FIFTH DIVISION
June 22, 2012

No. 1-10-1389

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. 99 CR 19216
	)	
JOE HENRY MILLER,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the record shows that the circuit court did not rule on whether defendant was entitled to a discharge hearing April 8, 2010, this court will not *sua sponte* address whether the circuit court erred in refusing to entertain his motion; fitness hearing was not void; finding that defendant was unfit with a likelihood of becoming fit within a year was against the manifest weight of the evidence; reversed and remanded for further proceedings under section 104-23(b) of the Code.

¶ 2 Following a fitness hearing on April 8, 2010, defendant Joe Henry Miller was found unfit with the possibility of becoming fit within a year, and within the same proceeding, the circuit court refused to entertain his motion for a discharge hearing. In this appeal, defendant maintains that the circuit court's "denial" of his motion for a discharge hearing on April 8, 2010, was void

because the court was required to either hold such a hearing or dismiss the criminal charges against him pursuant to section 104-23(b) of the Code of Criminal Procedure of 1963 (Code) 725 ILCS 5/104-23(b) (West 2010). He also claims that the fitness hearing was void and unauthorized by section 104-23(b), and that the court's finding that he could be restored to fitness was against the manifest weight of the evidence.

¶ 3 The record filed on appeal shows that on August 24, 1999, defendant was charged with multiple counts of aggravated criminal sexual assault and aggravated battery. Thereafter, the circuit court ordered Forensic Clinical Services (Clinical Services) to examine defendant to determine his fitness to stand trial. Defendant was found unfit with the likelihood of becoming fit within a year given the appropriate medication and remanded to the Department of Mental Health[1] (Department).

¶ 4 The record further shows that defendant has a significant psychiatric history dating back to 1984 when he was admitted to Cermak Health Services of Cook County Jail (Cermak) and Chester Mental Health Center (Chester) a number of times. Over the years, numerous findings were made by psychiatrists on defendant's fitness to stand trial, and fitness hearings were held by the trial court. Defendant was, at times, found unfit with no likelihood of becoming fit, and unfit with the likelihood of becoming fit within a year. There was also a brief period from late 2003 to mid 2004 during which he was found fit. In 2010, the trial court held another fitness hearing over defense counsel's objection and request for a discharge hearing. Following that hearing, the trial court concluded that defendant was unfit, but could be found fit within one year, and remanded him to the Department.

¶ 5 The Criminal Code of 1963 (Criminal Code) provides that the issue of a defendant's fitness for trial may be raised by either party or the court at any time before, during, or after trial. 725 ILCS 5/104-11 (West 2010). If defendant is found unfit to stand trial, it must then be

[1]The Department of Mental Health is now called the Department of Human Services.

determined whether there is a substantial probability that defendant, if provided with a course of treatment, will attain fitness within one year. 725 ILCS 5/104-16(d) (West 2010). If it is found that there is no such substantial probability, the court shall proceed as provided in section 104-23 of the Code. 725 ILCS 5/104-16(d) (West 2010).

¶ 6 Section 104-23 provides that if the court determines that there is not a substantial probability that defendant will attain fitness within a year, the State shall request the court to: 1) set the matter for a discharge hearing[2] pursuant to section 104-25; or 2) dismiss the charges with prejudice; or 3) remand defendant to the custody of the Department and if defendant is civilly committed by the Department, the circuit court having jurisdiction over the criminal matter shall dismiss the charges with leave to reinstate. 725 ILCS 5/104-23(b) (West 2010). In the third case, the Department shall notify the court upon discharge of defendant. 725 ILCS 5/104-23(b)(3) (West 2010).

¶ 7 Under the Mental Health and Developmental Disabilities Code (Health Code), the circuit court does not have jurisdiction to directly order involuntary admission of a person who is charged with a felony (405 ILCS 5/3-100 (West 2010). However, there are unique situations where a person charged with a felony will come solely under the mental health system, at least temporarily, such as where the person is found unfit. *People v. Kenton*, 377 Ill. App. 3d 239, 247 (2007).

¶ 8 The record shows that while defendant was in Cook County jail for the July 1999 sexual assault offense, he was charged in an unrelated case with aggravated battery of a peace officer on September 5, 1999. Two months later, the circuit court found defendant unfit with the likelihood

[2]A discharge hearing, which is sometimes called an "innocent only" hearing, is held to determine the sufficiency of the evidence against a person involuntarily committed for mental health treatment who is unlikely to become fit within a year, and determines only whether to enter a judgment of acquittal, not a finding of guilt; the question of guilt is deferred until defendant is found fit to stand trial and any order denying acquittal is directly appealable in the same manner provided for an appeal from a conviction in a criminal case. *People v. McBrien*, 144 Ill. App. 3d 489, 492 (1986), citing *People v. Rink*, 97 Ill. 2d 533 (1983).

of becoming fit within a year with medication, and remanded him to the Department. Following a restoration hearing in March 2001, defendant was found unfit with no reasonable probability of becoming fit and subject to continued involuntary admission.

¶ 9 The circuit court subsequently ordered Clinical Services to examine defendant to determine if he was fit to stand trial. In October 2001, a staff psychiatrist found that defendant was unfit with the reasonable probability that he may become fit within a year with medication; in October 2003, he was found fit to stand trial with medication; and in July 2004, he was found fit to stand trial with medication. After a subsequent fitness hearing in 2004, the circuit court found defendant fit to stand trial, but in June 2005, Clinical Services staff psychiatrist Dr. Fidel Echevarria informed the court that he was unable to determine defendant's fitness as he was "noncompliant with the rigors necessary to conduct a psychiatric evaluation." In September 2005, Clinical Services staff psychiatrist Carol Flippen found defendant unfit to stand trial, but likely to obtain fitness within a year with medication. Following a fitness hearing in October 2005, the circuit court found defendant unfit to stand trial, but that he could be restored to fitness within a year. The court then remanded defendant to the Department.

¶ 10 The record contains no information regarding defendant's status for the following two years. On November 13, 2007, however, the State informed the court that defendant requested a discharge hearing, that it was answering ready on that request, and that defendant was in the custody of the Department pursuant to a "civil commitment," in the September 1999 aggravated battery to a peace officer case. Defense counsel withdrew his motion for a discharge hearing, and filed a motion to dismiss. The State informed the court that it agreed with counsel's motion to dismiss noting that counsel believed that the circuit court had lost jurisdiction. The circuit court granted the motion to dismiss with leave to reinstate.

¶ 11 In November 2009, the July 1999 aggravated sexual assault case was reinstated against defendant based on his release by the Department. Defense counsel subsequently filed a motion to dismiss the indictment.

¶ 12 On February 11, 2010, the State informed the court that the next step was to determine defendant's fitness for trial. Defense counsel adamantly opposed a fitness hearing, noting that defendant had never been restored to fitness, and is currently in a psychiatric unit. Defense counsel informed the court that defendant had been found unfit with no likelihood of being restored to fitness within three years on his 1999 aggravated battery to a peace officer case, and there was a discharge hearing in the battery to a peace officer case which resulted in defendant being placed at Chester. Because no discharge hearing was held in the sexual assault case, counsel believed that the whole process in that case was void. Counsel further stated that defendant "has not been restored, period," and she requested a discharge hearing *nunc pro tunc* to 2005 and 2007. The court replied that there had been no fitness evaluation since 2007, and the State indicated that it was willing to do either a discharge hearing or a trial depending on the fitness evaluation. Defense counsel emphasized that many years had passed during which defendant was found unfit, and the State did not pursue anything. Counsel also indicated that defendant was recently evaluated at Chester. The court stated that it would request a report from the psychiatric unit on defendant's fitness to stand trial so it could determine whether it should prepare for trial or have a discharge hearing.

¶ 13 On March 8, 2010, defendant was examined by Clinical Services staff psychiatrist Dr. Peter Lourgos, who found him unfit to stand trial. Dr. Lourgos opined that defendant requires psychiatric intervention in a secure inpatient psychiatric facility. The psychiatrist, however, was unable to render an opinion as to whether defendant could be restored to fitness within the statutory time frame due to the "severity and refractory-nature" of his illness.

¶ 14 On March 16, 2010, the parties "[b]y agreement" continued the matter for a fitness hearing to April 8, 2010. At the hearing that ensued, Dr. Lourgos testified that he reviewed the prior psychiatrists' findings regarding defendant, and that in 2007, defendant was being medicated at Chester, but was still having auditory hallucinations, paranoid beliefs and other symptoms of a psychotic mental disorder. Dr. Lourgos met with defendant on March 8, 2010, for 25 minutes, but was unable to gather a lot of information from him due to his mental illness. During the interview, defendant was agitated, hostile, and psychotic.

¶ 15 Defendant informed Dr. Lourgos that he was not taking any medications, that he does not need them, and was being forced to take them, and does not have a mental illness. Defendant was unable to have a coherent conversation regarding the charge against him and the courtroom proceedings. Defendant also told Dr. Lourgos that the charge against him did not matter because the end of the world was coming, that the statute of limitations has run, that the judge and attorneys are being influenced by satellites, that he is being persecuted because he is not a devil worshiper, and that the satellite is violating his constitutional rights. When the doctor asked defendant if he could assist his counsel, defendant responded that he could do nothing with this conspiracy except pray. The interview was terminated prematurely due to defendant's increased agitation.

¶ 16 Based on this interview, Dr. Lourgos opined that defendant suffered from schizo-effective, bi-polar type disorder, that he is unfit to stand trial, and that he should be treated in a secure in-patient psychiatric facility. The doctor further testified that he was unable to come to a conclusion within a reasonable degree of medical or psychiatric certainty as to whether defendant is likely to attain fitness within the statutory time frame. Dr. Lourgos explained that since defendant had previously been found fit by several psychiatrists, he believed that it is possible that defendant's illness can be medicated properly. However, since defendant was not on medication, it was difficult to determine whether it is likely that he can be restored to fitness, but

"[t]here might be a possibility that he could be restored to fitness." The doctor also noted that defendant has been at Chester for the last three years, that he has not been made fit during those years, and is not currently on medication.

¶ 17 Following the doctor's testimony, defense counsel stated that defendant has been found unfit for nine and a half out of the past ten years, and that the psychiatrist's finding that he could not determine whether defendant will be restored was an "absurdity," in light of the history of this case. Counsel emphasized that defendant should have had a discharge hearing in 2007 when the charges were reinstated as defendant had been unfit for more than three years, and defendant should have a discharge hearing *nunc pro tunc* to 2007. Counsel then requested a discharge hearing.

¶ 18 The court responded that "[n]one of this is before me. None of these issues are before me today;" the primary issue was whether defendant can be found fit within a year. The court found that defendant was currently unfit for trial, but based on the testimony presented at the fitness hearing, it was not outside the realm of possibility that defendant could be found fit for trial. The court thus concluded that defendant "may be" found fit within one year and remanded him to the Department. Defendant now appeals from this order.

¶ 19 On appeal, defendant maintains that the circuit court's order denying his motion for a discharge hearing on April 8, 2010, was void because once the State reinstated the charges, the court was required to dismiss the charges with prejudice or to hold a discharge hearing (725 ILCS 5/104-23(b) (West 2010)) given the prior judicial finding that there was no substantial probability that he would attain fitness in the foreseeable future and thus no *bona fide* doubt as to his unfitness.

¶ 20 As an initial matter, we observe that in his notice of appeal, defendant identified April 8, 2010, as the order appealed from, but in his brief, he has specifically indicated that he is appealing the "denial of [his] motion for a discharge hearing on April 8, 2010." On that date,

however, the circuit court conducted a fitness hearing and confined its ruling to defendant's fitness, *i.e.*, that defendant was unfit with the likelihood of becoming fit within a year. Although defense counsel argued at the fitness hearing that defendant should receive a discharge hearing, the circuit court stated that this issue was not before it, and refused to entertain it.

¶ 21 Although a notice of appeal is to be liberally construed (*People v. Lewis*, 234 Ill. 2d 32, 37 (2009)), the written order entered by the court on April 8, 2010, does not include any ruling on a discharge hearing, and, in fact, that portion of the form order that pertains to a discharge hearing was blacked out. It is therefore evident that the order entered by the court was solely on defendant's fitness.

¶ 22 The jurisdiction of this court extends only to those matters in controversy that the trial court *has ruled* on. (Emphasis added.) *Canel and Hale Ltd. v. Tobin*, 304 Ill. App. 3d 906, 921-22 (1999). Since the circuit court did not entertain or rule on the discharge issue April 8, 2010, we have no jurisdiction over the merits of defendant's claim that the court erred in denying his motion for a discharge hearing on that date. *Canel and Hale Ltd.*, 304 Ill. App. 3d at 921. In addition, we note that defendant has raised no issue regarding the propriety of the circuit court's refusal to rule on whether he was entitled to a discharge hearing on April 8, 2010, and the courts of Illinois do not issue advisory opinions to guide future litigation. *Canel and Hale Ltd.*, 304 Ill. App. 3d at 922.

¶ 23 The State also maintains that the issue of whether defendant was entitled to a discharge hearing has become moot because it has since answered ready for a discharge hearing, with defendant postponing it for discovery purposes. An issue is rendered moot when it ceases to exist. *People v. Boyd*, 363 Ill. App. 3d 1027, 1030 (2006). Here, however, there was no controversy to be rendered moot since the circuit court never issued a ruling on the discharge issue, and further discussion is unwarranted.

¶ 24 Defendant also contends that the fitness hearing itself was void and unauthorized by section 104-23(b) of the Code (725 ILCS 5/104-23(b) (West 2010)). We disagree. Although section 104-23(b) does not require subsequent fitness hearings, it also does not prohibit them. *People v. Lang*, 113 Ill. 2d 407, 441-42 (1986). Our supreme court has held that the guarantee of fundamental fairness inherent in the due process clause requires periodic review of defendant's fitness status, so as to determine his fitness to stand trial, thereby ensuring that his speedy trial rights are not violated. *Lang*, 113 Ill. 2d at 444. Accordingly, periodic subsequent fitness hearings are allowed (*Lang*, 113 Ill. 2d at 441-42, 444), and defendant's voidness argument fails.

¶ 25 Defendant next contends that the circuit court's finding that he was unfit with the reasonable likelihood of becoming fit within a year was against the manifest weight of the evidence and an abuse of discretion. He maintains that the evidence supports the conclusion that he could not attain fitness within a year. The State responds that Dr. Lourgos provided the basis for a finding that defendant could be found fit within a year even though he could not reach a firm conclusion on the matter, and that it was not outside the realm of possibility that defendant could be found fit.

¶ 26 We observe that defendant has cited two different standards of review: manifest weight of the evidence and abuse of discretion. In support of his contention that the standard of review is an abuse of discretion, defendant cites to *People v. Rice*, 257 Ill. App. 3d 220 (1993). *Rice*, however, involved the issue of whether the trial court should have granted a fitness hearing. With regard to a trial court's determination on defendant's fitness, the standard of review is whether that determination is against the manifest weight of the evidence. *People v. Burton*, 184 Ill. 2d 1, 15-16 (1998); *People v. Lucas*, 388 Ill. App. 3d 721, 726 (2009)*; People v. Schoreck*, 384 Ill. App. 3d 904, 916-17 (2008) citing *People v. Haynes*, 174 Ill. 2d 204, 226 (1996).

¶ 27 Here, defendant does not contest the court's finding that he was unfit, but, rather, the court's finding that he may be found fit within one year. He notes that Dr. Lourgos could not

testify within a reasonable degree of medical certainty that there was a substantial probability that he could be restored to fitness.

¶ 28 Once the court has determined that defendant is unfit, it must then determine whether there is a substantial probability that he will become fit within a year. 725 ILCS 5/104-16(d) (West 2010). If there is a substantial probability or the court cannot determine whether such probability exists, it shall order defendant to undergo further treatment for purposes of rendering him fit. 725 ILCS 5/104-16(d) (West 2010). If the court finds there is no substantial probability, the case proceeds in accordance with section 104-23(b) (725 ILCS 5/104-23(b) (West 2010)).

¶ 29 In this case, the psychiatrist, Dr. Lourgos, testified that he could not decide within a reasonable degree of medical or psychiatric certainty as to whether defendant is likely to attain fitness within the statutory time frame. The doctor explained that since defendant had previously been found fit by several examiners, he believed that it was possible that defendant's illness could be medicated properly. The doctor further explained that, at this point, it was difficult to determine the likelihood of defendant being restored to fitness as he was not on medication, but that "[t]here might be a possibility that he could be restored to fitness." This testimony at most left open a possibility that defendant could become fit, but does not lend itself to the conclusion that there is a substantial probability that defendant could become fit within a year, especially in light of a decade of findings of unfitness. Although the court is not required to accept the opinions of psychiatrists in determining fitness (*Lucas*, 388 Ill. App. 3d at 728), no evidence was presented to support the determination that there was a substantial probability that defendant would attain fitness within a year. Accordingly, we find that the circuit court's finding that defendant would become fit within a year was against the manifest weight of the evidence. *People v. Jones*, 386 Ill. App. 3d 665, 672 (2008); *People v. Logan*, 352 Ill. App. 3d 73, 82 (2004).

¶ 30 We, therefore, reverse the circuit court's finding, and remand for further proceedings in accordance with section 104-23(b) of the Code. As stated above, section 104-23(b) provides, in relevant part, that if there is no substantial probability that defendant will become fit to stand trial within one year, the State *shall* request the court to (1) set the matter for a discharge hearing; (2) release defendant from custody and dismiss the charges against him with prejudice; or (3) remand defendant to the custody of the Department, and if the Department commits defendant pursuant to a hearing, the trial court having jurisdiction over the criminal matter shall dismiss the charges against defendant, with leave to reinstate, but if defendant is not committed, he shall be remanded to the court having jurisdiction over the criminal matter for disposition pursuant to subparagraph (1) or (2) of this section. (Emphasis added.) 725 ILCS 5/104-23(b) (West 2010).

¶ 31 Reversed and remanded with directions.