IN THE COURT OF APPEALS OF IOWA

No. 2-226 / 91-1191

FILED
AUG 27 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DAVID ALLEN SHELDON,

Appellant.

Appeal from the Iowa District Court for Lee County, David Fahey, Judge.

Sheldon appeals his conviction of nine counts of burglary in the second-degree on due process grounds. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Ann E. Brenden, Assistant Attorney General; and Michael P. Short, County Attorney, for appellee.

Heard by Schlegel, P.J., and Habhab, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

FACTS

On February 9, 1991, the officers from the Keokuk Police Department went to the defendant's home. The officers were investigating several burglaries and had been informed that stolen items could be found at the defendant's apartment.

The officers took the defendant to the police station and advised him of his Miranda rights. When asked about the burglaries, the defendant admitted to breaking into a substantial number of homes and vehicles. The police obtained the defendant's permission to search his apartment without a search warrant. The police recovered a number of items stolen from various houses in town.

On February 26, 1991, the State charged the defendant with eleven counts of burglary in the second degree.

On March 5, 1991, the defendant filed an application for a competency evaluation. While incarcerated, he threatened to commit suicide and injure himself. The application also indicated he destroyed legal correspondence and legal documents provided to him concerning the case. The defendant's attorney indicated the defendant may not understand the nature of the proceedings against him. The defendant also laughed inappropriately during court proceedings. The district court granted the application and ordered the defendant be evaluated by the Iowa Medical and Classification Center.

On April 1, 1991, a psychiatrist wrote a letter finding the defendant fit to stand trial.

On April 30, 1991, the State dismissed one of the counts against the defendant. At the same time, the defendant's counsel notified the district court of the defendant's desire to enter a guilty plea. When asked about the plea, the defendant refused to talk to the district court and asserted he could not hear the judge. Counsel had no trouble hearing the judge. Since the defendant refused to affirmatively tell the district court he wanted to plead guilty, the court rejected the guilty pleas and allowed the matter to stand for trial on April 30, 1991.

During trial, the defendant testified he was depressed when the officers questioned him and he was not concerned with his fate when he confessed to the burglaries. He testified he was "pretty well clear-headed" at the time of the trial and he denied committing the burglaries. He laughed and giggled during the trial. On May 1, 1991, the jury returned a verdict of guilty in nine of the ten burglary charges.

On May 16, 1991, the defendant filed a motion for a new trial. He argued the guilty verdicts returned by the jury are contrary to the law and evidence presented at trial. The district court denied his motion.

On July 10, 1991, the district court sentenced the defendant to a term of ten years on each of the nine

burglary counts. The district court ordered counts I, II, and III to run concurrently; counts IV, VI, and VII to run concurrently; and counts VIII, IX, and X to run concurrently, and the court ordered the three sets of concurrent sentences to run consecutively.

The defendant filed this appeal. We affirm.

ANALYSIS

The issue of defendant's competency implicates constitutional safeguards, therefore, our scope of review on appeal is de novo based on the totality of the circumstances. State v. Pedersen, 309 N.W.2d 490, 496 (Iowa 1981); State v. Kempf, 282 N.W.2d 704, 707 (Iowa 1979).

The defendant contends he was denied due process by the district court's failure to grant him a competency hearing sua sponte before rejecting his proffered guilty plea and starting his trial. We disagree.

The State argues we should not even consider the defendant's claim because error was not preserved on the competency issue. It maintains the defendant and his trial counsel chose not to pursue the issue at trial because a psychiatrist evaluated the defendant within one month of the trial and subsequently determined the defendant was competent to stand trial. Although we find the State's argument persuasive, we will consider the defendant's appeal because the facts are somewhat unclear and the

courts have previously held if the defendant was incompetent he was in no position to preserve error. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

Iowa Code section 812.3 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 proceeding must be suspended and a hearing had upon that question.

Iowa Code § 812.3 (1991). This section imposes an independent obligation on the district court to suspend criminal proceedings if the defendant's competency is questioned. Because of the district court's independent obligation, the defendant's failure to request a competency hearing prior to, or during, trial does not preclude defendant from raising the issue of his competency on appeal. Kempf, 282 N.W.2d at 706; Carstens v. Rans, 210 N.W.2d 663, 665 (Iowa 1973).

"When the defendant's competency during trial court proceedings is challenged on appeal, our task is to examine the information before the trial court to determine if at the relevant time an unresolved question of the defendant's competency reasonably appeared." Kempf, 282 N.W.2d at 707. A competency hearing was required if the "record contain[ed] information from which a reasonable person would believe a substantial question of the defendant's competency exists." Id. at 706. Relevant factors include "(1) presence of [defendant's] irrational behavior, (2)

other demeanor at trial which suggests a competency problem, and (3) medical evidence of which the trial court is aware concerning defendant's mental competency." State v. Myers, 460 N.W.2d 458, 460 (Iowa 1990)(citing State v. Lucas, 323 N.W.2d 228, 232-33 (Iowa 1982)). We note, the mere presence of a mental illness does not equate to incompetency. Hickey v. Dist. Court of Kossuth County, 174 N.W.2d 406, 410 (Iowa 1970) (citation omitted).

The trial court was presented with a very recent medical opinion that the defendant was in fact competent to stand trial. In a statement dated April 1, 1991, Dr. Lara indicated the defendant "does not have any mental condition which prevents him from appreciating his charges, from understanding the proceedings as explained to him, and from rationally cooperating with his counsel, should he choose to." Moreover, the defendant's behavior at the plea proceedings was fully consistent with Dr. Lara's observation that the defendant is "quite contrary," and that "[h]is seeming attempts at self-destruction and open distain of the court are from sheer spite." Finally, the defendant's behavior at trial, which took place on the same day as his aborted plea proceeding, was fully coherent. He testified at great length, articulately, and understandably, in his own defense. Nothing in the defendant's trial testimony or behavior supports his claim the district court should have stopped the proceedings to conduct a competency hearing. In fact, quite the opposite appeared.

The defendant was represented by counsel throughout who raised no question of the defendant's competency. It is extremely significant that the defendant's counsel chose not to raise this issue. It is even more significant that counsel clearly contemplated raising the issue and decided against doing so. This represents, time, thought, and the exercise of professional judgment on the competency issue. Counsel's decision to forego the hearing is indicative of the weakness of this claim.

After considering the factors previously outlined, we are unable to conclude the circumstances, either individually or in combination, raised enough doubt concerning the defendant's competency that the district court was required to order a competency hearing sua sponte.

We find no basis for disturbing the defendant's conviction. After considering all issues presented, we affirm the district court.

Costs of this appeal are taxed to the appellant.

AFFIRMED.