IN THE COURT OF APPEALS OF IOWA

No. 2-460 / 11-0941
Filed November 15, 2012

RICK BRANDES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Chickasaw County, Mark D. Cleve, Judge.

Appeal from the denial of postconviction relief. **AFFIRMED.**

C. Morgan Lasley and Michael O. Treinen of Dunakey & Klatt, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and W. Patrick Wegman, County Attorney, for appellee State.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

EISENHAUER, C.J.

Rick Brandes appeals from the district court ruling and order denying his application for postconviction relief. He contends the court erred in finding he failed to prove his trial attorneys were ineffective. He also contends his postconviction attorney was ineffective. We affirm.

I. Background

Brandes was convicted of first-degree kidnapping in a bench trial in 2006 and sentenced to life without parole. In 2007 this court upheld his conviction and sentence. *State v. Brandes*, No. 06-0576, 2007 WL 4553478, at *7 (Iowa Ct. App. Dec. 28, 2007). In 2008 Brandes applied for postconviction relief. He alleged he was sick and incompetent to stand trial, and his trial attorneys were ineffective (1) in not raising a challenge to his competence at trial, (2) in not calling two witnesses, and (3) in not requesting a change of venue. Following a contested hearing in 2011, the district court denied his application in its entirety.

The court found Brandes failed to prove either a breach of duty or resulting prejudice on his claims his attorneys should have requested a competency evaluation and should have called a neighbor and the codefendant's girlfriend as witnesses. On appeal he argues the court erred in these two rulings.

II. Scope and Standards of Review

Our review of postconviction relief proceedings can be for errors at law or de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). When an applicant asserts claims of a constitutional nature our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Because Brandes's

ineffective-assistance claims implicate his Sixth Amendment right to counsel, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

To establish an ineffective-assistance claim, Brandes must demonstrate, by a preponderance of the evidence (1) his attorneys failed to perform an essential duty and (2) prejudice resulted. *See State v. Adams*, 810 N.W.2d 365, 372 (Iowa 2012). We may resolve the claim if an applicant fails to prove either prong. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

To satisfy the "essential duty" prong, an applicant must show the attorney's representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In evaluating the objective reasonableness of an attorney's conduct, we consider "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. We evaluate the attorney's performance against "prevailing professional norms." *Ledezma*, 626 N.W.2d at 142 (citation omitted).

Considering the "prejudice" prong, "[t]here is a presumption the attorney acted competently, and prejudice will not be found unless there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007) (citation omitted). "A 'reasonable probability' means a 'substantial,' not 'just conceivable,' likelihood of a different result." *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012) (citations omitted).

III. Merits

A. Competency Evaluation. Brandes contends his trial attorneys were ineffective in not seeking a competency evaluation. In his application for postconviction relief he alleged he "was sick and incompetent to stand trial." He further alleged his trial attorneys "should have known [he] was unable to make logical and competent decisions regarding his trial defense." Generally, a competency hearing is required if information in the record would lead a reasonable person to believe there is a substantial question of the defendant's competence. *Jones v. State*, 479 N.W.2d 265, 270 (Iowa 1991). A criminal defendant is presumed to be competent; a mere allegation a defendant is incompetent does not rebut the presumption. *State v. Rieflin*, 589 N.W.2d 749, 752 (Iowa Ct. App. 1998). The burden is on the defendant to rebut the presumption, and if the evidence is in equipoise, the presumption of competency prevails. *Jones*, 479 N.W.2d at 270; *State v. Rieflin*, 558 N.W.2d 149, 152 (Iowa 1996), *overruled on other grounds by State v. Lyman*, 776 N.W.2d 865, 872-73 (Iowa 2010).

The Supreme Court has framed the test to determine if a criminal defendant is competent to stand trial as whether the person "has sufficient present ability to consult with [the defense attorney] with a reasonable degree of rational understanding—and whether [the defendant] has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). Iowa Code section 812.3(1) (2005), defines the test as whether "the defendant is suffering from a mental disorder [that] prevents the defendant from appreciating the charge, understanding the

proceedings, or assisting effectively in the defense." A common thread running through these tests is the requirement criminal defendants be able to assist their attorneys in their defense. *See Lyman*, 776 N.W.2d at 873-74; *see also State v. Johnson*, 784 N.W.2d 192, 194 (Iowa 2010).

We review the totality of the circumstances to determine if, at the relevant times, a substantial question of Brandes's competency appeared. We consider (1) any irrational behavior, (2) any demeanor in the proceeding suggesting a lack of competency, and (3) any prior medical opinion on competency of which the trial court is aware. *Jones*, 479 N.W.2d at 270.

Brandes has a lengthy history of mental illness, with a diagnosis of bipolar disorder with depression and psychosis. His trial attorneys pursued a defense of diminished responsibility. They knew about possible problems with Brandes's competency, they discussed his condition with his psychiatrist Dr. Akbar, and they decided Brandes was competent to stand trial.

When Brandes's trial attorneys consulted with Dr. Akbar, they were assured Brandes was competent to stand trial if he was taking his medication. The attorneys confirmed with jailers Brandes had been taking his medication as required during the nine months he was in jail before trial. One trial attorney testified Brandes's competency was a concern, which is why they met with his psychiatrist. Although the attorney characterized Brandes's thinking as "simplistic," he testified it was clear to him Brandes understood what was happening and could participate in his defense. The attorney further testified "there wasn't anything about him that . . . led me to believe he wasn't understanding the proceedings. Nor that he was able to cooperate with us."

Brandes's other attorney testified Brandes was able to communicate properly with him throughout his representation of Brandes. When he talked with Brandes about the case or when a decision had to be made, he said "it was clear to me he knew what we were discussing and that he was helping make those decisions. [W]e would lay out the options and he would make the decisions."

At the waiver of jury hearing Brandes answered questions from the court appropriately and, when necessary, gave more detailed answers. Brandes did not, as his brother claimed, just answer "yes" to every question the court asked. When Brandes appeared confused while the court was explaining the process of jury selection, the court ordered a recess to allow Brandes to discuss the matter with his attorneys. When the hearing resumed, Brandes indicated he understood each step of the waiver process.

Brandes's testimony during the trial similarly demonstrated his competence. He was rational, coherent, and responsive to the questions asked. The trial transcript does not reveal any irrational behavior by Brandes or any other indicators of incompetence. He was able to participate in the discussion of his decision to reject a plea offer from the State, stating he rejected the offer "[b]ecause these allegations aren't true."

Once, during cross-examination, Brandes said his mind was racing. The court took a fifteen-minute recess. When Brandes told his attorneys he was able to proceed, both attorneys felt comfortable Brandes was able to assist them and also competent to proceed. When cross-examination resumed Brandes handled it well and showed he understood how the prosecutor would attempt to discredit his testimony or try "to put words in [his] mouth."

Brandes's testimony at the postconviction trial also showed he was able to participate in his defense. He explained one of his claims of ineffective assistance was his attorneys failed to call his neighbor to testify at trial. Brandes testified he thought the neighbor should have been called because the walls of his apartment were very thin and the neighbor, who said he had not heard any screaming, would have heard if the complaining witness had screamed in the middle of the night as she testified.

Based on the foregoing we conclude, as did the postconviction court, Brandes failed to show his trial attorneys had a duty to request a competency examination or he would have been found incompetent under Iowa Code section 812.3 if his attorneys had requested a competency examination. His trial attorneys were not ineffective.

B. Witnesses. Next, Brandes contends his trial attorneys were ineffective in failing to call two witnesses at his trial: Brandes's neighbor, mentioned above, and his codefendant's girlfriend. Even if we assume the witnesses would have testified as Brandes claims, he has not shown how their testimony would have changed the outcome of his trial.

Even if the neighbor had testified he heard no screams on the night in question, it would have added nothing to Brandes's diminished capacity defense. Neither would it have overcome the overwhelming physical evidence supporting the complaining witness's account. If the codefendant's girlfriend had testified Brandes left his apartment and came upstairs to smoke marijuana and to get beer and cigarettes, her testimony would have added nothing to the defense because it did not address any issue in dispute and the evidence was in the

record through Brandes's own testimony and through the testimony of the codefendant's mother. Both also testified the girlfriend had mistakenly believed it was her boyfriend who had been there, so her testimony about her mistake would merely have been cumulative.

It appears the attorneys made strategic decisions not to call these two witnesses because neither would have helped the defense. We conclude Brandes's trial attorneys were not ineffective in making that decision. *See Ledezma*, 626 N.W.2d at 143 (noting ineffective-assistance claims involving tactical or strategic decisions must be considered in light of all the circumstances to determine whether the decisions resulted from tactical considerations or inattention); *State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982) (holding courts will not second-guess an attorney's reasonable tactical decisions).

Brandes cannot establish he was prejudiced by his attorneys' decisions not to call his neighbor or his codefendant's girlfriend, because their testimony would not have affected the outcome of the trial in light of the other, overwhelming evidence of his guilt. The complaining witness offered compelling testimony supported by all the physical evidence of her assault during her confinement by Brandes. The evidence from Brandes's apartment supported her account of the events. Police caught Brandes with her knife, and his hand had a cut from the knife as she testified.

C. Ineffectiveness of Postconviction Attorney. Finally, Brandes contends his postconviction attorney was ineffective in failing to call the same two witnesses in order to establish the necessity of their testimony in his criminal trial. We have already concluded neither witness's testimony would have

changed the outcome of the trial, so Brandes's trial attorneys were not ineffective in making that tactical decision. In the same way, the "failure" of Brandes's postconviction attorney to call these witnesses in an attempt to demonstrate the necessity of their testimony at trial is not ineffective assistance. Brandes has not established his postconviction attorney breached any essential duty or Brandes was prejudiced by his attorney's choice not to call the witnesses in question.

Because neither Brandes's trial attorneys nor his postconviction attorney were ineffective in representing him, we affirm the decision of the postconviction court denying relief.

AFFIRMED.