2018 IL App (2d) 160521-U
No. 2-16-0521
Order filed November 7, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KURT KNUTSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 12-CF-3089 Honorable John S. Lowry, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Jorgenson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We vacated the trial court's finding that defendant was fit, as the court merely accepted the parties' stipulation without exercising its own discretion.

¶ 2 Defendant, Kurt Knutson, appeals his conviction of first-degree murder (720 ILCS 5/-9-1(a)(1) (West 2012)). He contends that the trial court failed to hold a proper fitness hearing when it accepted the parties' stipulation that he was fit to stand trial. We determine that defendant's due process rights were violated when the trial court failed to make a record showing that it exercised its discretion in finding defendant fit. Accordingly, we vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 In November 2012, defendant was indicted on multiple counts in connection with the death of his girlfriend. On December 6, 2012, defendant's counsel stated that he had a *bona fide* doubt as to defendant's fitness to stand trial, and the trial court ordered a fitness evaluation. The order stated that the examiner was to submit a written report to the parties and the court within 30 days.

¶ 5 On February 27, 2013, the parties stated that the evaluation had been completed. The following colloquy then occurred:

> "[DEFENSE COUNSEL]: This was a case in which we had filed a motion for fitness.
>
> I had spoke to him previously, Judge, and given some of his background that he had told me, I just thought that it would be best to get him evaluated. He was evaluated by Dr. Lichtenwald.
>
> Dr. Lichtenwald evaluated him and found him fit to stand trial, Judge, and I do believe the parties are stipulating to the report that, in fact, if he was called as an expert, that he would conclude that he's fit to stand trial.
>
> [STATE'S ATTORNEY]: Judge, I would stipulate that if Dr. Lichtenwald were called to testify, he would testify consistently with his report dated—
>
> THE COURT: It has a number of dates on it.
>
> [STATE'S ATTORNEY]: Final draft dated January 24, 2013.
>
> THE COURT: And that he is qualified to testify as an expert witness?
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> [DEFENSE COUNSEL]: Correct, Judge.
>
> THE COURT: That's your stipulation?
>
> [DEFENSE COUNSEL]: Yes, Judge.

> THE COURT: And the matter comes on for a fitness hearing, the parties having stipulated that Dr. Lichtenwald is qualified to testify as an expert in this matter and would testify in accordance with his report, the court finds Mr. Knutson fit to stand trial."

Although the court referenced the report briefly in regard to the dates listed on it, nothing in the record indicates that it was filed with the court at that time. The court never made any reference to the substantive content of the report or stated that it had read it.

¶ 6 After being found fit, defendant waived formal arraignment. The court admonished defendant about the charges and possible sentences and asked if he understood. Defendant replied that he did. The court asked defendant if he took medication and whether it interfered with his ability to understand the court, and defendant replied that he did not think that it did. Defendant agreed that he understood what the court and his counsel had said to him.

¶ 7 On April 8, 2014, a hearing was held before a new judge on a defense motion to suppress statements, based on an argument that defendant was not properly informed of his *Miranda* rights, did not waive those rights, and did not understand those rights. The State asked that Dr. Lichtenwald be appointed to determine if defendant understood his rights. The court granted the motion. At a later hearing, the court clarified that the new appointment was for purposes of determining defendant's understanding of his *Miranda* rights and not for determining his fitness. On September 18, 2014, defense counsel stated that he had received a report from Dr. Lichtenwald, and he filed the original fitness evaluation, listing a final draft date of January 24, 2013. At a hearing on the matter, Dr. Lichtenwald testified that, in his opinion, defendant was capable of understanding and waiving his *Miranda* rights. The court partially granted the motion to suppress statements, finding that in one interview defendant, had asked for an attorney, yet

police had continued to question him, and that in two interviews defendant's *Miranda* waivers were invalid.

¶ 8 On April 12, 2016, defendant entered a partially negotiated guilty plea to one count of first-degree murder. The State dismissed the remaining counts.

¶ 9 On April 26, 2016, defendant moved to withdraw his plea, alleging, without providing details, that it was involuntary. The motion was denied, and defendant was sentenced to 30 years' incarceration.

¶ 10 Defendant moved to reconsider his sentence and, on June 27, 2016, he filed an amended motion to withdraw his plea. He made various allegations as to why his plea was involuntary but did not raise an issue regarding the adequacy of his fitness hearing. The court denied the motions, and defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant contends that the trial court failed to conduct a proper fitness hearing when it accepted the parties' stipulation about his fitness. Specifically, he contends that the court found him fit based solely on Dr. Lichtenwald's conclusion, without considering or analyzing the basis for that conclusion.

¶ 13 "The due process clause of the fourteenth amendment bars prosecuting a defendant who is unfit to stand trial." *People v. Cook*, 2014 IL App (2d) 130545, ¶ 12. "A defendant is unfit to stand trial if, based on a mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." *Id.*; see 725 ILCS 5/104-10 (West 2012).

¶ 14 " 'Normally, a trial court's decision that a defendant is fit to stand trial will not be reversed absent an abuse of discretion.' " *Cook*, 2014 Ill App (2d) 130545, ¶ 13 (quoting *People*

v. Contorno, 322 Ill. App. 3d 177, 179 (2001)). "However, because the issue is one of constitutional dimension, the record must show an affirmative exercise of judicial discretion regarding the fitness determination." *Id.* When a defendant did not raise this issue in the trial court, the determination of fitness concerns a substantial right, making plain-error review appropriate. *Id.*

¶ 15 " 'When a *bona fide* doubt as to a defendant's fitness exists, the trial court has a duty to hold a fitness hearing.' " *Id.* ¶ 14 (quoting *Contorno*, 322 Ill. App. 3d at 179). " 'A trial court's determination of fitness may not be based solely upon a stipulation to the existence of psychiatric conclusions or findings.' " *Id.* (quoting *Contorno*, 322 Ill. App. 3d at 179). " '[W]here the parties stipulate to what an expert would testify, rather than to the expert's conclusion, a trial court may consider this stipulated testimony in exercising its discretion.' " *Id.* (quoting *Contorno*, 322 Ill. App. 3d at 179). "However, '[t]he ultimate decision as to a defendant's fitness must be made by the trial court, not the experts.' " *Id.* (quoting *Contorno*, 322 Ill. App. 3d at 179). " 'A trial court must analyze and evaluate the basis for an expert's opinion instead of merely relying upon the expert's ultimate opinion.' " *Id.* (quoting *Contorno*, 322 Ill. App. 3d at 179). "The court should be active, not passive, in making the fitness determination." *Id.* (citing *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987)).

¶ 16 "Where a trial court fails to conduct an independent inquiry into a defendant's fitness but, instead, relies exclusively on the parties' stipulation to a psychological report finding the defendant fit, the defendant's due process rights are violated." *Id.* ¶ 15. "However, where a trial court's finding of fitness is based not only on stipulations but also on its observations of the defendant and a review of a psychological report, the defendant's due process rights are not offended." *Id.*

¶ 17 For example, in *Cook*, a year after a fitness evaluation had been performed, the parties informed the court that they were stipulating to the expert's finding in his fitness report. They also submitted a written stipulation, stating that, if called as a witness, the expert would testify consistently with his report that found the defendant fit to stand trial. That same day, the trial court signed an order finding the defendant fit to stand trial, based on the opinion of the expert as outlined in the fitness evaluation. The court later again found the defendant fit, without providing any additional reasoning. *Id.* ¶¶ 5-7. On appeal, the defendant contended that the trial court failed to hold a proper fitness hearing, and we agreed. *Id.* ¶ 22.

¶ 18 In reaching our determination, we first discussed *Contorno*, a case in which it was ambiguous whether the parties stipulated to the expert's ultimate conclusion or whether they stipulated that the expert would testify in conformance with his report. Further, the trial court's order in that case stated only that the defendant was found fit pursuant to the stipulation; there was no indication that the court conducted any analysis of the expert's opinion. As a result, we stated that, while the trial court might have made an independent determination of fitness, from the record it appeared that the court merely accepted the expert's conclusion. Thus, it appeared that the trial court did not exercise discretion in finding the defendant fit. *Id.* ¶ 16 (citing *Contorno*, 322 Ill. App. 3d at 180).

¶ 19 We also discussed *Thompson*, in which the parties stipulated to the reports of two experts who found that the defendant was fit for trial but the trial court's order finding the defendant fit did not discuss the issue other than that it noted the stipulation. *Id.* ¶ 17 (citing *Thompson*, 158 Ill. App. 3d at 861, 864-65). There, the Third District reversed, distinguishing cases in which the parties recited a detailed stipulation as to the experts' testimony rather than just a stipulation to their conclusions. Stating that the " 'distinction is a fine one,' " the court observed that the

parties stipulated only to the experts' findings and conclusions. *Id.* (quoting *Thompson*, 158 Ill. App. 3d at 864). It was clear that the trial court's decision was based solely on the stipulation, as it did not appear from the record that the trial court even reviewed the reports that the parties were stipulating to. *Id.* (citing *Thompson*, 158 Ill. App. 3d at 864-65). In addition, although not dispositive, the trial court did not question the defendant or the attorneys about the matter. The appellate court specifically stated that " '[t]he [trial] court should not be passive, but active in making the assessment as to fitness which the law requires.' " *Id.* (quoting *Thompson*, 158 Ill. App. 3d at 865). Thus, when the facts demonstrate that the trial court reviewed the report filed by the expert and had the opportunity to observe or question the defendant, the hearing met the requirements of due process. *Id.* ¶ 18 (citing *People v. Robinson*, 221 Ill. App. 3d 1045, 1050 (1991), and *People v. Mounson*, 185 Ill. App. 3d 31, 37 (1989)).

¶ 20 Ultimately, in *Cook*, we stated:

> "[W]e take this opportunity to clarify what a court should do when presented with a stipulation as to fitness. While the court may accept a stipulation that, if called to testify, an expert would testify consistently with his or her report, it is incumbent upon the court to make a record reflecting that it did more than merely base its fitness finding on the stipulation to the expert's ultimate conclusion. The court must state on the record the factual basis for its finding, which must be more than a mere acceptance of a stipulation that the defendant is fit or that an expert found the defendant fit. Here, had the court stated that it read the report and agreed with [the expert's] conclusion based on the facts set out in the report, or had it recited the facts it relied on in making its own fitness determination, there would have been no ambiguity about the court's exercise of discretion." *Id.* ¶ 20.

¶ 21 Here, as in *Cook*, the record does not show that the trial court exercised its discretion. Nothing shows that the trial court ever reviewed the substance of Dr. Lichtenwald's report. Although the court noted that there were several interview dates listed on the report, it made no mention of any substantive content of it. The court then immediately accepted the stipulation and found defendant fit, with no further discussion of the report. Indeed, the report was not even filed until over a year later. The court stated no details about the basis for its finding, and it did not question defendant or the attorneys about defendant's fitness.

¶ 22 The State argues that the stipulation was sufficient because it included the phrase that Dr. Lichtenwald would testify consistently with his report, which would include the basis for his opinion. However, this ignores the fact that nothing in the record establishes that the court actually reviewed the report or otherwise knew the basis for the finding. As a result, the record does not show that the court exercised its discretion as opposed to merely relying on Dr. Lichtenwald's ultimate opinion. The court was passive as opposed to active in making its determination.

¶ 23 Citing facts that allegedly establish that defendant was actually fit to stand trial, the State also contends that plain-error review is not appropriate. In doing so, it would appear that the State is arguing that the evidence was not closely balanced for purposes of plain-error review or that a harmless-error analysis may apply. But the law is clear that the determination of fitness involves a substantial right, subject to plain-error review. *Id.* ¶ 13; *Contorno*, 322 Ill. App. 3d at 180. Further, many of the facts that the State cites arose after the trial court reached its fitness determination and were not specifically associated with the fitness determination. Because the record does not show that the trial court exercised its discretion in finding defendant fit to stand trial, we vacate the trial court's finding of fitness.

¶ 24 Defendant contends that, because the fitness determination is more than five years old, the appropriate remedy is to allow him to plead anew. However, that is not automatically the case. Our supreme court has observed that "retrospective fitness determinations will normally be inadequate to protect a defendant's due process rights when more than a year has passed since the original trial and sentencing." *People v. Neal*, 179 Ill. 2d 541, 554 (1997). However, in "exceptional cases," "circumstances may be such that the issue of defendant's fitness or lack of fitness at the time of trial may be fairly and accurately determined long after the fact." *Id.* In *Cook*, we found such circumstances present, because the parties stipulated to the only evidence presented and the trial court was perfectly capable of reviewing that evidence and finding whether, in light of that evidence, the defendant was fit when he pleaded guilty and was sentenced. We thus remanded the cause for a retrospective determination of his fitness. *Cook*, 2014 IL App (2d) 130545, ¶ 22.

¶ 25 Here, as in *Cook*, the parties stipulated to Dr. Lichtenwald's report, which was the only evidence presented. The trial court is capable of reviewing the report and determining whether, in light of that evidence, defendant was fit. If the trial court finds that he was fit, the judgment shall stand. See *id.* If the court finds that he was not fit, it shall vacate the judgment and allow defendant to plead anew. See *id.*

¶ 26 III. CONCLUSION

¶ 27 The record does not show that the trial court exercised its discretion when it found defendant fit. Accordingly, the fitness finding is vacated and the cause remanded.

¶ 28 Vacated and remanded.