2012 IL App (1st) 102948-U

THIRD DIVISION
June 27, 2012

No. 1-10-2948

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 10 CR 1428
	)	10 CR 1794
	)	
TERRELL HILL,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *HELD:* The record did not show that defendant was unable to understand the nature of the proceedings or to assist in his own defense and, thus, the trial court did not abuse its discretion in failing to order a fitness hearing *sua sponte*.

¶ 2 Following a consolidated bench trial, defendant Terrell Hill was found guilty of delivery of a controlled substance in two of three cases and sentenced as a Class X offender to concurrent seven-year terms in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his conviction. Rather, he solely contends that the trial court erred in failing to order a fitness hearing *sua sponte* where a *bona fide* doubt existed regarding his fitness to stand trial.

¶ 3 On December 19, 2009, defendant was arrested and charged with one count of delivery of a controlled substance in three separate cases based on his sale of cocaine to an undercover police officer. Before trial, on April 1, 2010, defense counsel informed the court that defendant was ineligible for a drug treatment program at the Cook County Jail because "he does take some psych. meds." On April 26, 2010, the next court date, the following colloquy occurred:

> "THE COURT: Okay. He is on some medication so he was unable to go to Gateway, is that right?
>
> MR. BELL: That's correct, Judge, he's taking psyche meds.
>
> THE COURT: How are you doing now?
>
> THE DEFENDANT: I'm still taking my medicine, all right.
>
> THE COURT: You look like you're still having a difficult time though? Are you better?
>
> THE DEFENDANT: Little bit I'm better."

¶ 4 At sentencing, defense counsel highlighted several mitigating factors contained in the presentence investigation report (PSI) and at issue before this court. Defense counsel pointed out that defendant had some history of "mental treatment, not mental illness," including eight or nine months of psychological treatment between 1996 and 1997, diagnoses of post traumatic stress disorder and bipolar disorder after suffering six gunshot wounds in March 2007. While in jail awaiting trial, defendant was taking psychotropic medications and undergoing psychological treatment. Defense counsel also presented testimony from defendant's grandmother and his minister, both of whom asked the trial court to send defendant where he can get treatment for his disorders.

¶ 5 Before pronouncing sentence, the trial court stated that it had considered all the mitigating factors that were pointed out in the PSI, including his "history of mental health issues

that are ongoing," and that he was taking psychotropic medications and was "doing well with those efforts," as indicated by the certificates of achievement he obtained from a psychiatric treatment program in jail. The trial court asked whether the treatment program helped, and defendant responded, "They give me medicine to help keep me calm, to keep my moods from swinging. Without that I'm going to tell you I probably would be worse, way worse than I am." The trial court agreed that defendant needed help and assured him that any sentence will include psychological and psychiatric treatment.

¶ 6 In this appeal, defendant contends that trial court erred in failing to order a fitness hearing *sua sponte*. He argues that a *bona fide* doubt of his fitness was sufficiently raised by the facts disclosed during the aforementioned pretrial status dates and in the PSI to trigger the trial court's obligation to conduct a fitness hearing.

¶ 7 Defendant acknowledges that he did not raise the fitness issue in the lower court, but maintains that the issue may be reviewed as plain error because trying or sentencing an unfit defendant is fundamentally unfair, citing *People v. Sandham*, 174 Ill. 2d 379, 382 (1996). This court has recently held that "a trial court's failure to order a fitness hearing *sua sponte* 'may be reviewed as plain error' because 'it concerns a substantial right.' " *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 51 (*quoting People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001)). In that case, defendant argued that this court should find plain error under the second prong of plain error review. *Tolefree*, 2011 IL App (1st) 100689, ¶ 51. Here, defendant does not specifically present an argument on how the second prong is satisfied. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010); *People v. McCoy*, 405 Ill. App. 3d 269, 274 (2010). Nonetheless, before the issue of plain error may be addressed, we must first determine whether any error occurred at all. *Tolefree*, 2011 IL App (1st) 100689, ¶ 51.

¶ 8 The due process clause of the fourteenth amendment (U.S. Const., amend. XIV) prohibits the prosecution of a defendant unfit to stand trial. *People v. Weeks*, 393 Ill. App. 3d 1004, 1008

(2009). A defendant is presumed fit to stand trial and is considered unfit if he is unable to understand the nature and purpose of the proceedings against him or to assist in his own defense because of his mental or physical condition. 725 ILCS 5/104-10 (West 2008); *Weeks,* 393 Ill. App. 3d at 1008.

¶ 9 When facts are brought to the trial court's attention that raise a *bona fide* doubt as to defendant's fitness, the court has a duty to order a fitness hearing *sua sponte* to resolve the question. 725 ILCS 5/104-11(a) (West 2008); *Tolefree,* 2011 IL App (1st) 100689, ¶ 56. A *bona fide* doubt exists if there is a " 'real, substantial and legitimate doubt' " assessed against an objective standard. *Tolefree,* 2011 IL App (1st) 100689, ¶ 56 (*quoting People v. Eddmonds,* 143 Ill. 2d 501, 518 (1991)). As the determination of whether such doubt exists rests largely within the discretion of the trial court (*People v. Chamberlain,* 354 Ill. App. 3d 1070, 1073 (2005)), we review the trial court's failure to order a fitness hearing *sua sponte* for abuse of discretion, notwithstanding defendant's advocacy for *de novo* review (*Tolefree,* 2011 IL App (1st) 100689, ¶ 53).

¶ 10 Here, a *bona fide* doubt of defendant's fitness was not raised by the facts disclosed during the two pretrial status dates and in the PSI. The mere fact that in March 2007, more than two years before trial, defendant was diagnosed with post-traumatic stress disorder and bipolar disorder, is not sufficient to create a *bona fide* doubt of his fitness, because even if those disorders existed at the time of trial, defendant can be fit to stand trial although he is mentally disturbed or defective and requires psychological treatment. *People v. Moore,* 159 Ill. App. 3d 850, 855 (1987); *People v. Dominique,* 86 Ill. App. 3d 794, 804 (1980). That defendant had some history of "mental treatment, not mental illness" is insufficient to create a *bona fide* doubt regarding the narrower issue of his fitness to stand trial. *People v. Hill,* 308 Ill. App. 3d 691, 707-08 (1999); see *People v. Heral,* 62 Ill. 2d 329, 336 (1976) (a mere history of psychological disturbance does not necessarily indicate defendant's incompetence to stand trial). That

defendant was taking psychotropic medications, alone, is also insufficient to trigger the trial court's duty to order a fitness hearing *sua sponte*. *People v. Vallo*, 323 Ill. App. 3d 495, 504-05 (2001); 725 ILCS 5/104-21(a) (West 2008).

¶ 11 The *bona fide* doubt inquiry focuses on whether defendant is able to understand the nature and purpose of the proceedings and to assist in his defense (*People v. McCallister*, 193 Ill. 2d 63, 110 (2000)), and our review of the record shows that defendant was not hindered in this regard. Despite defendant's initially equivocal response to the trial court's question about his medications, *i.e.*, "Little bit I'm better," at sentencing, the court persisted and asked defendant whether the psychiatric treatment program in jail was helpful. Defendant answered, "They give me medicine to help keep me calm, to keep my moods from swinging. Without that I'm going to tell you I probably would be worse, way worse than I am." Defendant fully participated in these proceedings and his responses reflect that he understood the court's questions. *Chamberlain*, 354 Ill. App. 3d at 1073. Although a cold record may be an imperfect way of evaluating defendant's behavior and demeanor, we note that the trial court had the opportunity to observe defendant firsthand during the proceedings, and expressed no concerns about defendant's ability to understand the nature of the proceedings or to work with trial counsel. *People v. Hanson*, 212 Ill. 2d 212, 224 (2004). Similarly, trial counsel apprised the trial court that defendant had psychological problems and was taking psychotropic medications, but never stated that he could not communicate with defendant or that he had doubts as to defendant's fitness to stand trial. *People v. Hill*, 345 Ill. App. 3d 620, 630 (2003). Although defendant's grandmother and his minister expressed concern about defendant's mental health, they never indicated that defendant was unable to understand the proceedings or that he was not fit to stand trial. *Hill*, 345 Ill. App. 3d at 630. Unlike defendant's citation to *Sandham*, 174 Ill. 2d at 389, where the supreme court observed that a *bona fide* doubt arose when the trial judge himself expressed that concern at the sentencing hearing, the record in this case shows that defendant was able to understand the nature

of the proceedings and assist in his own defense. We thus conclude that the trial court did not abuse its discretion in failing to order a fitness hearing *sua sponte* (*Hill*, 345 Ill. App. 3d at 630) and discern no reason to excuse defendant's procedural default (*People v. Haynes*, 408 Ill. App. 3d 684, 694 (2011)).

¶ 12 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 13 Affirmed.