2019 IL App (2d) 161040-U
No. 2-16-1040
Order filed August 29, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ELIZABETH KLOSS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 14-CF-916 Honorable Michael W. Feetterer, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Jorgensen dissented.

ORDER

¶ 1 *Held*: (1) The trial court properly found defendant fit, as it did not simply adopt the expert's conclusion but rather reviewed the expert's report and drew its own conclusion; (2) under Rule 472, we remanded the cause for defendant to move for credit against fines.

¶ 2 Following a bench trial in the circuit court of McHenry County, defendant, Elizabeth Kloss, was found guilty of two counts of aggravated assault (720 ILCS 5/12-2 (West 2014)), two counts of a possession of a firearm without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2014)), and a single count of possession of firearm ammunition without a

FOID card (*id.* § 2(a)(2)). On appeal, defendant challenges the trial court's finding that she was fit to stand trial. She also argues that, pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14(a) (West 2016)), she is entitled to a *per diem* monetary credit toward fines imposed by the trial court. We affirm defendant's convictions but we remand to the trial court so that defendant may file a motion to apply the *per diem* credit to her fines.

¶ 3 I. BACKGROUND

¶ 4 Defendant's convictions stem from an incident in July 2014 in which McHenry County sheriff's deputies responded to a report of a suicidal female with access to weapons at a residence in Wonder Lake. When the deputies arrived at the residence, they encountered defendant, who, at some point, came out of the residence carrying a semiautomatic rifle. Defendant ignored commands to drop the weapon and pointed it at the deputies. One of the deputies fired his weapon at her, striking her in her left temple.

¶ 5 Prior to trial, defendant's attorney filed a motion seeking a determination of whether defendant was fit to stand trial. According to the motion, as a result of being shot, defendant suffered injuries including brain damage and the "loss of certain physical capacities." The motion stated, "during the more recent months of the pendency of this case, Counsel has observed [defendant's] physical and mental condition deteriorate, to the point where Counsel her [*sic*] serious doubts that she is fit at this time that she can understand the nature of the proceedings or assist Counsel in her defense."

¶ 6 The trial court appointed Robert L. Meyer, a licensed clinical psychologist, to examine defendant. Meyer prepared a written report indicating that he concluded that defendant was fit to stand trial. In the report, Meyer noted that defendant: (1) was able to state the charges against

her; (2) understood that the state's attorney would prosecute her and her attorney would defend her; (3) understood that, if she chose a bench trial, the trial judge would determine whether she was guilty and that, if she chose a jury trial, the jury would do so; and (4) understood that her case might be resolved through plea negotiations. Meyer further noted that "[a]lthough [defendant] does show impairment in memory functioning, her deficits do not appear to impact her ability to consult with her attorney."

¶ 7 At defendant's fitness hearing, the parties stipulated that, if Meyer were called as a witness, "he would testify consistent with his report which finds [defendant] fit to stand trial." No other evidence was presented at the hearing. The trial court stated, "Just for the record, the Court has reviewed the report prepared by Dr. Meyer ***. And based upon Dr. Meyer's examination of defendant, [she] is currently fit to stand trial."

¶ 8 II. ANALYSIS

¶ 9 The fourteenth amendment's due process clause forbids the criminal prosecution of a defendant who is unfit to stand trial. *People v. Holt*, 2014 IL 116989, ¶ 51. A defendant is presumed to be fit, but if there is a *bona fide* doubt as to his or her fitness, the trial court must order a determination of the issue before proceeding and the State bears the burden of proving, by a preponderance of the evidence, that the defendant is fit. 725 ILCS 5/104-1(a), (c) (West 2018). Section 104-13(a) of the Code (*id.* § 104-13(a)) provides that "[w]hen the issue of fitness involves the defendant's mental condition, the court shall order an examination of the defendant by one or more licensed physicians, clinical psychologists, or psychiatrists chosen by the court." When the parties stipulate to the expert testimony of the health care professional who conducted the examination, the trial court may consider the expert's stipulated testimony. *People v. Smith*, 2017 IL App (1st) 143728, ¶ 86. However, "[a] trial court's determination of fitness may not be

based solely upon a stipulation to the existence of psychiatric conclusions or findings." *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). "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.* The trial court's determination that a defendant is fit is reviewed under the abuse-of-discretion standard. *Id.* "However, because this issue is one of constitutional dimension, the record must show an affirmative exercise of judicial discretion regarding the determination of fitness." *Id.*

¶ 10 In *People v. Cook*, 2014 IL App (2d) 130545, ¶¶ 16-18, we surveyed cases considering the adequacy of the trial courts' findings of fitness. In two of those cases—*People v. Robinson*, 221 Ill. App. 3d 1045 (1991), and *People v. Mounson*, 185 Ill. App. 3d 31 (1989)—the trial courts' findings were affirmed. In two other cases—*Contorno* and *People v. Thompson*, 158 Ill. App. 3d 860 (1987)—they were reversed.

¶ 11 In *Contorno*, the parties stipulated that an expert's report found that the defendant was fit to stand trial, but it was unclear whether the parties stipulated to the expert's ultimate conclusion that the defendant was fit or stipulated that the expert's testimony would conform to the report. Moreover, it was unclear whether the trial court had analyzed the expert's opinion. We noted that it appeared that the trial court simply accepted the expert's opinion that the defendant was fit. In *Thompson*, the court identified a fine distinction between cases in which there is a detailed stipulation as to an expert's testimony and those in which the parties merely stipulate to the expert's conclusion. The stipulation in *Thompson* fell into the latter category. Indeed, it did not appear that the trial court had reviewed the expert's report.

¶ 12 In contrast, in *Robinson* and *Mounson* the trial courts reviewed the experts' reports. In *Robinson*, the trial court had the opportunity to observe the defendant and determine that she was

taking medication that, according to the expert, made her fit to stand trial. In *Mounson*, the trial court questioned the defendant before reaching the conclusion that he was fit to stand trial.

¶ 13 Based on those decisions, we reversed the trial court's finding in *Cook* that the defendant was fit. We reasoned as follows:

> "Here, as in *Thompson*, and unlike in *Robinson* and *Mounson*, the record does not show that the trial court exercised its discretion. Nothing indicates that the trial court ever reviewed [the expert's] report. Instead, the record indicates that it did not; *** when the court found defendant fit, the parties submitted the [expert's] report with the stipulation, and the court immediately signed the prepared order finding defendant fit. The court stated no details about the basis for the finding, and it did not question defendant or the attorneys about defendant's fitness. *** [W]ithout anything to indicate that the court actually reviewed the report or knew of the basis for the finding, the record is at best ambiguous as to whether the court exercised its discretion as opposed to merely relying on [the expert's] ultimate conclusion.
>
> Here, the court was not active in making the determination, as required by *Thompson*. Instead it was passive, in that it accepted a stipulation to [the expert's] finding, made no independent inquiry, and simply signed a premade order finding defendant fit without ever stating any of its own findings on the matter." *Cook*, 2014 IL App (2d) 130545, ¶¶ 19-20.

¶ 14 Significantly, in *Cook* we explained what a trial court should do when presented with a stipulation concerning the defendant's 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." (Emphasis added.) *Id.* ¶ 20.

¶ 15 Applying these principles, we conclude that the record sufficiently shows that the trial court properly exercised its discretion. The court indicated that it had itself reviewed Meyer's report and ruled that "based upon Dr. Meyer's *examination* of the defendant, [she] is currently fit to stand trial." (Emphasis added.) Thus, it is reasonably clear that the trial court did not simply adopt Meyer's ultimate finding, but rather performed its own analysis upon review of Meyer's report and his examination of defendant. We therefore find no basis for disturbing the trial court's determination that defendant was fit to stand trial.

¶ 16 We turn now to defendant's argument that, pursuant to section 110-14(a) of the Code, she is entitled to a *per diem* monetary credit toward fines. Defendant did not raise this issue below. Section 110-14(a) provides, "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2018). Defendant contends that application of the credit is sufficient to fully satisfy certain fines totaling $480. However, she acknowledges in her reply brief that, pursuant to Illinois Supreme

Court Rule 472 (eff. May 17, 2019), the issue must be resolved in the trial court before we may consider it. Rule 472 provides as follows:

> (a) In criminal cases, the circuit court retains jurisdiction to correct the following sentencing errors at any time following judgment and after notice to the parties, including during the pendency of an appeal, on the court's own motion, or on motion of any party:
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> ***
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> (2) *Errors in the application of per diem credit against fines*;
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> * * *
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> (b) Where a circuit court's judgment pursuant to this rule is entered more than 30 days after the final judgment, the judgment constitutes a final judgment on a justiciable matter and is subject to appeal in accordance with Supreme Court Rule 303.
>
> (c) No appeal may be taken by a party from a judgment of conviction on the ground of any sentencing error specified above unless such alleged error has first been raised in the circuit court. When a post-judgment motion has been filed by a party pursuant to this rule, any claim of error not raised in that motion shall be deemed forfeited.
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> (d) If a motion is filed or judgment pursuant to this rule is entered after a prior notice of appeal has been filed, and said appeal remains pending, the pending appeal shall not be stayed. Any appeal from a judgment entered pursuant to this rule shall be consolidated with the pending appeal.
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> (e) *In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.*" (Emphasis added.) *Id.*

¶ 17 Because this appeal was pending on March 1, 2019, we must remand to the trial court to allow defendant to file a motion to correct the claimed error in the application of the *per diem* credit.

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of McHenry County and remand to that court so that defendant may file a motion to correct the alleged error in the application of the *per diem* credit to her fines.

¶ 20 Affirmed and remanded.

¶ 21 JUSTICE JORGENSEN, dissenting:

¶ 22 The majority determines that the trial court properly found defendant fit, as it did not simply adopt the expert's conclusion but, rather, reviewed the expert's report and drew its own conclusion. Respectfully, I disagree.

¶ 23 As noted, the record must show an affirmative exercise of judicial discretion regarding the fitness determination. See, *e.g.*, *Cook*, 2014 IL App (2d) 130545, ¶ 13. The determination may not be based solely upon the expert's ultimate opinion, and the court must actively, not passively, analyze and evaluate the bases for the expert's opinion. *Id.*, 2014 IL App (2d) 130545, ¶ 14. Here, the crux of the State's argument is that the court performed its own analysis after reviewing the report, observing defendant, and purportedly interacting with defendant numerous times prior to the fitness hearing. In addition, the majority hangs its hat on the court's use of the word "examination," as reflecting that the court did not simply adopt the report's conclusion but, rather, formed its own conclusion based on the expert's "examination." I submit that the record belies any suggestion of meaningful consideration or evaluation reflecting judicial discretion.

¶ 24 To start, although the majority recites most of the court's fitness finding, it omits a few words that I find relevant. Specifically, the court's fitness finding, in full:

> "All right. Just for the record, the Court has reviewed the report prepared by Dr. Meyer dated August 11, 2016. And based upon Dr. Meyer's examination of the defendant, [she] is currently fit to stand trial. So that's for the record. All right. And you're [defendant], ma'am?"

¶ 25 The court rendered the above fitness finding without explaining what about the "examination" reflected fitness. The court did not make a record of its own alleged observations of defendant or interactions with her. The court asked no questions of defendant or any of the attorneys concerning fitness or any of the information in the report. Rather, I think that its statement reflects no more than a perfunctory adoption of the report in total, without meaningful consideration of it. Indeed, the report was literally handed to the trial judge minutes before the finding was made, and no recess was taken. The court announced that the report was dated August 11, 2016, when, in actuality, that date is incorrect for two reasons: first, the date August *1*, 2016, simply appears on the facsimile cover sheet attached to the report and, second, the report itself is dated July 29, 2016. The court clearly just quickly glanced at and announced dates without accuracy. Further, the State's reference to the court's interactions with and observations of defendant as suggesting independent assessment of her fitness is not particularly convincing where the court asked her no questions and instead, immediately after announcing its findings, asked whether she was, in fact, the defendant.

¶ 26 It is also telling that, after announcing its finding, the court launched into a technical recitation of the bills of indictment and possible attendant sentences, at the end asking defendant if she understood the nature of the charges and potential sentencing ranges. She replied that she

could not hear everything. The court did not, however, repeat the information for her; rather, it simply asked more loudly whether she understood. She said that she did, but defense counsel noted for the court that, as it had just seen when it asked defendant if she understood the potential penalties, "there are still difficulties." Counsel reiterated that, while he was not contesting fitness (which the court has already decided), the expert's report had noted defendant's capacity for attention and concentration were impaired due to her injuries. The court replied, "where are you reading?" The court, which had *supposedly* both reviewed the report and independently analyzed the findings of a four-page, single-spaced, small font, detailed evaluation minutes before rendering its fitness determination, did not know where in the report the expert had noted defendant's impairments. Counsel then proceeded to guide the court through the report to the section reflecting those impairments. Indeed, I note that the conclusion of the report explains that, even if fit, defendant's impairments may require support services, such as repeating words or phrases, and breaking down questions or statements into smaller or more manageable parts. In my opinion, if the court had meaningfully reviewed the report and had read those suggested support tactics, it would not have launched into a technical recitation of the indictments and sentencing ranges in the way that it did, and it would have repeated the information for defendant when she expressed that she had not heard him. Indeed, even if fit, the report reflects that defendant suffered from *serious* impairments as a result of a gunshot wound to the head, including amnesia, speech impairment, short-term memory loss, and chronic pain.

¶ 27 In sum, the propriety of a court's fitness finding based upon its acceptance of a stipulation to an expert's report is not a question resolved on the recitation of "magic words." Here, despite its use of the word "examination," the aforementioned examples reflect that, regardless of what it *said*, the court performed at best only a cursory and perfunctory review of

the report and simply accepted the report's conclusion as its own without further meaningful analysis. The court did not affirmatively articulate on the record *its own* evaluation of the evidence before it and, therefore, its finding is ambiguous as to whether it exercised its discretion. I note that this issue is reviewed for plain error, as it concerns a substantial right and defendant concedes that it was not raised below. See *Cook*, 2014 IL App (2d) 130545, ¶ 13. In that vein, as the trial court failed to conduct an independent inquiry into defendant's fitness, relying instead on the stipulation and report conclusions, I would find error and would vacate the fitness finding and remand for a new fitness hearing.