IN THE COURT OF APPEALS OF IOWA

No. 6-911 / 05-1984
Filed January 18, 2007

STATE OF IOWA,
Plaintiff-Appellant,

vs.

TIMOTHY MATTHEW WILKINS,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Denver D. Dillard, Judge.

The State appeals from a district court ruling finding the defendant incompetent to stand trial. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, J. Patrick White, County Attorney, and Anne M. Lahey and David V. Tiffany, Assistant County Attorneys, for appellant.

Rockne O. Cole, Iowa City, for appellee.

Considered by Huitink, P.J., Vogel, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

HUITINK, P.J.

The State sought discretionary review of a ruling by the district court finding the defendant, Timothy Wilkins, incompetent to stand trial. Our supreme court granted the State's request for discretionary review and transferred the case to this court. We reverse and remand for further proceedings.

I. Background Facts and Proceedings

In December 2004 Wilkins and his older brother, Robert, were charged jointly by trial information with one count of conspiracy to deliver crack cocaine and one count of delivery of crack cocaine. A second trial information, filed two months later, charged Wilkins and another man jointly with conspiracy to deliver and delivery of crack cocaine during a different time frame.

Wilkins requested a competency hearing in April 2005. The district court found probable cause to support the request and ordered Wilkins to be evaluated. *See* Iowa Code § 812.3(1) (2005). A competency hearing was held in September 2005.

At the competency hearing, Wilkins presented the testimony of Dr. Frank Gersh, a licensed psychologist. Dr. Gersh's evaluation of Wilkins in March 2005 consisted of an interview with Wilkins and his mother, the administration of several psychological tests, and a review of Wilkins's records. IQ testing revealed a verbal IQ of 58, a performance IQ of 51, and a full scale IQ of 50, which placed Wilkins in the mild to moderate range of mental retardation. According to Dr. Gersh, Wilkins was disoriented as to time and place during the interview, and his memory "was obviously very poor." Wilkins knew "he was arrested for having some white stuff in a bag," but did not know the charge

against him. He did not know the roles of the various persons in the courtroom; and "had no idea about court procedure." Dr. Gersh further found Wilkins was not capable of assisting his attorney in his own defense "as he does not remember the events that lead to each of his arrests." The doctor concluded that Wilkins "has a psychiatric disorder, mild to moderate mental retardation, which prevents him from being competent to stand trial."

Dr. Gersh noted Wilkins's IQ scores "are not significantly different from those obtained on two previous occasions, which suggests they are indeed accurate." Records from the two prior tests were introduced at the hearing. In 1992 a psychologist evaluated Wilkins to determine his eligibility for Social Security disability benefits. The psychologist concluded Wilkins, age fifteen at the time, had a verbal IQ of 52, a performance IQ of less than 45, and a full scale IQ of 44. The results "confirm[ed] the diagnosis of intellectual functioning in the mildly retarded range." A second evaluation occurred in December 2003. The evaluating psychologist concluded Wilkins had a verbal IQ of 53, a performance IQ of 51, and a full scale IQ of 48. She reported, "These scores place him in the moderately mentally retarded range," and that Wilkins had "very limited intellectual abilities." The psychologist further concluded, "It is quite apparent that he has never been able to engage successfully in the basic responsibilities of living."

The State presented the testimony of Dr. Tracy Gunter, a forensic psychiatrist, and Dr. Leonard Welsh, a clinical psychologist. Dr. Gunter reviewed records from Wilkins's nine-day stay at the Iowa Medical and Classification Center at Oakdale and interviewed Wilkins. Dr. Welsh administered individual

and group tests. Wilkins scored 88 on the verbal IQ test, and another intelligence test placed him in "the upper part of the mild retardation range." Both Doctors Gunter and Welsh were somewhat surprised of Wilkins's verbal IQ score, and each indicated his IQ appeared to be in the 70 to 80 range, given the circumstances known to them.[1] The doctors agreed that reliance on an IQ score alone is inadequate when evaluating competency. Dr. Gunter further testified that developmentally delayed individuals can continue to improve their adaptive skills into adulthood; and that her "experience with Mr. Wilkins was very, very different qualitatively and quantitatively" than that of Dr. Gersh.

During an interview with Dr. Gunter, Wilkins responded appropriately to her questions. He named the charges against him and indicated he could go to jail if convicted of the charges. He knew his attorney's name and accurately described the role of the prosecutor and the judge. In her review of records from his stay at Oakdale, Dr. Gunter observed Wilkins had done "very well." He signed up for a job with housekeeping, "went out with the guys," and "got very good ratings for participation in groups." She testified, "He didn't distinguish himself on the unit according to the notes and the reports that I have." Dr. Gunter opined that based on her interaction with him and her review of the records from his stay at Oakdale, Wilkins was not moderately mentally retarded. She concluded, "I believe that he has a factual and rational understanding of the charges and proceedings pending against him, so I feel that he has the ability to participate [at trial]." Dr. Welsh concluded similarly.

[1] Doctors Gunter and Welsh did not exchange information with Dr. Gersh.

The district court found Dr. Gersh and Dr. Welsh to be biased for and against the defense, respectively, because of their "almost exclusive employment and predictable testimony." The court added that while it was "more impressed with Dr. Gunter's impartiality, her conclusions are based in large part upon the testing and observations of others." The court noted the experts "were unanimous in their agreement that a valid test score in the low 50s supports a finding of incompetency and a valid score in the 70s or 80s supports a conclusion of competency." The court continued,

> The State failed to carry its burden of proving by a preponderance of the evidence that the defendant is competent to stand trial. This is not to say that the court concludes the defendant is, in fact, incompetent. He may or may not be incompetent as could be demonstrated by a more neutral evaluation. This is not the typical case of a mental illness. It stands or falls upon the validity of the intelligence testing. In this case, the two sides have cancelled each other out.

The district court ruled Wilkins was not competent to stand trial "because the State has failed to prove the standard by a preponderance of the evidence," and suspended further criminal proceedings indefinitely. After the State filed an application for discretionary review, the district court filed an "addendum to ruling on competency," discussing its previous ruling.

On appeal, the State argues the district court erred in (1) imposing the burden of proof on the State to establish Wilkins's competency, and (2) concluding that evidence in equipoise requires a finding of incompetency. The State contends established case law mandates the opposite conclusions.

II. Standard of Review

Contrary to Wilkins's assertions, our review is not de novo. *See State v. Jackson*, 305 N.W.2d 420, 425 (Iowa 1981). We review the district court's determination of competence for the correction of errors at law. *State v. Rieflin*, 558 N.W.2d 149, 151 (Iowa 1996). We are bound by the district court's findings of fact if they are supported by substantial evidence. *Id.* "[O]ur inquiry is limited to whether there is support in the record for the competency finding." *Id.*; *see also Jackson*, 305 N.W.2d at 425.

III. Discussion

There is a strong presumption that a defendant is competent to stand trial. *State v. Rieke*, 542 N.W.2d 577, 580 (Iowa Ct. App. 1995). A defendant has the burden of proving his or her incompetence by a preponderance of the evidence. *Rieflin*, 558 N.W.2d at 152. Iowa Code section 812.5(2) provides that

> If the court, by a preponderance of the evidence, finds 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, the court shall suspend the criminal proceedings indefinitely and order the defendant to be placed in a treatment program pursuant to section 812.6 and shall make further findings of record as necessary under section 812.6.

If the evidence of incompetence is in equipoise, the presumption of competency prevails. *Rieke*, 542 N.W.2d at 580.

In its "addendum," the district court provided "a further explanation of the court's reason for placing the burden of proof upon the State." The court based its placement of the burden on "the sweeping amendment to chapter 812" that occurred in 2004. *See* 2004 Iowa Acts ch. 1084, § 5. Upon careful review of

these amendments, we are not persuaded the legislature intended to change well-established case law placing the burden of proof in competency proceedings on the defendant. Therefore, the district court's assignment of the burden of proof to the State was in error.

The district court explained in its addendum,

> In this case, the evidence was not ambiguous or equivocal, but rather two polar opposites. Each expert psychologist testified to an opposite conclusion from the testing performed with the defense expert being unequivocal in his position and the State's expert conceding that his test results may have been artificially elevated but, nevertheless, substantially within the range of competency. Each expert conceded that the other's testing, if accurate, would support the other's conclusion. This circumstance or condition is not the "equipoise" contemplated in the cases cited by the State. As explained in its ruling, this court did not find sufficient credibility with either expert to accept their conclusions.

We disagree with the district court's conclusion that its summary of the testimony did not put the evidence in equipoise. *See State v. Rhode*, 503 N.W.2d 27 (Iowa Ct. App. 1993) (holding that where "[t]he evidence presented at the hearing by [defendant] was clearly in direct contradiction to the evidence presented by the State," the evidence was "essentially in 'equipoise,'" and defendant failed to prove incompetence by a preponderance of the evidence). As the district court noted, the opposing experts "have cancelled each other out," which puts the evidence in equipoise. Accordingly, the presumption of competency must prevail. *State v. Forsyth*, 547 N.W.2d 833, 838 (Iowa Ct. App. 1996).

We reverse the district court's ruling on competency and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.