2014 IL App (1st) 120215-U

SIXTH DIVISION
February 28, 2014

No. 1-12-0215

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.	)	No. 09 CR 13352
	)	
CHARLES TRIPLETT,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not abuse its discretion by effectively vacating its order of a behavioral clinical examination of defendant, where the court learned in the interim that two experts had earlier diagnosed defendant as malingering. Court's refusal of defendant's request for standby counsel was not based on a belief that court had no authority to appoint standby counsel and did not constitute reversible error.

¶ 2 Following a jury trial, defendant Charles Triplett was convicted of attempted first degree murder and sentenced to 31 years' imprisonment. He contends on appeal that the trial court erred in acquiescing to a refusal by the court's Forensic Clinical Services department (FCS) to perform

a behavioral clinical examination (BCX) of defendant previously ordered by the court. He also contends that the court erred when it denied his request for standby counsel in the erroneous belief that there is no law authorizing the appointment of standby counsel.

¶ 3 Defendant was charged with attempted first degree murder for, on or about July 4, 2009, personally discharging a firearm with the intent to kill, striking Robert Allison and thereby causing him great bodily harm and permanent disability. He was also charged with aggravated battery with a firearm on the same allegation that he shot Allison.

¶ 4 During defendant's August 2009 arraignment, at the request of defense counsel, the court ordered a BCX to evaluate defendant's fitness to stand trial with or without medication, sanity, and ability to understand *Miranda* warnings. The court also ordered the jail hospital to evaluate his medical and psychological complaints. Defense counsel did not provide the court any reason for his requests.

¶ 5 In November 2009, FCS psychologist Dr. Erick Neu issued a BCX report that he examined defendant on September 3 and November 23 and found him legally sane at the time of the alleged offense, capable of understanding *Miranda* warnings, and fit to stand trial. Regarding fitness, Dr. Neu noted that defendant had no evidence of any serious mental illness that would compromise his ability to understand the proceedings against him or assist in his defense, and that he "is not prescribed any psychotropic medications." Dr. Neu referred the reader to his psychological summary for the basis of his opinions.

¶ 6 In Dr. Neu's psychological summary underlying his report, he diagnosed defendant with malingering and alcohol abuse. Defendant reported inpatient mental health treatment about two decades prior, suicide attempts about a decade prior, that he was taking Prozac, Xanax, and

Valium obtained "on the black market," and extensive drug and alcohol abuse. His sister and fiancé could not recall any history of inpatient mental health treatment, had not observed any psychotic symptoms or bizarre behavior, agreed that he was taking antidepressants around the time of his alleged offense, and agreed that he abuses alcohol but were unaware of any drug use. His records showed "occasional" outpatient treatment but no known history of inpatient psychiatric treatment, prior prescriptions for antidepressants but none by February 2008, and that the jail hospital evaluated his mental health twice and found no treatment was needed and during one of these evaluations he was suspected of malingering. In Dr. Neu's first examination, defendant was uncooperative and gave various nonsensical answers to simple questions (for example, though it was 2009, that it was 2005 and the president was George [*sic*] Clinton), reported chronic suicidal ideation and both audio and visual hallucinations. In his second examination, defendant was cooperative, coherent and fully oriented, and he denied suicidal ideation or hallucinations though he reported feeling depressed. When Dr. Neu asked defendant questions about aspects of the criminal justice system, he answered almost every question incorrectly in the first examination but answered almost all such questions correctly in the second, and Dr. Neu concluded that the erroneous answers in the first interview were deliberate.

¶ 7 In January 2010, FCS psychiatrist Dr. Roni Seltzberg submitted a BCX report that she examined defendant on January 14 and found him legally sane at the time of the alleged offense, able to understand *Miranda* warnings, and fit to stand trial. Regarding fitness, Dr. Seltzberg noted that defendant is not prescribed any psychotropic medication "nor is there an indication of a need for this type of intervention." Dr. Seltzberg also referred the reader to her psychiatric summary for the basis of her opinions.

¶ 8 In Dr. Seltzberg's psychiatric summary underlying her report, she diagnosed defendant with malingering, alcohol abuse, and a personality disorder. In his examination, he was alert, oriented, and showed no sign of any "psychotic process," and while he reported being depressed, "there was no indication of hopelessness or helplessness." He demonstrated abstract thought processes and could relate information coherently. While claiming otherwise at times (he insisted he did not know the difference between a State's Attorney and public defender but "did reveal this knowledge nonetheless"), he demonstrated knowledge of the charges against him and other aspects of his case including plea bargaining and choosing a jury or bench trial.

¶ 9 The court received the BCX reports of Drs. Neu and Seltzberg in January 2010, and the case proceeded through pre-trial matters including a motion to quash arrest and an extensively-argued motion to reconsider denial of that motion. At the hearing on the motion to quash, defendant's fiancé Gloria Mallett testified to the circumstances surrounding defendant's warrantless arrest in their shared home on the day of the alleged shooting, while officers testified that they went to defendant's home after he was identified by the victim Allison, his friend, and a named bystander. The trial court denied the motion.

¶ 10 In March, May, and November of 2010, defendant expressed to the court concern that his case was not proceeding as quickly as he would like. The court explained the various tasks counsel must perform before the case is ready for trial and ascertained from defendant that he did not want to represent himself.

¶ 11 Counsel also filed a motion to suppress defendant's custodial statement. However, at a January 2011 hearing, after counsel explained that he prepared and amended the motion based on information that defendant provided, defendant refused to testify while also asserting that his

rights had been violated. The court ruled that the motion to suppress was withdrawn without prejudice.

¶ 12 In May 2011, after counsel informed the court that defendant wanted to demand trial, the court reminded defendant that he withdrew his motion to suppress. Defendant then denied that he made or signed a statement, denied that he can read or write English, and denied that a document shown to him bore his signature. When the court explained that counsel's motion to suppress would seek to exclude that statement, defendant replied that counsel could file such a motion. However, when counsel withdrew the trial demand and asked for a continuance to review his earlier motion before refiling, defendant said "I'm not in agreement at this time with that decision" and requested new counsel while stating that "I'm not electing to go *pro se* but I'm being forced to" by counsel's alleged ineffectiveness.

¶ 13 The court reminded defendant that counsel had filed motions on his behalf including a motion to quash where counsel examined witnesses and argued at length, albeit unsuccessfully. The court also reminded him that counsel sought to suppress his statement but defendant opposed the motion, so that the statement would be admitted against him at trial unless he testified that the statement was not his; that is, that it would be insufficient for counsel to thus argue. The court opined that defendant could not effectively represent himself, including basic tasks like reading police reports and taking notes, if he was illiterate. The court stated that it would not appoint standby counsel because "I'm not going to have an attorney put his or her law license [and] reputation on the line to act at your whim and at your direction" but instead counsel should be free to evaluate the evidence and any defenses. The court recommended that defendant not represent himself and told him that his counsel is a licensed attorney rather than a

"magician" or a "puppet [to] do what you tell him to do." The court gave defendant an opportunity to meet with counsel, including a reading of the statement at issue, before making his decision on self-representation, and defendant took the opportunity during a recess.

¶ 14 However, following the recess, counsel informed the court that defendant would not allow him to read the statement to him without "yelling over me" so that counsel could not finish reading the statement; counsel also spread of record that he had previously read the statement to defendant. The court ascertained from defendant that he was aware of the evidence the State would use against him and was ready for trial. Defense counsel requested a BCX on the basis that defendant had "clearly *** decompensated" since his last BCX and "tells me one thing [but] tells the court other things." The court agreed that "it's a necessary motion at this point" and ordered a BCX to evaluate defendant's fitness to stand trial and ability to understand *Miranda* warnings. Defendant then filed in open court a *pro se* motion for substitution of counsel -- not self-representation -- alleging various instances of ineffectiveness by trial counsel. The court continued the motion until receipt of the BCX report.

¶ 15 In June 2011, Dr. Mathew Markos and Dr. Peter Lourgos, FCS director and assistant director respectively, jointly sent a letter to the court opining that defense counsel's May 2011 request for a third BCX of defendant "on issues that have been already addressed (twice) by two of our doctors is clearly a misuse of our services." Drs. Markos and Lourgos noted that FCS receives over 2,000 referrals for BCXs each year and opined that repeat examinations deplete FCS's limited staff resources and thereby compromise its ability to serve the courts in a timely manner, resulting in delayed court proceedings and increased jail over-crowding. As to

defendant, they noted that both Dr. Neu and Dr. Seltzberg opined that he was malingering. Drs. Markos and Lourgos ended by thanking the court for its patience and consideration of the matter.

¶ 16 On June 27, 2011, the court received this letter and told defendant "unless there is something new that has come to light since both these examinations finding you fit, sane, and able to understand *Miranda*, further that you are malingering, I am not going to order" another BCX. Counsel argued that defendant has decompensated since his earlier BCXs and that a finding of fitness should not last "into infinity," and told the court that he sent a letter to Dr. Markos to similar effect. The court responded that, had defendant ever been found unfit, it would order another BCX, but defendant had never been anything but fit according to the court records and he "appears today to be understanding my words." The court again noted that defendant had been found to be malingering by two FCS doctors. Defendant, in person and through counsel, then demanded trial.

¶ 17 Counsel reminded the court of the *pro se* substitution motion, and the court ascertained from defendant that he did not want to represent himself. Defendant then argued the ineffectiveness claims in his motion, the primary being that counsel was unsuccessful on the motion to quash but also that counsel had somehow filed additional charges against him. When asked for a copy of these charges, defendant tendered counsel's motion to suppress and insisted that counsel was presenting the allegations therein rather than seeking to suppress them. Defendant expressed an apparent belief that his denial of making the statement should be sufficient to exclude it and the testimony of an Assistant State's Attorney (ASA) that defendant made the statement is inherently insufficient evidence in the face of his denial. He also criticized counsel for discussing victim Allison's medical bills with Allison and then, when counsel stated

that he did not speak with Allison and that the State tendered the bills, criticized him for not speaking with Allison. The court found that counsel "has gone above and beyond for you in his legal representation" and denied the substitution motion.

¶ 18 Just before trial in August 2011, defendant made a *pro se* oral motion for substitution of counsel, citing the grounds in his earlier motion. The court reiterated that substitution was denied and asked defendant if he wanted to represent himself. Defendant replied that he asked for standby counsel, and the court reminded him that it denied the request. Defendant then argued that the court "went against the colored [sic] state law that I have a standby counsel," to which the court replied "There's no law for standby counsel." The court went on to say "We don't have standby counsel in this courtroom." The court again asked defendant if he wanted to proceed with counsel or *pro se*, and he asked for more time, and his case file, to consider. When defendant maintained that he had not seen his case file, one of his three co-counsel told the court that all three attorneys had "extensive meetings" where they "went over the files." The court found that defendant was "attempting to circumvent the criminal justice system [by] blaming everyone for things that have not occurred." The court repeatedly asked defendant if he was going to represent himself, and defendant repeatedly replied by demanding his file. When the court assured defendant that he would see his file, albeit redacted as it is for all defendants, defendant clearly requested to represent himself and began to ask more questions of the court. The court reminded defendant that it was his decision to represent himself and they were "going to trial now because you have manipulated this court since 2009." The court allowed defendant to proceed *pro se* and commenced trial.

¶ 19 The evidence at trial from Allison, his girlfriend, and an eyewitness (who described the shooting but could not identify the shooter) was that defendant shot Allison in the street and then tried to shoot Allison after he fell wounded to the ground; that is, defendant stood over the prostrate Allison, aimed the gun at him, and pulled the trigger more than once but it did not fire. Allison's hands were empty both before defendant shot him and when defendant tried to shoot him on the ground. Allison's wounds required over a month of hospitalization and four surgeries. Allison admitted that he had struck defendant on the head about a month earlier, but testified that, when defendant and he met in the street just before the shooting, he apologized to defendant and stated that he struck defendant once because defendant was choking him. Until defendant shot Allison, there was no struggle and no threatening words or raised voices from either Allison or defendant. An ASA testified that defendant gave a post-arrest statement to the effect that Allison struck him without provocation in June 2009 and that, when he met Allison on the day at issue about a month later, he decided to shoot Allison because he showed no remorse for the earlier incident. In the statement, defendant admitted to shooting Allison but not to trying to shoot him while he was on the ground. Defendant chose not to testify, and was not allowed to call fiancé Mallett due to a motion to exclude and that she was not on his list of witnesses. Following arguments, instructions, and deliberation, the jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm, also finding that he personally discharged a firearm that proximately caused great bodily harm.

¶ 20 At defendant's request, counsel was appointed for the post-trial proceedings. His post-trial motion raised no allegation regarding the BCXs, fitness to stand trial, or his motion for substitution of counsel. The court denied the motion, finding the evidence of defendant's guilt

was overwhelming. Following evidence and arguments in aggravation and mitigation, defendant was sentenced to the minimum sentence (with firearm enhancement) of 31 years' imprisonment. This appeal timely followed.

¶ 21 On appeal, defendant first contends that the trial court erred in acquiescing to the refusal by FCS to perform the BCX ordered in May 2011 when defendant sought to waive counsel. The State responds that this issue has been forfeited as it was not preserved in defendant's post-trial motion. However, a forfeited claim may be reviewed for plain error, and the first issue under a plain error analysis is whether there is error at all. *People v. Eppinger*, 2013 IL 114121, ¶¶ 18-19. For the reasons stated below, we conclude that there is not.

¶ 22 A defendant is generally presumed to be fit to stand trial, and is unfit to stand trial "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." 725 ILCS 5/104-10 (West 2010). Because fitness concerns only the ability to function in the context of a trial, a person may be fit for trial though his mind may be otherwise unsound. *People v. Miraglia*, 2013 IL App (1st) 120286, ¶ 29. For example, a defendant receiving psychotropic medication will not be presumed unfit solely on that basis. 725 ILCS 5/104-21(a) (West 2010).

¶ 23 The issue of a defendant's fitness to stand trial may be raised by the court, defense, or State at any time before, during, or after trial, and "[w]hen a bonafide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further" including ordering a BCX by a psychologist or psychiatrist. 725 ILCS 5/104-11(a), (b), 104-13(a) (West 2010). The factors that may create a *bona fide* doubt of a defendant's fitness include any irrational behavior, his demeanor at trial, any prior medical opinion on the defendant's

competence, and any representations by defense counsel on the defendant's competence. *People v. Moore*, 408 Ill. App. 3d 706, 711 (2011), citing *People v. Brown*, 236 Ill. 2d 175, 186-87 (2010). Whether a *bona fide* doubt exists regarding a defendant's fitness is a matter of the trial court's discretion. *Moore*, 408 Ill. App. 3d at 711.

¶ 24 Here, as a threshold matter, the record belies defendant's contention that the court found defendant's "deteriorating condition rendered further fitness evaluation necessary before accepting his *waiver of counsel*, [then] erred by acquiescing in" FCS's refusal to conduct another BCX. (Emphasis added.) Except for an off-hand reference to proceeding *pro se* made before his written substitution motion, defendant repeatedly denied that he wanted to proceed *pro se*, and repeatedly requested substitution of counsel rather than self-representation, from May 2011 when the court issued the BCX order in question until just before trial in August 2011 when the court again denied his substitution motion. The court was not faced with a waiver of counsel, and thus was not evaluating defendant's fitness to represent himself, either when it ordered a BCX in May 2011 or when it received the FCS letter and decided not to order another BCX in June 2011.

¶ 25 The issue before us, as defendant frames it, is whether the trial court erred in acquiescing to FCS's refusal to perform another BCX. However, FCS did not refuse, it noted its concerns and asked for the court's consideration. After consideration, the court, in effect, vacated its BCX order of May 2011. We proceed on the basis that a court has the same discretion to vacate its BCX order as it does to initially issue (or refuse to issue) such an order. The court correctly noted that defendant had not previously been found unfit, and the FCS letter to the court correctly noted that both BCXs found that defendant was malingering. Notably, the BCX reports by Drs. Neu and Seltzberg made no reference to malingering, and Dr. Neu's psychological

summary and Dr. Seltzberg's psychiatric summary finding that defendant was malingering were not mentioned in the record until the court commented on the findings in denying the request for another BCX.[1] Under such circumstances, the court did not abuse its discretion by concluding that there was not a *bona fide* doubt of defendant's fitness requiring another BCX.

¶ 26 Defendant also contends that the court erred when it denied his request for standby counsel in the erroneous belief that it had no authority to appoint standby counsel.

¶ 27 A *pro se* defendant does not have a right to standby counsel, but such an appointment is permissible because there is no statute or court rule to the contrary. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 42. Criteria considered appropriate in deciding whether to appoint standby counsel include the nature and gravity of the charge, the expected factual and legal complexity of the proceedings, and the abilities and experience of the defendant. *Id.* The decision whether to appoint standby counsel is within the court's broad discretion and will not be reversed absent an abuse of discretion. *Id.* We recently reiterated that no Illinois trial court has been reversed for exercising its discretion to not appoint standby counsel. *Id.* While standby counsel may offer strategic advice to a *pro se* defendant outside the jury's view, a *pro se* defendant with standby counsel controls the substance of his defense so that standby counsel's duty is to assist in routine procedural matters and explain courtroom protocol. *Id.*, ¶ 51. Indeed, standby counsel infringes on a defendant's right to proceed *pro se* if he makes or substantially interferes with any significant tactical decisions, controls questioning of witnesses, or speaks on defendant's behalf on any matter of importance. *Id.*

[1] While defense counsel in January 2010 asked the court to issue an order directing FCS to release copies of the psychological and psychiatric summaries, we will not infer, as defendant does, that the court was aware of the diagnoses of malingering before the FCS letter. The absence of the summaries from the record until 2013 militates against it.

¶ 28 In *People v. Ware*, 407 Ill. App. 3d 315 (2011), we found that a court did not deny a defendant's request for standby counsel under a blanket policy against standby counsel, but "if we agree with defendant that the trial court failed to exercise its discretion, we cannot find that defendant was prejudiced because, even if the trial court had exercised its discretion and denied defendant standby counsel, that decision would not have been an abuse of discretion" applying the aforementioned standards. *Ware*, 407 Ill. App. 3d at 351.

> "First, the charges in this case included attempted first degree murder and aggravated battery. The charges were serious, resulting in a sentence of 25 years' imprisonment on the attempted murder charge. However, the facts and law involved with the charges were not complex; defendant was accused of stabbing the victim in the head with a butcher knife. Defendant did not refute the act of stabbing the victim in the head, but argued that he was acting in self-defense. While raising an affirmative defense increased the complexity of the case somewhat, it was still a fairly simple issue. Additionally, the evidence in the case consisted primarily of testimony from the victim, his wife, police officers, and defendant; there were no expert witnesses nor was there scientific evidence." *Ware*, 407 Ill. App. 3d at 352.

Moreover, the evidence against the *Ware* defendant was overwhelming, so that there would be no purpose in remanding for further proceedings solely on the basis that the court failed to exercise its discretion. *Ware*, 407 Ill. App. 3d at 353.

¶ 29 Here, defendant seizes upon one statement by the court, made in response to an assertion by defendant, for the proposition that the court mistakenly believed it had no discretion to appoint standby counsel. However, as noted above, no statute or court rule expressly forbids or authorizes such an appointment. Moreover, the court also told defendant earlier that it did not appoint standby counsel because counsel would "put his or her law license [and] reputation on the line to act at your whim and at your direction;" a court giving a reason why it does not act implies its authority to act. Moreover, the court stated shortly after its "no law for standby counsel" response that "[w]e don't have standby counsel *in this courtroom*." (Emphasis added.) It is apparent that the court's refusal to appoint standby counsel was based not in any mistaken belief that it had no legal authority to do so but on this judge's policy that such an appointment is imprudent because it restricts and potentially jeopardizes counsel, a stance supported by the case law above (*Ellison*, ¶ 51).

¶ 30 While defendant argues that such a blanket policy was an erroneous rejection of discretion, we find as the *Ware* court did that (1) there would have been no abuse of discretion in a discretionary decision to deny standby counsel, and (2) the evidence of defendant's guilt was overwhelming. As to the former, defendant faced essentially the same charges as the *Ware* defendant and the evidence in his case was similarly simple. As to the latter, the clear testimony of victim Allison and his friend was corroborated not only by defendant's confession but by the eyewitness, who could not identify the shooter but agreed with Allison and his friend that Allison was not holding a weapon and that the shooter tried to shoot Allison as he lay wounded on the ground. As the *Ware* court did, we find no reversible error in the denial of standby counsel.

¶ 31 Accordingly, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.