2019 IL App (3d) 180431-U

Order filed July 11, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-18-0431
v.	)	Circuit No. 05-CF-384
	)	
ROBERT L. JACKSON,	)	Honorable
	)	Paul P. Gilfillan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Carter, dissenting.

ORDER

¶ 1 *Held*: (1) Trial court abused its discretion in finding no *bona fide* doubt as to defendant's fitness and failing to order a fitness hearing; and (2) remedy for court's error is *vacatur* of defendant's conviction and remand for a new trial.

¶ 2 Defendant, Robert L. Jackson, was convicted of first degree murder and sentenced to 24 years' imprisonment. On appeal, he argues that the trial court abused its discretion in finding that

there was no *bona fide* doubt of his fitness to stand trial. We vacate defendant's conviction and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)) for the 2005 stabbing death of his boyfriend, David Sims. On January 8, 2007, defendant executed a jury waiver in open court. The court asked defendant a number of questions in order to determine the voluntariness of the waiver. In response to those questions, defendant told the court that he had recently completed his general education development (GED) and was not under the influence of drugs or alcohol.

¶ 5 Defendant informed the court that he was taking prescription medication for chronic depression. The court asked: "How does the medication affect you as far as *** understanding what I'm saying, what [defense counsel] is saying, for example?" Defendant responded: "It has no effect." The court continued: "In other words, do you understand where you are today and what you're doing today?" Defendant replied: "Yes, sir."

¶ 6 Defense counsel indicated to the court that defendant had been provided the opportunity to confer with his sister via telephone regarding the decision to waive a jury trial. Defendant also consulted with counsel, and indicated that he was satisfied with the legal services he had been provided. Defendant stated that he was waiving a jury trial of his own free will and that no one had made him any promises relating to the result of that decision. The court accepted the waiver.

¶ 7 Approximately four months later, on April 12, 2007, six days before his bench trial was scheduled to commence, defendant filed a *pro se* motion to withdraw his jury waiver. In the motion, defendant alleged that defense counsel "misled" defendant into accepting a bench trial. He also alleged that he had been under the influence of psychotropic medication at the time of

his waiver, and did not understand why counsel wanted him to waive his right to a jury trial. Defendant also variously attacked counsel's trial strategy and general performance.

¶ 8 A hearing on defendant's motion was held on April 16, 2007. At the hearing, the court asked defendant what medication he was taking. Defendant did not remember, but knew that it was more than one medication. Defendant knew that he was in a courthouse and knew who the judge and his defense attorney were. He indicated that another person had prepared his *pro se* motion on his behalf.

¶ 9 The court asked defense counsel if there were any concerns related to defendant's fitness to stand trial. Defense counsel stated that neither his review of portions of defendant's psychiatric history nor his conversations with defendant suggested unfitness. Counsel did indicate that defendant had a "long-standing severe depression, as well as some intellectual limitations."

¶ 10 The court then asked defendant about his earlier decision to waive his jury trial. Defendant explained:

> "[A]t that time my sister is the one that told me to go with the bench trial because she said that that's what she was told was best. And then my brother said that that wasn't a good idea. And I was just trying to go with the decision to where nobody would be mad at me for what I said."

The court went into recess so that information regarding defendant's medication could be obtained. The court noted: "[Defense counsel] has indicated *** that there have been no indications of unfitness. And obviously [defendant is] able to communicate with me here today, but we should, for the record, obtain information."

¶ 11 Following the recess, defense counsel informed the court that defendant had been taking an antidepressant medication. That medication had subsequently been replaced with a medication "used to deal with mood disorder, including agitation and severe anxiety." The State added that defendant was also on a medication for high blood pressure. Defendant believed he was also taking Prozac at some point. When the court asked defendant if he was taking those medications at the time of his jury waiver, he responded: "To my knowledge, yes."

¶ 12 The court then asked defendant if he wished to make any further comments on his request to withdraw his jury waiver. The following exchange ensued:

> "[DEFENDANT]: As far as the trial, the decision was done, it was a decision that was basically made by my sister.
>
> THE COURT: How so? I mean, how did that come about?
>
> [DEFENDANT]: Because I asked her what to do."

Later, defendant continued:

> "[T]here were conversations with her about choices. And my sister have all choices that made any difference in my life, she was one, one of the main people that I go to. And upon speaking with someone else, I was told that maybe I shouldn't have been able to go to her for the advice since she's being called as a witness by the State."

The State confirmed that defendant's sister had been subpoenaed, but only related to the house where the incident took place, rather than as a witness to the offense itself. The court then asked defendant if he had any specific complaints about the performance of defense counsel. Defendant replied: "No, sir. Since I've had maybe for two years, so to my knowledge he's been nothing but

polite to me when I have been in contact with him." The court denied defendant's motion to withdraw his jury waiver.

¶ 13 Defendant's bench trial commenced on April 18, 2007, two days after the hearing on his motion to withdraw his waiver. Before defendant entered the courtroom, defense counsel raised some concerns with the court. He explained that in meeting with defendant in a holding cell moments earlier, defendant had been unresponsive and had been crying and moaning with his face in his hands. Counsel described defendant as "having an emotional melt down." Counsel asserted that defendant had been engaged in some "obviously prayerful commentary." He indicated that there "was a comment to the effect that the devil has set this out." Counsel suggested: "I believe that it is a situation where the anxiety disorder perhaps is the root of this." He added: "I certainly have seen nothing to this level of this behavior. In fact, it was to the extent it would appear to me the activity back there even induced vomiting of some sort."

¶ 14 The court had defendant brought into the courtroom. Once there, defendant gave no verbal response to the court's questions. Defense counsel requested a fitness examination, adding that he had "not seen anything that suggests this is an attempt by [defendant] simply to avoid trial." The court responded: "[T]he mere fact that a defendant is emotional and decides to clam up on the day of trial wouldn't in and of itself be grounds to create a *bona fide* doubt of fitness." Defense counsel reiterated that he had never seen defendant in such a state, and again insisted that defendant was not acting volitionally. The court declared a recess.

¶ 15 Following the recess, the following exchange occurred:

> "[DEFENSE COUNSEL]: Judge, I would indicate to the court that [defendant] has in the last 20 minutes or so been able to communicate with me. I believe we are prepared to proceed at this point.

THE COURT: Any requests for delay as to fitness is being withdrawn?

[DEFENSE COUNSEL]: I believe it is, Judge. Yes, sir.

THE COURT: [Defendant], are you prepared to go with your case today?

THE DEFENDANT: I still believe that this definitely was set, this trial, to send me to hell.

THE COURT: Why is that?

THE DEFENDANT: Because of the lifestyle I was living."

The court then asked defendant if he understood what he was charged with. Defendant replied: "Somewhat." The court read the indictment in full, and again asked defendant if he understood the charge. The record reflects that defendant shook his head in the negative. The court asked what defendant did not understand about the charge. Defendant replied: "I just don't."

¶ 16 The court explained again that defendant was charged with stabbing David Sims without legal justification, leading to the following colloquy:

"THE DEFENDANT: Oh, okay.

THE COURT: Do you understand what the charge is?

(Pause.)

THE DEFENDANT: Yes.

THE COURT: Tell me what you are charged with.

THE DEFENDANT: You said charged with stabbing David.

THE COURT: Do you know what you are charged with?

THE DEFENDANT: You said stabbing David.

THE COURT: All right. Has [defense counsel] talked to you about what you are charged with?

THE DEFENDANT: We have talked about different stuff.

* * *

THE COURT: Do you feel that you understand what the possible sentences are in the case?

THE DEFENDANT: Yes.

THE COURT: And on any particular sentence, if you are found guilty in the case, all of the sentence must be served. So that if you were to receive a sentence of 30 years, then you would have to serve 30 years in prison with being given credit only for the time you actually served, which looks like almost two years.

Do you feel that you understand this?

THE DEFENDANT: Yes.

THE COURT: [Defense counsel] has been your attorney in the case. I think you told me the other day that he's been polite to you and has prepared your case, talked to you about your case, is that all correct?

THE DEFENDANT: Yes, he's talked to me about it.

THE COURT: Has he answered questions that you might have about the case?

THE DEFENDANT: There's been things that we have talked about and I didn't understand a lot of stuff, but decisions that were made, strictly pretty much by my sister that is here and my older brother."

¶ 17 Defendant agreed that he and counsel had met one on one, but he did not recall reviewing police reports with counsel. He could not remember how many times he had discussed the case with counsel, but agreed that it was more than once. Defendant affirmed that he could read and write and that he had recently completed his GED while in the county jail. The court found that there was no *bona fide* doubt as to defendant's fitness to stand trial.

¶ 18 At trial, defendant testified in his own defense.[1] At the outset of defense counsel's questioning, defendant affirmed that he was the defendant and that he had chosen to testify after discussing the matter with counsel. After counsel pointed out the issues from earlier in the day, defendant agreed that he was "fine to testify now."

¶ 19 Defendant provided detailed testimony regarding the day and evening he spent with Sims on the date of the incident. Regarding the incident itself that night, defendant recalled that he and Sims got into an argument and "tussled." He testified that Sims "swung at" him, at which point "things get kind of fuzzy." Defendant's memory of the remainder of the altercation was imperfect. He stated that at one point "it seems like there was someone else in the room." Defendant could not recall whether he stabbed Sims.

¶ 20 On cross-examination, defendant clarified that his first clear memory after Sims swung at him was of Sims on the kitchen floor, gasping for air. Defendant remembered having a knife and dropping it into the sink. Regarding that knife, defendant testified: "[I]t seems that somebody passed it to me and I dropped it in the sink." Defendant recalled that the individual was black, but did not remember many details, noting that "[i]t's foggy."

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[1]A comprehensive account of the evidence introduced at defendant's trial was set forth by this court in *People v. Jackson*, 2017 IL App (3d) 150273-U. We recite only the details of defendant's trial most relevant to the present issue.

¶ 21 The court found defendant guilty of first degree murder and, after a subsequent sentencing hearing, sentenced defendant to a term of 24 years' imprisonment. Defense counsel filed a motion to reconsider sentence, but that motion was not ruled upon. No notice of appeal was filed at that time.

¶ 22 On June 23, 2008, defendant filed a *pro se* petition for postconviction relief, alleging, *inter alia*, that defense counsel had been ineffective for failing to file a notice of appeal. After a series of delays and continuances—explained in detail in *People v. Jackson*, 2017 IL App (3d) 150273-U, ¶¶ 9-16—that issue reached a third-stage evidentiary hearing on February 13, 2015, nearly seven years after the petition was filed. Defense counsel testified at that hearing that defendant had been satisfied with the sentence he received and never indicated that he wished to appeal. The court denied defendant's petition.

¶ 23 On appeal from that denial, this court found that defendant received an unreasonable level of assistance from postconviction counsels. *Id*. ¶¶ 27-29. We remanded the matter for the appointment of new counsel and a new third-stage evidentiary hearing. *Id*. ¶ 29. This court also took note of the motion to reconsider sentence, which had been filed but never ruled upon. Finding that the motion had never been legally abandoned, we urged newly appointed counsel to "notice the motion for a hearing so that it may be ruled on by the trial court." *Id*. ¶ 30.

¶ 24 On remand, the trial court denied the motion to reconsider sentence, and a notice of appeal was timely filed. Accordingly, the present appeal is a direct appeal from defendant's conviction for first degree murder.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues that the record demonstrates a *bona fide* doubt as to his fitness to stand trial, and that the trial court therefore abused its discretion in failing to order a

fitness hearing. Defendant acknowledges that the issue was not preserved in a posttrial motion, and therefore argues for relief under the rubric of plain error. The State does not dispute that an error of this nature would be reversible under the second prong of the plain error doctrine, conceding that resolution of this case turns simply on whether error was actually committed. See *People v. Sandham*, 174 Ill. 2d 379, 382 (1996) ("[P]rosecuting a defendant where there is a *bona fide* doubt as to that defendant's fitness renders the proceedings fundamentally unfair.").

¶ 27 A. *Bona Fide* Doubt

¶ 28 A criminal defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2008). "A defendant is unfit if, because of his 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*. The issue of a defendant's fitness for trial may be raised at any time, by either party or the court. *Id*. § 104-11(a). "When a *bona fide* doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further." *Id*. Once a *bona fide* doubt has been raised, the burden is on the State to prove by a preponderance of the evidence that a defendant is fit to stand trial. *Id*. § 104-11(c). When the issue of fitness relates to a defendant's mental condition, the court shall appoint an expert to perform an examination. *Id*. § 104-13(a). The test of a *bona fide* doubt is objective, examining whether facts raise a "real, substantial, and legitimate doubt" regarding the defendant's mental capacity to meaningfully participate in his or her defense. *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991). "[*S*]*ome* doubt as to a defendant's fitness is not necessarily enough to warrant a fitness hearing." (Emphasis added.) *Sandham*, 174 Ill. 2d at 389.

¶ 29 The trial court has an affirmative duty to order a fitness hearing, *sua sponte*, any time a *bona fide* doubt as to defendant's fitness exists. *Id.* at 382. The question of whether a *bona fide*

doubt exists is a matter within the discretion of the trial court. *Id*. Accordingly, a trial court's failure to conduct a fitness hearing amounts to reversible error only where that decision, premised on the lack of a *bona fide* doubt of fitness, is arbitrary, fanciful, or unreasonable such that no reasonable person would take the view adopted by the court. See *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 53.

¶ 30 In *Eddmonds*, our supreme court discussed the factors that play a role in determining whether a *bona fide* doubt of fitness exists, and the difficulty inherent in reaching such a conclusion:

> "Relevant factors which a trial court may consider in assessing whether a *bona fide* doubt of fitness exists include a defendant's 'irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial.' (*Drope v. Missouri*, 420 U.S. 162, 180 (1975)). The representations of defendant's counsel concerning the competence of his client, while not conclusive, are another important factor to consider. [*Id.* at 177 n.13.] It is undisputed, however, that there are 'no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.' [*Id.* at 180.]" *Eddmonds*, 143 Ill. 2d at 518.

¶ 31 Furthermore, section 104-16 of the fitness statute, which governs the procedures of a fitness hearing, provides that matters admissible on the question of a defendant's fitness include:

> "(1) The defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;

(2) The defendant's ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel;

(3) The defendant's social behavior and abilities; orientation as to time and place; recognition of persons, places and things; and performance of motor processes." 725 ILCS 5/104-16(b) (West 2008).

Because such factors are probative of a defendant's fitness to stand trial, it follows that they are also relevant to the existence of a *bona fide* doubt as to that fitness.

¶ 32 On appeal, defendant lists approximately five factors that he claims amounted to a *bona fide* doubt of his fitness. Those factors include defendant's: stated deference to family members regarding decisions in his case; references to the devil and being sent to hell;[2] emotional breakdown and nonresponsiveness on the morning of trial; failure to understand or remember certain conversations with defense counsel; failure to fully or properly state the charge against him; and lack of memory concerning the details of Sims's stabbing.

¶ 33 Initially, we note that this court does not find each of defendant's proposed indicators equally compelling. For example, defendant's belief in the devil or that he was being punished by a higher power does not imply, as defendant suggests, that he was unaware of the earthly purpose of the trial as well. Likewise, defendant's trial testimony cuts in both directions. His lack of memory of Sims's killing and his invocation of an unexplained third party in the house are surely indicative of unfitness. See *id*. § 104-16(b)(2). Yet, defendant was able to cogently provide many details of that day prior to the incident itself. Similarly, we would not conclude

[2]Throughout the brief, appellate counsel insists that the "lifestyle" for which defendant believed he was being sent to hell was his homosexuality. While that interpretation is no doubt possible, it is an assumption that finds no actual support in the record.

that deference to trusted family members is itself indicative of unfitness. Although, such deference becomes more problematic where, as here, it appears defendant wholly abdicated his decision-making to family members, or otherwise made decisions simply so that his family would not be mad at him.

¶ 34 Despite these conflicting facts, the record nevertheless demonstrates serious questions about defendant's fitness to stand trial. While the State accurately points out that defendant was coherent and communicative two days before trial at the hearing on his motion to withdraw jury waiver, "[t]he question of fitness may be fluid." *People v. Weeks*, 393 Ill. App. 3d 1004, 1010 (2009). On the morning of his trial, defendant was emotional and unresponsive with counsel. It was well-established that defendant suffered from severe depression and an anxiety disorder, for which he was prescribed at least one psychotropic medication. Defense counsel suggested that he had never seen defendant like that before and opined that defendant was not malingering and that his documented anxiety disorder was the cause of the episode.

¶ 35 After a recess, defense counsel indicated that defendant had become communicative in the preceding 20 minutes, assuaging counsel's fitness concerns. The trial court, however, engaged in an extended colloquy with defendant related to his fitness. The record thus affirmatively demonstrates that the court had at least "some doubt" concerning defendant's fitness. See *Sandham*, 174 Ill. 2d at 389.

¶ 36 The court's questioning of defendant should have done nothing to relieve the court of its doubt; rather, defendant's responses to those questions only underscore the concerns for his fitness. The trial court asked defendant seven consecutive questions relating to defendant's understanding of the charge against him. Defendant replied that he "[s]omewhat" understood the charge, then that he did not understand it. After the court read the indictment again, defendant

merely responded "Oh, okay." Asked again if he understood the charge, defendant only responded "Yes" after a pause long enough to be noted in the record. Finally, after the court asked defendant to explain the charge in his own words, defendant could only briefly mimic the court's own phrasing of the charge. Far from assuaging any doubts of defendant's understanding, that exchange establishes a serious possibility that defendant, in that moment, did not understand the charge against him.

¶ 37 The court's colloquy is also significant for the questions that were not asked. For example, the court did not ask defendant open-ended questions relating to his ability to understand the nature and purpose of the proceedings. The court could have asked defendant what a bench trial was, or how it compared to a jury trial. The court could have asked what role defendant's lawyer or the judge would play in the proceedings. The court could have asked what the potential outcomes of the trial and their consequences could be. More to the point, the court could simply have asked what the purpose of the proceedings was. Instead, the court—evidently concerned to some extent regarding defendant's fitness—made only minimal effort to determine the extent of defendant's understanding of the proceedings.

¶ 38 Finally, we note the troubling nature of the court's observation that defendant had simply "decide[d] to clam up on the day of trial." The record is replete with evidence that defendant's "emotional melt down" was more than a mere decision to not talk. Defense counsel, who had familiarity with defendant, insisted that defendant was not acting volitionally. In addition to being unresponsive, defendant was crying and moaning, apparently to the extent that he had vomited in his holding cell. The court was aware of defendant's mental conditions and his need for medication. Accordingly, it seems the reference to defendant being "emotional" and

"decid[ing] to clam up" are misrepresentative of what was actually happening the morning of trial.

¶ 39 Given defendant's documented mental conditions, his evidently fragile state the morning of trial, and his inability to meaningfully articulate any information about the proceedings that were soon to commence, we find that a *bona fide* doubt existed as to his ability to understand the nature and purpose of the proceedings against him. The trial court's conclusion otherwise was unreasonable and an abuse of its discretion. Of course, we point out that this finding does not reflect any opinion concerning whether defendant was *actually* fit at the time. Nevertheless, the existence of a *bona fide* doubt compelled the trial court to *sua sponte* order a fitness hearing. The court's failure to do so amounted to reversible error under the second prong of the plain error rubric. *E.g.*, *People v. Moore*, 408 Ill. App. 3d 706, 710 (2011).

¶ 40 B. Remedy

¶ 41 The question of remedy remains. Defendant argues that we should vacate his conviction and remand for a new trial. The State asserts that we may instead remand for a retrospective fitness hearing, and indeed argues that we should do so.

¶ 42 In *People v. Neal*, 179 Ill. 2d 541 (1997), our supreme court considered the propriety of retrospective fitness hearings. The court stated: "Where the delay in conducting the hearing would exceed a year, however, the difficulties associated with retrospective fitness determinations are more problematic." *Id*. at 553. Indeed, the *Neal* court recognized that the United States Supreme Court has consistently and repeatedly vacated judgments of conviction and remanded for a new trial in cases involving such lengthy delays. *Id*. (collecting cases). Still, the *Neal* court held that the passage of time is not dispositive, observing that the Supreme Court cases involving delays did not represent a flat ban on retrospective fitness hearings after a certain

amount of time had passed, but "an admonition as to the inherent difficulty of retrospectively determining an accused's competency to stand trial." *Id*. The court concluded:

> "Consistent with the United States Supreme Court's admonition, we cannot dispute 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. In exceptional cases, however, 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*. at 553-54.

¶ 43 The *Neal* court went on to decide it was indeed faced with such an exceptional case. There, the defendant had argued in postconviction proceedings that the medication he was taking near the time of his trial *per se* entitled him to a fitness hearing, under a previous version of the fitness statute. See Ill. Rev. Stat. 1983, ch. 38, ¶ 104-21(a). While the supreme court agreed, it also held that the defendant's fitness hearing could be held retrospectively, 15 years after his conviction. *Neal*, 179 Ill. 2d at 554. The court reasoned:

> "If the chemical properties of medication are such that their effects could accurately be assessed in light of a defendant's known medical history, as was the case here, it would not matter whether the evaluation followed the original trial and sentencing by 15 days or 15 years. The result would be the same." *Id*.

¶ 44 In *People v. Kinkead*, 168 Ill. 2d 394 (1995) (*Kinkead I*), and *People v. Kinkead*, 182 Ill. 2d 316 (1998) (*Kinkead II*), our supreme court again considered the deprivation of a fitness hearing to a defendant who was entitled to one solely based on his use of psychotropic

medication.[3] In *Kinkead I*, the court declined to vacate the defendant's conviction, instead favoring a "limited remand for clarification of the circumstances surrounding defendant's use of psychotropic medications." *Kinkead I*, 168 Ill. 2d at 415. In *Kinkead II*, the appeal following that remand, the court found that the evidence adduced relating to the defendant's medication gave rise to a *bona fide* doubt as to his fitness. *Kinkead II*, 182 Ill. 2d at 342. The court concluded: "In light of the fact that five years have passed since the original proceedings, we further hold that a retrospective fitness hearing is inappropriate." *Id*. at 348.

¶ 45 The *Kinkead* cases appear to draw a distinction between fitness hearings based on a *bona fide* doubt and fitness hearings based solely on the use of psychotropic medication. The court made that distinction explicit in *People v. Mitchell*, 189 Ill. 2d 312, 330 (2000), when it wrote: "This court's prior determination that the legislature equated the ingestion of psychotropic medication with a *bona fide* doubt of defendant's fitness was simply erroneous." The *Mitchell* court concluded that denial of a fitness hearing in the face of a *bona fide* doubt violated due process, while the denial of a fitness hearing under the since-amended section 104-21(a) did not. *Id*. at 330-31. Indeed, we are aware of no Illinois supreme court cases in which the court ordered a retrospective fitness hearing after a *bona fide* doubt of fitness had been found.

¶ 46 Among our own recent precedents relating to this issue, a second distinction emerges. In *People v. Cleer*, 328 Ill. App. 3d 428, 430 (2002), the trial court explicitly found a *bona fide* doubt of fitness. The court appointed an expert psychiatrist, who examined the defendant and submitted a report to the court. *Id*. Subsequently, defense counsel conceded that the defendant was fit, and the trial court found the defendant fit to stand trial. *Id*. On appeal, this court found

[3]We note that the present version of the fitness statute, as well as the one in effect at the time of defendant's trial, no longer provides that a defendant is entitled to a fitness hearing simply because of his medication.

that procedure to be in error, pointing out that the court had a duty to hold a full fitness hearing once a *bona fide* doubt had been raised. *Id*. at 431. Similarly, in *People v. Moore*, 2012 IL App (3d) 110615-U, ¶ 8, the trial court found a *bona fide* doubt of the defendant's fitness and appointed an expert to examine him. The expert doctor examined the defendant and submitted a report to the court in which he opined that the defendant was fit. *Id*. ¶ 9. No fitness hearing, however, was held, and the court never explicitly found the defendant to be fit. *Id*. ¶¶ 9, 21. This court accepted the State's confession of error and remanded for a retrospective fitness hearing. *Id*. ¶ 21.

¶ 47 In *People v. Payne*, 2015 IL App (3d) 120147-U, ¶ 7, the trial court found the defendant unfit to stand trial early in the proceedings. The defendant was examined by multiple doctors, at least one of whom filed a report with the court indicating his finding that the defendant was fit to stand trial. *Id*. ¶¶ 7-8. Based on that report, the defense stipulated to the defendant's fitness at a restoration hearing approximately seven months later. *Id*. ¶ 9. The court entered an order finding fitness based on the stipulation. *Id*. ¶ 10. In a fractured decision, two of three justices found that the trial court was obligated to conduct an independent analysis of the evidence at a fitness restoration hearing, as opposed to merely accepting a stipulation. *Id*. ¶ 62. A separate majority found that a retrospective fitness restoration hearing was the appropriate remedy. *Id*. ¶¶ 65, 89.

¶ 48 Whether in our supreme court or in this district, it is clear that the propriety of a retrospective fitness hearing turns on practical considerations. In *Neal*, the supreme court observed that the defendant's fitness turned solely on the type, dosages, and interactions of his medication, information that could still be discerned many years later. In the Third District cases listed above, retrospective fitness hearings were ordered only where the defendants had been contemporaneously examined by experts, and reports submitted to the court at the time.

Accordingly, there were materials and witnesses on which a retrospective hearing could be based.[4] Thus, while our supreme court has cautioned that retrospective hearings should be reserved for "exceptional cases," the fact remains that such hearings are sometimes feasible. *Neal*, 179 Ill. 2d at 554.

¶ 49 The instant case, however, is not exceptional. After a minimal inquiry into defendant's fitness, the trial court found no *bona fide* doubt. No fitness hearing was scheduled; no doctors were appointed; no reports were submitted. Moreover, the *bona fide* doubt as to defendant's fitness is not related to his psychotropic medication. It is based upon his erratic behavior prior to trial and his apparent lack of understanding of the proceedings upon which he was about to embark. There has been no suggestion by any party, either at the trial or appellate level, that either of those facts related to his medication.

¶ 50 The State contends, briefly, that a retrospective hearing is possible because "defendant's actions, conduct, mannerisms, and manner of speech are depicted on the record." We disagree. In fact, the State has identified the very factors that are *not* on the record. Defendant's words are on the record, as well as some brief descriptions of his behavior by defense counsel. To ask an appointed expert to opine on defendant's mental state based on a trial record is to request a task that is nearly impossible and certainly illogical. Twelve-year-old recollections from those in the courtroom that day could be of little additional assistance. The United States Supreme Court and our own supreme court have cautioned that retrospective fitness hearings following a lengthy delay should, at the very least, be the exception rather than the rule. To find that a retrospective fitness hearing is appropriate case would be, in essence, to find that it is appropriate in *every* case.

[4]Notably, none of those cases involved delays even half as long as the delay in the present case.

¶ 51 We recognize the burden that the remand for a new first degree murder trial places on the State and trial court. However, there can be no doubt that concerns for state and judicial resources are subordinate to the protection of defendant's right to due process. Accordingly, we vacate the trial court's judgment of conviction and remand the matter for a new trial.

¶ 52 III. CONCLUSION

¶ 53 The judgment of the circuit court of Peoria County is vacated and the cause is remanded.

¶ 54 Vacated and remanded.

¶ 55 JUSTICE CARTER, dissenting.

¶ 56 I respectfully dissent from the majority's decision in the present case. I would find that the trial court did not commit an abuse of discretion in determining that there was no *bona fide* doubt as to defendant's fitness to stand trial and in not ordering a fitness hearing. As the majority notes in part, the threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. See *In re Leona W.*, 228 Ill. 2d 439, 460 (2008); *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). In this particular case, when the potential fitness issue arose, the trial court inquired of defendant and confirmed that defendant understood the nature of the charge against him and the possible sentences for that charge. The trial court also inquired of defense counsel and was told that defendant had been communicating with defense counsel and that defendant and defense counsel were ready to go to trial. In my opinion, the trial court in this case made an appropriate inquiry into defendant's fitness to stand trial and sufficiently determined that there was no *bona fide* doubt as to defendant's fitness. See 725 ILCS 5/104-10, 104-11 (West 2006). I am not persuaded to the contrary by defendant's claim during his testimony at trial that he could not

remember what happened when the victim was stabbed and that defendant's memory of the event was "foggy" at that point. Based upon the facts in the present case, the applicable law on this issue, and the standard of review, I would find that no error occurred and would affirm defendant's conviction.