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2014 IL App (3d) 120821-U

Order filed July 14, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0821
FLOYD R. MAY,	)	Circuit No. 10-CF-701
Defendant-Appellant.	)	Honorable Walter D. Braud, Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices Schmidt and Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court did not err in summarily dismissing defendant's postconviction petition.
- ¶ 2 Defendant, Floyd R. May, pled guilty but mentally ill to armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). The trial court sentenced defendant to nine years of imprisonment. Defendant filed a postconviction petition, which the circuit court summarily dismissed as meritless. Defendant appeals, arguing that the trial court erred in dismissing his petition because

he presented an arguable claim that he was no longer mentally fit at the time of sentencing. We affirm.

¶ 3

### FACTS

¶ 4 Defendant was charged with armed robbery. 720 ILCS 5/18-2(a)(2) (West 2010). The charging instrument alleged that on July 28, 2010, defendant knowingly took \$106 and four cartons of cigarettes from a woman while armed with a knife and threatening the imminent use of force.

¶ 5 Defense counsel filed a motion for a fitness examination, indicating that jail personnel were no longer giving defendant his medication because defendant had "cheeked it" in an attempt to overdose. The trial court found that a *bona fide* doubt as to defendant's fitness "ha[d] been raised" and ordered a fitness evaluation.

¶ 6 On August 30, 2010, Dr. Kirk Witherspoon conducted a psychological evaluation of defendant. Witherspoon's evaluation report indicated that defendant had received intensive mental health care for the last 15 years and was taking various prescription medications. In the prior eight months, defendant was unemployed and had been hospitalized approximately a dozen times for attempting suicide, typically by overdosing on medications.

¶ 7 Witherspoon questioned defendant regarding his understanding of the charges, the range of penalties, and his available legal defenses. Defendant was aware that he was charged with a felony, and that a felony was more serious than a misdemeanor. He understood the range of sentences he could face, court procedures, and the roles of a judge, jury, prosecutor, defense attorney, defendant, and witnesses.

¶ 8 Witherspoon also questioned defendant in reference to the likely trial outcome, his ability to plan a legal strategy, propensity to cooperate with counsel, and capacity to disclose pertinent

information to his attorney. Defendant was aware where he would be tried and the meaning of evidence. He believed the State had a strong case against him. He planned to enter into a negotiated plea agreement and was considering entering a plea of not guilty by reason of insanity due to having no memory of the alleged offense. Defendant indicated that he would confer with counsel if he disagreed with him and would inquire of his attorney if a witness was conveying something that he did not understand. He understood the meaning of confidentiality between himself and his attorney.

¶ 9 As for the alleged offense, defendant indicated that he blacked out after ingesting an excessive amount of psychotropic medication and had no memory of the offense. Due to his lack of memory, defendant's performance on a standardized test of courtroom competency fell below the performance level typically associated with positive independent impressions of courtroom competency.

¶ 10 Witherspoon diagnosed defendant with bipolar disorder. Witherspoon indicated that defendant was fit to stand trial in that his psychological problems were "largely in remission" and defendant had a factual and rational understanding of courtroom participants and procedures, skills to assist defense counsel, and an understanding of the case.

¶ 11 On September 10, 2010, the parties stipulated that Witherspoon would testify consistently with his report if he were called to testify at trial. The trial court found that defendant was fit to stand trial, was capable of understanding the nature and purpose of the proceedings against him, and was able to assist in his own defense and plea.

¶ 12 On September 23, 2010, defendant entered into a negotiated plea of guilty but mentally ill with a sentencing cap of 15 years of imprisonment. The State's Attorney recited defendant's criminal history, which included domestic battery, escape, resisting a peace officer, domestic

abuse assault, obstructing justice, driving under the influence (DUI), and aggravated DUI. The judge admonished defendant that he was pleading guilty to the Class X felony of armed robbery by use of a knife, with an applicable sentencing range of 6 to 30 years of imprisonment. Defendant indicated that he understood the charge and the penalties. The court further admonished defendant that by pleading guilty he was giving up his right to a trial, testify on his own behalf, call witnesses, cross-examine witnesses, and be present at trial. Defendant confirmed his signature on the written guilty plea and waiver of the right to a trial. Defendant confirmed that he was not coerced into pleading guilty. The trial court found that defendant knowingly waived his right to trial and knowingly entered a plea of guilty.

¶ 13 The State presented the factual basis for the plea. According to the factual basis, a white male entered a Gasland store on July 28, 2010, in the early morning, brandished a knife, and demanded money and cigarettes. The man was wearing a bandana over his mouth and a hat. The attendant gave the man \$106 and three to five cartons of Marlboro and Newport cigarettes. In reviewing the surveillance videotape, police identified the man in the videotape as defendant by the large tattoo on his arm. Later that morning, police recovered from defendant's home four cartons of Newport and Marlboro cigarettes, a hat, and articles of clothing similar to those worn by the man in the videotape. The trial court found there was a factual basis and accepted defendant's plea of guilty.

¶ 14 On October 5, 2010, defendant wrote a letter to the trial court indicating that on the night of the incident he had attempted suicide by overdosing on his prescribed medications and had no memory of the crime. On December 13, 2010, a sentencing hearing took place. The presentence investigation report documented defendant's history of drug and alcohol abuse, criminal activity, and suicide attempts. Defendant's medical history dated back to 1995, and included diagnoses of

adjustment disorder, bipolar disorder, generalized anxiety disorder, panic disorder, major depression, impulse control disorder, alcohol dependency, opioid dependency, sedative dependency, and narcissistic personality disorder. In late 2009 and 2010, defendant made multiple suicide attempts and had an ongoing opioid dependency issue. Medical personnel recommended long-term residential care with psychiatric involvement and substance abuse treatment. As of July 23, 2010, defendant was not interested in a detoxification or rehabilitation program. On July 28, 2010, defendant committed the offense in this case, for which he pled guilty but mentally ill to armed robbery.

¶ 15 At the sentencing hearing, defendant's wife of 27 years testified that defendant can function properly when he is taking his medication. When he is not on his medication "[h]e just can't function very well." When he takes too much medication "he's not right," and does not act properly. When this occurs, he speaks and acts in a different manner.

¶ 16 The trial court indicated that armed robbery with a knife, whether the person is mentally ill or not, is such an offense that "it requires a significant sentence to the Department of Corrections." The court also indicated that "a person who's only partially in their minds [*sic*] is given some slack," and the court thought that was true in this case. The trial court sentenced defendant to nine years of imprisonment, noting that it was "quite a bit knocked off because [the court did not] think it [was] all [defendant's] fault," but also noted that people working in stores should not have to be worried about someone with a knife.

¶ 17 On May 29, 2012, defendant filed a *pro se* postconviction petition. In the petition, defendant alleged that he was deprived of effective assistance of counsel in that his attorney, *inter alia*, failed to subpoena doctors and mental health records that defendant wanted subpoenaed. Defendant also indicated in his petition:

"The jail [doctor] took me off my psychotropic medication and I was going through [sic] withdrawals from a very addictive drug. I was at the time unable to aid in my case. I may have been found mentally competent to stand trial [sic] at the time the [doctor] interviewed me, but I was on my medication."

¶ 18 On August 17, 2012, the circuit court summarily dismissed defendant's postconviction petition as meritless. Defendant appealed.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant argues that the trial court erred in summarily dismissing his *pro se* postconviction petition because he presented an arguable claim that he was no longer mentally fit at the time of sentencing. We review the summary dismissal of a postconviction petition at the first stage of the postconviction proceedings *de novo*. *People v. Brown*, 236 Ill. 2d 175 (2010).

¶ 21 The State argues that defendant forfeited the issue of his fitness at the time of sentencing because the issue was not clearly set forth in the postconviction petition. Where forfeiture is applicable, a claim is necessarily frivolous or patently without merit and the court may properly dismiss the petition. *People v. Blair*, 215 Ill. 2d 427 (2005). Here, defendant's petition alleged he was taking psychotropic medication at the time of his fitness evaluation and subsequently was taken off that medication, rendering him incapable of aiding in his case. With these allegations, the issue of defendant's fitness at sentencing was sufficiently raised in defendant's postconviction petition.

¶ 22 Although defendant sufficiently raised the issue of his fitness at sentencing in his postconviction petition, the issue is without merit. The Post-Conviction Hearing Act (Act) provides a procedural mechanism by which individuals under a criminal sentence can assert a claim that their conviction was a result of a substantial violation of a constitutional right. 725

ILCS 5/122-1 *et seq.* (West 2010). The Act provides for a three-stage review of a defendant's postconviction petition. *Id.*; *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage of the proceedings, a postconviction petition may be summarily dismissed if the claim therein is "frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). A *pro se* petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d 1. A claim that is completely contradicted by the record is meritless. *Id.*

¶ 23 Due process under the Illinois and United States Constitutions prohibits the prosecution of a defendant who is unfit. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 2. A defendant is presumed fit to stand trial or to plead and be sentenced, and he is considered to be unfit if he is unable to understand the nature and purpose of the proceedings against him or to assist in his own defense. 725 ILCS 5/104-10 (West 2010); *People v. Weeks*, 393 Ill. App. 3d 1004 (2009). When facts are brought to the trial court's attention to raise a *bona fide* doubt as to defendant's fitness, the court has a *sua sponte* duty to order a fitness hearing to resolve the issue. 725 ILCS 5/104-11(a) (West 2010).

¶ 24 A *bona fide* doubt exists if there is a "real, substantial and legitimate doubt" as to defendant's fitness. *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991). Factors considered in assessing whether a *bona fide* doubt of fitness is raised include a defendant's irrational behavior, demeanor in court, prior medical opinions on defendant's competence, and any representations by defense counsel on defendant's competence. *Brown*, 236 Ill. 2d 175.

¶ 25 Fitness to stand trial and mental illness are not synonymous. *Weeks*, 393 Ill. App. 3d 1004. Fitness speaks only to a person's ability to function within the context of the trial, plea, or sentencing and does not refer to sanity or competence in other areas. *People v. Tolefree*, 2011 IL App (1st) 100689. A person can be found fit for trial although his mind is otherwise unsound.

*Id.* The fact that a defendant was taking psychotropic medications alone does not raise a *bona fide* doubt of a defendant's fitness. *People v. Nichols*, 2012 IL App (4th) 110519; *People v. Mitchell*, 189 Ill. 2d 312 (2000).

¶ 26 Here, prior to defendant's plea, a *bona fide* doubt of defendant's fitness was raised. Defendant underwent a fitness evaluation, which indicated that defendant was fit. The trial court found defendant to be fit. The fact that defendant subsequently stopped taking a previously prescribed psychotropic medication, by itself, does not rebut the presumption of his fitness. There is nothing in the record to indicate that there was a real, substantial and legitimate doubt as to defendant's fitness at the time of sentencing. Whether or not defendant was receiving his prescribed psychotropic medication does not indicate his level of fitness. Therefore, defendant's petition failed to present an arguable claim that he was no longer mentally fit at the time of sentencing, and summary dismissal of the petition was proper.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Rock Island County is affirmed.

¶ 29 Affirmed.