2012 IL App (2d) 110509-U
No. 2-11-0509
Order filed September 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Ogle County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-85
KERRY A. BECKINGHAM,	)	Honorable Stephen C. Pemberton,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in failing to order a fitness hearing sua sponte: despite its inartful language, it did not find a bona fide doubt of fitness, instead merely granting defendant's motion for a fitness examination to determine whether such doubt existed.

¶ 1 Defendant, Kerry A. Beckingham, appeals from his conviction of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2008). He contends that the trial court had a *bona fide* doubt of his fitness to stand trial and that it erred by failing to *sua sponte* hold a fitness hearing. We determine that the trial court merely found that the issue of fitness had been raised and ordered an

evaluation at defendant's request. The court made no determination that there actually was a *bona fide* doubt of fitness and it was not required to hold a hearing on the matter when the parties never asked for one. Accordingly, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged in connection with damage to a pool liner. On November 22, 2010, defendant's public defender moved for a fitness evaluation on the basis that defendant was receiving social security disability because he suffered from mental retardation. Counsel also told the court that, based on conversations he had with defendant, he believed that there was a *bona fide* doubt as to fitness.

¶ 4 The court asked the State if it had any objection to the motion itself. The State said "no," and the court then stated: "I'll find that there is a bona fide doubt of [defendant's] fitness that has been raised and I'll order an examination be undertaken, a fitness examination, under the statute by Dr. Brayden." The court's written order stated in part that the court found "that there is a bona fide doubt which exists as to the issue of the [d]efendant's fitness."

¶ 5 On February 28, 2011, a different attorney from the public defender's office appeared for defendant's counsel. The court stated: "We had had [*sic*] a case set for trial, and then there was an issue of competency raised, and they've received the report, and I think the petition is withdrawn, so we're back to—we're back to setting the case for trial." Counsel replied "I think that's correct" and said that this was one of the instructions he received from defendant's counsel. The court set a new status date for the parties to arrange for a trial date. At that status hearing, the court noted that the case had gone off on a side track about fitness and now the court wanted to see if it was ready

to be set for trial. Defendant's counsel said he thought that it was ready, and a trial date was set. The record does not contain the report of the fitness evaluation.

¶ 6 At the bench trial, defendant testified. He coherently answered questions, and the record does not give any indication that he was unable to understand the proceedings. Defendant was convicted, and the presentence investigation noted that defendant believed his mental health was good. Defendant told the investigator that he met with a psychiatrist in regard to the case, but no recommendations were made from that evaluation. The investigator reported that defendant was a high school graduate and worked part time.

¶ 7 Defendant was sentenced to 60 days in jail, a 12-month term of conditional discharge, and restitution. No posttrial motions were filed, and he appeals.

¶ 8 II. ANALYSIS

¶ 9 Defendant contends that the trial court concluded that a *bona fide* doubt of his fitness existed and that it was not authorized to proceed further without conducting a fitness hearing.

¶ 10 Due process prohibits the prosecution of a defendant who is unfit for trial. *People v. Goodman*, 347 Ill. App. 3d 278, 287 (2008). Fitness to stand trial requires that a defendant understand the nature and purpose of the proceedings against him and be able to assist in his defense. 725 ILCS 5/104-10 (West 2004). Whether a *bona fide* doubt of a defendant's fitness has arisen is generally within the trial court's discretion. *People v. Smith*, 353 Ill. App. 3d 236, 240 (2004). However, once the trial court concludes that there is a *bona fide* doubt of a defendant's fitness, the defendant becomes entitled to a fitness hearing. *Id.*

¶ 11 Defendant did not object to the court's failure to hold a fitness hearing and did not raise the issue in a posttrial motion. "While such issues are generally deemed waived, an issue may be

reviewed as plain error when it concerns a substantial right." *People v. Vernon*, 346 Ill. App. 3d 775, 777 (2004). "The determination of a defendant's fitness to stand trial concerns a substantial right." *Id*. Thus, plain-error review is appropriate. *Id*.

¶ 12 Section 104-11 of the Code of Criminal Procedure of 1963 provides as follows:

> "(a) The issue of the defendant's fitness for trial *** may be raised by the defense, the State or the Court at any appropriate time *** before, during, or after trial. When a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.
>
> (b) Upon request of the defendant that a qualified expert be appointed to examine him or her to determine prior to trial if a bona fide doubt as to his or her fitness to stand trial may be raised, the court, in its discretion, may order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in the case." 725 ILCS 5/104-11 (West 2008).

¶ 13 When counsel requests a fitness evaluation to determine whether a *bona fide* doubt of fitness is present, the court may order an evaluation, but there is no right to a hearing absent a finding by the court that a *bona fide* doubt as to fitness actually exists. See *People v. Hanson*, 212 Ill. 2d 212, 217 (2004).

¶ 14 For example, in *Hanson*, the trial court granted the defendant's motion for an expert examination to determine his fitness for trial. After the examination was completed, the defendant withdrew his motion. At no time in the proceedings did the defendant request a fitness hearing. The supreme court held that a fitness hearing is mandatory only if the trial court finds a *bona fide* doubt of a defendant's fitness to stand trial. The court noted that the trial court may, in its discretion, order

a fitness examination to aid in its decision whether the defendant is fit for trial. However, the mere fact of granting the defendant's motion for a fitness examination does not necessarily mean that the trial court found a *bona fide* doubt of the defendant's fitness. *Id.* at 222. The court explained the statutory distinction between sections 104-11(a) and (b) as follows:

> "Sections 104-11(a) and (b) may be applied in tandem or separately, depending on if and when the trial court determines a *bona fide* doubt of fitness is raised. If the trial court is not convinced *bona fide* doubt is raised, it has the discretion under section 104-11(b) to grant the defendant's request for appointment of an expert to aid in that determination. [Citation.] Even for a motion filed under section 104-11(a), the trial court could specify its need for a fitness examination by an expert to aid in its determination of whether a *bona fide* doubt is raised without a fitness hearing becoming mandatory. In either instance, after completion of the fitness examination, if the trial court determines there is *bona fide* doubt, then a fitness hearing would be mandatory under section 104-11(a). *** In sum, the primary distinction between sections 104-11(a) and 104-11(b) is that section 104-11(a) ensures that a defendant's due process rights are not violated when the trial court has already found *bona fide* doubt to have been raised, while section 104-11(b) aides the trial court in deciding whether there is a *bona fide* doubt of fitness." *Id.* at 217-18.

¶ 15 In contrast, if the court finds that a *bona fide* doubt exists, an evidentiary hearing must be held. *Smith*, 353 Ill. App. 3d at 242. In *Smith*, the court *sua sponte* found a *bona fide* doubt as to fitness and ordered an examination. The parties later stipulated to a report finding the defendant fit, and the court found him fit without holding a hearing. We reversed, noting that, unlike in *Hanson*, the court had specifically found a *bona fide* doubt of fitness. Thus, a hearing was mandatory. *Id.*

¶ 16 Here, defendant never asked for a *fitness hearing*. Instead, he asked only for an *evaluation*, which the court granted. Without a finding by the court that there was a *bona fide* doubt of his fitness to stand trial, there was no right to a hearing on the matter. Defendant argues that the court made such a finding, but a close reading of the record does not reflect that. Instead of finding that there was a *bona fide* doubt as to fitness and setting a hearing, when it granted the motion for an evaluation, the court stated: "I'll find that there is a bona fide doubt of [defendant's] fitness that has been raised and I'll order an *examination be undertaken, a fitness examination*, under the statute." (Emphasis added.) In its written order, it then stated that there was "a bona fide doubt which exists as to the issue of the [d]efendant's fitness." Although inartful, the court's oral comments and action reflect that the issue of fitness had been raised, and it ordered a fitness evaluation to assist in determining whether a *bona fide* doubt as to fitness actually existed. This determination is bolstered by the fact that nothing in the record supports a conclusion that defendant was unfit. Defendant spoke coherently during his trial, and the only reference in the record to the fitness evaluation indicated that it did not make any determination that defendant was unfit. Accordingly, the court was not required to *sua sponte* order a fitness hearing.

¶ 17 III. CONCLUSION

¶ 18 The court merely found that the issue of fitness had been raised and did not determine that a *bona fide* doubt of fitness actually existed. Thus, the court was not required to order a fitness hearing, and the judgment of the circuit court of Ogle County is affirmed.

¶ 19 Affirmed.