2014 IL App (1st) 121205-U

FIFTH DIVISION
August 22, 2014

No. 1-12-1205

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 97 CR 2588-92
	)	
KAWAUN MICKENS,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶1 ***Held***: The dismissal of defendant's postconviction petition was affirmed where defendant failed to make a substantial showing that his constitutional rights were violated when the trial court found him fit to stand trial.

¶2 Defendant, Kawaun Mickens, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). He seeks reversal of that order and a remand for an evidentiary hearing, contending that he made a substantial showing that his constitutional rights were violated when the trial court found him fit to stand trial. For the reasons that follow,

we affirm.

¶3 Defendant was arrested in 1996 and charged by indictment with numerous sexual offenses. Defendant pled not guilty to these charges. In 1997, the trial court ordered that defendant be examined to determine whether he was fit to stand trial. At a subsequent fitness hearing, it was stipulated that two psychiatrists with the Cook County Forensic Clinical Services (FCS) evaluated defendant and found him unfit to stand trial but restorable to fitness within the statutory period of one year. See 725 ILCS 5/104-16 (d) (West 1996) ("If [the trial court] finds that the defendant is unfit, the court or the jury shall determine whether there is substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year. *** If such probability is found or if the court or the jury is unable to determine whether a substantial probability exists, the court shall order the defendant to undergo treatment for the purpose of rendering him fit"). The trial court found that defendant was unfit to stand trial because he did not understand the nature of the proceedings and was unable to cooperate with his counsel. The court found, however, that there was a chance of restoration to fitness within the statutory period of one year. The court ruled that defendant was subject to involuntary admission and remanded him to the Illinois Department of Mental Health. Defendant was ultimately sent to the Chester Mental Health Center (Chester).

¶4 A second fitness hearing was held in 1998. At that hearing, Doctor Antonin Gesmundo, a staff psychiatrist who treated defendant at Chester, testified that defendant was unfit to stand trial because he was paranoid and suspicious and could not cooperate with counsel. The doctor diagnosed defendant with schizophrenia, auditory hallucinations and paranoid ideations. Dr. Haidari Shikari, a forensic psychiatrist with the FCS, similarly opined that defendant was unfit to stand trial because of his inability to understand the nature of the charges against him and the

court proceedings and his inability to cooperate with counsel. Dr. Timothy Cummings, a staff psychologist with FCS, examined defendant but testified that he was unable to reach a conclusion on defendant's fitness to stand trial because defendant was unwilling to convey sufficient information to allow the doctor to reach a definitive conclusion. The doctor did not believe defendant was schizophrenic but said that he expressed a "fair amount" of "paranoid ideation." The doctor also found evidence of "malingering behavior" by defendant and believed that defendant was exaggerating particular aspects of his symptomatology.

¶5 In addition to these witnesses, Dr. Stafford Henry, a psychiatrist with FCS, also evaluated defendant and disagreed with the diagnoses of the Chester doctors who diagnosed defendant with schizophrenia and opined that defendant was fit to stand trial on medication. The doctor believed that defendant had been pretending to suffer from schizophrenia and was malingering during their interview and that defendant's behavior was designed to be found unfit to stand trial. Dr. Henry explained that malingering is a psychiatric diagnosis that means to exaggerate or falsify psychiatric symptoms for specific purposes for a specific gain. Doctor Roni Seltzberg, a psychiatrist with FCS, evaluated defendant and concluded that he was malingering and fit to stand trial. The doctor believed that defendant's behavior in court, rocking and behaving catatonically, was an "act" designed to deceive others and that defendant began this deception when his legal problems arose. Dr. Seltzberg also did not see any evidence of schizophrenia and the only evidence she saw of acute psychotic disturbance was in defendant's self-reported information. The doctor believed that defendant's prescribed medication was unnecessary to maintaining his fitness.

¶6 At the conclusion of the second fitness hearing, the trial court found that defendant was fit to stand trial with medication. The court stated that, based on the expert testimony, it was

"clear" that defendant understood the nature of the charges against him and could cooperate with his attorney if he chose to do so. The court found credible the expert opinions that defendant was malingering and stated that defendant chose to engage in violence in his life and then f[ell] back on the symptoms that Dr. [Stafford] described." The court noted that its own observations of defendant's behavior in court were the same as those of Dr. Seltzberg, that defendant understood what was taking place and "perk[ed] up" when something interested him. The court further found that on his current medication, defendant could cooperate with counsel if he chose to do so.

¶7 After defendant was found fit to stand trial, defense counsel informed the court that defendant wished to withdraw his plea of not guilty and enter pleas of guilty to all charges. The trial court asked defendant if he understood that he had five cases pending before the court and that his attorney had just stated that defendant wished to plead guilty in those five cases. Defendant said that he understood. The court asked defendant if he understood that he would be giving up his right to plead not guilty and go to trial, and defendant said he understood. The court asked defendant if he understood that the court told defense counsel that defendant could have time to talk with his mother and discuss what he wanted to do, and that defendant said he had thought about it, did not need additional time and wanted to accept the offers made by the State and plead guilty. Defendant stated "yes."

¶8 The State informed the court that defendant would be pleading guilty to two counts of attempt aggravated criminal sexual assault, two counts of aggravated criminal sexual assault, and one count of aggravated battery in a public place in exchange for a total sentence of 80 years' imprisonment. The court then explained to defendant the rights that he would be giving up if he pled guilty, including the right to plead not guilty and be tried by a jury, the right to be present in

court while witnesses were testifying and to assist his lawyer in cross-examining witnesses, the right to call witnesses and to testify on his own behalf and the right to force the State to prove his guilt beyond a reasonable doubt. The court asked defendant if he was pleading guilty freely and voluntarily and defendant responded "yes."

¶9 The State then advised the court of the facts in each case so that the court could determine if there was a factual basis for a plea of guilty in each case. According to the State, in case number 97 CR 2588 (attempt aggravated criminal sexual assault), the evidence would show that defendant accosted the victim outside her apartment, put a gun to her head and forced her inside her home. Defendant threatened to shoot her and then put his finger inside her vagina. After discovering that the victim was menstruating, defendant said that he should just kill her and then left the apartment. In case number 97 CR 2589 (attempt aggravated criminal sexual assault), defendant woke the victim up inside her home and fondled her vagina. The victim told defendant she was menstruating and defendant left the apartment. In case number 97 CR 2590 (aggravated battery in a public place), defendant approached the victim as she was leaving her apartment, put her in a headlock and tried to twist her head. The two struggled briefly and then defendant left. In case number 97 CR 2591 (aggravated criminal sexual assault), defendant approached the victim as she left her apartment, put a hard object against her head and forced her back inside the building and into her apartment. Defendant covered the victim's face with a coat and forced his penis into her vagina. Defendant then made the victim lay on the bed and again forced his penis into her vagina. In case number 97 CR 2592 (aggravated criminal sexual assault), the victim awoke in her bed to find defendant standing next to her. Defendant put his hand over the victim's mouth and a scarf over her eyes and then put his penis into her vagina.

¶10 After reviewing the possible range of sentences for each offense with defendant and

ascertaining that defendant understood the rights he was giving up by pleading guilty, the court found that defendant knowingly and intelligently understood the consequences of pleading guilty. The court found that there was a factual basis for a guilty plea to each charge and therefore accepted defendant's guilty pleas and imposed a total sentence of 80 years' imprisonment.

¶11 Defendant did not file a motion to withdraw his guilty plea or a direct appeal. Instead, on July 16, 2001, defendant filed a *pro se* postconviction petition. Defendant asserted, among other things, that he was unfit to stand trial and that his attorney was ineffective for failing to fully discover defendant's psychological and personal history. The trial court appointed the Public Defender's office to assist defendant with his petition. Nothing further was filed, however, and the petition was dismissed by the trial court. Defendant appealed that dismissal on the basis that the trial court did not rule on the petition within 90 days. The State confessed error on this point and on that basis this court remanded the case to the trial court for further proceedings on defendant's petition. Defendant was allowed to file an amended petition alleging, among other things, that the trial court had erred in finding that he was fit to stand trial. Appointed counsel filed a supplemental petition asserting additional claims and incorporating defendant's *pro se* claims by reference. The State filed a motion to dismiss the petition, which the trial court granted. This appeal followed.

¶12 On appeal, defendant contends that his petition made a substantial showing that his due process rights were violated when the trial court found him fit to stand trial and accepted defendant's guilty pleas and imposed sentence. Defendant claims that the record from the fitness hearing establishes that the trial court's fitness determination was against the manifest weight of the evidence. Defendant asserts that the record from the fitness hearing further establishes that

defendant was not malingering and could not rationally assist his attorney in his defense and that he was unfit to stand trial or plead guilty. We disagree.

¶13 At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If no such showing is made, defendant is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Dismissal is also appropriate where the record from the original trial proceedings contradicts the allegations in defendant's petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). "The scope of the [postconviction] proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Harris*, 224 Ill.2d 115, 124 (2007). Accordingly, issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding. *People v. Petrenko*, 237 Ill.2d 490, 499 (2010).[1] A postconviction claim that depends on matters outside the record, however, is not ordinarily forfeited because such matters may not be raised on direct appeal. *People v. English*, 2013 IL 112890, ¶ 22; *People v. Youngblood*, 389 Ill.App.3d 209, 214 (2009). We review the circuit court's second stage dismissal of defendant's postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

¶14 Due process prohibits the prosecution of a defendant who is unfit to stand trial. *People v. Easley*, 192 Ill. 2d 307, 318 (2000). "A defendant is presumed to be fit to stand trial or to plead, and be sentenced. A defendant is unfit if, because of his mental or physical condition, he is

[1] The parties agree that under prevailing Illinois Supreme Court precedent, defendant's claim is not procedurally barred despite defendant not having filed a direct appeal. See *People v. Rose*, 43 Ill. 2d 273 (2002). We acknowledge that in *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007), the Fifth District observed that "our supreme court seems to be moving away from the *Rose* holding." However, as in *Brooks*, in light of the fact that our supreme court has not overruled *Rose*, we decline to find forfeiture.

unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 1998).

¶15 Factors a court may consider in determining whether a defendant is fit to stand trial include, but are not limited to, the following:

> "(1) The defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;
>
> (2) The defendant's ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel;
>
> (3) The defendant's social behavior and abilities; orientation as to time and place; recognition of persons, places and things; and performance of motor processes." 725 ILCS 5/104-16 (b)(1)-(3) (West 1998).

¶16 Fitness to stand trial and mental illness are not synonymous. *People v. Weeks*, 393 Ill. App. 3d 1004, 1009-10 (2009). "Fitness speaks only to a person's ability to function within the context of a trial. It does not refer to sanity or competence in other areas. A defendant can be fit for trial although his or her mind may be otherwise unsound." *Easley*, 192 Ill. 2d at 320 (citing *People v. Murphy*, 72 Ill. 2d 421, 432-33 (1978)). "The issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense. If so, then, regardless of mental illness, defendant will be deemed fit to stand trial." *Easley*, 192 Ill. 2d at 323.

¶17 "The trial court's ruling on the issue of fitness will be reversed only if it is against the manifest weight of the evidence." *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if

the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008).

¶18 Defendant advances a number of attacks against the trial court's determination that defendant was fit to stand trial and specifically against the court's reliance upon the expert opinions that defendant was malingering and fit to stand trial. These include that the court's decision to credit the opinions of Dr. Henry and Dr. Seltzberg was against the manifest weight of the evidence where those doctors' testimony was "weak and self-contradictory," that Doctor Henry and Doctor Seltzberg's conclusions that defendant was malingering in order to be found unfit were inconsistent with defendant's psychiatric history and current behavior and that those doctors' opinions that defendant was malingering were based upon behavior that was not inconsistent with schizophrenia. Defendant similarly argues that Dr. Henry and Dr. Seltzberg "hedged their opinions that [defendant] was not schizophrenic by attempting to minimize the conflicts between their opinions and conflicting opinions and by offering inconsistent, alternative diagnoses of [defendant's] behavior." Finally, defendant asserts that the trial court did not properly consider defendant's "long history of treatment for mental illness" and "consistent opinions of treating psychiatrists" in finding defendant fit to stand trial.

¶19 We find that defendant's petition has failed to make a substantial showing of a due process violation. In this case, the trial court was presented with conflicting expert testimony on the question of defendant's fitness to stand trial. As the trier of fact, the trial court was free to accept the opinion of one expert over another or to accept part and reject part of each expert's testimony. *People v. McDonald*, 329 Ill. App. 3d 938, 946-47 (2002); *People v. Cosme*, 247 Ill. App. 3d 420, 428 (1993). Based upon the trial court's decision to credit the expert testimony of Dr. Henry and Dr. Seltzberg, as well as the court's own observations of defendant, the trial court

found defendant fit to stand trial. We have reviewed the expert's testimony and find that it was sufficient to support the court's determination.

¶20 Moreover, all of defendant's claims in his petition and on appeal amount to no more than an attack on the credibility of the expert witnesses and the weight to be given to their testimony and ultimately to a request that this court retry the issue of whether defendant was fit to stand trial. However, the trier of fact is responsible for assessing the witnesses' credibility, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). More specifically, "the credibility and weight to be given psychiatric testimony are matters for the trier of fact, who is not obligated to accept the opinions of defendant's expert witnesses over those opinions presented by the State." *People v. Urdiales*, 225 Ill. 2d 354, 431 (2007); *Haynes*, 174 Ill. 2d at 231. Although there were experts in this case who opined that defendant was unfit to stand trial, this does not require similar findings by the trial court since it is the trial court's function to assess the credibility and the weight to be given to psychiatric expert testimony. See *People v. Coleman*, 168 Ill. 2d 509, 525 (1995). The ultimate issue of fitness is for the trial court, not the experts, to decide. *Id.*

¶21 Additionally, the record shows that all of the points defendant raises on appeal were raised at the fitness hearing. At that hearing, defendant explored all of the alleged inadequacies in the expert opinions that he was fit to stand trial through a vigorous cross-examination of those witnesses and through the opinions of other experts that defendant was unfit to stand trial. See *Lieberman*, 379 Ill. App. 3d at 602 (rejecting the respondent's attack on the credibility of the State's expert witnesses and noting that the "respondent explored all of the alleged inadequacies in [the State's experts'] opinions during a vigorous cross-examination of both witnesses and through the testimony of his own expert witnesses"). For example, the issue of whether

defendant suffered from schizophrenia was fully explored during the fitness hearing and we note that even if the court believed that defendant was schizophrenic, this would not preclude a finding that defendant was fit to stand trial. See *Easley*, 192 Ill. 2d at 323 ("The issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense. If so, then, regardless of mental illness, defendant will be deemed fit to stand trial"). Regardless, in finding defendant fit to stand to stand trial, the trial court explained the reasons for its ruling. These included the court's decision to credit the opinions of Dr. Henry and Dr. Seltzberg and the court's own observations of defendant. We find no basis in the record to substitute our judgment for that of the trier of fact on these matters or to otherwise conclude that the court's determination that defendant was fit to stand trial was against the manifest weight of the evidence. Although defendant asks that we engage in a point-by-point review of each expert's opinion, we note that to do so is inconsistent with the scope of a direct appeal. As this court has explained:

> "[T]he mandate to consider all the evidence on review does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. To engage in such an activity would effectively amount to a retrial on appeal, an improper task expressly inconsistent with past precedent." *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007).

Given that such point-by-point review is inconsistent with the scope of a direct appeal, we decline to engage in such a review in context of an appeal from the dismissal of a postconviction petition. Accordingly, we find that defendant has not made a substantial showing that his due process rights were violated when the trial court found him fit to stand trial.

¶22 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶23 Affirmed.