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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 20, 1988 259

vs.)

JOHN H. NELSON,) 8-32
87-106

Defendant-Appellant.)

Appeal from the Iowa District Court for Muscatine County (No. 1625-1085), J. L. Burns and David J. Sohr, Judges.

Defendant appeals from the convictions which resulted after he entered guilty pleas to one charge of second-degree murder and one charge of involuntary manslaughter. **REVERSED AND REMANDED.**

Charles L. Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxanne Ryan and Pamela Greenman Dahl, Assistant Attorneys General; and Stephen J. Petersen, Muscatine County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

Defendant appeals from the convictions which resulted after he entered guilty pleas to one charge of second-degree murder and one charge of involuntary manslaughter. He contends the district court erred in finding him competent to participate in judicial proceedings. We reverse and remand for further proceedings consistent with this opinion.

In October 1985 the defendant was accused of killing his mother and a woman he believed to be his mother's lesbian lover. The defendant was charged with two counts of first-degree murder.

The defendant's attorney moved to suspend the criminal proceeding on the ground the defendant was mentally incompetent to stand trial. After psychiatric examinations, the district court ruled in April 1986 that the defendant was incompetent to stand trial at that time. However, after a second competency hearing in November 1986, the district court ruled that the defendant was at that time competent to stand trial. The defendant subsequently entered guilty pleas to one count of second-degree murder and one count of involuntary manslaughter. He has now appealed from the resulting convictions.

An accused "may not be tried or convicted while he is incompetent to stand trial or assist in his own defense. To deprive him of this right is to deprive him of due process and a fair trial." State v. Emerson, 375 N.W.2d 256, 261 (Iowa 1985), citing State v. Lyon, 293 N.W.2d 8, 12 (Iowa 1980)). To establish competence, it must be shown that "defendant appreciates the charge, understands the proceedings, and can assist effectively in the defense." Id., citing Lyon, 293 N.W.2d at 9.

Our scope of review is de novo. Id. Because constitutional safeguards are implicated, we make our own evaluation of the totality of the circumstances. Id. We examine the evidence before the trial court to determine if an unresolved

question of the defendant's competency reasonably appeared. Id. But see State v. Aswegan, 331 N.W.2d 93, 95 (Iowa 1983) (trial court's denial of defendant's request for a pretrial competency hearing constitutes due process challenge requiring de novo review). We consider the pretrial proceedings and the trial evidence. State v. Pedersen, 309 N.W.2d 490, 495 (Iowa 1981).

The appropriate statutes to consider on the issue of competency are set out as follows:

> **812.3 Mental incompetency of accused.**
> 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.
>
> **812.4 Cessation of criminal prosecution.**
> If, upon hearing conducted by the court, the accused is found to be incapacitated in the manner described in section 812.3, no further proceedings shall be taken under the complaint or indictment until the accused's capacity is restored, and, if the accused's release will endanger the public peace or safety, the court must order the accused committed to the custody of the department of human services.
>
> **812.5 Effect of restoration of mental capacity.**
> If the accused is committed to the department of human services, after the expiration of a period not to exceed six months, the court shall upon hearing review the confinement and determine whether there is a substantial probability the prisoner will regain capacity within a reasonable time. If not, the state shall be directed to institute civil commitment proceedings. . . .

A defendant is presumed to be competent, and the burden to establish the contrary is on him. Pedersen, 309 N.W.2d at 496. In the case at hand the district court found defendant to be incompetent at the first competency hearing; thus, the burden shifted to the State to prove defendant's competency at the second competency hearing. See State v. Thomas, 205 N.W.2d 717, 721 (Iowa 1973). The fact that defendant pleaded guilty does not waive his right to contest his competency on appeal. State v. Walton, 228 N.W.2d 21, 24 (Iowa 1975). Nor does defendant's failure to file a motion in arrest of judgment bar his right

to assert the issue of competency. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

We have reviewed the district court's findings. We have also reviewed the transcripts of testimony from both the first and second competency hearings, as well as the transcript of defendant's plea-taking. We have examined the various exhibits in this case, consisting of many filings, pleadings and letters drafted by defendant, and the medical reports submitted on defendant's condition. Based on the totality of the circumstances, we find that an unresolved reasonable doubt existed as to defendant's competence to plead guilty at the time the district court accepted his plea.

Defendant's history reveals that he was hospitalized at the Mount Pleasant Mental Health Institute in 1959 for three months and again from September 1961 until April 1963. He was diagnosed at those times as having "schizophrenic reaction, paranoid type." The medical reports at that time reveal that defendant talked about his mother being a lesbian and living with a half-man and half-woman; that defendant was obviously psychotic and talked of a minister who tried to make love to him like a woman; and that he had a special mission with something to do with the work of Christ. One report referred to defendant's extremely poor judgment and insight; that defendant showed a great deal of unrealistic thinking with ideas of grandeur and hostility to society and his family; and that his imagination was quite bizarre and lacking reality. While defendant was in University Psychiatric Hospital in Iowa City for a brief period during this time, he received twelve electroshock treatments.

At the first competency hearing held in April 1986, Dr. Varner, a psychiatrist, testified defendant was a paranoid schizophrenic who was severely psychotic; he felt defendant was not competent to represent himself (which defendant desired) or assist counsel in his defense. Dr. Gersh, a clinical psycholo-

gist, held a similar opinion. Other witnesses testified defendant displayed confusion, delusions, and hallucinations. One psychiatrist, Dr. Frederickson, testified that although defendant possessed paranoid schizophrenia, this condition was not chronic and defendant could understand the charges and assist in his defense. Defendant's testimony at the first competency hearing consisted of illogical, unresponsive, rambling, and inappropriate answers and evidenced the fact defendant continued to suffer from delusions.

The court file contained many documents filed by the defendant pro se. Among them was "Defendants Findings of Depones" which included the following:

> 2. Semi Coma
>
> It is evident I have been without a Lawyer since befor the hanging, and could find no Lawyer to take my case, due to semi coma; and the facts of the hanging (one dam lot of years). . . .
>
> * * *
>
> 5. Semi Coma has not been ruled on Fairly, (Dr. on channel 12 T.V., said during a Flash Back;) "The very happening is enough to replenish the mind completely; what then? Of that very issue was clouded. . . .
>
> 6. I do not think yet today it would take very much fore me to get on a laughing spree, about the milking machine. . . .
>
> * * *
>
> 8. The addition of a (Hermophendite, Lesbian); Born Monster; Born by Man—operation; Grew back "Hermophendite"; a Lesbian in each of them intoto;
>
> 9. I do not think a Jurum Dr. can take one look at that Koren crud and know the difference; It comes and goes at it wants; no Dr. could tell the difference at one look;
>
> 10. When it is found this court in some way is the more responsible for Kemp being in that house for/fore anytime; and the state's wording they cannot afford anything; I am going to Bill you!
>
> * * *
>
> 12. Proof of said Koren crud, I have been called off the floor V.A. Hosp due to the fact I was smelling "stink"; more than once: They did not want the rest of the Patients to have to contend with that . . . .

* * *

16. Mark Montagna went to sleep or rested his eyes for a long time . . . .

The defendant testified at the first competency hearing with regard to item 8 of this particular document as follows:

> A. Yeah, it is in the addiction of a hermophendite and a lesbian in one person. Basically, they called them at one time born monsters. And she was then by jurisprudence reprimanded for some crimes and then was sent to Mount Pleasant. She was then operated on, so basically it could be called born by man, you know. Over a period of time, as I do understand, but I am not completely certain to that fact, and neither is in any records to prove it, but she grew back a hermophendite. Which they do do sometimes, and that is on medical files.
>
> Q. Okay. John — A. Very rare.
>
> Q. Let me interrupt you for a second. Excuse me for interrupting. John, let me just ask you this, just insert this. Now, you are talking about she grew back a penis; is that right? A. Yes, sir.
>
> Q. Okay. A. And also within each three of these people there was a lesbian in tutu.
>
> Q. In tutu, what does that mean? A. That means completely around. She was lesbian, and that's — there was no part time making it stuff, she was lesbian, that was all. There's people within this courtroom right here that said that they have heard talk of the same over a period of several years, and have said that within the last few hours.

With reference to item number 6 of "Defendant's findings of Depones," defendant testified:

> A. I never thought it would be a funny thing for several years. You know, I was pretty young when I came in the barn, the man was on his knees, and his genitalia, I guess, or penis, stuck in the milking machine. He was making about one mile every five or six days, trying to get to the shut-off valve. I got a hell of a big itch on the top of my head, and I walked over and shut the air off for him. Several years later, the fact of the matter is, after the osteopath put me in, I kind of had a visualization of him being in front of Christ on his knees with his genitalia stuck in a milking machine and trying to tell Christ he only had three more holes to go. And it struck me so damn funny I laughed myself out of bed. I think it's horribly funny, to be right damn truthful with you. That actually took place. And the same guy that I saved the life was in on the hanging, believe it or not. That's the damn truth.

With regard to item number 12 of the same document, defendant testified:

> Q. And can you describe this Korean crud for us? What does it do? A. It eats holes in either side or what would be described as both sides of my testes. It has ate holes in me as many as three times a year. It was also spread over other parts of my body. When that is exposed to the air basically on a twenty-four-hour basis, the skin will dry up and flake off.

Following the first competency hearing, defendant filed several other documents which contained a great deal of nonsensical, illogical jargon.

Based on the foregoing evidence, the district court found defendant not capable of assisting effectively in his defense. Defendant was then committed to the Mental Health Institute in Mount Pleasant in early April 1986. A social worker, Marty Rosensteel, and staff psychiatrist, Dr. Rose, wrote the district court twice within the first two months with their opinions that although defendant may have been schizophrenic and his speech was totally illogical, he was capable of assisting in his own defense. They felt that while defendant could converse in a coherent and friendly manner, he lapsed into nonsensical legal jargon when asked about his pending legal situation; however, they nonetheless felt he was capable of assisting his defense counsel. Defendant refused medication from the facility; but if he were given medication, Rosensteel and Dr. Rose felt his psychiatric condition would stabilize.

In May and June 1986, the defendant, pro se, again filed several documents with the court. They include the following statements:

> Wherefore, we demand address where the Medical Jurisprudence of the medical term "Flash Back" and "semi coma" may be obtained for a true interpretation to the court . . . .
>
> * * *
>
> The defendant knows of the insipedness the court has of certiorari records presumed to be totality setteled. This reognizance is a shameful matter but necessary to the defence . . . .
>
> * * *
>
> Because the defendant has been denied access to all, except a dictionary, we do know that a "Born Monster" and saying so in court, The

> court would rather repudiate, what was mention in court is the fact Kemp was a Lisben and a Hermaphrodite; "and" what was not mention is, what does constitute a "Born Monster"; Within the Kemp family, one of which the defendant was conned into going with. This person had 3 Kidneys incorporated and/or born with her. Her brother had 3 testis "Born with him", Kemp and the same as above have the same ant. The ant was born with no neck, "her head set on her shoulders", what the medical word is, we do not know . . . .
>
> * * *
>
> The defendant saved a mans leg P. Part. The case and/or cause was of Lymph glands. They were taken out, from his groin down. He could not walk a block and then had to set down. He then contacted gangrene in one of his legs. He was then to have it taken off within the next 2 weeks. The defendant being a amateur herblist gave some advice to this man and his leg was saved. This mans leg being saved is on record in Iowa City, Iowa . . . .
>
> * * *
>
> We have the proof Kemp was depute over the some of one dollar $1.00 to the Nelson family. "Obsession" worrying about the kids all the time. "Plutocrary" when Kemp moved in their were 4 children. Kemp has been around 11 offspring and was in contact with others most of their growing years; . . . .

When defendant refers to "Kemp" above, he is referring to the woman he believed to be his mother's lesbian lover.

The second competency hearing took place November 14, 1986. Again social worker Rosensteel testified similarly to his prior letter to the court that defendant understood his legal situation. Dr. Rose felt that it was obvious defendant was a paranoid schizophrenic but that his condition was in a good state of remission. Dr. Rose stated that defendant had "quite pronounced paranoid thoughts at times, particularly in relationship to this case." Defendant would talk to Dr. Rose in lengthy legal jargon in explaining the charges against him; however, Dr. Rose felt defendant was competent. Neither Dr. Rose nor Rosensteel reviewed defendant's medical history or performed psychological tests on defendant. Dr. Varner testified contrary to Dr. Rose. He testified that "with an illness of this length, this duration and this breadth, with these

kinds of symptoms, the chances of this going into spontaneous remission, I would say, are on the order of 1 in 100,000." Dr. Varner saw the defendant November 6, 1986. He testified at the second hearing as follows:

> It was not only not in remission, it appeared to have worsened and had broadened, and delusional concerns about the judicial system now include myself and Dr. Gersh. He refused to see Dr. Gersh, who had tested him the first time, and a deputy, and started becoming pretty angry, and we just terminated the interview. So I don't think -- remission is out of the question. The question is, did he even hold his own, is he as good as he was the last time I saw him. And since he has, as the letter says from Mount Pleasant, refused any form of treatment, I would expect him to certainly not improve, and, if anything, in the stress of confinement, to deteriorate. And I think that's exactly what happened.
>
> * * *
>
> My opinion is that he's incompetent to assist, for several reasons. One is a total lack of insight into his illness and how the delusion would be — for example, he thinks it is critical to his case that he be able to introduce here the fact that this county put the decedent in his home, and that — when he was a child, with his mother. And that that is still part of the reason why he shot the hermaphrodite. When he protests — and I have no knowledge otherwise — that the shooting of his mother was accidental, he has absolutely no remorse about shooting her. She got what was coming.
>
> * * *
>
> He describes reloading and shooting more than once. And he believes that he will be able to use the placement of this lady in his home when he was a child as a defense, and doesn't recognize, I don't believe, at all that his counsel, that all the counsel that I have talked to, have recommended an insanity plea, which he absolutely rejects. I don't think he has the remotest understanding of the rulings of evidence, so he could not, in my experience, be able to defend himself.

At the second competency hearing, defendant again testified. We agree with the district court that defendant's responses were perhaps more responsive and direct than those given at the first hearing. However, while it is true defendant appeared more coherent, we cannot say that any improvement, as such, was sufficient to satisfy us that he was more competent in November of 1986 than he was in April 1986. His responses were rambling and still somewhat illogical. Defendant testified for only a brief time in November 1986, compared

to when he testified six months earlier. While we recognize the district court observed defendant and therefore could assess more closely other personality traits, we cannot look only at the brief time defendant testified at the second competency hearing in determining whether defendant is competent.

Prior to the district court entering judgment after defendant pleaded guilty in December 1986, defendant repeated much of the same gibberish to the pre-sentence investigators as he previously had. Defendant wrote a letter to the district court in December 1986, again making little sense, and set out the following:

> I do have some facts that may be very important. To try to tell you:
>
> My sister Carol and Kemp put together what they called the "Iowa Bun Clock", the true facts are my sister Carol put the same together and Kemp claimed it. This was done by several different molds of ceramic "left over Pieces." Kemp came down with the idea of going to Washington, D.C. and getting a patent on that "Iowa Bun Clock": They did, and when they got back it was informed to me by Kemp that they might be going back to Washington, D.C. in all likelihood for the same type reasons: There is some possibility that Kemp may have gotten into my writings and/or mom and then told Kemp: What I am speaking of was wrote up to the Chief Judge of the 7th Judicial District, the Honorable Judge James R. Havercamp, "Intervention";
>
> Because Kemp was aiming the gun at Mom after the first shell went off and jus microseconds before the first shell went off. And then did click the hammer off three times. I now think Kemp was trying to kill Mom, Kemp gave no word and yet would not stop wrestling for the gun:
>
> I have been told not to worry about anyone else thru this whole thing; I think the inter most character of what was on Kemp's mind such as it was. The ceramic shop. Going back to Washington, D.C. Going back to Kemps old live/life still and to at last assume control of the one's in Kemp's own family. In the same way, illegal means; The one's whom would not have anything to do with Kemp or Kemp's wanton of self importants. Plenipotentiary. Maybe some of the Solomons may have been picking Kemp for the same status. The one whom has 3 Kidney's got the Red Wood Motel, in Muscatine not long ago, seems as tho all the Born Monsters in the Kemp and Solomons are trying to make some kind of a stand. It is a fact they do not care whom gets in the way:

We find the record consisting of both defendant's voluminous irrational written documents and his rambling, illogical testimony reveals that defendant is not competent but suffers from a mental illness and delusions to the point that he is unable to appreciate the charge, understand the proceedings, or assist effectively in his defense. Defendant may have been able to "talk about the weather," but the experts agree when he spoke of the charges pending against him, he made little sense.

We hereby reverse the judgment and sentence entered and remand this case to the district court and order that further criminal proceedings shall cease until such time that the defendant is shown to be competent.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. Our scope of review is de novo. State v. Emerson, 375 N.W.2d 256, 261 (Iowa 1985). The defendant challenges his competency. It is clear that if an accused is tried or convicted while incompetent to stand trial or assist in his defense, he is denied due process and a fair trial. Emerson, 375 N.W.2d at 261.

The issue of competency must be established at a hearing pursuant to Iowa Code section 812.3, at which time it must be shown that the "defendant appreciates the charge, understands the proceedings, and can assist effectively in the defense." State v. Lyon, 293 N.W.2d 8, 9 (Iowa 1980). In the case before us two such hearings were held.

At the first competency hearing the district court found the defendant to be incompetent. At the second hearing the court found the defendant competent. Since the defendant challenges his competency on appeal, we

> [e]xamine the information before the trial court to determine if at the relevant time an unresolved question of the defendant's competency reasonably appeared. Because constitutional safeguards are implicated, we make our own evaluation of the totality of the circumstances.

Emerson, 375 N.W.2d at 261.

The trial court applied the correct standard of law. It had the opportunity to observe the defendant and judge his conduct and demeanor. After doing so, it found competency.

After making my own evaluation of the totality of the circumstances, I concur with the trial court that at the relevant time no unresolved questions of the defendant's competency reasonably appeared. I would affirm.