2012 IL App (1st) 101250-U

FOURTH DIVISION
May 3, 2012

No. 1-10-1250

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 23495
	)	
PAUL D. TAYLOR,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err by not holding a fitness hearing when the court did not express a *bona fide* doubt of defendant's fitness and when reports from the examinations of three psychiatrists agreed that defendant could choose to cooperate with counsel. The court did not err in failing to admonish defendant before waiving counsel when he argued *pro se* on a motion to withdraw his plea; the motion had already been stricken and motions to reconsider denied, so that there was not a motion properly pending when the court permitted defendant to argue.

¶ 2 Pursuant to a negotiated guilty plea in January 2009, defendant Paul Taylor was convicted of theft and sentenced to five years' imprisonment. Defendant appeals from the denial of his

motion to withdraw his plea. On appeal, he contends that the trial court erred in not holding a fitness hearing to make an independent assessment of his fitness after expressing concern over his fitness. He also contends that the court erred in allowing him to proceed *pro se* on his motion to withdraw his plea and that he was not properly admonished for a waiver of counsel. For the reasons stated below, we affirm.

¶ 3 Defendant was arrested on September 25, 2005, and charged with two counts of residential burglary allegedly committed on that date in two apartments in the same building.

¶ 4 In October 2005, defendant filed a *pro se* motion for judgment as a matter of law, arguing that the State had not responded to his earlier motion to dismiss. In November 2005, defendant filed *pro se* motion, seeking contempt findings against defense counsel and the assistant State's Attorney (ASA) on his case, alleging in relevant part that counsel had not filed his *pro se* motion to dismiss. Defendant also filed a *pro se* discovery motion.

¶ 5 In court on November 10, 2005, defendant requested to proceed *pro se*. The court read the charges to defendant, informed him of the sentencing range for a mandatory Class X offender, and described in detail his right to counsel. The court attempted to impress upon him that, though it was his right, it would be unwise to proceed *pro se*. Questioning by the court revealed that defendant was taking medication daily for bipolar disorder and that he wanted to represent himself because "every time I trust someone, they always want me to take a plea when I am innocent of all the convictions." The court asked defendant if he was waiving his right to counsel voluntarily, and he replied that he was. Though the court found defendant to be coherent and not apparently mentally ill or under the influence of drugs or alcohol, the court also noted his medication for bipolar disorder and ordered the court’s Forensic Clinical Services (FCS) to conduct a behavioral clinical examination (BCX) of defendant to evaluate his ability to represent himself.

¶ 6 In December 2005, Dr. Sharon Coleman of FCS reported to the court that she had conducted the BCX on November 22 and concluded that defendant was able to represent himself. While he had a history of bipolar disorder, this was not "significantly debilitating" nor did it "compromise his ability to understand the nature and purpose of the proceedings pending against him." Defendant "communicated in a rational manner his beliefs and understanding about how the legal system will work as applied to his case" and shows understanding of "the possible outcomes of a guilty verdict," without any "unrealistic or idiosyncratic beliefs about himself or his current legal situation."

¶ 7 When the case was next before the court on December 19, 2005, defendant withdrew his request to proceed *pro se* and the court appointed counsel.

¶ 8 On January 30, 2006, defense counsel asked the court for a BCX of defendant to evaluate defendant's fitness to stand trial with or without medication. Psychiatrist Dr. Jonathan Kelly of FCS reported to the court in March 2006 that he had conducted the BCX and determined that defendant was unfit to stand trial, needed inpatient mental health services, and was likely to be restored by treatment to fitness within a year. Because of his bipolar disorder and "delusional beliefs concerning court personnel," defendant was unable to assist in his defense or participate in legal proceedings. Dr. Kelly's accompanying report, dated February 17, 2006, explained that defendant "was oriented to the date, place, and person," knew the name of his counsel and the presiding judge, and "was intermittently able to give coherent, relevant, [and] organized responses," but also would close his eyes and seemingly fall asleep, give "unintelligible responses" to some questions, and not respond to some questions until repeated several times. At the time of the BCX, defendant was receiving lithium carbonate and Seroquel. Dr. Kelly noted that the earlier BCX by Dr. Coleman found defendant sane and fit to stand trial while noting his personality disorder and history of bipolar disorder.

¶ 9 During a first hearing on March 17, 2006, Dr. Kelly testified to the content of his BCX report. He added that, after the abortive examination of February 17, he conducted another exam in March. At that time, defendant showed comprehension of the personnel and procedures in a criminal case but expressed a deep distrust of anyone working for "the government" including the judge and defense counsel. On cross-examination, Dr. Kelly admitted that many defendants are suspicious of appointed counsel but clarified that most do not believe, as defendant expressed, "that their public defender is actively plotting against them." The court found defendant unfit to stand trial with a substantial probability that treatment could render him fit within a year and committed defendant to the custody of the Department of Mental Health[1]("the Department") for treatment. The Department was ordered to issue an opinion as to the probability of defendant being fit for trial within a year.

¶ 10 In September 2006, the Department reported to the court that defendant was now "able to understand the nature of the charges against him and cooperate in his defense." Attached was the report of psychiatrist Dr. Basheer Ahmed. Upon admission to the Department facility, defendant was "cooperative" and had no "cognitive or comprehension disability" or delusions but also showed a "hostile, resistive paranoid evasive attitude" or "mild paranoia and tendency to blame others," while his attentiveness was "somewhat constricted but not totally impaired." Defendant was initially "defiant" to his new medications – mood-stabilizer Divalproex sodium, anti-psychotic Olanzapine, and Clonazepam for anxiety – but his resistance then decreased in frequency and intensity. However, "defendant's tendency towards opposing authority has not changed and is very likely never going to change," so that upon discharge from Department custody Dr. Ahmed found that his "insight and judgement have improved" while he was still

[1]The Department was at some point renamed the Department of Human Services.

"generally defiant and oppositional." Because defendant was "fully capable of not choosing to display this attitude," Dr. Ahmed found him fit to stand trial.

¶ 11 In October 2006, Dr. Kelly reported that he conducted a new BCX of defendant that month and found him fit to stand trial with medications. At the time of the BCX, he was receiving daily 2000 milligrams (mg) of mood-stabilizer Divalproex sodium, 20 mg of antipsychotic Olanzapine, and 1mg of anti-anxiety Clonazepam, with no relevant side effects.

¶ 12 On November 21, 2006, the court ordered a new BCX for fitness to stand trial with and without medication, to be conducted by Dr. Coleman as a second opinion to Dr. Kelly.

¶ 13 Later in November 2006, Dr. Kelly reported that he conducted another BCX of defendant that month, finding him unfit to stand trial and in need of inpatient mental health services because his bipolar disorder caused "delusional beliefs and other manic symptoms" that impaired his ability to assist in his defense. His "irrational, paranoid and grandiose beliefs prevent him from working collaboratively with defense counsel." Defendant accurately described the roles of the judge, ASA, and defense counsel and correctly stated that he faced up to 30 years' imprisonment. Defendant told Dr. Kelly that he was consistently taking all prescribed medication, which as of November 2006 was mood-stabilizing Depakote, antipsychotic Zyprexa, and antianxiety Klonopin. However, defendant also asserted that defense counsel "misled" and "misrepresented" him, withheld evidence from him, and was cooperating with the ASA "to get me out of the way." He wanted counsel to present his motions and his theory of the case, and while he did not want to proceed *pro se* he wanted the court to appoint private counsel rather than the public defender. Dr. Kelly described defendant's desire to have outside counsel appointed and for counsel to present his motions as "unrealistic expectations" and found that defendant "had grandiose delusional thinking that his legal approach to the case is superior to

that of the public defender." Dr. Kelly described defendant as having "poor judgment" and "tenuous" impulse control. The court granted defendant another fitness hearing.

¶ 14 In January 2007, Dr. Kelly reported to the court that he conducted another BCX in December 2006 and found defendant fit to stand trial with medications. His bipolar disorder was in "partial remission" and he was able to assist in his defense, being both willing and able to cooperate with the public defender appointed to him. He had no relevant side effects from his medications, but he had "sporadic compliance" with medication so that he "may have recurrence of psychotic symptoms and severe mania" and thus require re-evaluation if he fails to take his medications as prescribed.

¶ 15 On February 7, 2007, the court commenced a fitness restoration hearing. The court briefly admonished defendant for an untranscribed lack of decorum, stating "I don't know what's so humorous," but defendant responded coherently that he understood that he could be removed from the courtroom for inappropriate behavior. Dr. Kelly testified that he examined defendant five times, in February, March, October, November, and December 2006. He testified in detail to the most recent exam and reiterated his conclusion that defendant would be fit for trial so long as he took his medications. On cross-examination, Dr. Kelly explained that defendant still did not trust defense counsel but that distrust did not rise to his previous delusional level and he now expressed willingness to cooperate with the assigned public defender. Following this testimony, the court found defendant fit to stand trial with medication.

¶ 16 On March 27, 2007, defense counsel told the court that she was "having difficulty communicating with" defendant and requested a BCX on fitness. The court ordered a BCX to determine fitness with or without medication.

¶ 17 In April 2007, Dr. Kelly reported to the court that he conducted a BCX on March 29 and April 9 and found defendant fit to stand trial with medications. His bipolar disorder was in

"partial remission" and he "is able to assist in his defense, if he chooses to do so." Dr. Kelly noted defendant's history of sporadic compliance with medication and reiterated that he may require re-evaluation if he fails to take his medications. On May 8, 2007, the court acknowledged the BCX report and proceeded with the case without further finding or comment.

¶ 18 The case proceeded through discovery and pre-trial motions until January 2008, when defendant began filing *pro se* motions for bond reduction, a bill of particulars, appointment of private counsel, and a psychiatric opinion by a non-FCS psychiatrist. In oral argument on the motions on February 14, 2008, defendant alleged that his previous public defender "was working with the State." In lieu of proceeding on the motions, the court ordered a new BCX to evaluate fitness with or without medication.

¶ 19 Dr. Kelly reported to the court later in February 2008 that he could not conduct a BCX because defendant refused to participate in any exam by a FCS psychiatrist. Thus, Dr. Kelly could not offer an opinion on his fitness. On February 28, 2008, the court acknowledged defendant's argument for an independent psychiatric evaluation but ordered that he undergo a BCX by FCS, noting that an outside opinion could be sought later if this BCX found him unfit. The court expressly noted that defendant made a coherent and cogent argument for an independent exam. In the interim, a different public defender was assigned to the case.

¶ 20 In March 2008, Dr. Coleman reported to the court that she conducted a BCX of defendant that month and found him fit to stand trial. Dr. Coleman found him "capable of assisting counsel in his defense, *if he so chooses*." [Emphasis in original.] His compliance with medication was sporadic, and he is "willfully oppositional and uncooperative" even when fully compliant. Dr. Coleman opined that "his current behavior appears to [be] due to his severe personality disorder and not his clinical condition."

¶ 21 Dr. Kelly made a similar report to the court in May 2008 of an April BCX, echoing Dr. Coleman's report that defendant could choose to cooperate in his defense. Dr. Kelly stated that, while defendant "needs to comply with prescribed medications" to keep symptoms of his bipolar disorder in check, "defendant does not believe he needs psychotropic medications and will not reveal to what extent he is complying with his physician's prescription," nor would he consent to provide the relevant medical records.

¶ 22 On May 22, 2008, the court received the BCX reports of Drs. Coleman and Kelly, and both defense counsel and the ASA expressed their intent to stipulate to the reports. The court instead examined defendant at length regarding his request for the appointment of counsel other than the public defender. Though defense counsel had filed a motion to quash, defendant was displeased that she was not filing a motion challenging the identification. Counsel explained why she believed such a motion would not succeed. When the court asked defendant to explain why he wanted outside counsel, he discussed at length his issues with the public defender who initially represented him rather than the present one. After determining that present counsel was consulting with defendant and filing discovery and other motions, the court denied defendant's motion for the appointment of outside counsel. Defendant then demanded to proceed *pro se*, and the court informed him of the charges against him and his potential sentence as a mandatory Class X offender. The court questioned defendant regarding his ability to represent himself, learning that he attended high school but not college and had represented himself in court but not in a jury trial. The court attempted to impress upon defendant that he would be a layman contending with trained ASAs, that the court would hold him to the same standards as counsel, and that he could not request counsel once trial began. The court ordered a new BCX before ruling on the motion to proceed *pro se*, noting that "I really don't think you're capable of representing yourself." As defendant objected at length that the delay for a new exam would

violate his right to due process, he mentioned that he "had plenty of money" including that he "had a Mercedes-Benz" and "had a coin collection *** worth *** maybe five thousand dollars."

¶ 23 Dr. Kelly reported to the court in June 2008 that he conducted a BCX that month and found defendant fit to stand trial. He echoed the earlier findings by himself and Dr. Coleman that defendant could choose to cooperate in his defense. Dr. Kelly stated that, while defendant "does need to comply with prescribed medications" to keep symptoms of his bipolar disorder in check, "defendant does not believe he needs psychotropic medications and will not reveal to what extent he is complying with his physicians' prescription," nor would he consent to provide the relevant medical records.

¶ 24 On June 26, 2008, defendant informed the court that he would proceed with the public defender, and thus the court received Dr. Kelly's BCX report without further ruling or comment. Counsel presented a motion for bond reduction, noting that "he has good issues for a motion" and consistently maintained his innocence, but the court denied the motion.

¶ 25 On September 11, 2008, defense counsel withdrew the motion to quash. When the court asked defendant if he wanted a bench or jury trial, he demurred that the situation was "crazy" and made "no sense" and requested "time to think that over." The court continued the case to a later date, and defendant elected a jury trial. However, when the court asked defendant again on November 7, 2008, whether he wanted a bench or jury trial, defendant refused to answer because he wanted to object to counsel not presenting the motion to quash. The court ordered a jury trial.

¶ 26 A plea hearing was held on January 5, 2009. By agreement, one count of the indictment was *nol prossed* and the other count was amended to felony theft, a Class 3 felony, so that defendant would no longer be a mandatory Class X offender. The court read the charge to defendant and informed him of the sentencing range, including regular and extended prison terms, mandatory supervised release, and probation. Defendant expressed understanding of these

admonishments, including repeating back to the court that he was now charged with "theft over three hundred" and faced "five to ten extended term, I could face ten years." He pled guilty, and he consistently expressed understanding when the court informed him of his right to a bench or jury trial. He denied that he had been threatened or promised anything beyond the terms of the plea agreement, and agreed that his plea was voluntary. The parties stipulated to the factual basis for the plea, and defendant agreed that he was pleading guilty to the stipulated facts. Defendant waived a post-sentencing investigation report, and the State informed the court of defendant's prior criminal record. Defendant objected (as he had earlier at the bond re-hearing) that an offense recorded as sexual assault was actually sexual abuse, and the ASA so acknowledged. The court sentenced defendant to five years' imprisonment with 1200 days credit for time served. The court then admonished him that he has the right to appeal, he would first have to file within 30 days a written motion to vacate the plea, that any issue not raised in the motion would be waived for appeal, the residential burglary charges and accompanying Class X offender status could be reinstated if such a motion was granted, an appeal would have to be filed within 30 days of the denial of the motion, and transcripts and counsel would be provided for the motion and appeal if he was indigent.

¶ 27 Defendant filed a motion to withdraw his plea, arguing that he was innocent, that he believed he was pleading guilty to possession of stolen property rather than theft, and that he had not been receiving his medication for his bipolar disorder.

¶ 28 When the court asked defendant on March 12, 2009, if he wanted counsel appointed for his case, defendant agreed. However, on September 23, 2009, defendant (through counsel) requested a continuance so he could retain private counsel. When neither defendant nor private counsel attended court on November 30, 2009, the court struck the post-plea motion. The court denied defendant's *pro se* motion to reconsider on January 22, 2010, also denying his motion to

appoint outside counsel on the basis that there was no motion pending for counsel to present. Defendant filed a second motion to reconsider, which the court denied on March 18, 2010.

¶ 29 However, the court heard *pro se* arguments upon the post-plea motion on April 23, 2010. Defendant argued that he did not want to plead guilty but to have the case dismissed in the pre-trial stage upon his motions. The court found that "there was nothing defective in your plea" and ruled that the "motion to withdraw your guilty plea is denied." This appeal timely followed.

¶ 30 On appeal, defendant first contends that the trial court erred in not holding a fitness hearing to make an independent assessment of his fitness after expressing concerns over defendant's fitness.

¶ 31 A defendant is unfit to stand trial "if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2010). Because fitness concerns only a person's ability to function within the context of trial, a person may be fit for trial though his mind may be otherwise unsound. *People v. Taylor*, 409 Ill. App. 3d 881, 896 (2011). A defendant receiving psychotropic medication will not be presumed unfit solely on that basis. 725 ILCS 5/104-21(a) (West 2010).

¶ 32 A defendant is generally presumed to be fit to stand trial or to plead. 725 ILCS 5/104-10 (West 2010). The issue of a defendant’s fitness to stand trial may be raised by the court, defense, or State at any time before, during, or after trial, and the court may order a BCX by a psychologist or psychiatrist. 725 ILCS 5/104-11(a), (b), 104-13(a) (West 2010). The factors that may create a *bona fide* doubt of a defendant’s fitness include any irrational behavior, his demeanor at trial, any prior medical opinion on the defendant's competence, and any representations by defense counsel on the defendant's competence. *People v. Moore*, 408 Ill. App. 3d 706, 711 (2011), citing *People v. Brown*, 236 Ill. 2d 175, 186-87 (2010). Whether a

bona fide doubt exists regarding a defendant's fitness is a matter of the trial court's discretion. *Moore*, 408 Ill. App. 3d at 711.

¶ 33 When the court orders a BCX and receives the report thereof, it "shall conduct a hearing to determine the issue of defendant's fitness." 725 ILCS 5/104-16(a) (West 2010). "When a *bona fide* doubt of the defendant's fitness has been raised, the burden of proving that the defendant is fit by a preponderance of the evidence and the burden of going forward with the evidence are on the State." 725 ILCS 5/104-11(c) (West 2010). In a fitness hearing, relevant factors include the defendant's "knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;" his "ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel;" and his "social behavior and abilities; orientation as to time and place; recognition of persons, places and things; and performance of motor processes." 725 ILCS 5/104-16(b) (West 2010). While "the court *may* call its own witnesses and conduct its own inquiry," (emphasis added)(725 ILCS 5/104-11(c) (West 2010)), no statute or supreme court rule requires that a court independently question a defendant or other witness and it is within the court's discretion not to do so. *Taylor*, 409 Ill. App. 3d at 899. "On the basis of the evidence before it, the court *** shall determine whether the defendant is fit to stand trial or to plead." 725 ILCS 5/104-16(d) (West 2010). A trial court's determination that a defendant is fit to stand trial will not be reversed absent an abuse of discretion. *Taylor*, 409 Ill. App. 3d at 896.

¶ 34 Here, a summary of events is invaluable in evaluating the contention of error. After a November 2005 BCX found defendant fit to stand trial, a March 2006 BCX found him unfit, and defendant was remanded to the care and custody of the Department. However, the Department reported to the court in September 2006 that he was fit to stand trial, with the proviso that he

would still be "generally defiant and oppositional" while "fully capable of not choosing to display this attitude." An October 2006 BCX by Dr. Kelly found defendant fit for trial with medication, while a November 2006 BCX also by Dr. Kelly found him unfit. Notably, the unfitness findings were based in large part upon defendant's "unrealistic expectations" of counsel and his "grandiose delusional thinking that his legal approach to the case is superior to that of the public defender." Also notable is that Dr. Kelly again found defendant fit with medication in January 2007. When a restoration hearing was held in February 2007, Dr. Kelly testified and was subject to cross-examination before the court found defendant fit to stand trial with medication. All subsequent BCXs, by Dr. Kelly in April 2007 and May and June of 2008 and by Dr. Coleman in March 2008, were consistent that defendant was fit for trial in that, while it could not be determined whether he was compliant with his prescriptions, he could choose to cooperate with counsel. When the court ordered the last of these BCXs, it was considering defendant's motion to proceed *pro se*, and the court stated that it was ordering the BCX that "I really don't think you're capable of representing yourself." Defendant told the court at the next session of his decision to accept the public defender, and the court accepted the last BCX without ruling or comment.

¶ 35 From the aforementioned facts, we find no reversible error. First and foremost, the court did not express a *bona fide* doubt of defendant's fitness but concern over his ability to represent himself. In admonishing defendant twice at great length on his right to self-representation, the court made pellucidly clear its belief that a person fit to stand trial would still be making a very unwise decision to represent himself. In other words, concern over defendant's ability to self-represent was not the same as a *bona fide* doubt of fitness. It is apparent to us that the court felt it had nothing left to rule on once defendant decided to withdraw his motion to proceed *pro se*, thus corroborating that the court's concern was not fitness but the more complex ability to represent oneself. Secondly, a common thread may be drawn from the opinions of the three

psychiatrists in this case: that while defendant may or may not have been taking his medication, his defiance and oppositional attitude was something within his control so that he could choose to cooperate with counsel. Even the November 2006 BCX finding defendant unfit after his return from the Department echoed this assessment: defendant's "delusions" included believing that he knew better than trained counsel, that counsel should have to follow his instructions, and that he had the right to have outside counsel appointed if the public defender would not present his motions and his theory of the case. Between the fact that the court did not express a *bona fide* doubt of fitness and the repeated findings of three psychiatrists that defendant could choose to cooperate with counsel, we find no abuse of discretion from not ordering a fitness hearing or otherwise conducting an independent evaluation of defendant's fitness.

¶ 36 Defendant also contends that the court erred in allowing him to proceed *pro se* on his motion to withdraw his plea and that he was not properly admonished for a waiver of counsel.

¶ 37 Supreme Court Rule 401(a) (eff. July 1, 1984) provides that a waiver of counsel by a defendant facing possible imprisonment must be proceeded by an admonishment of (1) the nature of the charges, (2) the minimum and maximum sentences for the offenses, including any enhancements for prior convictions, and (3) his right to counsel, including appointed counsel if indigent. A defendant has the right to counsel on a motion to withdraw his plea. Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 38 Here, a brief summary of proceedings will again be enlightening. Counsel was appointed for defendant on his motion to withdraw his plea. Counsel passed on to the court defendant's request for a continuance so he could employ outside counsel. However, after defendant failed to attend court with or without counsel, the court struck the motion. When the court denied defendant's motion to reconsider, the court noted that it would not appoint outside counsel because there was no motion pending for counsel to argue. The court also denied a second

motion for reconsideration. Thus, when the court entertained defendant's *pro se* arguments in favor of his motion, it was not granting a waiver of counsel on a pending motion to withdraw plea. Instead, the court allowed defendant to make one last argument to save his motion to withdraw his plea.

¶ 39 Accordingly, the judgment of the circuit court is affirmed.

¶ 40 Affirmed.