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2014 IL App (3d) 120720-U

Order filed September 24, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	Appeal Nos. 3-12-0720, 3-12-0721, 3-12-0722, and 3-13-0318
v.	)	Circuit Nos. 10-CM-740, 11-CF-300, and 11-CF-306
RODERIC T. HODGE,	)	Honorable Clark E. Erickson and Kenneth A. Leshen,
Defendant-Appellant.	)	Judges, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Defendant's domestic battery and contempt convictions are reversed, and the cause is remanded for a fitness determination and further proceedings.

¶ 2 After a jury trial, defendant, Roderic T. Hodge, was found guilty of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)) and the court sentenced defendant to six years' imprisonment. During the proceedings, defendant was also convicted of four direct criminal contempt charges.

On appeal, defendant argues that: (1) the jury determination that he was fit to stand trial was against the manifest weight of the evidence and defense counsel was ineffective for failing to move for a directed verdict during the fitness hearing; (2) the court denied defendant his right to testify; and (3) the court improperly sentenced defendant to three consecutive 30-day sentences for direct criminal contempt where the sentences were based on a single course of conduct. We reverse and remand.

¶ 3 FACTS

¶ 4 Defendant was charged in three separate cases with criminal trespass to real property (720 ILCS 5/21-3(a)(2) (West 2010)), domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)), and criminal damage to government supported property (720 ILCS 5/21-4(1)(a) (West 2010)). The court appointed the public defender.

¶ 5 On July 15, 2011, defense counsel expressed concern as to defendant's fitness to stand trial and moved for a fitness evaluation. The court granted the motion.

¶ 6 During the June 26, 2011, evaluation hearing, defendant was disruptive and accused the court of violating his rights. Defense counsel stated that he had attempted to speak with defendant prior to the hearing, but defendant was erratic and unable to maintain a coherent conversation. The court found that there was a *bona fide* doubt as to defendant's fitness and appointed an additional expert to examine defendant.

¶ 7 On September 8, 2011, the court conducted a bench fitness hearing. At the hearing, Dr. James Simone testified that he had examined defendant. Simone stated that defendant did not have the ability to follow courtroom testimony or assist counsel with his case. Simone concluded that defendant was not fit to stand trial, but opined that he could be restored to fitness within one year. A report prepared by Dr. Erwin Baukus was also introduced via stipulation.

Baukus' report concluded that defendant was fit to stand trial.

¶ 8 Defendant testified at the hearing that he could assist his attorney in his defense. However, during the proceeding, defendant was disruptive and stated he did not request that the public defender be appointed. In rebuttal, Simone testified that he had observed defendant's interaction with defense counsel. During the interaction, defendant had difficulty staying focused, appeared agitated, and used profanity.

¶ 9 The court found that "the evidence [was] overwhelming that [defendant was] unfit to stand trial" and ordered that defendant remain in custody in a secure facility while receiving mental health treatment. At the conclusion of the hearing, defendant engaged in a seven to eight minute altercation with four or five officers and was forcibly removed from the courtroom. He was ordered to undergo further treatment.

¶ 10 On December 15, 2011, defendant appeared before the court in the custody of the Department of Human Services. The parties stipulated to the report prepared by the staff at Chester Mental Health Center that stated defendant was fit to stand trial. Defendant and defense counsel then jointly requested that counsel be discharged. The court found that defendant was fit to stand trial and granted defendant's waiver of counsel.

¶ 11 On June 11, 2012, defendant appeared *pro se* for a hearing on the criminal charges. The State asserted that defendant had rejected a plea offer that would have resolved his pending cases. Defendant responded that the State never made such an offer. The court ordered defendant to be reexamined by Simone. Defendant protested the need for another examination, noting that a team of experts had determined that he was fit. Defendant apologized for his comments and behavior and then embarked on a discourse about peace and justice. At the conclusion of his statement, defendant attempted to accept the State's plea offer, but the court

would not accept a plea unless defendant was again found fit. The court continued the case to allow defendant to be examined by Simone.

¶ 12 On June 14, 2012, defendant made a motion to vacate the court's order for a fitness hearing. After defendant argued his motion, the court expressed doubt about defendant's ability to represent himself and reappointed the public defender. The court also found a *bona fide* doubt of defendant's fitness to stand trial and appointed Simone to examine defendant. In a repeat of the September 2011 hearing, a physical struggle ensued between defendant and the court security officers and Defendant was forcibly removed from the courtroom by four officers.

¶ 13 On August 13, 2012, the case was called for a fitness hearing before Judge Kenneth Leshen, and a jury was impaneled. Dr. Simone testified that he had been assigned to evaluate defendant's fitness to stand trial in August 2011 and at that time Simone found that defendant was unfit to stand trial. On August 1, 2012, pursuant to the court's directive, Simone went to the Kankakee County jail to meet with defendant and re-evaluate his fitness. Defendant walked out of his cell, saw Simone, returned to his cell, and refused to leave. Simone was unable to conduct an evaluation but explained that defendant's behavior had not changed since the 2011 evaluation and defendant had not received treatment. Simone opined that defendant could not participate in his own defense or engage with his attorney in any meaningful way and defendant was therefore unfit to stand trial. At the conclusion of Simone's testimony, the State rested without producing additional evidence.

¶ 14 Defense counsel then called defendant to testify. Defendant stated that he refused to cooperate with Simone because Simone had provided perjurious testimony at a prior hearing. Defendant stated that the staff at Chester Mental Health Center had determined he was fit. On cross-examination, defendant initially refused to answer the State's questions. When the court

instructed defendant to answer, defendant protested and accused the court of being "thugs." Defendant also accused the court of "playing games," and of being "fucking jokes" to which the court responded that if defendant was found fit, he would be in direct criminal contempt. Defendant replied with additional accusations that the court was a "thug[]" and a "clown." When the testimony resumed, defendant said a report from the Chester Mental Health Center stated that he was "consistently alert, responsive and oriented to person, place, time," and able to think coherently and objectively. Defendant examined the report (which was neither tendered nor admitted), and stated that there was no reason for the fitness examination. Defendant said "I've been fit to stand trial. The question is would you all let me stand trial."

¶ 15 On redirect examination, defendant stated "[w]ell, I think I'm fit in certain ways and certain ways possibly maybe not." At the conclusion of the redirect, the court adjourned for lunch, and defendant stated "[y]ou fucking clown[,]" "[f]uck you. Fuck you and your contempt."

¶ 16 During closing arguments, the State argued that defendant was currently unfit to stand trial but could be returned to fitness within one year if he received treatment. Defense counsel asked the jury to base its decision solely on the evidence and pointed out that Simone was never able to do a formal evaluation of defendant. Defense counsel asked the jury for a fair determination. The jury found defendant fit to stand trial, and the court found defendant in direct criminal contempt of court and sentenced defendant to six months in jail. Defendant continued to interrupt the court, and the court again found defendant in contempt and added a consecutive term of six months in jail.

¶ 17 On August 20, 2011, Judge Leshen reduced defendant's contempt sentence to a single six- month term in jail and ordered the sentence to be served consecutive to any prison term defendant received in the three pending criminal cases.

¶ 18 Thereafter, Judge Clark E. Erickson took over the case and denied defendant's request to proceed *pro se*. In doing so, Judge Erickson noted that defendant had been "a very difficult individual throughout all these proceedings" to which defendant replied "[a]s the Court has been." Judge Erickson found defendant in direct criminal contempt and sentenced defendant to an additional 30 days in jail. Defendant continued to interrupt the court during the remainder of the hearing, and Judge Erickson found defendant in direct criminal contempt on two additional occasions and imposed two more 30-day sentences. At the conclusion of the hearing, Judge Erickson imposed a combined contempt sentence of 90 days in jail to be served consecutive to defendant's prior90-day contempt sentence and any sentence imposed in the underlying cases.

¶ 19 After separate jury trials, defendant was found not guilty of criminal damage to government supported property and guilty of domestic battery. The court sentenced defendant to six years' imprisonment for domestic battery, and the State dismissed the remaining criminal trespass charge. Defendant appeals.

¶ 20 ANALYSIS

¶ 21 I. Fitness Determination

¶ 22 Defendant argues that he was not fit to stand trial for domestic battery or to be convicted of direct criminal contempt where the evidence at his second fitness hearing established that he was unfit to stand trial. Defendant also argues that defense counsel was ineffective for failing to move for a directed verdict at the conclusion of the State's evidence during the fitness hearing.

¶ 23 The due process clause of the fourteenth amendment bars prosecuting a defendant who is unfit to stand trial. U.S. Const., amend. XIV; *People v. Shum*, 207 Ill. 2d 47 (2003). A defendant is presumed fit to stand trial, unless, 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). The issue of a defendant's fitness to stand trial may be raised before, during, or after trial by the defense, State, or court. 725 ILCS 5/104-11(a) (West 2010). When a *bona fide* doubt of a defendant's fitness is raised, the court shall order a determination of the issue before proceeding further. *Id*. The party alleging that a defendant is fit has the burden of proving, by a preponderance of the evidence, that the defendant is fit to stand trial. See *People v. Jones*, 386 Ill. App. 3d 665 (2008). Prior to trial, a defendant's fitness may be determined by the court or by a jury. 725 ILCS 5/104-12 (West 2010). A fitness determination will not be reversed unless it is against the manifest weight of the evidence. *Jones*, 386 Ill. App. 3d 665.

¶ 24 In reaching a fitness determination, the court is not required to accept the opinions of mental health experts. *People v. Baldwin*, 185 Ill. App. 3d 1079 (1989). However, the court cannot reject an expert's opinion that a defendant is unfit without testimony or evidence that defendant was fit, other than defendant's own statement. *Jones*, 386 Ill. App. 3d 665. An incompetent defendant is not a reliable witness regarding his own competency and "[t]o accept defendant's opinion that he is able to co-operate with counsel in his defense, when the purpose of the hearing is to determine that very fact, would make a sham out of the sanity hearing[.]" *People v. McKinstray*, 30 Ill. 2d 611, 616-617 (1964).

¶ 25 Here, the State bore the burden of proving that defendant was fit to stand trial. At the jury fitness hearing, Simone was the only witness who testified for the State. Simone reported that defendant refused to participate in the 2012 psychological evaluation. However, from his observations and prior interactions, Simone opined that defendant was unfit to stand trial. Defendant testified, in opposition, that he was fit to stand trial and had been found fit by the staff at Chester Mental Health Center, but defendant did not provide documentation of the fitness

report. The uncontradicted expert testimony, therefore, established that defendant was unfit to stand trial. This conclusion was further supported by defendant's repeated outbursts, indifference to contempt charges, and altercations with officers in the courtroom. Defendant also refused to cooperate in the preparation of his psychological evaluation and did not approve of appointed counsel's representation. In light of this record and Simone's opinion, defendant's testimony was insufficient to establish fitness. Thus, the jury's fitness determination was against the manifest weight of the evidence. As a result, we reverse defendant's domestic battery conviction and remand the cause for a new fitness determination and further proceedings.

¶ 26 Additionally, based on our determination, we cannot find that defendant could form the requisite intent to be convicted of contempt. See *People v. Duff*, 2012 IL App (5th) 100479. Therefore, we reverse defendant's contempt convictions outright.

¶ 27 Finally, our ruling has rendered analysis of defendant's ineffective assistance of counsel argument and remaining issues moot.

¶ 28 II. Motion for Recognizance Bond

¶ 29 During the pendency of the appeal, defendant filed a motion for release on a recognizance bond or to set bond pending final disposition of this appeal. As a result of our resolution of this appeal, we deny defendant's motion as moot.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kankakee County is reversed, and the cause is remanded for a fitness determination and further proceedings with regard to the domestic battery conviction.

¶ 32 Reversed and remanded.

¶ 33 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 34 I concur in that portion of the judgment which reverses defendant's domestic battery conviction. I do not concur in the majority's decision to require a new fitness determination. Likewise, I do not concur in the majority's decision reversing defendant's contempt convictions outright. I would affirm defendant's contempt convictions.

¶ 35 The majority concludes that defendant's repeated outbursts, indifference to contempt charges and altercations with officers in the courtroom supports the conclusion that defendant was unfit to stand trial. I submit that the evidence, as discussed above, does not establish that the jury's determination of fitness was against the manifest weight of the evidence. A jury, based on the evidence and not only defendant's statements, but watching defendant's actions and listening to him, could determine that defendant was able to understand the nature and purpose of the proceedings against him and to assist in his defense. Defendant's actions may just as likely show that, while able to understand and assist, he was *unwilling* to behave and assist. With respect to the contempt conviction, the majority states, "we cannot find that defendant could form the requisite intent to be convicted of contempt." *Supra* ¶ 26. First, I agree that defendant did not intend "to be convicted of contempt." However, the question is whether a reasonable trier of fact, considering all the evidence in the light most favorable to the State, could find the requisite *mens rea*. *People v. Collins*, 106 Ill. 2d 237 (1985).

¶ 36 I do agree to reverse the domestic battery conviction because I believe the trial court improperly denied the defendant his right to testify. There is no doubt that defendant was doing everything he could to make the trial difficult. There was a "discussion" between the trial court and defendant about whether defendant would affirm his testimony as opposed to swearing to it. After reading the colloquy between the trial court and defendant on the issue of defendant testifying, it seems clear that after defendant figured out that he had pushed the trial court as far

as he could push it, he agreed to take the oath. The entire colloquy could not have lasted more than a couple of minutes. While the trial court's frustration is understandable, denying defendant the right to testify is a harsh sanction. Defendant offered to apologize and said he would take an oath or do whatever the trial court required to allow him to testify. I believe at that point, defendant should have been given the opportunity to testify.

¶ 37 Under the circumstances of this case, I think that the failure to allow defendant to testify requires a new trial. So for that reason and that reason only, I concur in the decision to reverse defendant's domestic battery conviction. I would otherwise affirm.

¶ 38 With respect to the motion for recognizance bond, I would deny that.