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2012 IL App (3d) 110615-U

Order filed November 19, 2012

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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 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-11-0615
	)	Circuit No. 10-CF-359
	)	
OSCAR MOORE,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The cause is remanded for a retrospective fitness hearing. Defendant's conviction and sentence are otherwise affirmed.
- ¶ 2 Defendant, Oscar Moore, was convicted of retail theft of merchandise having a value not exceeding \$150 (720 ILCS 5/16A-3(a) (West 2010)). The trial court sentenced defendant to 42 months' imprisonment. Defendant appeals, arguing: (1) counsel was ineffective for failing to investigate his history of mental illness; (2) the trial court considered an improper factor when

pronouncing its sentence; and (3) the trial court erred in failing to conduct a fitness hearing. We find that counsel was not ineffective, defendant's sentence was not an abuse of discretion, and the trial court did err in failing to conduct a fitness hearing. The cause is remanded to the trial court for a retrospective fitness hearing.

¶ 3

### FACTS

¶ 4 Defendant was charged with retail theft of merchandise with a value of less than \$150 (720 ILCS 5/16A-3(a) (West 2010)). Because defendant had previously been convicted of retail theft, the offense was a Class 4 felony (720 ILCS 5/16A-3(b) (West 2010)). Defendant, acting *pro se*, pled not guilty, demanded a speedy trial, requested a reduction in bond, and otherwise participated in pretrial hearings. Prior to trial, counsel was appointed for defendant.

¶ 5 At trial, evidence established that defendant and another suspect entered a Dollar General store around 5:45 p.m. on July 20, 2010. While in the store, an employee witnessed defendant take two bottles of tire shine spray and place them under his shirt. As defendant left the store, the employee saw two bottles of body wash in his back pocket. The employee called the police. When the police officers approached defendant, they found the four items on his person. Defendant did not have a receipt for the items. At the scene, the employee identified defendant and the stolen merchandise.

¶ 6 Defendant testified in his own defense. He stated that he went to the store to return some items. He repeatedly denied that he had the stolen merchandise on his person. In rebuttal, the State introduced evidence of defendant's prior felony convictions.

¶ 7 The trial court found defendant guilty of the offense and ordered a presentence investigation report (PSI). The PSI revealed that, in his previous incarcerations, defendant had

been diagnosed with schizophrenia and depression, depressive disorder, and major depressive disorder with psychotic features. The probation officer reported that defendant had a history of auditory and visual hallucinations of his late mother, and that he had a history of using Prozac, Risperdal, and Sinequan.

¶ 8 Relying on the information contained in the PSI, the trial court asked the parties whether there was an issue concerning defendant's fitness to be sentenced. Defendant informed the court that he had conversations with his late mother, one as recently as the day before the hearing. Based on defendant's comments and the information contained in the PSI, the court ordered a retrospective fitness evaluation by Dr. James Simone. The court also found a *bona fide* doubt concerning defendant's fitness to be sentenced.

¶ 9 Thereafter, Simone submitted a report to the court. He concluded that defendant was fit for trial, even though his mental health limited his ability to assist in his own defense. The court continued the matter in an attempt to learn more about defendant's condition. However, as the State concedes, the trial court failed to conduct a proper fitness hearing, and the judge never made a finding as to fitness.

¶ 10 At the sentencing hearing, defense counsel recommended that the court sentence defendant to a period of probation based on his need for treatment. The court sentenced defendant to 42 months' imprisonment. It concluded that such a period of time would put defendant in the best position to receive help for his mental health problems. Defendant appeals.

¶ 11

## ANALYSIS

¶ 12

### I. Ineffective Assistance of Counsel

¶ 13 Defendant first argues that counsel was ineffective for failing to investigate his history of

mental illness and failing to discuss his mental health history in relation to an appropriate sentence. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish the first prong, defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319 (2011).

¶ 14 Where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation. *People v. Orange*, 168 Ill. 2d 138 (1995). In this case, prior to the sentencing hearing, defendant did not display any signs of mental health problems. In fact, defendant represented himself effectively in pretrial proceedings, and continued to add input after counsel began his representation. Further, before and during the trial, counsel was not privy to the mental health information contained in the PSI, and the fact that defendant had been found guilty of prior crimes demonstrated that he had not been found unfit to stand trial. Therefore, we find that the circumstances known to counsel before and during trial did not reveal a sound basis for further inquiry into his mental health history. See *People v. Tye*, 323 Ill. App. 3d 872 (2001).

¶ 15 Defendant claims that counsel was also ineffective for failing to discuss his mental health in relation to an appropriate sentence. The record contradicts this claim. After receiving the PSI, counsel argued that defendant should receive a sentence of probation based on his need to obtain treatment for his mental health issues. Therefore, because counsel did discuss defendant's illness

with the court after it was discovered, we find that counsel's representation did not fall below an objective standard of reasonableness.

¶ 16

## II. Improper Factor

¶ 17 Next, defendant argues that the trial court erred by imposing a sentence based on an improper factor. Specifically, defendant claims the trial court erred by lengthening his term of imprisonment to promote his rehabilitation. While a trial court is given great deference in pronouncing a sentence, it may not consider an improper factor. *People v. Reed*, 376 Ill. App. 3d 121 (2007). Consideration of an improper factor in aggravation affects the defendant's fundamental right to liberty and will result in a remand for resentencing, except in circumstances where the factor is an insignificant element of the sentence. *Id.* A trial court's sentencing decision will not be altered absent an abuse of discretion. *Id.*

¶ 18 Defendant argues that it was improper for the trial court to consider his rehabilitation when pronouncing his sentence. The Illinois Constitution specifically mandates that all penalties be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. Rehabilitation, therefore, is not only a proper factor to consider when sentencing a defendant, it is a necessary factor to consider in the State of Illinois. As such, the court did not err when it took into consideration defendant's need for mental health treatment in order to restore him to useful citizenship. We find the sentence was not an abuse of discretion.

¶ 19

## III. Fitness Hearing

¶ 20 Finally, defendant argues that the trial court erred in failing to conduct a fitness hearing after it raised a *bona fide* doubt regarding his fitness to be sentenced. He further argues that the

court's error should result in the vacation of his conviction and sentence. The State concedes that the trial court failed to conduct a fitness hearing; however, it argues that defendant's conviction and sentence should be affirmed and the cause should be remanded for a retrospective fitness hearing.

¶ 21 Pursuant to section 104-11 of the Code of Criminal Procedure of 1963, once a *bona fide* doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further. 725 ILCS 5/104-11(a) (West 2010). When the court fails to hold a fitness hearing, it is the norm to remand the cause for a retrospective fitness hearing. *People v. Mitchell*, 189 Ill. 2d 312 (2000). Here, the trial court considered defendant's mental health and found a *bona fide* doubt regarding defendant's fitness to be sentenced. In addition, the court received a retrospective fitness evaluation. However, prior to conducting the sentencing hearing, the court failed to conduct a fitness hearing or make a finding as to fitness. Therefore, we remand the cause for a retrospective fitness hearing. If the court determines that defendant was unfit, a new sentencing hearing should be held. If the court finds that defendant was fit, defendant's conviction and sentence shall stand.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Kankakee County is affirmed in part, and the cause is remanded with directions.

¶ 24 Affirmed in part and remanded with directions.