IN THE COURT OF APPEALS OF IOWA

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6-101
85-81

STATE OF IOWA,

Plaintiff-Appellee,

vs.

LARRY L. MCMULLIN,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County (No. CRF 8546) - William L. Thomas, Thomas L. Koehler, and Paul J. Kilburg, Judges.

Defendant appeals his conviction of voluntary manslaughter. He contends the district court erred in refusing to suppress his confession, and in ruling that he was mentally competent to stand trial. **REVERSED.**

Charles L. Harrington, Chief Appellate Defender for the defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General for the plaintiff-appellee and Harold Denton, Assistant Linn County Attorney, for the plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

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SCHLEGEL, J.

In January, 1984, a girl was reported missing from the Linn County Care Facility Psychiatric Unit. On February 23, 1984, her body was found in an abandoned house by detectives investigating her disappearance. They were brought to the house by defendant, another resident of the Linn County Care Facility Psychiatric Unit. Defendant had earlier been taken by the detectives from the care facility and brought to the police station for questions regarding the girl's disappearance. After reading defendant his Miranda rights, and obtaining his signature waiving his right to an attorney, the detectives procured defendant's confession and his willingness to show them where the body was located.

On February 24, 1984, defendant was charged with first degree murder, but the Linn County Attorney later filed a trial information charging defendant with murder in the second degree. Defendant was arraigned on this information on September 4, 1984.

A hearing was held concerning defendant's competency to stand trial and the trial court ruled that defendant failed to prove that he was incompetent. Defendant then requested and received a court-appointed expert to help him understand the nature of the proceedings against him. Subsequently, defendant filed a motion to suppress his inculpatory statements, alleging they were involuntary and obtained in violation of the fifth and fourteenth amendments to the United States Constitution, and Article I, section 9 and 10 of the Iowa Constitution. At the suppression hearing, defendant also orally renewed his motion challenging his competency to stand trial. Both motions were denied by the trial court.

Defendant waived his right to a jury trial and the case proceeded to trial to the court on an amended and substituted information charging defendant with voluntary manslaughter. Pursuant to an agreement and stipulation of the parties, the case was submitted for trial as set forth solely in the minutes of testimony attached to the original trial information and additional minutes subsequently filed in the case. The trial court found defendant guilty of voluntary manslaughter and sentenced him to a term not to exceed ten years. Defendant appeals alleging his confession should have been suppressed and that he was not competent to stand trial.

I. Scope of Review. Our standard of review regarding the suppression of a confession was recently stated in State v. Davidson, 340 N.W.2d 770, 77 (Iowa 1983), wherein the supreme court stated:

> "(This court will) review the evidence de novo and make an independent evaluation under the totality of circumstances to determine whether the waiver and confession were voluntary. State v. Hahn, 259 N.W.2d 753, 758 (Iowa 1977). The burden of proof is on the State to prove by a preponderance of the evidence that defendant's waiver, Fryer v. State, 325 N.W.2d 400, 409 (Iowa 1982), and confession, State v. Holderness, 301 N.W.2d 733, 739 (Iowa 1981), were made knowingly, voluntarily, and intelligently."

The State must prove by a preponderance of evidence that the defendant (1) understood the right and (2) intentionally relinquished it. State v. Jackson, 380 N.W.2d 420, 424 (Iowa 1986). The right does not depend on a request by the defendant, and courts indulge every reasonable presumption against waiver. Id.

II. Suppression of Statements.

Despite being 20 years old at the time of his arrest, defendant has a very limited ability to understand oral and written language. The State's expert,

Dr. Frederickson, staff psychiatrist at the Iowa Security Medical Facility at Oakdale, testified that defendant has a verbal I.Q. of 62, a performance I.Q. of 82, and a full scale I.Q. of 69. These figures put defendant at the high end of the mild mental retardation range. One of the defendant's experts, Dr. Vernon Varner, a clinical psychiatrist, testified that defendant functions much lower than his I.Q. would indicate. Dr. Varner, along with another clinical psychologist, Dr. Gersh, believed that defendant functioned more closely to the I.Q. level of 50. Both defendant's experts concluded that defendant has organic brain damage. In Dr. Gersh's opinion, defendant is at approximately the first grade level in terms of reading comprehension. A special education teacher who worked with defendant in an attempt to help him understand the judicial process, testified that defendant is unable to comprehend words of more than four or five letters. The Care Facility Program director, where defendant attended, stated that defendant is very motivated yet retained very little of what he learned in the classroom. Defendant knows the first names of the members of his family but does not know their middle names, or that his father's name, Bob, is also Robert. Both of defendant's psychiatrists, the special education teacher and the program director testified that defendant is highly suggestible in that he typically agrees or answers "yes" to oral questions he does not understand. Dr. Gersh further testified that because of defendant's "almost automatic" response of "yes", the only way to really tell if he understood anything was to have him restate it in his own words. This fact was corroborated by the program director at the care facility.

When the detectives arrived at the care facility to transport defendant to the police station, they were told by the director that they would have to explain things well to defendant. However, during the drive to the police department, the officers concluded defendant was of "average" intelligence.

At the department, defendant was taken to the interrogation room of the detective bureau where he was advised of his constitutional rights. Defendant told the detectives that he could not read very well, so one of the detectives read him his Miranda rights, slowly, pausing after each paragraph to make sure defendant understood. Defendant indicated his understanding of each paragraph by saying "yes" in response to the officer's inquiry. Other than saying "yes", defendant's remarks during the reading of the rights form were limited to his statements that his father had an attorney and that he had witnessed Miranda rights procedures on television. Approximately 10 to 15 minutes were spent advising defendant of his rights. Neither detective could recall defining any terms in the waiver form and neither officer claimed to have offered any explanation of the form to defendant.

After defendant signed the form, he was questioned about the girl's death. Approximately an hour later, defendant began to cry and confessed. The detectives then requested that defendant show them the house where the girl died. He then took them to the house and told them where the act had taken place. They returned to the detective bureau where a written confession was typed and signed by defendant. The secretary who typed the statement stated that the text of the statement was dictated by the detectives but that some of the words were defendant's. Up until this time, defendant was not offered an opportunity to contact his parents or the program director at the care facility. After he had given the written statement and was being booked, he was allowed to call his parents upon his request.

Dr. Frederickson, the State's psychiatrist, testified, in effect, that defendant could comprehend the meaning and effect of his Miranda rights as they were presented by the detectives. The State argues on appeal that Dr. Frederickson's testimony should be given greater weight because he observed

defendant at Anamosa for a much longer period of time than the relatively short time spent by defendant's experts when they interviewed defendant. However, the one individual who spent the most time with defendant was the program director at the care facility. The director repeatedly supported the conclusions of defendant's experts in that he provided examples of defendant's inability to grasp the meaning of anything other than very short simple instructions.

Defendant's limited mental capabilities are very similar to those possessed by the defendant in State v. Jackson, 380 N.W.2d 420, 423 (Iowa 1986). There the supreme court said, "Considering defendant's low intelligence and difficulty in comprehending language of even average clarity, it is impossible to believe he understood and made a knowing and intelligent decision to give up the right to counsel in submitting to the interrogation." Id. at 425. Likewise, we conclude that, in this case, defendant could not have understood his rights when they were read to him by the detectives. Therefore, he did not make a knowing and intelligent decision to waive his right to counsel. The inculpatory statements made at this interrogation should have been suppressed.

II. Competency. Iowa Code section 812.3 (1983) provides as follows:

> If at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her 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.

It is well-settled that "(a) criminal trial of a person who is incompetent to undergo trial deprives him of due process of law." Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975); accord, State v. Pedersen, 309 N.W. 2d 490, 495 (Iowa 1981); State v. Lyon, 293 N.W.2d 8, 12 (Iowa 1980).

Therefore this court's review of the competency question is de novo. State v. Davidson, 340 N.W. 2d 770, 773 (Iowa 1983). A defendant is initially presumed to be competent and the burden to establish the contrary should be on him; if the evidence is in equipois the presumption should prevail. State v. Pedersen, 309 N.W.2d at 496.

Defendant provided the testimony of two psychiatrists who administered and interpreted the results of numerous tests. These examinations included the revised WAIS, Weschler Memory Scale, Benton Visual Retention Test Facial Recognition Test, Controlled Oral Word Association Test, Carter Background Interference Procedure for the Bender-Gestault Test, Wide Range Acievement Test, and Comprehension of Miranda Rights Test. Based on these tests and interviews, the psychiatrists, paticularly Dr. Gersh, concluded that defendant was incompetent to stand trial.

The State, on the other hand, administered the MMPI personality test and the WAIS test to defendant and concluded that he was competent to stand trial. However, defendant's experts severely criticized the results of these tests because the subject needs a sixth grade reading ability to comprehend the questions. When asked, the State's expert conceded that defendant didn't have the vocabulary to understand the questions.

Dr. Gersh was initially retained to help defendant understand the judicial process. After several sessions, and numerous test results, Dr. Gersh concluded that defendant would not be able to follow courtroom conversation and could not assist his attorney in jury selection or in evaluating the testimony of prosecution witnesses. Defendant then acquired the services of Dana Berry, a special education teacher, to also help defendant understand the courtroom procedures. After fifteen one-half-hour sessions, using visual aids and constant repetition, she was able to get defendant to recognize a few key words but

she did not believe he understood them. Ms. Berry described his overall understanding of the proceedings as follows:

> I think Larry learned what a courtroom was and he learned that the judge was the boss. That was the only way I could get him to understand what a judge was and what his position was. He was the boss. And he would — He would know that the jury was going to be there and I would ask him again, what is a jury, and I would have a long pause. And Larry's technique is to wait and hope that you will prompt him . . . .
> But I don't teach that way, so I would just let him wait and eventually he would just say, I don't know, or if he thought I was pressing him, he would just fall apart. He would start to cry. And so I'd say, okay, Larry. Calm down. Now, let's go back. And we would again back up from where we were going.
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> But I don't think Larry understands as you and I understand what his position is and how it will affect him in the long run. He does not comprehend tomorrow. He does not comprehend a week from now.

Based upon the testimony of defendant's experts and the special education teacher, we conclude that defendant is suffering from a mental disorder which prevents him from understanding the proceedings, or assisting effectively in his defense. The trial court erred in declaring defendant competent to stand trial.

Based upon our de novo review, we hold the defendant did not knowingly and voluntarily waive his right to an attorney and that he is incompetent to stand trial. Therefore, the trial court's decisions to allow his inculpatory statements into evidence, and to require defendant to stand trial are reversed. A new trial shall be ordered only at such time defendant is shown to be competent to stand trial.

REVERSED.