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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

DAVID ALLEN LONG aka DAVID
ALLEN HOOPS,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Defendant-Appellee.

Filed October 21, 1980

0-225
63465

Appeal from Warren District Court - M. C. Herrick, Judge.

Defendant appeals from judgment entered following his plea of guilty to charges of escape and being an habitual offender asserting that because he was without the assistance of counsel when he entered the plea, trial court erred in overruling his motion to dismiss the charges or in not permitting him to withdraw his plea.

AFFIRMED.

Robert A. Gottschald, Indianola, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendant appeals from judgment entered following his plea of guilty to charges of escape, in violation of section 719.4, supplement to the Code 1977, and being an habitual offender, contrary to section 902.8, supplement to the Code 1977. Defendant argues that because he was without the assistance of counsel when he entered the guilty plea, trial court erred in overruling his motion to dismiss the charge or in not permitting him to withdraw his plea of guilty. We affirm.

On February 20, 1979, the defendant appeared with counsel and entered a guilty plea to criminal cause no. 6128, charging him with violations of section 719.4 (escape) and section 902.8 (habitual offender), supplement to the Code 1977. Prior to this escape, defendant had been in custody awaiting trial on no. 5906, charging him with second degree theft and being an habitual offender. The county attorney indicated at the February 20th hearing that in return for a guilty plea to no. 6128, the State would recommend dismissal of no. 5906.

Prior to sentencing on the above charges, defendant escaped a second time from the Warren County Jail and was charged in cause no. 6193 on February 26, 1979, with violations of section 719.4 (escape) and section 902.8 (habitual offender). Defendant, without assistance of counsel, entered a guilty plea to both charges.

Defendant appeared with counsel for sentencing on both charges on March 5, 1979. Counsel moved to dismiss the charges in no. 6193, or in the alternative to withdraw the guilty plea, on the basis that defendant was denied his right to assistance of counsel. Trial court overruled the motion and entered a judgment imposing the following sentences:

1. No. 6128
 - a. Escape - 5 years
 - b. Habitual criminal - 15 years, with a three year minimum
2. No. 6193
 - a. Escape - 5 years, consecutive with escape in no. 6128
 - b. Habitual Criminal - 15 years, concurrent with habitual criminal sentence in 6128

This appeal followed.

I. Scope of Review. This is an action at law; our review is on assigned error only. Iowa R. App. P. 4. Defendant challenges his competency to make a plea of guilty without the assistance of counsel. Our task on review is to determine from the information before the trial court whether, at the time the guilty plea was made without counsel in no. 6193, an unresolved question concerning defendant's competency reasonably appeared thereby rendering his waiver of counsel invalid. State v. Kempf,

282 N.W.2d 704, 707 (Iowa 1979). Because constitutional safeguards are implicated, we make our own evaluation of the totality of circumstances by reviewing the record *de novo*. *Id.*

II. Competency to Waive Right to Assistance of Counsel. Defendant alleges he was denied his right to assistance of counsel in no. 6193 because he lacked competency to make an effective waiver. In support of his argument, defendant notes that his counsel at the guilty plea hearing in no. 6128 only three days earlier had requested a psychiatric evaluation at Oakdale (Iowa Medical Security Facility). The court denied this request but indicated it would consider recommending an early psychiatric evaluation after sentencing. During the plea hearing on no. 6193, defendant told the court that he had been in jail for five months and it was starting to drive him crazy. Defendant maintains the record thus suggests a question as to his mental competence which should have been resolved prior to acceptance of his guilty plea (made without the assistance of counsel) in no. 6193.

We begin our analysis with section 812.3, supplement to the Code 1977, which "...requires a hearing on the issue of competency when the record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists. The question is a legal one. Trial court discretion is not involved." *Kempf*, 282 N.W.2d at 706-07. We turn then to our examination of the evidence.

At the time of entry of the guilty plea in no. 6193, defendant was twenty-seven years old and had a high school education about which the court inquired. Information available to trial court showed defendant had never had a mental evaluation.

At the arraignment on no. 6128, defense counsel stated his opinion that a psychiatric evaluation of defendant would be beneficial in making the presentence investigation more complete. Counsel further stated that defendant felt the evaluation might be able to identify certain problems which could be helped through clinical care. None of these problems were specified. Defense counsel, in his discussion before the court, did not indicate in any way that the evaluation was needed due to any mental incapacity of defendant to proceed through the criminal process. The court denied defense counsel's request for an Oakdale evaluation prior to sentencing, stating it would not be helpful or necessary.

Trial court in both no. 6128 and no. 6193 conducted the regular Sisco-Brainard interrogation through questions to which defendant made appropriate responses, generally "yes" or "no" or short responses regarding his understanding and intentions.

The following colloquy took place during the plea hearing on no. 6193:

THE COURT: And this would be consecutive to the sentence that you have coming up here on a previous plea. You understand that?

THE DEFENDANT: Yes, I do.

* * *

THE COURT: Now do you want the Court to appoint an attorney to represent you in this matter?

THE DEFENDANT: Your Honor, I would like to be able to plead guilty and be sentenced today where I could go ahead and start this, if possible.

THE COURT: Do you want to waive your right to counsel?

THE DEFENDANT: Yes.

THE COURT: And you want to waive any further time to consider it further before entering a plea?

THE DEFENDANT: Yes, Sir.

* * *

THE DEFENDANT: Your Honor—

THE COURT: Yes.

THE DEFENDANT: --I am sorry to interrupt. Would I be able to go ahead and just waive the rights for a pre-sentence [sic] investigation so I could go ahead and start this three years?

THE COURT: Well, you will be given credit for the time in jail here, but the law requires the Court to get a pre-sentence [sic] investigation made and have a report at the time of sentencing, so I don't feel that I should waive that, Mr. Long, but, as I say you will be given credit for the time in jail that you have already served and the time that you serve awaiting for the sentence.

THE DEFENDANT: That is why I wanted to plead guilty, so I could get out of here. I have been up here five months now and it is starting to drive me crazy there.

THE COURT: Well, the Court would have no objections to trying to get this pre-sentence [sic] investigation expedited if we can.

At defendant's sentencing on no. 6128 and no. 6193 on March 5, 1979, defense counsel spoke at length against sentencing on that date because the presentence investigation was incomplete. Counsel also asked the court to sua sponte dismiss the habitual offender charge connected with the first escape (no. 6128). He further stated he felt it was unfair that defendant was allowed to plead guilty to no. 6193 without counsel's assistance, particularly since defendant would be facing thirty years in custody. Defense counsel renewed his earlier request for evaluation of defendant's

psychiatric competence, stating he believed no person could logically conclude it to be in defendant's best interest to plead guilty to such a lengthy sentence when defendant could do no worse then to go through a jury trial. Counsel also indicated defendant was not advised of his options, nor was he (counsel) called to the hearing even though he had represented defendant for six to eight months. Counsel then reviewed the sentencing options.

The court, again, inquired into the voluntariness of defendant's plea on no. 6193.

THE COURT: Excuse me. Mr. Long, when you appeared here last week, I think it was February the 26th, you requested the Court to accept your plea of guilty and waived your right to counsel. Do you recall that?

THE DEFENDANT: Yes.

THE COURT: And you also asked the Court to move up the date for sentence so that you could get out of the Warren County Jail.

THE DEFENDANT: Yes, I did.

THE COURT: And is that still your desire? To have sentence pronounced today?

THE DEFENDANT: (No response.)

THE COURT: In other words, do you want some additional pre-sentence [sic] investigation made and the sentence moved back to the 26th of March, which would be the next date that I will be here? I am going to be absent for the next two weeks.

THE DEFENDANT: Your Honor, I would like to wait.

THE COURT: You would like to what?

THE DEFENDANT: Wait for sentencing.

THE COURT: Waive additional time, you mean?

THE DEFENDANT: No. I would like to have additional time.

* * *

THE COURT: Stay in the Warren County Jail until the 26th of March?

THE DEFENDANT: Yes, sir.

After the court determined that the defendant's request to wait was based on the allegedly incomplete presentence investigation (information about defendant's juvenile record was not included), the court denied defendant's request, proceeded with pronouncing judgment on no. 6128 and 6193, and then stated:

THE COURT: . . . I believe you preferred the penitentiary rather than the reformatory, Mr. Long; is that correct?

THE DEFENDANT: Yes, Sir.

In sum, the record shows a twenty-seven year old man with considerable experience in the legal system who preferred incarceration at the Iowa State Penitentiary over the Warren County Jail. Also, we note that the events leading to the charges in no. 6193 occurred within a short time of no. 6128. The court's opinion regarding defendant's competency in no. 6128 certainly could have affected his decision to accept defendant's plea in no. 6193. Significantly, defense counsel representing defendant on no. 6128 did not move for a competency determination. See State v. Stoddard, 180 N.W.2d 448, 451 (Iowa 1970). But even then, a request for psychiatric evaluation is alone insufficient to establish incompetency, State v. Johnson, 234 N.W.2d 878, 880 (Iowa 1975); likewise, defense counsel's disagreement with defendant's decision to plead guilty does not suggest defendant's incompetency. State v. Thomas, 205 N.W.2d 717, 723 (Iowa 1973).¹

We conclude from the record it does not "reasonably appear that defendant suffered a mental disorder preventing him from appreciating the charge, [or] understanding the proceedings. . . ." Kempf, 282 N.W.2d at 710. We hold the factors presented by defendant, when viewed together with those we have cited in our review of the record, are not sufficient to cause a reasonable person to conclude a substantial question of defendant's competency to plead guilty existed. Trial court properly accepted defendant's plea in no. 6193.

AFFIRMED.

All judges concur except Oxberger, C.J., and Snell, J., who dissent.

¹ In Thomas, on the day before trial, defendant appeared before the court stating his desire to plead guilty. His attorney vigorously objected, recommending that the court reject the plea. Trial court accepted the plea and was affirmed on appeal. The supreme court stated that the decision on how to plead is defendant's and that the fact defendant did not agree with counsel did not suggest incompetency.

OXBERGER, C. J. (dissenting)

I dissent.

At the arraignment on the second set of escape and habitual offender charges, Long was understandably under great psychological pressure and confusion. He had already been incarcerated for five months on charges which had once gone to trial resulting in a hung jury. At the time of his first escape, he faced another trial on those charges. Three days before the second escape, he recognized psychological difficulties and requested evaluation to receive proper treatment. The judge was aware of these facts when Long again faced him without counsel on new escape charges. The record reveals the accused to be preoccupied with his desire to "get out of here". The record does not reveal precautionary measures taken by the court to assure the voluntary, intelligent waiver of counsel rights or guilty plea in absence of counsel. The record reveals Long's confusion with the sentence to be applied. He asked for speedy disposition so he could start "this three years," where, in fact, the State was seeking an additional 20 years for the charges.

Under the circumstances, the court erred in refusing to allow withdrawal of the guilty pleas. Although realizing the desire for judicial speed and economy, we must not condone this rubber-stamp version when clearly outweighed by the intrusion on a person's protected rights.

Snell, J., joins in this dissent.