2016 IL App (4th) 140438-U

NO. 4-14-0438

FILED
September 19, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
KEITH M. McINTOSH,	)	No. 12CF504
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: After previously adjudicating defendant to be unfit to stand trial, the trial court failed to hold a valid restoration hearing; therefore, the trial court must hold a retrospective fitness hearing.

¶ 2 In a bench trial, the trial court found defendant, Keith M. McIntosh, guilty of home invasion (720 ILCS 5/12-11(a)(2) (West 2010)). The court sentenced him to 30 years' imprisonment. He appeals.

¶ 3 We reverse the trial court's judgment, and we remand this case for a retrospective fitness hearing, because after previously finding defendant to be unfit to stand trial, the court failed to hold a valid restoration hearing. See *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 38. The court held a restoration hearing, but, under case law, it was not a valid restoration hearing because the record fails to affirmatively show the court independently exercised its discretion in finding defendant to be restored to fitness, as opposed to going along with the attorneys'

stipulation to the conclusions in the psychological report. See *People v. Greene*, 102 Ill. App. 3d 639, 641-42 (1981). Consequently, the presumption of continuing unfitness, arising from the previous adjudication of unfitness, is unrebutted by a valid restoration hearing. See *id.* at 643.

¶ 4 Because defendant's fitness to stand trial is "a critical threshold issue" (*People v. Kinkead*, 168 Ill. 2d 394, 405 (1995)), we do not reach the other issues he raises in his appeal (see *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987); *Greene*, 102 Ill. App. 3d at 640). The other issues are premature until this threshold issue is resolved.

¶ 5 I. BACKGROUND

¶ 6 On August 23, 2012, in another case against defendant, People v. McIntosh, Vermilion County case No. 11-CF-699, the trial court found him to be unfit to stand trial. The examining psychiatrist, Lawrence Jeckel, had recommended that defendant obtain medication and outpatient treatment, but he was unsure that defendant could regain fitness within a year.

¶ 7 As it turned out, defendant's incarceration in the present case prevented him from undergoing outpatient treatment. Consequently, on January 23, 2013, when the question of his fitness came up again, there was no report of his progress.

¶ 8 On that date, when the trial in this case was scheduled to begin, defense counsel requested a fitness examination in both cases. The trial court appointed a psychologist, David Coleman, to evaluate defendant and opine whether he had regained fitness.

¶ 9 On February 20, 2013, Coleman wrote a report of his evaluation. In his report, he stated that defendant functioned in the low-average range and that defendant had a verbal intelligence quotient of 86. Coleman diagnosed defendant as having post-traumatic stress disorder; bipolar I disorder, most recent episode mixed with psychotic (paranoid) features; and antisocial personality disorder. Although he opined that defendant was fit to stand trial, he added

that defendant only "marginally" demonstrated an ability to choose among his legal options and to appreciate the implications of his decision. He noted that defendant would have difficulty confining his statements to concise and clearly relevant responses and that he might need reminders to consult his attorney before making legal choices.

¶ 10 On March 19, 2013, having received Coleman's report, the trial court held a hearing on the question of whether defendant had regained his fitness to stand trial. Defendant was present at the hearing, with defense counsel. The hearing consisted, in its entirety, of the following colloquy:

> "THE COURT: The [d]efendant is answering ready for trial as to both cases. Date?
>
> MS. LAWLYES [(prosecutor)]: Judge, there is a report from Dr. Coleman that needs to be addressed, dated February 20th. [Defendant] was set for another evaluation, as the [c]ourt might recall.
>
> THE COURT: Right.
>
> MS. LAWLYES: There was a finding in the [2011] case of unfitness, but not in the 2012 [case].
>
> THE COURT: Right. Mr. Merlie [(defense counsel)], have you seen the psychological evaluation of Dr. Coleman?
>
> MR. MERLIE: Yes, Your Honor, I have.
>
> THE COURT: Are you willing to stipulate to its findings?
>
> MR. MERLIE: Yes, Your Honor.
>
> MS. LAWLYES: We will, Your Honor.

THE COURT: It would appear that[,] according to Dr. Coleman, [defendant] does meet the conditions for fitness. He was found to be competent. There is a finding of competency. Having so found, are we ready for trial?

MS. LAWLYES: I'm sorry?

THE COURT: Are we ready for trial?

MS. LAWLYES: Yes, Your Honor."

¶ 11 II. ANALYSIS

¶ 12 A. The State's Theory of Invited Error

¶ 13 The State argues that because defendant, through his defense counsel, "expressly agreed to the procedure followed by the trial court," the doctrine of invited error should "[estop him] from claiming that such procedure entitles him to a new trial." We note that invited error bars a claim of plain error. *People v. Jones*, 2015 IL App (1st) 121016, ¶ 109.

¶ 14 The supreme court describes the doctrine of invited error as follows:

"The rule of invited error or acquiescence is a form of procedural default also described as estoppel. [Citation.] The rule prohibits a party from *requesting to proceed in one manner* and then contending on appeal that the *requested* action was error. [Citation.] The rationale for the rule is that it would be manifestly unfair to grant a party relief based on *error introduced into the proceedings by that party*." (Emphases added.) *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33.

¶ 15 The difficulty with the theory of invited error is that if anyone made an invitation, it was the trial court, not defense counsel. The court asked defense counsel if he were willing to

stipulate to the findings in Coleman's report, and he answered yes. In the restoration hearing, defense counsel never invited the court to do anything.

¶ 16 Granted, "a defendant is *generally* precluded from attacking or contradicting [a] stipulation" (emphasis added) (*People v. McFadden*, 2016 IL 117424, ¶ 15)), but an exception is when the defendant has stipulated to the restoration of his or her fitness (*People v. Reeves*, 412 Ill. 555, 560 (1952)). "[T]he trial court may consider an expert's stipulated testimony to assess a defendant's fitness but may not rely solely on the parties' stipulation to an expert's *conclusion* that the defendant is fit." (Emphasis in original.) *Gipson*, 2015 IL App (1st) 122451, ¶ 30.

¶ 17 B. Stipulating Away the Question of Restoration

¶ 18 The restoration hearing in this case is indistinguishable from the constitutionally inadequate restoration hearing in *Greene*.

¶ 19 In *Greene*, a psychiatrist named Riefman examined the defendant and opined that he was "unable to cooperate with counsel in his own defense and unfit to stand trial because of schizophrenia, paranoid type." *Greene*, 102 Ill. App. 3d at 640. The trial court found him to be unfit to stand trial. *Id.*

¶ 20 Eleven months later, Riefman reexamined the defendant and reported, in a letter to the presiding judge of the criminal division, that the defendant was " 'now mentally fit to stand trial.' " *Id.* at 640-41. Specifically, according to Riefman, the defendant now " 'understood the nature of the charge and the purpose of the proceedings, and [was] able to cooperate with counsel in his own defense.' " *Id.* at 641.

¶ 21 Another psychiatrist, named McCable, examined the defendant and filed a report likewise opining that he now was fit to stand trial. *Id.*

¶ 22 The trial court then held a hearing on whether the defendant was restored to fitness. *Id.* In the hearing, "there was no formal introduction of evidence." *Id.* Instead, the prosecutor read into the record the letter from Riefman. *Id.* Defense counsel agreed with the prosecutor that McCabe's report had been filed and that it said the defendant was fit to stand trial. *Id.*

¶ 23 The prosecutor then stipulated to " 'the findings of the two psychiatrists as contained in the reports and stipulate[d] to the fact that the defendant [was] fit for trial.' " *Id.* Defense counsel " '[stipulated] to the same matter.' " *Id.* The trial court responded: " 'Very well, fine. Where do we go from here, gentlemen?' " *Id.* A minute order stated: " 'Stipulated testimony heard. Order of Court. Finding defendant fit to stand trial. Judgment is entered on the finding.' " *Id.*

¶ 24 The defendant waived a jury (*id.*), and in the ensuing bench trial, the trial court found him guilty of rape and aggravated battery (Ill. Rev. Stat. 1973, ch. 38, ¶¶ 11-1, 12-4). *Greene*, 102 Ill. App. 3d at 640. The court sentenced him to imprisonment. *Id.*

¶ 25 The defendant appealed, and the appellate court "[found] it necessary to address only the first issue raised by [the] defendant on appeal, namely, whether [the] defendant, having been previously adjudged unfit to stand trial, received a fitness hearing that was statutorily and constitutionally sufficient to base a valid finding of fitness before being tried on these serious charges." *Id.*

¶ 26 The appellate court observed that, under case law, a prior adjudication of unfitness raised the presumption that the condition of unfitness remained. *Id.* at 641. This presumption could be rebutted only by "a valid subsequent hearing adjudicating [the defendant]

fit." *Id.* at 641-42. The hearing in *Greene* was not a valid restoration hearing, and hence, the presumption of continuing unfitness was unrebutted. *Id.* at 643. The appellate court explained:

> "It does not appear that a true court hearing was conducted in connection with the restoration of [the defendant]. The trial court's decision rested solely upon stipulations to unsworn psychiatric testimony. Under these circumstances, it is difficult to conceive that the trial judge exercised any discretion in determining [the defendant] fit for trial. Indeed, the evidence produced was so minimal that the trial court had little before it upon which to exercise its discretion.
>
> A judicial determination of fitness cannot be based upon mere stipulation to the existence of psychiatric conditions. [Citations.] Rather, the cases require an adversarial hearing and have disapproved of verdicts of fitness based solely upon unsupported stipulations, agreements, pleas made by the accused or his counsel. [Citation.] Since we find no affirmative showing in the record below that the trial court exercised discretion in finding [the defendant] fit to stand trial, there was in effect no fitness hearing at all[,] and we are compelled to reverse." (Internal quotation marks omitted.) *Id.*

¶ 27 Subsequently, in *People v. Lewis*, 103 Ill. 2d 111, 115-16 (1984), the supreme court distinguished the stipulation in *Greene* from the stipulations in *Lewis* by noting that, in *Greene*, the attorneys stipulated to the findings in the psychiatric reports and to the fact that the defendant was fit for trial, whereas, in *Lewis*, "it was stipulated that, if called to testify, qualified psychiatrists who had examined [the] defendants would testify that in their opinions the defendant was mentally fit to stand trial." The supreme court reasoned:

> "The stipulations [in *Lewis*] were not to the fact of fitness, but to the opinion testimony which would have been given by the psychiatrists. Upon considering these stipulations and personally observing [the] defendants, the circuit court could find [the] defendants fit, seek more information, or find the evidence insufficient to support a finding of restoration to fitness. The circuit court recognized that *** [t]he ultimate issue was for the trial court, not the experts, to decide. We find, therefore, that the circuit courts did not err in considering the stipulations regarding the psychiatrists' opinions as to [the] defendants' fitness." (Internal quotation marks omitted.) *Id.* at 116.

¶ 28 The distinction between stipulating to findings in psychiatric reports and stipulating that the authors of the reports, if called to the witness stand, would testify as they had written could strike the reader as subtle—but it is a distinction the supreme court made and, thus, one that we must honor. *People v. Thompson*, 158 Ill. App. 3d 860, 864 (1987). Without implying that we have any power to review decisions by the supreme court, we would observe that something could be said in support of the distinction. It is a distinction between evidence and no evidence. Stipulated testimony is evidence. A stipulation to a fact, by contrast, dispenses with the need for evidence. *People v. Woods*, 214 Ill. 2d 455, 469 (2005). The concern in *Greene* was that by stipulating to the findings in the psychiatric reports, the attorneys dispensed with the need for any actual evidence of the defendant's restoration to fitness and the trial court just went along. In *Lewis*, by contrast, there was an evidentiary hearing, in which the trial court made an independent determination of fitness.

¶ 29 It is possible that, in the restoration hearing, the experienced trial judge in this case actually made an independent determination of fitness. See *People v. Cotorno*, 322 Ill. App.

3d 177, 179 (2001). That possibility, however, is not enough. *Id.* The record must affirmatively show he did so (see *id.*; *Greene*, 102 Ill. App. 3d at 642)—and the record does not. Instead, by stipulating to Coleman's conclusions, the attorneys took the issue of fitness off the table, and it appears the trial court just acceded to them and Coleman.

¶ 30 The nature of defendant's restoration hearing is problematic under *Greene*, and the problem acquires another dimension when we consider that Coleman qualified his opinion by stating that defendant only "marginally" demonstrated an ability to choose among his legal options and to appreciate the implications of his decision and that he would have difficulty confining his statements to clearly relevant responses. Defendants in criminal cases have to make important legal choices, and in their interactions with defense counsel, they have to be able to give answers that have some intelligible relevance to the questions defense counsel puts to them, either in private or on the stand. These abilities are important to preparing and presenting a defense. To what extent would the impairment of these abilities hinder defendant from "consult[ing] with counsel" and "function[ing] within the context of a trial"? *People v. Eddmonds*, 143 Ill. 2d 501, 519 (1991). To say that defendant possesses these abilities "marginally" is like saying he is kind of fit, and in our jurisprudence, there is no such thing as kind of fit. See *Gipson*, 2015 IL App (1st) 122451, ¶ 34. "Under our jurisprudence, a defendant is either fit to stand trial, fit to stand trial with medication, or not fit." *Id.* There is no such thing as "marginal" fitness. *Id.*

¶ 31 C. The Harmfulness of the Error

¶ 32 While admitting the procedural deficiency of the restoration hearing, the State argues the error was harmless because not only did the stipulated report show that defendant

understood the proceedings and was capable of making reasoned decisions and assisting his attorney, but his conduct at the various hearings and in the trial showed he was in fact fit to stand trial. Therefore, the State argues that any procedural error in the restoration hearing should be deemed harmless beyond a reasonable doubt. See *People v. McCullum*, 386 Ill. App. 3d 495, 515 (2008).

¶ 33 This error cannot be brushed aside as harmless. "Defendant's prior adjudication of unfitness raises the presumption that the condition of unfitness remains. [Citations.] This presumption continues until there has been a valid subsequent hearing adjudicating him fit." *Greene*, 102 Ill. App. 3d at 641-42. Because there was no valid restoration hearing in this case, that is, "no affirmative showing in the record below that the trial court exercised its discretion in finding [defendant] to be fit to stand trial" (*id.* at 643), the presumption of continuing unfitness is unrebutted. Convicting a defendant who is presumably unfit to stand trial is fundamentally unfair, a violation of due process. See *People v. Murphy*, 72 Ill. 2d 421, 430 (1978) ("It is established that the conviction of a person who is unfit to stand trial violates due process.").

¶ 34 D. The Remedy

¶ 35 Although the supreme court previously disapproved of retrospective fitness hearings held more than a year after the trial and sentencing (*People v. Neal*, 179 Ill. 2d 541, 554 (1997)), "that disapproval has since been overcome." *Gipson*, 2015 IL App (1st) 122451, ¶ 38. "[I]t appears that retrospective fitness hearings are now the norm." *People v. Mitchell*, 189 Ill. 2d 312, 339 (2000).

¶ 36 Therefore, we remand this case to the trial court for a retrospective fitness hearing. If, in the retrospective fitness hearing, the evidence is inconclusive or suggests that

defendant was unfit, the court should order a new trial. See *Gipson*, 2015 IL App (1st) 122451, ¶ 38. If, alternatively, the court determines that defendant's fitness can be accurately assessed and confirmed despite the passage of time, the court may decline to grant a new trial, and the conviction will stand. *Id.*

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we reverse and remand for further proceedings consistent with this order.

¶ 39 Reversed and remanded.