

IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed December 30, 1981

vs.)

JIMMIE W. WARE,)

Defendant-Appellant.)

1-363
65752

Appeal from: Polk District Court - Harry Perkins and C. Edwin Moore, Judges.

Petitioner appeals trial court's denial of his application for postconviction relief from his 1974 guilty plea to larceny from the person in violation of section 709.6, The Code 1973, asserting that trial court denied his right to due process by accepting his guilty plea without ordering a competency hearing pursuant to chapter 783, The Code 1973 and that he received ineffective assistance of counsel when his attorney allowed him to plead guilty even though the attorney thought he was incompetent to stand trial.
REVERSED AND REMANDED.

Chris Odell, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Petitioner, Jimmie Winston Ware, appeals from trial court's denial of his application for postconviction relief from his 1974 guilty plea to larceny from the person in violation of section 709.6, The Code 1973. On appeal petitioner asserts that trial court denied his right to due process by accepting his guilty plea without ordering a competency hearing pursuant to chapter 783, The Code 1973. He also claims that he received ineffective assistance of counsel when his attorney allowed him to plead guilty even though the attorney thought he was incompetent to stand trial. We reverse.

On January 29, 1974, petitioner was charged by county attorney's information with aggravated robbery in violation of section 711.1 and 711.2, The Code 1973. Petitioner allegedly stole sixty cents from a newspaper carrier, while armed with a dangerous weapon. Petitioner initially pled not guilty. On February 22, 1974, upon application of his appointed attorney, petitioner was sent to Oakdale for psychiatric evaluation. On June 6, 1974, petitioner appeared with counsel and, pursuant to a plea bargain, pled guilty to the lesser included offense of larceny from the person in violation of section 709.6, The Code 1973. Trial court accepted, his plea and sentenced him to the men's reformatory at Anamosa for a term not to exceed 15 years. Petitioner filed a petition for postconviction relief on April 10, 1980, alleging that he was denied effective assistance of counsel and that his guilty plea was not entered voluntarily and intelligently. The court appointed counsel to represent petitioner in these proceedings, and set the cause for hearing on September 3, 1980. The postconviction court found that petitioner failed to sustain his burden of proof and entered an order denying relief on September 26, 1980. This appeal followed.

L. Scope of Review. Ordinarily, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. "However, when, as here, issues as to violation of constitutional safeguards are raised this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the entire record under which rulings on those constitutional rights were made. That is, when a constitutional issue is presented, the evidence relevant to the issue is reviewed *de novo*." Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Preservation of Error. Section 663A.8, The Code, provides:

All grounds for relief available to the applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceedings that resulted in the conviction

or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

The State argues that petitioner did not raise the issue of competency in the proceeding that resulted in his conviction, or on direct appeal from that conviction, and has shown no sufficient reasons for failure to do so. The State thus would have this court refuse to consider the issue of petitioner's competency. We, however, note that the State itself failed to raise before the postconviction court the issue of petitioner's failure to preserve error at the plea proceedings. "It is axiomatic that issues not raised below may not, in the absence of extraordinary circumstances, be raised on appeal. Levitt v. United States, 517 F.2d 1339, 1347 (8th Cir. 1975). See also Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980). We thus turn to petitioner's assignments of error.

III. Competency. Petitioner argues that it was incumbent upon the trial court to order a competency hearing because the facts shown during the plea proceedings clearly indicate that the court should have had a "reasonable doubt" as to the petitioner's sanity. We agree.

The statute controlling the competency issue, section 783.1, The Code 1973, provided:¹

If a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question.

The test of sanity under this section is whether defendant has the mental capacity to appreciate the charge against him, understand the proceedings, and conduct his defense. State v. Milford, 186 N.W.2d 590, 592 (Iowa 1971). " 'Reasonable doubt' as used in section 783.1 exists when, after consideration of all the relevant facts, one's mind is left in such a condition that he cannot honestly say he feels an abiding conviction to a moral certainty as to the truth of the matter, and 'doubt' is an attitude of the mind toward the acceptance of or a belief in a proposition, theory, or statement in which the judgment is not at rest but inclines alternately to either side." Id. It is "the duty of the court to satisfy itself that no reasonable doubt exists as to the accused's mental capacity to understand the nature of the proceedings against him and to appreciate the

¹ The difference between section 783.1 and chapter 812 in the present code is succinctly analyzed in State v. Kempf, 282 N.W.2d 704, 706-07 (Iowa 1979).

consequences of his guilty plea." Hickey v. District Court, 174 N.W.2d 486, 490 (Iowa 1970). From our review of the record, we believe trial court should have had a reasonable doubt as to petitioner's sanity. The colloquy between the court and petitioner reveals petitioner had difficulty remembering the circumstances of the offense and responding to the court's inquiries. In addition to his colloquy, there was testimony that the petitioner had prior emotional and psychiatric problems, a low IQ, and had experienced learning disabilities resulting from brain damage. Trial court also had concern about petitioner's mental problems and his trial counsel believed petitioner was incompetent to stand trial. From this record we believe there was sufficient evidence to give trial court a reasonable doubt as to petitioner's ability to assist in his defense, even though trial court apparently had before it a psychiatric evaluation of the petitioner in which the examining psychiatrist concluded petitioner was competent to stand trial. Petitioner was entitled to a hearing to enable the factfinder to weigh all the evidence and reach an informed decision. We thus conclude that trial court should have ordered a hearing and that the postconviction court erred in failing to so find.

IV. Ineffective Assistance of Counsel. Petitioner also argues that the postconviction court erred in determining that he had failed to prove by a preponderance of the evidence that he was denied effective assistance of counsel is based on the fact that his attorney at trial allowed him to plead guilty and did not request a competency hearing, despite the fact the attorney believed his client to be incompetent. In light of our conclusion in division III, we do not address petitioner's claim on this issue.

Based upon trial court's failure to order the competency hearing, we remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

All judges concur except Carter and Donielson, JJ., who dissent.

CARTER, J. (dissenting)

I dissent. I do not believe that the colloquy referred to by the majority is sufficiently incoherent to alert the trial court to the fact that defendant was unable to communicate with counsel so as to assist in the preparation of his defense. Indeed, defendant's recall and description of the events which gave rise to the criminal charge appear to be reasonably good. The material portion of this colloquy is as follows:

THE COURT: What did you do in this case, Mr. Ware?
Can you tell me, just in a few words, what happened?

MR. WARE: I don't remember, really remember. The only thing, I just met and saw the person. That's all.

THE COURT: How much money did she have on her?

MR. WARE: I don't know. Some change. I forgot.

THE COURT: Did you get all the change she had?

MR. WARE: I don't remember that either, you know, too well.

THE COURT: Did you know this girl's name?

MR. WARE: No. I don't even know the person. Not really. I seen her, you know, that same night, the night before. That's all.

THE COURT: Would you know her if you saw her again?

MR. WARE: Nope.

THE COURT: Was she a papergirl? Was she delivering or something like that?

MR. WARE: Yeah. I think so. Yeah. She was going opposite, going down the opposite way down the street, and then that's all--that's the only time I seen her, and then I seen the day after that.

THE COURT: What did you have to say to her to get her to give you her money?

MR. WARE: I didn't harly [sic] say anything. I just said "Money" and she just give it to me and I just took off. That's all.

THE COURT: Did you show her a knife or anything like that?

MR. WARE: She didn't see anything. She didn't even see my face because I was in the restaurant.

THE COURT: Did you have any idea why she gave her money to you? Was she frightened or scared or--

MR. WARE: Must have been. You know,--most people, you know, somebody come up beyond you at night you'd be kind of scared too.

THE COURT: You didn't hurt this girl at all, did you?

MR. WARE. No, I didn't. You know, I just came up behind her. That's all I said. I didn't touch her or anything like that. (Tr. I, pp. 6-8; App. p.).

While the majority alludes to the defendant's prior psychiatric problems and low IQ, the chronology of events in the trial court suggests that these were matters of which the court was made aware prior to the guilty plea hearing. As a result, the defendant was sent to the Security Medical Facility for an evaluation. As the majority notes, this produced a psychiatric evaluation that defendant was competent to stand trial.¹ It appears this evaluation was ordered by the court for purposes of avoiding the very problem which is now raising its head for the first time many years after defendant's conviction and sentence.

The psychiatric evaluation followed defendant's residency at the Security Medical Facility in March and April of 1974. Defendant's guilty plea was entered on June 6, 1974. The majority suggests no intervening events which would require the trial court to ignore this evaluation and hold a hearing to determine competency under section 783.1, The Code 1973. The situation presented is thus similar to that presented in People v. Woods, 84 Ill. App. 3d 938, 946, 405 N.E.2d 1238, 1244 (1980), where the court states:

We find no merit to defendant's contention that he was denied due process by the trial court's failure to conduct a hearing on his fitness to stand trial and be sentenced. A fitness hearing is required when a bona fide doubt of defendant's fitness to stand trial or be sentenced is raised. (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-1.) But, no bona fide doubt has been raised in this case. Prior to trial, a psychiatric examination was conducted on defendant and he was found to be fit to stand trial. Before sentencing, another psychiatric examination of defendant was conducted and he was found to be fit to be sentenced. Despite defendant's protestations that his conduct during trial, including his failure to cooperate with the public defender, raises a bona fide doubt of his fitness, we cannot say that his conduct when viewed in light of the [prior] results of the psychiatric examinations was sufficient to raise a bona fide doubt of his fitness. (emphasis supplied.)

At the time of the guilty plea, the court had no medical evidence bearing upon defendant's competency other than the evaluation made at the Security Medical Facility. Section 783.1, The Code 1973, relied upon by the majority, does not require the court to speculate that uncontroverted medical evidence would be overcome if a hearing were ordered. Postconviction relief was properly denied.

Donielson, J., joins in this dissent.

¹ The evaluation is not in the record of the postconviction hearing but the result of the evaluation was testified to by defendant's own attorney and is not disputed on this appeal.