2012 IL App (1st) 092899-U

SECOND DIVISION
January 24, 2012

No. 1-09-2899

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.	)	No. 96 CR 4293
	)	
STEVEN HUGHES,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's sentences were vacated and resentencing occurred on remand, defendant's subsequent and second filing under the Post-Conviction Hearing Act was considered an initial, as opposed to a successive, petition, and defendant's trial counsel did not provide ineffective assistance in failing to provide documents in question on issue of defendant's fitness to stand trial; the dismissal of the petition without an evidentiary hearing was affirmed.

¶ 2 Defendant Steven Hughes appeals the dismissal of his post-conviction petition without an evidentiary hearing. On appeal, defendant contends his petition made a substantial showing that a *bona fide* doubt existed as to his fitness at the time of trial and that a fitness hearing should

have been held before trial. Defendant also argues his trial counsel was ineffective in failing to adequately investigate and locate various medical records to allow a challenge to his fitness prior to trial. We affirm the dismissal of defendant's petition without an evidentiary hearing.

¶ 3 This case has a lengthy procedural history. The following facts are relevant to the issues raised in this appeal from defendant's post-conviction petition filed in 2002, which was his second filing under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2002)). This order will address two main issues: (1) whether the 2002 petition should be considered an initial post-conviction filing or a successive post-conviction petition; and (2) whether the circuit court erred in dismissing the petition without an evidentiary hearing for the reasons defendant raises on appeal. For the reasons that follow, we find that the 2002 petition, which was amended by counsel in 2008, constitutes an initial post-conviction filing and the dismissal of the petition was proper.

¶ 4 Trial, Sentencing and Direct Appeal

¶ 5 Defendant jury's trial took place in September 1997.[1] Prior to trial, in August 1996, defendant informed the court he wished to proceed *pro se* and argue two motions he had prepared *pro se*, including a motion to quash his arrest and suppress evidence.

¶ 6 Richard Kling was appointed as counsel for defendant for trial. In June 1997, Kling addressed the court regarding letters that defendant had written to the U.S. Attorney accusing the trial judge of misconduct regarding defendant's case. Kling said he was going to request that the court order a psychiatric examination to determine defendant's fitness to stand trial.

[1] At trial, the State presented evidence that on January 13, 1996, defendant and the victim struggled after the victim invited defendant into her apartment and defendant demanded that they have sex. When the victim refused, defendant struck her in the chest multiple times, puncturing her lung and causing it to collapse. Defendant was convicted of attempted first degree murder, armed robbery, armed violence and aggravated battery; the latter two counts were merged into the attempted murder conviction.

¶ 7 The following colloquy then occurred between Kling and the trial court in June 1997:

> "MR. KLING [defense counsel]: *** I would ask the court for the forensic institute of the circuit court of Cook County to order a psychiatric examination to see if [defendant is] fit to stand trial.
>
> THE COURT: Denying such a request, Mr. Kling, is very risky. I perceive the law to be, as I understand it, if there's a *bona fide* issue that I'm compelled to pursue it. The problem that I'm having is whether or not there is any *bona fide* basis for believing that he is unfit to stand trial. That is to say that he lacks the ability to cooperate with counsel or understand the nature of the proceedings. His aberrant, and I consider it to be aberrant, does not necessarily raise that kind of question [*sic*]. Otherwise every person who makes a false accusation of one kind or another would be susceptible to a BCX [behavioral clinical examination] procedure. That is eventually all that is going on here. [Defendant] for one reason or another has come to the conclusion that something is a fact which he has no evidence of and is pursuing that in the best way that he knows how. And in what [], if there was a factual basis for it, apparently would appear to be an appropriate avenue of pursuit, perhaps. I don't know if that is sufficient to say that there is a *bona fide* issue."

¶ 8 Kling stated that if an examination of defendant was to be ordered, he "doub[ted] if it will come back unfit." Kling requested leave to withdraw from representing defendant. The court denied the request to withdraw and also denied Kling's request for a BCX of defendant.

¶ 9 Before the second day of trial began on September 8, 1997, Kling informed the court that defendant had written a letter to the Attorney Registration and Disciplinary Commission (ARDC) in which he accused Kling of misconduct. Kling once again requested leave to withdraw from

representing defendant. The court found defendant's actions to that point to be dilatory and "lacking in substance and merit" and denied Kling's request to withdraw as defendant's counsel.

¶ 10 While the parties awaited a tardy juror, Kling informed the court that defendant told him that if he sat down at the counsel table, defendant would "smack the sh– out of" him. Defendant continued to ask the trial judge for a transcript of a certain day's court proceedings and told the court he "was going to get" it for not making that transcript available. During that exchange, defendant picked up a chair and attempted to throw it at Kling. The court sentenced defendant to six months in jail for direct contempt of court and ordered that defendant be placed in restraints. The court ordered that defendant's trial would proceed with Kling as his counsel.

¶ 11 After the jury returned its verdict but before defendant's sentencing took place, the court allowed Kling to withdraw from representing defendant. In November 1997, the court conducted a sentencing hearing without appointing new counsel for defendant. The court sentenced defendant to 30 years for attempted first degree murder and 20 years for armed robbery, with those terms to be served consecutively.

¶ 12 Defendant took a direct appeal to this court, which concluded in 2000 that although Kling was properly allowed to withdraw after trial, new counsel should have been appointed to represent defendant during the post-trial proceedings and at sentencing. *People v. Hughes*, 315 Ill. App. 3d 86, 94 (2000). This court vacated defendant's sentences and remanded for the appointment of counsel and for a hearing on defendant's post-trial motions, including his motion for a new trial, and a new sentencing hearing. *Hughes*, 315 Ill. App. 3d at 96.

¶ 13 While defendant's initial direct appeal was pending in August 1998, defendant filed a *pro se* petition seeking relief pursuant to the Act, alleging only that his trial counsel was ineffective for failing to introduce evidence that he lacked the complete use of his legs and thus could not have committed the crimes. In September 1998, the circuit court dismissed defendant's petition

as frivolous and patently without merit. On appeal, this court affirmed. *People v. Hughes*, No. 1-98-4098 (2001) (unpublished order under Supreme Court Rule 23).

¶ 14 Resentencing

¶ 15 Defendant's case returned to the trial court in September 2000 pursuant to this court's remand for resentencing. The public defender appointed to represent defendant informed the court that defendant wished to proceed *pro se*. The court thoroughly admonished defendant as to his right to be represented by counsel during his sentencing hearing, and the court allowed counsel to withdraw from the case. After defendant abandoned his *pro se* arguments on various post-trial motions over a period of several months, the trial court indicated it would proceed to sentencing. Defendant told the court he had been forced to take medication during his time in custody. The court immediately ordered a BCX to determine if defendant was fit for sentencing.

¶ 16 In December 2000, a hearing was held at which the court found defendant fit for sentencing and accused defendant of malingering. Ten days later, on the date that had been set for sentencing, defendant cut his forearm with a razor blade in open court. In March 2001, the court held that defendant was unfit for sentencing and committed him to the Illinois Department of Mental Health for treatment. Defendant was admitted to the Elgin Mental Health Center (Elgin) and deemed fit for sentencing in October 2001. At the August 2002 hearing at which defendant was resentenced, defendant was allowed to appear *pro se.* The court sentenced defendant to the same terms of 30 years and 20 years, to be served consecutively.

¶ 17 Defendant appealed his sentence to this court in case No. 1-02-2473, asserting, *inter alia*, that he was never properly restored to fitness before that sentence was imposed. In 2003, this court retained jurisdiction and granted the State's motion for a limited remand for a retroactive hearing on defendant's fitness to be sentenced, with his fitness to be determined as of his release from Elgin in October 2001.

¶ 18 The retroactive restoration hearing was held in 2004 before the same judge who presided at defendant's trial. The court ruled that defendant was fit for sentencing upon his release from Elgin and up to and including the date of his resentencing.

¶ 19 Defendant's appeal then returned to this court where he argued, among other points, that a *bona fide* doubt existed as to his fitness to stand trial. *People v. Hughes*, No. 1-02-2473, at 29-32 (2005) (unpublished order under Supreme Court Rule 23). This court noted that disruptive behavior or a mental disturbance exhibited by a defendant does not raise a *bona fide* doubt as to his fitness. *Hughes*, No. 1-02-2473, at 29-30. This court reviewed defendant's behavior toward Kling and noted that defendant "additionally relies upon his history of mental illness dating back to 1993." *Hughes*, No. 1-02-2473, at 31. Noting that defendant was capable of interacting with court personnel and filing several motions on his own behalf, this court concluded that the trial judge did not abuse its discretion in finding that no *bona fide* doubt existed as to defendant's fitness to stand trial. *Hughes*, No. 1-02-2473, at 31-32.

¶ 20 After reviewing the other issues raised by defendant, this court affirmed his convictions and sentence. The Illinois Supreme Court denied defendant leave to appeal. *People v. Hughes*, 217 Ill. 2d 613 (2006).

¶ 21 Proceedings on Defendant's Second Post-Conviction Filing

¶ 22 In November 2002, defendant filed his second post-conviction petition, which provides the basis for the instant appeal. Post-conviction counsel was appointed for defendant in April 2003. The petition was removed from consideration until the resolution of defendant's appeal to this court in No. 1-02-2473, which is discussed above.

¶ 23 In 2008, post-conviction counsel amended the petition to assert that defendant's trial and appellate counsel failed to provide effective assistance as to the issue of defendant's fitness to stand trial. The petition contended, *inter alia*, that although defendant had advised Kling about

his medical history, Kling provided deficient representation by failing to raise the issue of defendant's competency to stand trial. Attached to the amended petition were 26 exhibits chronicling defendant's medical and mental health history starting in 1993.

¶ 24 The petition asserted that had Kling investigated defendant's medical history, counsel would have discovered facts sufficient to raise a *bona fide* doubt as to his fitness to stand trial, including that defendant had sustained head injuries, undergone a psychotic episode, had attempted suicide and had been administered psychotropic drugs during a previous incarceration. The petition details several of those incidents, which took place between 1969 and 1984. The petition also asserts that defendant was hospitalized at the Tinley Park Mental Health Center four separate times during 1993.

¶ 25 The State moved to dismiss the amended petition. The circuit court granted the State's motion to dismiss the petition, finding defendant's claim to be barred by *res judicata*. The court also held that defendant had not established his trial counsel was ineffective under either prong of *Strickland v. Washington*, 466 U.S. 668 (1984). The court noted that Kling made a reasonable assessment of defendant's mental history and that defendant exhibited his awareness of the legal proceedings by proceeding *pro se* at times. The court further observed that the documents appended to defendant's petition would not have prompted a different outcome on the question of defendant's fitness to stand trial. Defendant now appeals that ruling.

¶ 26 Analysis

¶ 27 On appeal, defendant contends his post-conviction petition made a substantial showing that a *bona fide* doubt as to his fitness existed at the time of trial and also that his trial counsel was ineffective in filing to investigate and discover his medical history to present a challenge to his fitness for trial.

¶ 28 We first address the State's contention that this post-conviction filing should be treated as a successive post-conviction petition. The State points out that defendant filed his first post-conviction petition in 1998 during the pendency of his initial direct appeal and that the petition currently under consideration constitutes a successive post-conviction filing.

¶ 29 Defendant responds that his resentencing on remand constituted a separate "conviction" for purposes of the Act, and the instant petition represented the first opportunity for him to raise his arguments in a post-conviction context. Citing *People v. Hager*, 202 Ill. 2d 143, 149 (2002), defendant points out that a post-conviction petition can only be filed by a defendant who has been "convicted," meaning a defendant who is subject to a final judgment, which includes both a conviction and a sentence. See also *People v. Woods*, 193 Ill. 2d 483, 488 (2000). We agree with defendant.

¶ 30 In the case at bar, defendant was initially convicted and sentenced in 1997. Defendant's sentences were vacated and the case was remanded for resentencing in 2000, and defendant was resentenced in August 2002. The post-conviction petition that is now at issue was filed in November 2002, after defendant was resentenced. The trial court appointed post-conviction counsel in 2003 and held the petition off call pending the direct appeal of defendant's resentencing. That direct appeal ultimately resulted in the 2005 decision by this court in No. 1-02-2473. In December 2008, post-conviction counsel amended defendant's petition.

¶ 31 When this court vacated defendant's sentences in 2000, defendant's convictions ceased to exist, and therefore, any post-conviction proceedings as to the defendant's petition filed in August 1998 were to no effect. See *Hager*, 202 Ill. 2d at 149. The instant petition represents defendant's first opportunity to challenge his convictions and sentence upon resentencing. See *Hager*, 202 Ill. 2d at 149; see also *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011) (order sentencing

defendant on remand constitutes separate "conviction" for purposes of the Act). Accordingly, defendant's current filing is to be evaluated as an initial post-conviction petition.

¶ 32 Now turning to the merits of that petition, defendant contends that filing makes a substantial showing that a *bona fide* doubt of his fitness existed at the time of his trial in 1997 and that a fitness hearing should have been held prior to trial. Post-conviction counsel attached 26 exhibits to the amended petition, many of which detail defendant's medical and mental health history from 1991 to 2008. Defendant further argues his trial counsel was ineffective in failing to investigate and locate these records earlier in order to challenge his fitness to stand trial.

¶ 33 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. At the second stage of a post-conviction proceeding, prior to an evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). A post-conviction petitioner is not entitled to an evidentiary hearing as of right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Review of the dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011), citing *People v. Edwards*, 195 Ill. 2d 142, 156 (2001).

¶ 34 As defendant acknowledges, the issue of whether a *bona fide* doubt existed as to defendant's fitness to stand trial was raised and discussed in his second direct appeal, which this court decided in 2005. This court determined the trial court did not abuse its discretion in finding no *bona fide* doubt existed as to defendant's fitness to stand trial. *Hughes*, No. 1-02-2473, at 31-32. This court noted the trial judge "consistently maintained his belief that defendant was fit and would only manifest symptoms of unfitness when it was to his advantage" and this court further noted that defendant "relies upon his history of mental illness dating back to 1993." *Hughes*, No. 1-02-2473, at 31.

¶ 35 Nevertheless, defendant asserts a fitness hearing should have been held and that Kling was ineffective in failing to investigate and locate the specific medical records affixed to the current petition and present them as evidence of his unfitness. Defendant focuses on seven of the 26 exhibits attached to his petition that chronicle his hospitalizations between 1993 and 1996.

¶ 36 Defendant places particular emphasis on records revealing that, prior to his trial, he was admitted voluntarily to a psychiatric unit and was admitted to a hospital for suicidal thoughts and thoughts of harming others. The records also establish he sustained a seizure disorder and gunshot wounds, including a wound to the spine that affected his mobility, and had abused alcohol and cocaine. In 1993, defendant was housed at various mental health facilities and diagnosed with organic mood disorder, continuous alcohol abuse, antisocial character and seizure disorder.

¶ 37 One of the records on which defendant now relies is a July 1993 report of the Illinois Department of Mental Health, which describes his behavior as follows:

> "This patient does not display a positive attitude toward any type of real treatment. He will become verbally abusive toward staff if not given his way and has been known to take advantage of the sick patients on the unit. He likes to hustle others and was often found selling cigarettes to other patients. Staff also felt that he may have been asking some patients to pay him for protection. He showed no real interest in becoming involved in any type of outpatient drug program. At first, this patient caused no problems for the staff, was cooperative, but when things did not go his way, he became hostile and verbally abusive toward staff, especially the females. * * *

> The prognosis for this patient is very poor, as long as he refuses any serious treatment for his alcohol and drug abuse in the community. * * * He has been involved in behavior of taking advantage of other patients in the unit and he would not stop it even when confronted about it and lost his grounds pass. He denied it and refused to talk about it. * * * Patient refused all aftercare planning."

¶ 38 Defendant contends those exhibits documented his inability to cooperate with counsel, his "obsession over issues" and his anti-social behavior, before and during the crimes and his trial.

¶ 39 Due process bars the prosecution of an unfit defendant. *People v. Brown*, 236 Ill. 2d 175, 186 (2010). In Illinois, a defendant is presumed to be fit to stand trial, and will be considered unfit only if, due to a mental or physical condition, he or she is unable to understand the nature and purpose of the proceedings or to assist in the defense. 725 ILCS 5/104-10 (West 2010). A defendant is entitled to a fitness hearing only when a *bona fide* doubt of his or her fitness is raised. 725 ILCS 5/104-10 (West 2010). A defendant's fitness to stand trial "speaks only to a person's ability to function within the context of trial; it does not refer to sanity or competence in other areas." See *People v. Coleman*, 168 Ill. 2d 509, 524 (1995); *People v. Taylor*, 409 Ill. App. 3d 881, 896 (2011). A person may be fit for trial although his mind is otherwise unsound. *Coleman*, 168 Ill. 2d at 524; *Taylor*, 409 Ill. App. 3d at 896.

¶ 40 A defendant bears the burden of proving a *bona fide* doubt as to his fitness. *People v. Weeks*, 393 Ill. App. 3d 1004, 1009 (2009). The presumption that a defendant is fit can be successfully rebutted by evidence that he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense. *People v. Redd*, 173 Ill. 2d 1, 23 (1996).

¶ 41 This court has acknowledged the risk that where a defendant is found unfit for sentencing, a *bona fide* doubt as to his earlier fitness to stand trial may be raised. See *People v. Brown*, 131 Ill. App. 3d 859, 865-66 (1985). Here, defendant was found unfit for sentencing after he cut his arm with a razor blade in court and was admitted to a mental health facility in Elgin for several months before being deemed fit for sentencing. However, as we conclude below, the records that defendant has attached to his petition do not establish his unfitness at the time of trial.

¶ 42 Claims of ineffectiveness of counsel are judged under the familiar test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688. To establish that defense counsel's failure to request a fitness hearing prejudiced defendant within the meaning of *Strickland*, defendant must demonstrate that facts existed at the time of his trial that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and assist in his defense. See *People v. Harris*, 206 Ill. 2d 293, 303 (2002). Similarly, defendant is entitled to relief on his claim of ineffectiveness based on the absence of the records at issue only if he shows he was prejudiced by counsel's failure to present that documentation, *i.e.*, that the trial court would have ordered a fitness hearing had it known of that evidence. See, *e.g.*, *People v. Alberts*, 383 Ill. App. 3d 374, 378 (2008).

¶ 43 Kling was reasonable in concluding that defendant was fit to stand trial. The record establishes that defendant was able to understand the nature and the purpose of the court proceedings. Kling had a sufficient opportunity to interact with and observe defendant's actions throughout the court proceedings. Defendant filed multiple *pro se* motions and, at several points, addressed the court cogently while voicing his interest in acting as his own counsel. Although

defendant created numerous disruptions in court and threatened Kling, defendant's behavior was largely intended to prolong the proceedings. For example, immediately before defendant disrupted court by attempting to hurl a chair at Kling, defendant told the court he was upset because he was not provided with a transcript of a certain day's court proceedings, and defendant threatened the trial judge directly. Contrary to a determination that defendant could not understand the court proceedings and the nature of his trial, the record establishes that defendant acted purposefully throughout.

¶ 44 Moreover, because the physical and mental conditions of defendant set out in the newly presented documents do not rebut the presumption that he was fit to stand trial, Kling was not ineffective for failing to provide them as evidence of defendant's unfitness. Evidence that a defendant has been admitted to a mental institution, or the existence of a mental disturbance or the need for psychiatric care, do not necessarily raise a *bona fide* doubt as to a defendant's fitness. See, *e.g.*, *People v. Hanson*, 212 Ill. 2d 212, 224-25 (2004) (defendant's diagnosis with organic personality disorder, alcohol dependence, seizure disorder and other conditions did not present sufficient evidence to support finding of a doubt as to fitness); see also *People v. Jones*, 109 Ill. App. 3d 120, 129-30 (1982); *People v. Richardson*, 81 Ill. App. 3d 718, 726 (1978).

¶ 45 In conclusion, the medical and mental health records appended to defendant's current petition do not rebut the presumption of his fitness to stand trial, and his trial counsel therefore did not render ineffective assistance in failing to present those materials earlier or request a fitness hearing.

¶ 46 Accordingly, the circuit court's dismissal of defendant's post-conviction petition without an evidentiary hearing is affirmed.

¶ 47 Affirmed.