Iowa Code section 812.3 (1993) requires a competency hearing if the "record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists." *Mann*, 512 N.W.2d at 531 (citations omitted). The relevant considerations include (1) defendant's apparent irrational behavior; (2) any other demeanor that suggests a competency problem; and (3) any prior medical opinion of which the trial court is aware. *Jones v. State*, 479 N.W.2d 265, 270 (Iowa 1991); *State v. Meyers*, 460

N.W.2d 458, 460 (Iowa 1990); *see also Drope*, 420 U.S. at 180, 95 S. Ct. at 908, 43 L. Ed. 2d at 118.

There is a presumption a defendant is competent to stand trial, *Jones*, 479 N.W.2d at 270 (citing *State v. Pedersen*, 309 N.W.2d 490, 496 (Iowa 1981)), and the burden is on the defendant to prove otherwise. *Jones*, 479 N.W.2d at 270 (citing *Pedersen*, 309 N.W.2d at 496). Defendant has failed to overcome this presumption. We have carefully reviewed the record. There is nothing to suggest defendant behaved irrationally or failed to understand the nature of the proceedings in which he was involved. Furthermore, his evaluation at Broadlawns deemed him competent to stand trial. Under this record, we cannot say "a reasonable person [would] believe a substantial question of the defendant's competency existed" under Iowa Code section 812.3 or under prior case law. *Mann*, 512 N.W.2d at 531 (citations omitted). We affirm the trial court on this issue.

III. Request to Dismiss Appointed Counsel.

Defendant next contends the trial court improperly denied defendant's request to dismiss appointed counsel on the day of trial. Appellate courts accord trial courts broad discretion in considering a defendant's motion for substitute counsel. *State v. Hutchinson*, 341 N.W.2d 33, 42 (Iowa 1983) (citations omitted); *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979) (citations omitted), *cert. denied*, 446 U.S. 921 (1980).

Defendant has the burden to demonstrate sufficient cause to warrant the appointment of substitute counsel. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (citation omitted). The trial court must balance the defendant's right to his counsel of choice versus the public interest in the prompt and efficient administration of justice. Id. (internal quotation omitted).

Appellate courts are slow to find an abuse of discretion when the request for substitute counsel comes at the eleventh hour. *Hutchinson*, 341 N.W.2d at 42 (citations omitted). Trial courts are given considerable latitude in ensuring an orderly trial process. *Id.* "Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Morris v. Slappy*, 461 U.S. 1, 11, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610, 620 (1983).

In this case, the jury panel was waiting for the selection process as defendant made his last-minute request to dismiss his lawyer. More importantly, defendant presented no compelling reason to appoint substitute counsel.

Defendant's difficulty with his attorney was limited to plea negotiations. The disagreement between defendant and counsel did not involve any issue material to the defense. The sole point of contention was sentencing, an issue which would not be decided during the trial. Defendant's disenchantment with counsel's plea bargain performance did not preclude effective representation during the trial. The Sixth

Amendment does not guarantee the right to a "meaningful attorney-client relationship." *Morris*, 461 U.S. at 13, 103 S. Ct. at 1617, 75 L. Ed. 2d at 621 (internal quotation omitted). Accordingly, the trial court did not abuse its discretion in directing defendant to go to trial with Mr. Benzoni as his attorney.

IV. Jury Instructions.

Defendant next asserts the trial court erred in instructing the jury. A trial court's decision on jury instructions will not be disturbed absent an abuse of discretion. *State v. Webb*, 516 N.W 2d 824, 831 (Iowa 1994) (citation omitted). Moreover, any "'error in jury instructions must be prejudicial to warrant reversal.'" *Id.* (quoting *State v. Boley*, 456 N.W.2d 674, 679 (Iowa 1990) (citation omitted), *cert. denied*, 498 U.S. 924 (1990)).

Defendant mentions he preserved error on the question of whether the marshalling instruction should have contained the "beyond a reasonable doubt" language. However, he mounts no argument on appeal as to why the trial court erred by denying his requested revision of Jury Instruction No. 21. Accordingly, defendant abandons this claim on appeal. *See State v. Rosewall*, 239 N.W.2d 171, 173 (Iowa 1976).

Defendant also has waived any complaint regarding the submission of a verdict form for acquittal by reason of diminished responsibility. At trial, defendant objected to the verdict forms only to the extent he argued the lesser-included offenses should be

on separate pages and the greater offense of robbery in the first-degree should not be repeated in each form of the verdict. Defendant's failure to request the words "by reason of diminished responsibility" be added to the verdict form allowing for acquittal precludes him from raising the issue on appeal. *See State v. Jackson*, 259 N.W.2d 796, 799 (Iowa 1977) (defendant may not try one case at trial and another on appeal) (citations omitted). Defendant waived alleged errors regarding the jury instructions.

V. Admission of Defendant's Confession.

Defendant further contends the trial court should not have admitted his confession into evidence. However, defendant waived the opportunity to challenge the voluntariness of his confession by failing to file a timely motion to suppress. *See State v. Hrbek*, 336 N.W.2d 431, 435 (Iowa 1983). Defendant was arraigned May 18, 1993. Any motion to suppress defendant's confession would have to be filed within forty days of the arraignment, or by June 28, 1993. Iowa R. Crim. P. 10(4). Defendant did not challenge the voluntariness of his confession until months later, during the middle of trial.

Defendant did not show good cause for not timely raising the question of voluntariness. *See* Iowa R. Crim. P. 10(3). Defense counsel's only excuse was that he was not appointed to the case until December. However, he did not particularly argue his late appointment constituted good cause under Rule 10(3). *Hrbek*, 336 N.W.2d at 435. His attorney filed an application for leave to file notices of defenses after his

appointment but did not take any action to challenge his client's confession. As such, his belated appointment was not good cause for waiting until midtrial to request a hearing on the voluntariness of defendant's confession. Defendant waived this issue.

VI. Ineffective Assistance of Counsel.

Lastly, defendant argues his trial counsel was ineffective in several instances. Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). There is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We preserve defendant's ineffective assistance of counsel claim for a later proceeding.

The trial court is affirmed on all other issues. Conviction affirmed.

AFFIRMED.