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2012 IL App (3d) 100735-U

Order filed April 10, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 10th Judicial Circuit,
Plaintiff-Appellee,) Peoria County, Illinois,
)
v.) Appeal No. 3-10-0735
) Circuit No. 09-CF-350
AARON M. COOK,)
) Honorable
Defendant-Appellant.) James E. Shadid,
) Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by failing to *sua sponte* order a fitness hearing for defendant where defense counsel: (1) represented that defendant was fit; and (2) informed the court that he had no issues communicating with defendant. Defendant's DNA analysis fee is vacated.

¶ 2 On December 14, 2009, defendant, Aaron M. Cook, pled guilty to one count of aggravated battery of a child. 720 ILCS 5/12-4.3(a) (West 2008). On that date, pursuant to a negotiated plea agreement, the court ordered defendant to serve 17½ years' imprisonment and pay

costs and fees including a \$200 deoxyribonucleic acid (DNA) analysis fee. After sentencing, defendant sent a *pro se* letter to the court asking to withdraw his guilty plea because he had been coerced into accepting the plea agreement by his attorney. The court appointed counsel to represent defendant. After counsel filed a supplemental motion to withdraw defendant's guilty plea, the court denied defendant's supplemental motion.

¶ 3 On appeal, defendant argues there was a *bona fide* doubt as to his fitness. Consequently, defendant asserts the trial court violated his due process rights by failing to conduct a fitness hearing. Defendant also argues the DNA analysis fee was improper because his DNA was already on file at the time of sentencing. We vacate defendant's DNA analysis fee, and otherwise affirm defendant's conviction.

¶ 4 **FACTS**

¶ 5 On April 21, 2009, defendant was charged with aggravated battery of a child. The bill of indictment alleged that on March 27, 2009, defendant caused great bodily harm to a child under the age of 13. Defendant, through his attorney Sean W. Donahue, filed a motion requesting the court to order a fitness examination pursuant to section 104-13 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/104-13 (West 2008)).¹ The motion alleged counsel had a *bona fide* doubt as to defendant's fitness because defendant reported to defense counsel that defendant was experiencing auditory and visual hallucinations on May 1, 2009. On May 12, 2009, the trial court granted defendant's motion for a fitness evaluation and ordered defendant to be evaluated by Dr. Ryan Finkenbine. The fitness evaluation has not been provided to this court

¹The motion is actually titled "Motion for Fitness Hearing"; however, the motion requests only a fitness examination pursuant to section 104-13 of the Code. 725 ILCS 5/104-13 (West 2008)).

on appeal. However, the record reveals defense counsel reported to the court on October 2, 2009, defendant was determined by the evaluator to be fit.

¶ 6 In an unrelated matter, the record reveals defendant and another inmate, James Fuller, escaped from the Peoria County jail on November 17, 2009. Defendant was apprehended by the authorities on the same day of the escape.

¶ 7 On December 4, 2009, defendant appeared with attorney Donahue before the court for a scheduling conference in this case. The trial court noted defendant was arraigned the previous day concerning the new escape charge, in case No. 09-CF-1276 and indicated at that time defendant no longer wanted Donahue to represent him. Upon being questioned by the court on December 4, 2009, with counsel present, defendant stated:

"I don't trust [Donahue], Your Honor, I don't want him as a lawyer, I tried to get rid of him before, you guys wouldn't let me, he's in cahoots, he's conspiring with the State and the federal government against me, they want to railroad me, I don't want him as my lawyer, I don't trust him, he's not representing me, I don't feel he's doing his job as good as he could be.

THE COURT: What is it that he—that he—that you want him to do that he's not doing?

THE DEFENDANT: He wanted to give me the maximum sentence, they want you know what I'm saying?

*** I know he's trying to hurt me, Judge, I know he doesn't like me, he's conspiring against me.

THE COURT: Those are just general allegations, why do you say that?

THE DEFENDANT: Because I can hear—I told him about how they're trying to poison me out at the county now after I came back, that's why I stopped taking the medication out there, and I stopped eating, drinking their food a week ago. I told him about it, he didn't do nothing about it—

THE COURT: What medication are you supposed to be taking?

THE DEFENDANT: I don't know, they give me some kind of medicine. I haven't been taking it though because I know they're trying to do something to it.

THE COURT: So they're offering it, you are refusing to take it?

THE DEFENDANT: Yeah, and then they're trying to make me eat their food and drink their water, and I stopped doing that too. They're trying to put something in it, and I told Mr. Donahue about it and he didn't do nothing about it. I don't trust him, I tried to get rid of him before, I don't want him as my lawyer, I don't even want to work with him, I don't even want to stand by him right now."

¶ 8 Following this exchange, the trial court asked attorney Donahue whether he had difficulty communicating with defendant. Counsel denied any difficulties and reaffirmed that defendant had been evaluated for fitness, and there were "no issues in that regard." The trial court then stated:

"And for the record, I think it's a matter of public knowledge, if anything else, but these are the same allegations that are being made by Mr. Fuller, who is the co-defendant in the escape, not in the same Bill of Indictment, but out of the same fact pattern, these are the same allegations Mr. Fuller is making against the public defender, almost exactly the same allegations Mr. Fuller is making against his public defender next door in the trial of

this case other than the escape charge."

¶ 9 A few days later, defendant appeared with attorney Donahue to present a negotiated guilty plea agreement to the court on December 14, 2009. In exchange for the State's recommendation for the court to impose a sentence of 17½ years in the Department of Corrections, defendant agreed to plead guilty to aggravated battery of a child. During the hearing before the court, defendant revealed that he was taking Thioridazine, which is an antipsychotic drug used to treat schizophrenia. The court inquired whether defendant was taking his prescribed dosage of Thioridazine, and defendant confirmed he was. The court also questioned, "is there anything about the medication you're taking that's making it so you do not understand what you're doing today?" Defendant stated "no."

¶ 10 Defendant subsequently wrote a *pro se* letter to the court asking to withdraw his guilty plea. The trial court appointed counsel to represent defendant for purposes of this motion. Defendant's new counsel prepared and filed a supplemental motion to withdraw the guilty plea alleging defendant was coerced into accepting the plea agreement, and he was not advised he would be serving 85% of his sentence.

¶ 11 At a hearing on the supplemental motion to withdraw the guilty plea, defendant stated he was not thinking clearly when he pled guilty because he had just recently restarted his medication and finished a two-week hunger strike. When the trial court inquired as to why defendant did not mention these facts during his guilty plea, defendant replied he had been "nervous." The trial court denied the motion, and defendant appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues the court violated his due process rights because a *bona fide*

doubt existed concerning his fitness and the trial court failed to conduct a fitness hearing to determine his fitness. He also alleges he should not have been assessed the \$200 DNA analysis fee. We vacate defendant's DNA analysis fee, and otherwise affirm defendant's conviction.

¶ 14 Defendant concedes he forfeited the fitness issue because he did not raise it in his supplemental motion to withdraw guilty plea. *People v. Enoch*, 122 Ill. 2d 176 (1988). A forfeited issue may only be reviewed for plain error. *People v. Williams*, 193 Ill. 2d 306, 348-49 (2000). Under the plain error test, a reviewing court may consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error was so serious that defendant was denied a substantial right. *People v. Herron*, 215 Ill. 2d 167, 179 (2005). "A trial court's failure to order a fitness hearing *sua sponte* 'may be reviewed as plain error' because 'it concerns a substantial right.'" *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 51, quoting *People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001). However, the first step under the plain error analysis is to determine whether an error occurred at all. *Id.*

¶ 15 Due process bars the prosecution of a person who is not fit to stand trial. *People v. Sandham*, 174 Ill. 2d 379 (1996). However, a defendant is presumed fit to stand trial, and will be considered unfit only if, because of defendant's mental or physical condition, defendant 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 2008). When a *bona fide* doubt is raised as to defendant's fitness, the trial court must order a determination of the issue before proceeding further. 725 ILCS 5/104-11(a) (West 2008). Further, it is within the trial court's discretion to determine whether there exists a *bona fide* doubt as to defendant's fitness, since the trial court is in a better position to observe and evaluate defendant's conduct. *People v. McCullum*, 386 Ill. App. 3d 495, 515

(2008). Factors relevant for the trial court to consider in assessing whether a *bona fide* doubt exists concerning defendant's actual fitness include: (1) defendant's demeanor and behavior before the court; (2) counsel's statements concerning defendant's competence; and (3) any prior medical determinations of fitness. *People v. Hanson*, 212 Ill. 2d 212, 223 (2004).

¶ 16 In the instant case, defense counsel filed a motion requesting a fitness examination pursuant to section 104-13 of the Code. As requested, the court ordered a fitness examination, presumably to assist counsel in deciding whether to request a hearing on the issue of defendant's suspected unfitness. Although appellant bears the burden of providing an adequate record on appeal, the record in this case does not contain a copy of Dr. Finkenbine's evaluation pursuant to the court's order entered on May 12, 2009. *People v. Jenkins*, 383 Ill. App. 3d 978, 990 (2008) (appellant bears burden of producing sufficiently complete record on appeal to support claim of error).

¶ 17 Nonetheless, the record reveals defense counsel reported to the court on October 2, 2009, defendant was determined by the evaluator to be fit. It is clear from the record that after the evaluation was completed, defense counsel's concerns about his client's fitness were alleviated, and counsel did not request a fitness hearing pursuant to section 104-16 of the Code. 725 ILCS 5/104-16 (West 2008). Consequently, as of October 2, 2009, the trial court was not obligated to conduct a fitness hearing for the purpose of determining defendant's fitness before proceeding further. 725 ILCS 5/104-11(a) (West 2008).

¶ 18 Next, defendant argues that a *bona fide* doubt developed as to his fitness when defendant appeared with his attorney for a scheduling hearing on December 4, 2009, following his escape with another inmate a few days earlier. The record demonstrates that on December 4, 2009,

defendant informed the judge for the first time that his attorney was conspiring with the state and federal government against him and was trying to "railroad" him. Defendant also told the court he was taking an antipsychotic medication used to treat schizophrenia, and various unidentified individuals at the county jail were trying to poison him causing him to refuse both food and water. On that date, the trial court carefully noted for the record that the codefendant in the escape episode made very similar allegations against his own counsel.

¶ 19 The case law provides that even though a defendant may suffer from some mental disturbance or may require psychiatric treatment, that does not necessarily create a *bona fide* doubt of fitness. *People v. George*, 263 Ill. App. 3d 968 (1993). In this case, on December 4, 2009, defense counsel repeated defendant was fit and stated he did not have any issues communicating with defendant. See *Id.* at 980 (stating "[w]hen defense counsel has neither indicated a problem in preparing a defense nor requested a fitness hearing, evidence of mental illness alone does not provide grounds for reversing a conviction").

¶ 20 A few day later, the record clearly shows defendant participated in his guilty plea hearing on December 14, 2009, by answering the court's questions appropriately and coherently. Defendant informed the court the medication did not prevent him from understanding the proceeding. Based on these circumstances, the trial court did not abuse its discretion by failing to *sua sponte* order a fitness hearing.

¶ 21 Finally, defendant argues his conviction must be reversed because the trial court did not make an actual finding on the record with regard to defendant's fitness. See *Contorno*, 322 Ill. App. 3d 177. However, the court is only required to make such a finding, after a *bona fide* doubt arises with regard to defendant's fitness in the first place. 725 ILCS 5/104-11(a) (West 2008);

Contorno, 322 Ill. App. 3d 177, 179. Since we conclude there was no *bona fide* doubt following the entry of the May 12, 2009, order requiring a fitness examination by a qualified expert at the defendant's request, the trial court did not commit any error. Thus, plain error does not exist in this case.

¶ 22 Defendant's second argument on appeal is that the trial court improperly assessed a \$200 DNA analysis fee as part of his sentence because his DNA was already on file at the time of sentencing. See *People v. Marshall*, 242 Ill. 2d 285 (2011). Because the State confesses error, we agree. Accordingly, we vacate defendant's DNA analysis fee.

¶ 23 **CONCLUSION**

¶ 24 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 25 Affirmed in part and vacated in part.