

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALLEN SURHIGH,

Defendant-Appellant.

UNPUBLISHED

December 1, 2000

No. 216242

St. Clair Circuit Court

LC No. 98-002136-FC

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). He appeals as of right. We affirm.

Defendant contends that he was denied due process by the trial court's failure to inquire further as to his competency when, during the course of trial, counsel informed the court that defendant's communications were unresponsive and inappropriate. We disagree. A trial court's failure to make adequate inquiry as to a defendant's competence to stand trial is a violation of a defendant's right to a fair trial. *Pate v Robinson*, 383 US 375, 385; 86 S Ct 836; 15 L Ed 2d 815 (1966). Although the determination of a defendant's competence is within the trial court's discretion, a trial court has the duty of raising the issue of incompetence where facts are brought to its attention that raise a "bona fide doubt" concerning the defendant's competence. *People v Ray*, 431 Mich 260, 270 n 5; 430 NW2d 626 (1988); *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). The decision with regard to the existence of a "bona fide doubt" will only be reversed where there is an abuse of discretion. *Id.*

In the present case, the only indication by defense counsel that he may have had problems with defendant came on the second day of trial, when he informed the court that he had been having trouble communicating with defendant during the course of the trial, that defendant was not responding in an appropriate fashion, and that defendant was mumbling to himself. The trial court indicated that if defendant chose not to cooperate with counsel, he did so at his own peril. The court further noted that it could only comment based on its observations. After the state rested, defense counsel told the court that defendant understood his right to remain silent, but chose to testify. When defendant testified, his version of events was in large part the same as

that of the victim, differing only in whether the sexual contact was consensual, whether he had intentionally harmed the victim, and why he and the victim came to blows.

In a case involving circumstances similar to the present case, the Sixth Circuit noted that the Supreme Court in *Drope v Missouri*, 420 US 162; 95 S Ct 896; 43 L Ed 2d 103 (1975), had identified certain relevant considerations regarding the quantum of evidence necessary to require resort to proceedings to inquire into a defendant's competency: (1) an expressed doubt by counsel concerning a client's competency, although a court is not required to accept such representations without question, (2) evidence of a defendant's irrational behavior at trial and his demeanor at trial, and (3) prior medical opinion regarding the defendant's competency to stand trial. See *Owens v Sowders*, 661 F2d 584, 586 (CA 6 1981), citing *Drope, supra* at 177 n 13, 180. While one of the factors alone might require further inquiry, there are no fixed or immutable signs that invariably indicate the need for further inquiry to determine a defendant's fitness to proceed. *Owens, supra*. The *Owens* court noted that both *Drope* and *Pate, supra*, involved defendants with histories of disturbed behavior documented by sworn testimony or psychiatric reports, violence to others, and self-infliction of injury. *Id.* at 587. In *Owens*, the Sixth Circuit distinguished the case before it from *Drope* and *Pate* by noting that counsel for the defendant did not document prior psychiatric problems and did not raise the issue of competency other than in an unsupported affidavit, nor did counsel repeatedly raise the issue of competency, and that the defendant's own testimony did not indicate incompetence. *Id.* at 586-587.

We see little difference between the situation in the present case and that faced by the Sixth Circuit in *Owens*. Here, defense counsel brought to the attention of the court some difficulties he was having with his client. Of course, courts need not accept without question a lawyer's representations concerning the competence of his client, although the lawyer's expressed doubt as to his client's competency is a factor that must be considered by the court. *Drope, supra* at 177 n 13. In this case, however, the representations by counsel were unsupported by other evidence. There is no indication in the record that defendant had a history of disturbed behavior or psychiatric problems. Moreover, the record lacks indications of bizarre courtroom behavior or anything, other than counsel's unsubstantiated allegations, that would indicate any behavior on defendant's part that could reasonably cause the court to be concerned about defendant's competency to stand trial.

Defendant points to his indecision before trial over the prosecution's offer of a plea bargain as evidence of incompetence, as well as the fact that he went to trial even though there was a substantial array of evidence of guilt. We have examined the record of the colloquy before the judge and find nothing that would give rise to a bona fide doubt as to defendant's competency. Defendant expressed reluctance to accept the bargain when he could not consult with someone he trusted. It seems clear that defendant's indecision related to the time he would be forced to serve. In addition, we reject defendant's claim that his willingness to go to trial shows evidence of incompetency. To accept this claim would be effectively to raise the right of every defendant to force the state to prove its case as evidence of incompetency. Thus, we are left with only defense counsel's statement to the court during the second day of trial. We cannot conclude that counsel's statement, without some other support in the record, would support a finding of abuse of discretion.

As we noted previously, counsel informed the court after the prosecution had rested that defendant understood his right to remain silent and wanted to testify. Counsel's statement to the court serves as an indication that defendant was able to consult meaningfully with his attorney. Even though defense counsel could have again raised the issue of his client's competency, he did not. Just as in *People v Blocker*, 393 Mich 501, 508; 227 NW2d 767 (1975), it appears that defense counsel's concerns about his client's competency were assuaged by this point in the trial.¹ We also note that defendant testified and was able to answer all foundational questions and give his version of the events. Our review of defendant's testimony prior to trial during plea proceedings and during trial has not revealed any evidence from which to conclude that defendant was incompetent. On these facts, the trial court had no duty to inquire further as to defendant's competence because no facts were brought to its attention that raised a "bona fide doubt" about defendant's competence. *Harris, supra* at 102. The trial court did not abuse its discretion.

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

¹ We recognize that the defendant in *Blocker* had been examined by a psychiatrist before trial, while no examination took place in this case. However, we find this to be a distinction without a difference.