

IN THE COURT OF APPEALS OF IOWA

No. 1-479 / 90-1349

FILED

JAN 29 1992

CLERK SUPREME COURT

DARYL L. HOLLINS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Scott County,
James R. Havercamp, Judge.

Hollins appeals the district court's denial of
postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich,
Assistant Attorney General, William E. Davis, County
Attorney, and J.E. Tobey, III, Assistant County Attorney,
for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

SCHLEGEL, J.

In 1984 Daryl Hollins was convicted of first-degree murder and first-degree robbery. We affirmed his conviction in 1985. Hollins later filed the present application for postconviction relief. The district court denied postconviction relief, and Hollins has appealed. Hollins contends his attorneys rendered ineffective assistance by failing to seek a hearing to determine his mental competency to stand trial.

Hollins has been hearing impaired since birth. He claims his ability to speak is also impaired, his intelligence is limited, and that tests have shown he has lower communication and comprehension abilities than most hearing-impaired persons. Hollins asserts there was a substantial question as to whether he was able to appreciate the charge against him, to understand the proceedings, or to assist effectively in his defense. See Iowa Code § 812.3 (1991). Hollins feels his trial attorneys had a duty to request a hearing on his mental competency to stand trial and his attorneys rendered ineffective assistance by failing to do so.

The State responds that Hollins is unentitled to relief because he did not raise the issue of his competency to stand trial on direct appeal. We reject Hollins' claim that a substantial question as to his competency existed rendering his attorneys ineffective in failing to pursue a hearing. Because we find Hollins is unsuccessful on the merits of his claim, we do not address the waiver issue.

Ordinarily our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

We determine counsel breached no duty in failing to pursue further the issue of Hollins' competency. Hollins' defense lawyers at trial were Mark Smith and Randy Hohenadel. Mark Smith testified that he was lead counsel and did most of the work regarding Hollins' competency to stand trial. Smith detailed the steps taken in assessing Hollins' capacity to appreciate the charge, understand the proceedings, and assist effectively in his defense, and determined that further action was unnecessary.

Smith had at least nineteen contacts with Hollins. He noted that initially he and Hollins had trouble communicating but that he eventually gained Hollins' trust,

and communication improved to the point that he "was not having any further problem with [Hollins] in terms of his communication or talking to him about preparation of the case and the role of various expert witnesses and also [his] role and [the other defense lawyer's] role."

Smith contacted John Meyers of Deaf Services of Iowa; Meyers found "nothing to suggest that [Hollins] is incapable of understanding or participating in the court proceedings if sign language interpretation . . . is provided." Two interpreters were used at trial. Smith testified there was no indication that Hollins did not understand the proceedings and noted that "I talked to him during the breaks and he seemed to be well aware of what was going on, and also again was refuting what the witnesses were testifying to."

Hollins complains that Smith had in his possession a report from Dr. Ritterhoff concluding Hollins was incompetent to stand trial which he did not submit to the court. 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 proceedings must be suspended and a hearing had upon that question.

The supreme court has interpreted this section to require 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." State v. Kempf, 282 N.W.2d 704, 706-07 (Iowa 1979). Counsel breached no duty unless there was an unresolved question as to competency. Id.

Because we find no such unresolved question remained after Smith had investigated the issue of Hollins' competency, we determine no essential duty has been breached. The information available to Smith at the time of trial showed Hollins was competent; no breach of duty existed in ceasing to further pursue the matter.

We affirm the district court's denial of postconviction relief.

AFFIRMED.