2015 IL App (5th) 120547-U

NO. 5-12-0547

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fayette County.
	)	
v.	)	No. 12-CF-92
	)	
LLOYD W. MERKLEY,	)	Honorable
	)	S. Gene Schwarm,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it denied the defendant's motion to appoint an expert to aid in determining whether a *bona fide* doubt existed regarding the defendant's fitness to plead or stand trial and the error resulted in a violation of the defendant's right to due process and requires that the defendant's guilty plea and the judgment of conviction be vacated and that the cause be remanded for further proceedings.

¶ 2 The defendant, Lloyd W. Merkley, was charged with one count of predatory criminal sexual assault of a minor child. The defendant's attorney moved for a fitness evaluation to determine whether a *bona fide* doubt about the defendant's fitness to plead or stand trial could be raised. The motion was denied. After the case was called for trial, the defendant pled guilty to predatory criminal sexual assault and he was sentenced to 10

years in prison. The defendant moved to withdraw his guilty plea, but the motion was denied after an evidentiary hearing. On appeal, the defendant contends that the circuit court's decision to deny his motion for the appointment of an expert to determine whether a *bona fide* doubt as to his fitness to plead or stand trial could be raised constituted reversible error. The defendant also contends that the circuit court's failure to properly and completely admonish him in accordance with the requirements of Illinois Supreme Court Rule 402 (eff. July 1, 2012) before accepting his guilty plea was reversible error. For reasons that follow, we vacate the defendant's guilty plea and the judgment of conviction and remand this cause for further proceedings.

¶ 3 On June 15, 2012, the defendant was charged by information with one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2010)). He made his initial appearance before Judge Allan Lolie on June 23, 2012. The transcript from the initial hearing shows that the defendant had difficulty understanding the charge that had been filed against him. It was only after Judge Lolie methodically reviewed the specific allegations of the charge that the defendant indicated he understood the nature of the charge. After the bond was set, the defendant spontaneously announced that his wife was in a safe house and unable to attend the hearing because she had been threatened by his son and daughter-in-law (the victim's parents).

¶ 4 On September 5, 2012, the defendant's attorney filed a motion for the appointment of an expert to determine whether a *bona fide* doubt as to the defendant's fitness to plead or stand trial could be raised and whether the defendant was insane or suffered from diminished capacity at the time of the offense. A hearing was held before Judge Lolie on

September 19, 2012. The defendant's attorney informed the court that the defendant had been diagnosed with posttraumatic stress disorder arising from his service in Vietnam and that the defendant had been receiving treatment for the condition for several years. The defendant's attorney noted that when he conferred with the defendant, the defendant gave responses that did not make sense, and that the defendant appeared to have other psychological issues which needed to be addressed. Counsel stated, as an officer of the court, that he had genuine concerns about the defendant's fitness to stand trial or plead. The State objected to the motion for a fitness evaluation and argued that the defense did not provide any facts that would raise a *bona fide* doubt as to the defendant's fitness for trial. Following the arguments of counsel, Judge Lolie granted the defendant's attorney additional time to provide documentation or witnesses in support of his motion, and adjourned without issuing a ruling.

¶ 5 The hearing resumed on September 24, 2012. At that time, the defendant's attorney reported that he had received a letter from the United States Department of Veterans Affairs (VA) which stated that the defendant was 100% disabled due to posttraumatic stress disorder. Judge Lolie asked the defendant's attorney whether he believed there was a *bona fide* doubt as to the defendant's ability to understand the nature of the proceedings and to assist in his defense. Counsel replied that he had genuine doubts, and he again pointed out that there were several occasions when it appeared that the defendant could not follow conversations or provide responsive answers to questions.

¶ 6 Judge Lolie then turned to the defendant and asked him a number of questions regarding the charge against him and the possible penalties. Judge Lolie then asked the

defendant what would happen to him if he were found not guilty, and the defendant could not answer that question. When Judge Lolie asked the defendant whether he was on medication prior to being arrested, the defendant said, "yes." When asked whether he knew which medications he had been taking, he replied that the court would have to get that information from the VA pharmacy. The court then asked whether the jail was continuing to give the defendant his medications. The defendant said that "the doctor that comes to the jail has destroyed all my VA medicine and has given me what he wanted to give me," and that he did not know what medication he was being given. Judge Lolie asked the defendant whether he understood the process. The defendant said that he did, but then asked the court to enter an order directing that the defendant's living will be returned to him so that he could destroy it. Judge Lolie informed the defendant that he did not have authority to enter such an order because that matter had nothing to do with the criminal case. In response, the defendant claimed that the will was important because the person who possessed the will could do anything he wanted, including gain access to the defendant's VA file. Judge Lolie reiterated that he had no authority over the matter because it had nothing to do with the felony case. Judge Lolie then stated that he was "not convinced" that there was a *bona fide* doubt as to the defendant's fitness for trial or his ability to assist in his defense, and he denied the defendant's motion for a fitness evaluation. He noted the ruling was without prejudice and that the defense could renew the motion if additional information came to light. The docket entry states: "After inquiry of Defendant, the court denied mot for fitness eval. Defendant was able to state what a trial was and said he understood the proceedings."

¶ 7 The case was called for trial on October 29, 2012, with Judge S. Gene Schwarm presiding. Twelve jurors and an alternate were selected, but the panel was not sworn in that day. The next morning, the court was notified that a plea agreement had been reached. When proceedings resumed, the court reviewed the charge and the potential penalties and asked the defendant whether he understood the charge and penalties. The defendant said, "Yes." The court then asked the defendant whether he understood that he was presumed innocent; that he had a right to have a trial; that the State had the burden of proof; that he had a right to cross-examine the State's witness and to present witnesses on his own behalf; and that by pleading guilty he was giving up those rights. The defendant said that he understood. When asked if he wanted to plead guilty, the defendant replied, "Yes. Get it done and over with, that's it." When the defendant was asked whether anyone was forcing him to plead guilty, the defendant answered, "No." When the defendant was asked whether his plea was voluntary, the defendant replied:

> "That way it's done, over with. And I'll tell you the same thing I told Mr. Potter. I will be dead by Christmas. I plan on taking my own life with my own hands through dehydration, through starvation. I will be dead by Christmas and the family can put me in Cemetery Row with the rest of my family."

¶ 8 The court advised the defendant that it needed to make sure the defendant was thinking clearly and knew what he was doing before it could accept the defendant's guilty plea.

> "DEFENDANT: I plead guilty, Your Honor, and let the family put me on Cemetery Row with the rest of them.

THE COURT: You're doing this knowingly and voluntarily?

DEFENDANT: Voluntarily, yes. That way they win, I lose, and that's it, it's done and over with. But I promise you, I will be dead by Christmas so that my wife can put me on Cemetery Row with the rest of them. For I am now seven out of seven that will be buried there. I'm the last of the family. So I can promise you, I will be dead by Christmas."

¶ 9 Following this exchange, the court found that the plea was knowingly and voluntarily made, and that there was a factual basis to support it. The court accepted the defendant's guilty plea and sentenced him to 10 years in the Department of Corrections, followed by a term of mandatory supervised release. After the defendant was informed of his rights of appeal, he asked whether he would be permitted to stay in the custody of the sheriff's department "until his death in December." The court advised the defendant that he would be transferred to the custody of the Department of Corrections. At the close of the hearing, the defendant again proclaimed that he would be dead by Christmas.

¶ 10 On November 8, 2012, the defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. In the motion, the defendant alleged that he pled guilty after being threatened and intimidated by his wife, his son and his cousin, and that he had attempted to talk to his attorney about the situation prior to pleading guilty, but his attorney said the deal had already been made and would not listen. The defendant's counsel then moved to withdraw as attorney of record based on the allegations in the defendant's motion, and the motion was granted. On November 28, 2012, the defendant's newly-appointed counsel filed a motion to vacate the guilty plea. The motion asserted

that the defendant was not competent to enter the plea, and that the defendant had been subjected to coercion and threats before he entered the guilty plea.

¶ 11 During the evidentiary hearing, the defendant testified that he entered a guilty plea because he had been threatened by his wife, his wife's cousin and his son. He also stated that he had been contacted by law enforcement and that they notified him of threats made by his son. The defendant claimed that he had to place his wife in a safe house six times because his son was "bounty hunting" for her. The defendant then stated that he was afraid of his own wife. At the close of his testimony, the defendant said that he would take his own life because he "wanted to end this whole thing."

¶ 12 The defendant's trial attorney was called as a witness. He stated that the defendant's wife was present for the plea discussion, and that she told defendant, with her finger pointed at him, that he was not going to put the little girl through a trial and that he was going to take the plea. The defendant's attorney also testified that he explained to the defendant that he did not have to take the plea. After considering the testimony and the arguments of counsel, the court denied the defendant's motion to withdraw his guilty plea.

¶ 13 On appeal, the defendant initially contends that the court committed reversible error when it denied the motion for a psychological evaluation to aid in determining whether a *bona fide* doubt existed as to the defendant's fitness to plead or stand trial.

¶ 14 The right to be fit for trial is fundamental. *People v. Sandham*, 174 Ill. 2d 379, 382, 673 N.E.2d 1032, 1033 (1996). Due process bars the prosecution or sentencing of a defendant who is not competent to enter a plea or stand trial. *People v. Hanson*, 212 Ill.

2d 212, 216, 817 N.E.2d 472, 474 (2004). A defendant is considered to be unfit to stand trial or enter a plea if, because of a mental or physical condition, he is unable to understand the nature and purpose of proceedings against him or to assist in his defense. 725 ILCS 5/104-10 (West 2000).

¶ 15 There is a statutory presumption that a defendant is fit to stand trial. 725 ILCS 5/104-10 (West 2000). The defendant has the burden of proving the existence of facts that raise a *bona fide* doubt as to his mental capacity to cooperate with his counsel and meaningfully participate in his defense. *People v. Eddmonds*, 143 Ill. 2d 501, 518, 578 N.E.2d 952, 959 (1991). A number of factors may be considered in determining whether a *bona fide* doubt has been raised as to a defendant's fitness, including the defendant's irrational behavior, his demeanor at trial, any prior medical opinion on the defendant's competence, and the representations by the defendant's counsel about the defendant's competence. *Eddmonds*, 143 Ill. 2d at 518, 578 N.E.2d at 959. Whether a *bona fide* doubt as to a defendant's fitness has arisen is generally a matter within the discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Sandham*, 174 Ill. 2d at 382, 673 N.E.2d at 1033.

¶ 16 Section 104-11 of the Code of Criminal Procedure of 1963 (Code) addresses the subject of a defendant's fitness to stand trial, to plead, and to be sentenced. 725 ILCS 5/104-11 (West 2000). Section 104-11(a) of the Code states that the issue of the defendant's fitness for trial may be raised by the defense, the State, or the court at any appropriate time before, during, or after trial, and that when a *bona fide* doubt about fitness is raised, the court shall order a determination of the issue before proceeding

further. 725 ILCS 5/104-11(a) (West 2000). Section 104-11(b) of the Code states that upon the defendant's request that a qualified expert be appointed to determine whether a *bona fide* doubt as to his fitness may be raised, the court has discretion to order an appropriate examination. 725 ILCS 5/104-11(b) (West 2000).

¶ 17 Section 104-11(a) and section 104-11(b) may be applied in tandem or separately. *Hanson*, 212 Ill. 2d at 216, 817 N.E.2d at 474. In a case where the trial court is not convinced that a *bona fide* doubt about the defendant's fitness has been raised, the court has discretion under section 104-11(b) to grant the defendant's request for appointment of an expert to aid in that determination. 725 ILCS 5/104-11(b) (West 2000). When the issue of the defendant's fitness is considered under section 104-11(a), the trial court may appoint an expert to conduct a fitness evaluation, and the order for a fitness evaluation does not automatically trigger the provision for a mandatory fitness hearing. 725 ILCS 5/104-11(a) (West 2000). Thus, the order for a fitness evaluation, whether entered pursuant to section 104-11(a) or (b), does not create an inference that the court has found that a *bona fide* doubt as to the defendant's fitness has been raised, thereby requiring a fitness hearing. *Hanson*, 212 Ill. 2d at 217, 817 N.E.2d at 475. If, after completion of the fitness evaluation, the trial court should find that a *bona fide* doubt as to the defendant's fitness has been raised, then a fitness hearing would be mandatory under section 104-11(a). *Hanson*, 212 Ill. 2d at 218, 817 N.E.2d at 475.

¶ 18 In this case, the defense moved for the appointment of a qualified expert to aid in the determination of whether a *bona fide* doubt as to the defendant's fitness to plead or stand trial could be raised. The defendant's trial attorney stated that he had genuine

concerns about the defendant's fitness to plead or stand trial. Trial counsel noted that the defendant had been under psychiatric care for many years; that the defendant suffered from posttraumatic stress disorder as a result of his service in the Vietnam War; that the defendant was under treatment with the Veteran's Administration; and that the defendant appeared to experience significant memory lapses. Trial counsel also noted that the defendant had difficulty tracking their conversations and at times appeared delusional. The defense offered evidence showing that the defendant was being treated for posttraumatic stress disorder related to his military service, that he was taking medications prescribed by VA physicians, and that the VA had determined that he was 100% disabled due to posttraumatic stress. There was no evidence that the defendant had undergone a prior competency evaluation.

¶ 19 The record illustrates the fluctuations in the defendant's behavior and his demeanor during pretrial appearances, the plea hearing and postplea proceedings. During exchanges with the court, the defendant was able to answer "yes-or-no" questions about his rights and the process, but the defendant's replies seemed rote and were often made after the court rephrased the question or explained certain concepts. There were occasions where the defendant seemed to be clear about the process and to follow the proceedings, and then suddenly he engaged in some impromptu and unrelated commentary about alleged threats directed against his wife or about his plan to commit suicide via starvation by Christmas.

¶ 20 The defendant's erratic behavior throughout the pretrial and plea proceedings, his attorney's concerns about his competency, and the medical information from the

defendant's providers at the VA were relevant factors to be considered in determining whether a *bona fide* doubt of fitness was raised. *Eddmonds*, 143 Ill. 2d at 518, 578 N.E.2d at 959. The defendant has a fundamental right to be fit to enter a plea or to stand trial. Given the defendant's behavior throughout the pretrial proceedings, and the other evidence as described herein, we find that the trial court should have allowed defendant's motion for the appointment of an expert to evaluate the defendant and to offer an opinion as to whether a *bona fide* doubt as to fitness could be raised. Therefore, the trial court erred in denying the defendant's motion for a fitness evaluation. The failure of the trial court to order a fitness evaluation pursuant to section 104-11(b) deprived the defendant of due process and requires that the defendant's guilty plea, and the judgment and sentence entered thereon, be vacated, and that the case be remanded. *Sandham*, 174 Ill. 2d at 388-89, 673 N.E.2d at 1036. Given the passage of time, we have no way to know whether a *bona fide* doubt as to the defendant's fitness may be raised. This issue may be presented to the trial court on remand. Accordingly, the defendant's plea of guilty and the judgment of conviction are hereby vacated and the cause is remanded to the circuit court for further proceedings consistent with this decision.

¶ 21 In light of our disposition of the defendant's first issue, we need not decide whether the trial court's admonitions and inquiry regarding the defendant's entry of a guilty plea were in substantial compliance with our supreme court rules.

¶ 22 Judgment vacated; cause remanded.