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2019 IL App (3d) 170119-U

Order filed July 19, 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. 3-17-0119
v.	)	Circuit No. 16-CF-315
	)	
SHAWN MARLON BROWN,	)	Honorable
	)	Jodi M. Hoos,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The trial court committed second-prong plain error in failing to affirmatively exercise its discretion at the defendant's fitness hearing.

¶ 2 The defendant, Shawn Marlon Brown, appeals his conviction for armed robbery. The defendant contends that the trial court (1) erred in failing to affirmatively exercise its discretion in determining whether he was fit to stand trial, and (2) failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012).

¶ 3 I. BACKGROUND

¶ 4 The defendant was charged with armed robbery (720 ILCS 5/18-2(a)(2) (West 2016)) and aggravated robbery (*id.* § 18-1(b)(1)).

¶ 5 At a pretrial hearing, defense counsel advised the court that the defendant had been hearing voices. Defense counsel stated:

> "[I]n speaking with [the defendant] just last night, he told me *** of a mental problem that he has had in the past [that] has resurfaced. He's under medication for this, but he had in the past heard voices. He tells me that he is again starting to hear the voices and said that he was having some difficulty in communicating with me.
>
> This is the first that I've heard of it since I've been representing him, although he did mention to me previously that he had this condition and that it may have factored into the events in question in this case.
>
> So having been told by [the defendant] that he is again having these problems, I'm bringing it to the Court's attention because I think it may be necessary to do an evaluation to determine whether or not he's fit to stand trial."

Defense counsel clarified that he was, in fact, requesting that an evaluation be performed to determine whether the defendant was fit to stand trial. The State indicated that it did not object to the defendant's request for a fitness evaluation. The court ordered that the defendant undergo an evaluation.

¶ 6 A fitness evaluation report prepared by Dr. Jean Clore, a clinical psychologist, was submitted to the court. Clore found that the defendant suffered from schizoaffective disorder, posttraumatic stress disorder, and a mild intellectual disability. Clore noted that the defendant

had been experiencing auditory hallucinations, among other symptoms, at the time of the evaluation. Clore also noted that the defendant's medications included an antipsychotic, a mood stabilizer, and an antidepressant. Clore concluded, nonetheless, that the defendant was fit to stand trial. Clore stated that "it may be reasonable for [defense counsel] to periodically provide reminders and education during the adjudication of the alleged crime" due to the defendant's mild intellectual disability.

¶ 7 At the next hearing, a new judge presided over the proceedings. The following exchange occurred:

> "[DEFENSE COUNSEL]: Your Honor, we are here on a review of fitness. I believe I have already tendered a copy of Dr. Clore's report. *** That report finds that there is no reason to believe that [the defendant] is unfit to stand trial in any way.
>
> And so we are looking to have this put back on the calendar for jury trial and I have forgotten what the dates were. I believe they have been tendered in the order with the new dates for trial and pretrial.
>
> THE COURT: Is [this] your understanding, [State]?
>
> [ASSISTANT STATE'S ATTORNEY]: Yes, Your Honor.
>
> THE COURT: All right. The Court will acknowledge receipt of the report with the findings contained therein and acknowledge the stipulation if called to testify the doctor would testify consistent to that report."

¶ 8 The court entered a written order stating that "by agreement–The defendant is fit to stand trial." The order also stated: "[F]itness report received. Parties stipulate to contents of report."

¶ 9 A jury trial commenced on November 29, 2016. At the conclusion of the trial, the jury found the defendant guilty on both counts. On January 13, 2017, the court sentenced the defendant to 21 years' imprisonment for armed robbery. The court did not enter a judgment for aggravated robbery.

¶ 10 II. ANALYSIS

¶ 11 The defendant argues that the trial court erred in failing to affirmatively exercise its discretion in finding him fit to stand trial.

¶ 12 The defendant concedes that he forfeited this issue by failing to object in the trial court. However, the defendant requests that we review this issue under the second prong of the plain error doctrine. Under the second prong, a reviewing court may consider an unpreserved error when "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "The right to be fit for trial *** is fundamental." *People v. Sandham*, 174 Ill. 2d 379, 382 (1996). Accordingly, issues concerning a defendant's fitness to stand trial are subject to review under the second prong of the plain error doctrine. See *People v. Moore*, 408 Ill. App. 3d 706, 710 (2011). See also *People v. Esang*, 396 Ill. App. 3d 833, 840 (2009) ("A trial court's failure to independently analyze and weigh expert testimony in making a fitness finding is a constitutional error, properly considered under the plain error doctrine and reversible unless it can be proved to be harmless beyond a reasonable doubt."); *People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001) ("The determination of a defendant's fitness to stand trial concerns a substantial right, and plain-error review is appropriate.").

¶ 13 "The fourteenth amendment's due process clause precludes the prosecution of a defendant who is unfit to stand trial." *People v. Smith*, 2017 IL App (1st) 143728, ¶ 84. A defendant is unfit to stand trial if he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense due to a mental or physical condition. 725 ILCS 5/104-10 (West 2016).

¶ 14 "When a *bona fide* doubt as to a defendant's fitness exists, the trial court has a duty to hold a fitness hearing." *Contorno*, 322 Ill. App. 3d at 179. Because the issue of a defendant's fitness to stand trial is one of constitutional dimension, "the record must show an affirmative exercise of judicial discretion regarding the determination of fitness." *Id.* "A trial court's determination of fitness may not be based solely upon a stipulation to the existence of psychiatric conclusions or findings." *Id.* However, a defendant's due process rights are not violated when a trial court's finding of fitness is also based on its own observations of the defendant and a review of a psychological report. *People v. Cook*, 2014 IL App (2d) 130545, ¶ 15. Where the parties stipulate as to what an expert would testify rather than stipulating to the expert's conclusion, the court may consider this stipulated testimony in exercising its discretion. *Contorno*, 322 Ill. App. 3d at 179.

¶ 15 In the instant case, the trial court's written order stated that it found the defendant fit "by agreement." The court acknowledged that it had received the fitness evaluation report and that the parties stipulated that Clore would testify consistently with report. However, the court did not indicate that it had reviewed the contents of the report or that it was basing its finding of fitness on the stipulated testimony of the doctor. Rather, the court's written order indicated that it found the defendant fit by agreement of the parties. Additionally, the judge who found the defendant fit was a different judge from the one who had presided over the prior proceedings. Thus, the judge

could not rely on her past observations of the defendant in determining fitness. Under these circumstances, we find that the court failed to independently exercise its discretion in finding the defendant fit to stand trial.

¶ 16 We reject the State's argument that there was "no room for judicial discretion" to conclude that the defendant was anything but fit to stand trial because the sole evidence before the court was a report in which Clore opined that the defendant was fit to stand trial. The State contends that the court was not in a position to reject Clore's finding because there was no contradictory evidence. See *People v. Baldwin,* 185 Ill. App. 3d 1079, 1087 (1989) (holding that the trial court could not reject uncontradicted expert testimony that the defendant was unfit to stand trial without evidence that the defendant was fit other than the defendant's own statement). While the State is correct that the only evidence presented at the fitness hearing was Clore's report, the court was still required to exercise judicial discretion in finding the defendant fit to stand trial. See *Contorno,* 322 Ill. App. 3d at 179 ("The ultimate decision as to a defendant's fitness must be made by the trial court, not the experts.").

¶ 17 Having found that court did not exercise its discretion in finding the defendant fit to stand trial, we now consider the appropriate remedy. The defendant argues that his conviction should be reversed and the matter should be remanded for a new trial. The State argues that the matter should be remanded for a retrospective fitness hearing and that a new trial should be ordered only if the trial court retrospectively determines that the defendant was unfit to stand trial.

> "[R]etrospective 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 the defendant's fitness or lack of fitness at the time of

trial may be fairly and accurately determined long after the fact." *People v. Neal*, 179 Ill. 2d 541, 554 (1997).

¶ 18 In *Neal*, the court held that a retrospective fitness determination was appropriate despite the fact that 15 years had passed since the defendant's trial where the defendant claimed that he had been taking a psychotropic medication during his pretrial incarceration and did not receive a fitness hearing. *Id.* at 545, 553-54. The court reasoned that the chemical properties of the psychotropic medication could accurately be assessed in light of the defendant's known medical history. *Id.* at 554. On the other hand, in *Esang*, 396 Ill. App. 3d at 840-41, the court held that a retrospective fitness hearing was not the appropriate remedy given that (1) more than two years had passed since the defendant's trial; (2) the defendant's condition was not alleged to have been produced by a single, readily assessed factor; (3) the defendant failed to adequately cooperate with medical personnel; and (4) the extent of the defendant's evaluations was limited.

¶ 19 In the instant case, more than two years have passed since the original trial and sentencing. We do not believe that this case presents an exceptional situation where the defendant's fitness may be determined long after the fact. Like in *Esang*, the defendant's condition was not alleged to have been caused by a single, readily assessed factor. Accordingly, we find that reversal and remand for a new trial is the appropriate remedy.

¶ 20 In reaching our holding, we recognize that the court in *Cook*, 2014 IL App (2d) 130545, ¶ 22, found that a fitness determination could fairly and accurately be made more than a year after the trial based on a similar factual situation as in this case. The court noted that the only evidence presented at the fitness hearing was a stipulation. *Id.* The *Cook* court reasoned that the trial court was capable of reviewing the stipulated evidence and determining whether the defendant was fit when he pleaded guilty and was sentenced. *Id.* Like in *Cook*, the only evidence

presented at the fitness hearing in this case was the stipulated testimony of a clinical psychologist. However, for the reasons we have discussed, we do not believe that a retrospective fitness hearing is the appropriate remedy in this case.

¶ 21 Because we reverse and remand the matter for a new trial on the basis of the fitness issue, we do not consider the merits of the defendant's second argument—namely, that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). In the event of a new trial, we caution the trial court to determine whether each prospective juror both understands *and* accepts the principles set forth in Rule 431(b).

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the trial court is reversed. The matter is remanded for a new trial.

¶ 24 Reversed and remanded.

¶ 25 JUSTICE WRIGHT, dissenting:

¶ 26 I respectfully disagree with the majority's finding that the trial court, Judge Hoos, failed to independently exercise her discretion before finding defendant fit to stand trial. The majority correctly asserts that the trial court's fitness determination may not be based solely upon a stipulation to the existence of psychiatric conclusions or findings.

¶ 27 Here, the trial court acknowledged receipt of the psychologist's report and the findings contained therein. The trial court further acknowledged the parties' stipulation that if called to testify, the psychologist would testify consistent to the contents of the report. The trial court's use of the term "acknowledge" signifies the trial court's exercise of discretion. For instance, instead of adopting the report's conclusions as dispositive, the trial court acknowledged or recognized the existence of the report and its contents. Moreover, the parties merely stipulated

that the expert would testify consistently with her report, not to the expert's conclusions. Trial courts may consider such stipulated testimony when exercising their discretion regarding fitness determinations. *Contorno*, 322 Ill. App. 3d at 179. For these reasons, I would conclude that the trial court exercised independent judicial discretion when it found defendant fit to stand trial. I would hold that no due process violation occurred and that procedural default applies.

¶ 28 Turning to defendant's Rule 431(b) contention, defendant concedes that trial counsel failed to raise the alleged error in the trial court. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). Accordingly, defendant's claim is subject to the doctrine of plain error. See *Piatkowski*, 225 Ill. 2d 551, 564-65 (2007).

¶ 29 Rule 431(b) requires that the court "ask each potential juror, individually or in a group, whether that juror understands and accepts" what have come to be known as the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. Jul. 1, 2012); See *People v. Zehr*, 103 Ill. 2d 472 (1984). Here, despite defendant's contention, the trial court, Judge Kouri, asked each panel of prospective jurors whether they accepted and understood the *Zehr* principles. As such, no error has occurred here and procedural default applies. Defendant's convictions should be affirmed.