IN THE COURT OF APPEALS OF IOWA

No. 3-338 / 12-0207
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARY RUSSELL BURKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris (October 2010 competency evaluation order), George L. Stigler (August 2011 competency evaluation order), Thomas N. Bower (November 2011 competency review hearing), Todd A. Geer (December 12, 2011 hearing allowing withdraw and substituting defense counsel), and Jon C. Fister (trial and sentencing), Judges.

Gary Russell Burke appeals from judgment entered on his convictions of first-degree harassment and first-degree burglary in violation of Iowa Code sections 708.7 and 713.1 (2009). **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Heard by Doyle, P.J., and Danilson and Mullins, JJ. Bower, J. takes no part.

DANILSON, J.

Gary Russell Burke appeals from judgment entered on his convictions of first-degree burglary and first-degree harassment in violation of Iowa Code sections 708.7 and 713.1 (2009). Because the district court made no finding that Burke's waiver of counsel was intelligently and voluntarily made and we determine there was not a meaningful colloquy that resulted in Burke knowingly and intelligently waiving his right to counsel, we are unable to conclude that Burke was competent to represent himself. We reverse and remand for new trial.

I. Background Facts and Proceedings.

At about 3 a.m. on September 3, 2009, Christina Moses and Matthew Tierney awoke to a loud bang—the door to their apartment, which had been locked and secured with a chain, was broken in and a person was standing in their hallway yelling, "I knew you were making bombs, I'm going to kill you." Moses screamed and called 911. Tierney got out of bed, grabbed a pool cue, and confronted defendant, Gary Burke, who resided in the apartment directly above Moses and Tierney. Burke was wearing only boxer shorts and was brandishing what Tierney believed was a screwdriver in his fist. He refused Tierney's orders to leave, so Tierney struck Burke on the back with the pool cue and chased him out of the apartment. Tierney saw Burke go upstairs.

Police responded to Moses's 911 call and found the steel door to the apartment broken in and not capable of being secured. Moses and Tierney were distraught, scared, and upset. Moses and Tierney identified Burke as the

intruder. They were taken to the police station for further statements. Moses and Tierney told police that they had prior problems with Burke.

Police knocked on Burke's door for several minutes and got no response. Sometime after 4:25 a.m., police gained entry to Burke's apartment and found him in his bedroom with his eyes closed. The police told Burke they were investigating a burglary. Burke said nothing, but held his hands out and together as if to be handcuffed.

Burke was charged with first-degree harassment and first-degree burglary. *See* Iowa Code §§ 708.7, 713.1 (2009).

On October 4, 2010, the district court ordered Burke to undergo a competency evaluation. An order was entered on December 9, 2010, providing that Burke was to be transported to the Iowa Medical and Classification Center (IMCC) for "a complete psychiatric and psychological evaluation." The evaluation was not conducted until July 2011. Burke underwent several hours of psychological testing and a two-hour interview with Tim Kockler, Ph.D.

Dr. Kockler reported:

> Speech was normal with regards to volume, rate and tone. No auditory comprehension difficulties were apparent. Memory was grossly intact. The defendant's intellectual ability was estimated to be in the below average to average range. Frustration tolerance was adequate. Affect was broad. His mood was described as "slightly depressed." The defendant denied having both homicidal and suicidal ideation. His thought content was appropriate for the situation. Thought processes were intact and goal directed. There was no evidence of delusions. The defendant denied experiencing hallucinations. Judgment, reasoning and insight were fair.

Dr. Kockler found Burke did suffer from substantial mental illness, meeting the criteria for bipolar disorder NOS.[1] Burke's Axis II diagnosis was "Personality Disorder NOS with Obsessive compulsive traits and schizoid and paranoid features." Dr. Kockler concluded:

> Nevertheless, at the present time, the aforementioned diagnoses do not appear to be negatively impacting the defendant's competency status. On a standardized competency measure, the defendant demonstrated a rational and factual understanding of the proceeding against him and he has the ability to consult with counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.
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> **RECOMMENDATIONS**: The following recommendations are suggested to the Court.
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> 1. The defendant should be returned to court to face his current charges.
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> 2. Ongoing psychopharmacological intervention is tantamount to this defendant maintain his current competency status.

At an August 29, 2011 hearing, a record was made calling Burke's competency into question despite the IMCC report conclusion. On August 30, defense counsel, Paul Shinkle, filed notice of insanity defense and notice of diminished responsibility in which counsel asserted the defendant's behavior had deteriorated since the competency exam and asked for a re-evaluation. On August 31, the district court entered an order removed the matter from the docket and ordered another evaluation by the IMCC as to the defendant's present capacity to stand trial.

However, the IMCC medical services director sent a letter to the court on September 6 stating:

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[1] NOS stands for "not otherwise specified."

> We regret to inform the courts that we will not be admitting Mr. Burke to IMCC to be evaluated by the same person who recently found him competent to proceed with his current charges. We would refer the courts to an outside evaluator in the community that could give another perspective on Mr. Burke's competency to proceed with his current charges.

On September 7, the court ordered the Black Hawk County Sheriff to administer medications to Burke as prescribed by IMCC medical staff. The court further ordered that Burke's competency be reviewed by local mental health center staff ten days after reimplementation of the medication regimen.

A competency review hearing was set for November 7, but Burke refused to participate.

However, the hearing was held on November 9. Burke's behavior was belligerent, his statements often bizarre. He denied Attorney Shinkle represented him though Shinkle was privately retained. Burke stated, "I need psychiatric treatment. I can't. I'm freaking out. I didn't get my meds today." The court ordered Burke removed from the courtroom as he was not cooperating, at which point Burke directed profanity at the judge. He was found in contempt of court. Once the defendant was removed from the hearing, defense counsel described his current behavior and ideations. The district court noted that a defendant is presumed competent, an evaluation had determined Burke competent, and set the matter for trial. A written order followed.

On November 15, Attorney Shinkle requested Burke be examined as "there has been no finding of his competency, i.e. sanity, at the time of the events."

On December 1, Attorney Shinkle made application to be allowed to withdraw because Burke refused to acknowledge he was Burke's attorney and would not cooperate.

A final pretrial hearing was held on December 12. Trial was scheduled to begin December 13. Attorney Shinkle again reported Burke refused to see him. Burke denied having retained Shinkle and requested a court-appointed attorney. The judge informed Burke trial was to start the next day. Burke stated it was acceptable to him that new counsel be appointed even though trial was to begin the next day. A public defender, Erin Bolinger, was sitting in the courtroom and was asked if she was available; she indicated she was familiar with the file and was available. The prosecutor informed the court the State had made an offer of a plea agreement, which was reviewed with Burke on the record. The court allowed Shinkle to withdraw, appointed Bolinger to represent the defendant, and the matter to remain set for trial as scheduled.

On the day of trial, which was being held before a judge not previously involved in the proceedings, Burke stated he wished to represent himself and "immediately accept the plea agreement." Burke then argued with the court and the prosecutor about the terms of the agreement, including how he was to be given credit for time served.[2]

Attorney Bolinger made a record that Burke refused to meet with her, refused to waive speedy trial, was "unable to understand why an independent mental evaluation may prove not only useful, but certainly necessary in pursuing

[2] Burke's argument is less than coherent from our review of the transcript.

a defense for his case." Bolinger cited a case, *State v. Jordan*, at which point Burke made several seemingly nonsensical statements about "Airman Jordan." Bolinger requested the proceedings be stayed, asked that Burke have an independent evaluation, and stated "[I]t's my opinion that he is not competent to represent himself."

The prosecutor stated, "I guess I would agree with Ms. Bolinger, that I don't believe that Mr. Burke is competent to represent himself." However, she resisted suspending the proceedings because a judge had found Burke competent on November 9.

The court asked Burke, "[D]o you still want to represent yourself?" Burke replied, "Yes." The court then attempted a colloquy about the defendant's right to represent himself, which is punctuated by Burke's tangential statements and arguments with the court, as well as his claims of being an expert in electronics and having access to the Pentagon. Eventually, the court stated, "We're going to go in the courtroom now and begin jury selection." The prosecutor asked the judge if Ms. Bolinger was representing the defendant. The court replied, "No. I am going to let him represent himself. I am going to appoint Ms. Bolinger as standby counsel, to be there in case he does decide he wants to ask her a question . . . ."

During jury selection, Burke stated, "I don't want a jury trial. I accept the plea agreement. I accept the plea offer. I do not want a jury trial. My name is Gary Burke." Additional record outside the presence of potential jurors was

made about a possible plea, but again, the process broke down because Burke argued with the judge and the prosecutor.

Jury selection resumed. At one point a potential juror asked the prosecutor, "Is this a mental health court or something?" The prosecutor stated, "No. This is a trial." The potential juror responded, "Well, shouldn't he be in mental health court or something?"

When the court asked Burke if he had any questions for the jury panel, Burke announced, "Your honor, you offered me a plea bargain," and stated, "I request at this time no jury trial. I request no trial." The court announced,

> Okay. We'll try this one more time. Let's take the defendant back to the jury room where we visited once before. We will visit one more time and see whether we're going to proceed with the jury trial or not. So, the deputies—Mr. Burke, go with the deputies. We'll go back to where we visited earlier this morning, and we'll visit some more.

The jury pool was sent on recess.

The court attempted to discuss the plea offer with Burke. Again the discussions broke down and Burke stated, "I don't accept it." The potential jurors were brought back and the defendant's comments became bizarre. Burke informed the court he had not received his medications that morning. The jury was later excused and the court stated, "Make sure Mr. Burke gets his lunch and his medicine."

On the morning of the second day of trial, standby counsel asked the court to declare a mistrial and appoint her counsel following mistrial. The court ruled the defendant had been found competent to stand trial. The court noted that the doctors who examined the defendant remarked about "different things about him,

and he does take some bizarre positions and has strange opinions, but I'm not finding that that puts me in a position to overrule the doctors that have already evaluated him."

Burke was found guilty as charged and now appeals. He contends the district court erred by failing to conduct an adequate inquiry into whether he was competent to stand trial and whether he was competent to represent himself.[3]

II. Scope and Standards of Review.

We review constitutional claims de novo. *State v*. *Oliver*, 812 N.W.2d 636, 639 (Iowa 2012).

III. Discussion.

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

A criminal defendant has the constitutional right to waive legal representation so long as his waiver of counsel is voluntary and intelligent. *Faretta v. California*, 422 U.S. 806, 807 (1975). In *Faretta*, the United States

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[3] Burke makes numerous other claims of error. He asserts the court erred by failing to allow a continuance for an independent competency evaluation, requiring that he be handcuffed during the trial, overruling his motion for a mistrial, and interfering with his opportunity to accept a plea agreement. Burke argues, too, that the State engaged in prosecutorial misconduct by prosecuting a mentally incompetent defendant and by suggesting to the jury that defendant was pretending to have a mental illness. These several claims are subsumed by our ruling on the adequacy of the court's inquiry as to whether the defendant was competent to represent himself. As for Burke's contention that the court erred in failing to instruct the jury on diminished responsibility and insanity and in submitting a definition of murder, we leave those instructional matters for consideration at retrial.

Supreme Court emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored." 422 U.S. at 834. But, "[a] criminal defendant may not be tried unless he is competent, *and he may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently.'*" *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (emphasis added) (citations omitted).

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. In this sense there *is* a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence.*
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> This two-part inquiry is what we had in mind in *Westbrook.* When we distinguished between "competence to stand trial" and "competence to waive [the] constitutional right to the assistance of counsel," we were using "competence to waive" as a shorthand for the "intelligent and competent waiver" requirement of *Johnson v. Zerbst.* This much is clear from the fact that we quoted that very language from *Zerbst* immediately after noting that the trial court had not determined whether the petitioner was competent to waive his right to counsel. Thus, *Westbrook* stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, *a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.*

Id. at 400-02 (emphasis in final sentence added) (citations and footnotes omitted).

As our supreme court wrote in *State v. Cooley*,

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent oneself, an accused must knowingly and intelligently forgo those relinquished benefits. The Supreme Court has imposed rigorous restrictions on the information that must be conveyed to a

> defendant, and the procedures that must be observed, before permitting a waiver of the right to counsel at trial. A searching or formal inquiry is among the procedures required before an accused's waiver of counsel may be accepted. While the extent of a trial court's inquiry may vary depending on the nature of the offense and the background of the accused, some sort of meaningful colloquy must be accomplished.

608 N.W.2d 9, 14-15 (Iowa 2000) (internal quotation marks and citations omitted). The *Cooley* court went on to describe the inquiry required:

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.
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> "[A] mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel. [T]his case shows that such routine inquiries may be inadequate although the Constitution 'does not require that under all circumstances counsel be forced upon a defendant.'"

Id. at 15 (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)). "[A] waiver that does not meet these criteria is not valid." *Id.* at 16.

Here, the district court attempted to conduct a colloquy with the defendant, but we are hard pressed to find it "meaningful" under our de novo review of the circumstances. On the day before the trial, a day that Burke was more lucid than

the morning of the trial, he requested counsel be appointed to represent him. On the morning trial was to begin, the defendant announced he wished to represent himself. However, both standby counsel *and the prosecutor* stated they did not believe he was competent to represent himself. The court's colloquy with Burke broke down into argument by the defendant unrelated to whether his waiver was voluntary. Just before the court stated they were going into the courtroom to start jury selection, Burke made several more nonsensical statements. He stated the court could not bring up the first-degree burglary charge because he had a sealed agreement with his former attorney, Andrea Dryer, who was now a judge, higher than the presiding judge by a "magnitude of four." Burke then began a discussion about the Clinton family, contending the presiding judge was "the second nephew of the Clinton family," and how he was the only person that could "refer to him as Mr. Clinton." To describe the court's discussion with Burke as a meaningful colloquy that resulted in Burke knowingly and intelligently waiving his right to counsel is untenable. Moreover, at no time during these proceedings did the trial court determine that Burke's waiver of counsel was voluntary, knowing, and intelligent. *See Godinez*, 509 U.S. at 396; *Hannan v. State*, 732 N.W.2d 45, 53 (Iowa 2007).[4]

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[4] During oral arguments, the State contended the issue on appeal did not encompass the adequacy of the colloquy to establish that Burke's waiver of counsel was voluntary, knowing and intelligent. *But see Hannan*, 732 N.W.2d at 53 (noting that a proper waiver must be voluntary, knowing and intelligent). We acknowledge that if the issue on appeal is whether a defendant properly waived their right to counsel, that the "sister right" of self-representation is not at issue. *See id*. at 52. However, the obverse is not true. Where, as here, the issue relates to whether the defendant is competent to represent himself, our analysis necessarily begins with whether the defendant voluntarily, knowingly, and intelligently waived the right to counsel. For example, as stated in

In addition, we note that trial courts have the obligation of conducting a hearing whenever there is sufficient doubt concerning a defendant's competence. *See Drope*, 420 U.S. at 180–81. "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id.* Sufficient doubt as to Burke's competence should have required additional hearing on more than one occasion under this record. *See* Iowa Code § 812.3 (providing that proceedings may be suspended at any stage of the proceedings, and a hearing held to determine if a mental disorder prevents the defendant from "appreciating the charge, understanding the proceedings or assisting effectively with his defense"). Dr. Kockler diagnosed the defendant with a substantial mental illness and noted that "psychopharmacological intervention is tantamount to this defendant maintain[ing] his current competency status." During trial, the defendant informed the court that he had not received his medications. This should have been explored by the district court. We conclude the district court failed to make adequate inquiry as to the defendant's competence to waive counsel.

Hannan, our supreme court noted that if the issue is whether the defendant clearly and unequivocally invoked the right to self-representation, the determination first begins with whether the defendant waived the defendant's right to counsel and then requires further determinations. *Id*. at 52 n.4. Moreover, before a defendant may be permitted to exercise the right of self-representation, the court must be satisfied that the waiver was proper. *Id*. at 53; *accord United States v. Patterson*, 140 F.3d 767, 774 (8th Cir. 1998). One court described the issue of a whether the waiver was proper as a "prerequisite" to a defendant's self-representation. *State v. Imani*, 786 N.W.2d 40, 49 (Wis. 2010). We also note that Burke argues in his brief that "the district court's inquiry was less than a meaningful inquiry." Accordingly, we decline to determine the issue of whether Burke was competent to represent himself in a vacuum without first determining whether his waiver was proper.

A harmless error analysis cannot be utilized to cure the error incurred by an invalid acceptance of a defendant's waiver of the constitutional right to counsel and the resultant election to proceed with self-representation. *Cooley*, 608 N.W.2d at 18. Consequently, the proceedings by which Burke was tried and convicted violated his Sixth Amendment right to counsel under the United States Constitution and we reverse and remand for further proceedings.

REVERSED AND REMANDED.