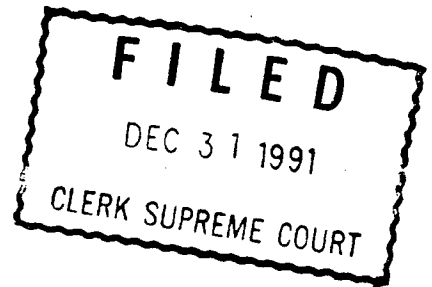


IN THE COURT OF APPEALS OF IOWA

No. 1-411 / 90-1082



STATE OF IOWA,

Appellee,

vs.

RICHARD LEROY PFLEPSSEN,

Appellant.

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Appeal from the Iowa District Court for Benton County,
William L. Thomas, Judge.

Defendant appeals from his conviction, following a jury trial, on two counts of second-degree fraudulent practice, in violation of Iowa Code sections 524.1607, 714.8(10), and 714.10(1) (1989). He asserts (1) that the district court should have held a hearing on the issue of his competency to stand trial, and (2) that he did not voluntarily and intelligently waive his right to testify. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Ann E. Brenden, and Michael Wallace, Assistant Attorneys General; Tammy J. Buckingham, County Attorney; and Greg K. Smith, Student Legal Intern, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden,
JJ.

DONIELSON, J.

The defendant, Richard Leroy Pflepsen, was charged with two counts of second-degree fraudulent practice. He was accused of making false statements on applications for loans at two banks in Vinton. Pflepsen was released on bail, and a jury trial was scheduled.

Pflepsen twice moved for a continuance, once three days before trial and again at the start of trial, asserting that he had a painful dental problem (apparently two infected teeth) for which he needed care. He wanted to make a dental appointment apparently to have the teeth extracted. However, Pflepsen had already seen a dentist and had received prescriptions for penicillin, to control the infection, and Darvon, for pain. As a condition of his bail, he was also taking methadone. Pflepsen's dentist told the district court that no medical emergency existed and that there was absolutely no reason why Pflepsen could not be in court. The district court denied both motions for continuance, and trial was held as scheduled.

Pflepsen continued taking the penicillin, Darvon, and methadone during the three-day trial. On the second day of trial, he began holding an ice pack to his cheek. He explained that his mouth hurt and that the ice pack helped relieve the pain. The State objected to Pflepsen's use of the ice pack claiming it was "an artifice to gain sympathy." Pflepsen responded that he was trying to limit his need for pain medication because he "had a problem with

it." The district court directed Pflepsen to continue taking the pain medication.

Later that afternoon, Pflepsen requested that trial be adjourned early because his tooth was "bothering him greatly" and he wanted to see a dentist on an emergency basis. He said that he had been taking the pain medication, but that it was "affecting his ability to participate in the trial because it affected his concentration and . . . his attention." The district court gave Pflepsen an opportunity to make a dental appointment and adjourned trial early. That evening, he saw a dentist who prescribed penicillin and Darvon.

Trial resumed the next day. At the close of the State's case in chief, a record was made regarding Pflepsen's decision not to testify in his own behalf. Pflepsen's counsel stated that he had spent considerable time with Pflepsen, discussing whether he should testify, because Pflepsen had indicated that he had some trouble concentrating. Pflepsen's counsel also stated that he believed Pflepsen's decision not to testify was based on the factors a defendant would normally consider in deciding whether to testify.

Pflepsen stated that he felt that the pain medication he was taking interfered with his judgment and "talking ability," but he indicated that he probably would not have testified even if he had not been taking the medication. The State noted, without objection from Pflepsen, that

Pflepsen had appeared alert during the trial, that he had consulted with and offered suggestions to his counsel, and that he had taken notes while listening to the witnesses testifying against him. The district court found that Pflepsen's decision not to testify was voluntary and intelligent.

At no time during the trial did Pflepsen or his counsel request that a hearing be held on the matter of his competency to stand trial, and the district court did not hold such a hearing. The jury found defendant guilty on both counts of second-degree fraudulent practice, and the district court sentenced him to a prison term not to exceed five years on each count, the terms to be served concurrently. Pflepsen has appealed.

Because constitutional safeguards are implicated, our standard of review is de novo. State v. Lucas, 323 N.W.2d 228, 233 (Iowa 1983).

I. Competency. We make our own evaluation on the question of the defendant's competency from the totality of the circumstances. State v. Lyon, 293 N.W.2d 8, 12 (Iowa 1980); State v. Kempf, 282 N.W.2d 704, 707 (Iowa 1979). When the defendant's competency at trial is challenged on appeal, we examine the information before the trial court to determine whether it was reasonably apparent that an unresolved question concerning the defendant's competency existed. Kempf, 282 N.W.2d at 707. We must determine whether the record contains grounds sufficient to cause a

reasonable person to find the existence of a substantial question concerning the defendant's competency. Id. at 706.

Iowa Code section 812.3 (1989) provides:

If at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question.

The defendant is initially presumed to be competent to stand trial, and the burden rests on the defendant to prove the contrary by a preponderance of the evidence. State v. Pedersen, 309 N.W.2d 490, 496 (Iowa 1981).

Pflepsen contends that once the trial court became aware that he was having problems concentrating and participating in the trial due to the required medication, the court should have suspended the proceeding and held a competency hearing. We disagree.

First, we are not persuaded that Pflepsen in fact had trouble concentrating. Second, we certainly do not believe Pflepsen has demonstrated that a tooth ache or a controlled dosage of medication affected his concentration to the degree that it rendered him incapable of appreciating the charges against him, understanding the proceedings, or effectively assisting in his defense. Nothing appears in the record before us which would cause a reasonable person to believe a substantial question of Pflepsen's competency existed.

II. Voluntary and Intelligent Waiver of Right to Testify. The United States Supreme Court has made it clear that criminal defendants have a constitutional right to testify on their own behalf. Rock v. Arkansas, 483 U.S. 44, 49-54, 107 S. Ct. 2704, 2708-09, 97 L. Ed. 2d 37, 44 (1987). Only the defendant may waive this fundamental constitutional guarantee. See Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993 (1983); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987).

Generally, a fundamental right will be found to have been waived only if there is record evidence demonstrating "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938). The burden rests on the State to prove by a preponderance of the evidence that the defendant's waiver was knowingly, intelligently and voluntarily made. State v. Vincik, 398 N.W.2d 788, 789 (Iowa 1987).

The record in this case reveals that Pflepsen made a knowing, intelligent, and voluntary waiver of his right to testify. The trial court asked Pflepsen if his attorney had informed him of his right to testify and why he might wish to waive the right. Pflepsen's counsel advised the court that he had spent adequate time on the subject with Pflepsen. Counsel went on to state that "irrespective of [the medication] . . . the decision was made based on the

usual and customary factors one would take into consideration in making such a determination." Pflepsen stated that he probably would not testify, even if he was not on medication, given the conversation he had with his attorney. Pflepsen was apparently alert and the subject was roundly discussed in a colloquy with the court.

Looking at the totality of the circumstances, we are convinced Pflepsen made a knowing, intelligent, and voluntary waiver of his right to testify based upon reasons independent of his usage of medication.

The costs of this appeal are taxed to the defendant.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.