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2014 IL App (3d) 121015-U

Order filed August 22, 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 No. 3-12-1015
v.)	Circuit No. 11-CF-589
)	
TONY L. LARRY,)	Honorable
)	Susan Sumner-Tungate,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not denied his right to due process when the trial court found him fit to stand trial.

¶ 2 Following a jury trial, defendant, Tony L. Larry, was found guilty of aggravated driving under the influence of drugs (DUI) (625 ILCS 5/11-501(d)(1)(H) (West 2010)), driving while license suspended (625 ILCS 5/6-303(a) (West 2010)), and failure to stop at a stop sign (625 ILCS 5/11-1204(b) (West 2010)). He was sentenced to six years' imprisonment. Defendant appeals, arguing his due process rights were violated when the trial court failed to make an

independent determination of his fitness to stand trial. We affirm.

¶ 3

FACTS

¶ 4

On November 18, 2011, defendant was charged by indictment with aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2010)), driving while license suspended (625 ILCS 5/6-303(a) (West 2010)), and failure to stop at a stop sign (625 ILCS 5/11-1204(b) (West 2010)). On December 29, 2011, defense counsel filed a motion for a fitness evaluation, asserting that defendant suffered from schizophrenia. According to the motion, defendant heard voices, had been prescribed psychotropic drugs, and had problems assisting in his own defense.

¶ 5

A hearing on the motion was held on January 20, 2011. Defendant testified that four or five years ago he was hospitalized for schizophrenia approximately five times. Defendant testified that he had heard voices in the past, but had not heard them in years. Defendant stated that he most recently took psychotropic medication two years ago. In response to the State's questions, defendant explained the role of his attorney, the prosecutor, and the judge. Defendant also explained the difference between a bench and jury trial and testified that he understood the charges against him. The trial court denied the motion to appoint an expert for a fitness evaluation, finding no *bona fide* doubt as to defendant's fitness. The court specifically noted that defendant was clear and coherent, and that he was very responsive to questions and appeared very intelligent.

¶ 6

On May 29, 2012, defense counsel filed an emergency motion for a fitness evaluation. The motion stated that defendant informed his counselor he was hearing voices again. The motion also stated defendant had a long history of taking psychotropic drugs, but that he had not taken any since his incarceration. At a hearing on May 30, 2012, the State informed the court that it was not objecting to the defense's request to appoint an expert, and the court then granted

the motion. Defendant objected, explaining that he was fit and was ready to start his trial.

¶ 7 The court entered a written order for defendant's fitness evaluation on May 31, 2012.

The court found that the parties raised a *bona fide* doubt as to defendant's fitness to stand trial.

The court stated that defendant demonstrated a lack of understanding of the nature of the charges against him and the judicial proceedings before the court.

¶ 8 On June 12, 2012, Dr. J. Simone prepared a written fitness evaluation. Simone reported that defendant had a long history of mental illness treatment and psychiatric hospitalizations, but noted that at the time of the report defendant was not taking any medication. Defendant reported symptoms of insomnia, loss of appetite, and low energy, which Simone determined were consistent with defendant's diagnosis of depression. Simone also noted that the instant case involved a traffic accident in which defendant's friend was killed, and thus found defendant's symptoms consistent with normal grieving. Defendant reported hearing voices, stating that he often heard his friend screaming at the accident scene and talking to him about his court case. Simone evaluated defendant's mental status, reporting that defendant had no delusional or psychotic symptoms that would interfere with his ability to consult with counsel and had a functional understanding of the role of court personnel and courtroom procedures. Simone opined that defendant had the capacity to understand his legal situation, the charges against him, and the possible penalties. Defendant also had the ability to relate the events of the incident, communicate with defense counsel, stay focused, maintain appropriate social behavior, and understand the legal procedures in the case. Simone concluded that defendant was fit to stand trial.

¶ 9 At a hearing on June 26, 2012, the trial court stated that it read defendant's fitness evaluation and confirmed that the parties received the report. The court said that the report

stated defendant had the ability to understand his current legal situation and the charges against him and found defendant fit to stand trial. Neither party offered any additional information or argument.

¶ 10 The cause proceeded to a jury trial on August 6, 2012, and defendant was found guilty of aggravated DUI (625 ILCS 5/11-501(d)(1)(H) (West 2010)), driving while license suspended (625 ILCS 5/6-303(a) (West 2010)), and failure to stop at a stop sign (625 ILCS 5/11-1204(b) (West 2010)). At defendant's sentencing hearing, his presentence investigation report revealed that defendant had a history of mental health issues dating back to 2008. Defendant reported he voluntarily admitted himself to a psychiatric unit to seek help with his auditory hallucinations and depression. Defendant was hospitalized twice in June 2008 and also in March and April 2011. Defendant's symptoms included insomnia, auditory hallucinations, depression, and substance abuse problems. Defendant previously took psychiatric medications, but was not taking any medications at the time of sentencing. The trial court sentenced defendant to six years' imprisonment. Defendant's motion to reconsider sentence and motion for a new trial were denied. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 Defendant argues his due process rights were violated when the trial court held an inadequate fitness hearing. Specifically, defendant claims the court did not make an independent determination as to whether he was fit to stand trial.

¶ 13 Defendant did not object to the adequacy of his fitness hearing at trial or in a posttrial motion, but asks this court to review this issue under the second prong of the plain error doctrine. Under the plain error doctrine, a reviewing court may consider errors when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against

defendant; or (2) the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010). However, before addressing whether defendant's claim satisfies the plain error doctrine, we must first determine whether a clear or obvious error occurred. *Id.*

¶ 14 The due process clause of the fourteenth amendment prohibits prosecuting a defendant who is unfit for trial. *People v. Mitchell*, 189 Ill. 2d 312 (2000). A defendant is presumed fit to stand trial, and will be considered unfit only if, because of defendant's 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 2012). A defendant is entitled to a fitness hearing only when a *bona fide* doubt regarding his fitness is raised. 725 ILCS 5/104-11(a) (West 2012).

¶ 15 In this case, defense counsel requested the appointment of an expert to evaluate defendant. The State agreed that an expert should be appointed, and the trial court granted the request. In its written order, however, the court found that parties raised a *bona fide* doubt as to defendant's fitness to stand trial. It is unclear from the record what evidence the court relied on to determine that a *bona fide* doubt of defendant's fitness existed. Based on the fact that the parties presented no evidence or argument at the May 30, 2012, hearing, it appears that the court appointed Simone to evaluate defendant in order to determine whether a *bona fide* doubt of fitness existed. See 725 ILCS 5/104-11 (West 2012) (allowing a preliminary fitness examination to determine whether a *bona fide* doubt of fitness exists); *People v. Hanson*, 212 Ill. 2d 212 (2004) (stating that merely ordering a fitness examination does not necessarily imply a finding of a *bona fide* doubt). If, after the evaluation, the trial court found that no *bona fide* doubt existed, it was not required to hold a fitness hearing.

¶ 16 However, even with the trial court's written order stating that a *bona fide* doubt was raised, we conclude that the trial court's fitness determination did not violate defendant's due process rights. Defendant argues his fitness hearing was constitutionally inadequate, relying on *People v. Esang*, 396 Ill. App. 3d 833 (2009), and *People v. Contorno*, 322 Ill. App. 3d 177 (2001), to claim that the trial court failed to make an independent determination of defendant's fitness. *Esang* and *Contorno* hold that the ultimate decision about a defendant's fitness must be made by the trial court, not by the experts. Thus, a determination of fitness may not be based solely on the parties' stipulation as to a psychological conclusion finding defendant fit. *Contorno*, 322 Ill. App. 3d 177. As such, the record must show an affirmative exercise of judicial discretion regarding the determination of fitness. *Id.* In *Esang*, it was determined that the trial court's finding that defendant had been restored to fitness was insufficient where the court previously found defendant unfit and accepted defendant's unreliable stipulation as to his fitness to stand trial. *Esang*, 396 Ill. App. 3d 833. In *Contorno*, it was determined that the trial court's fitness hearing was insufficient where the court merely accepted the psychiatrist's ultimate conclusion that defendant was fit. *Contorno*, 322 Ill. App. 3d 177.

¶ 17 Here, the trial court held a hearing and stated that after reading the report, it accepted Simon's conclusion that defendant was fit. The court based its finding on the contents of the report, not the parties' stipulations as to the report's conclusion. The court also made this determination with the benefit of observing defendant during the course of the proceedings. See *People v. Lewis*, 103 Ill. 2d 111 (1984) (holding that a finding of fitness did not offend defendant's due process rights where the court relied not only on stipulations that the expert's would testify defendant was fit, but also on its observations of defendant and a review of the psychological report). In particular, the court held a prior hearing in January 2011, relating to

defendant's fitness, where it found the evidence insufficient to raise a *bona fide* doubt as to his fitness. It was not until May 2012 that defense counsel raised the concern that defendant reported hearing voices. Simone directly addressed this in the report, stating that it was normal for defendant to be hearing the voice of his friend that recently died in the car accident. Thus, the only concern relating to defendant's fitness was explained as a symptom of grief and depression.

¶ 18 Furthermore, there is no other indication in the record of defendant's unfitness for trial. Despite defendant's history of mental illness, the record reveals that defendant was appropriate and responsive to the court's questions throughout the court proceedings. See *People v. Easley*, 192 Ill. 2d 307 (2000) (finding that a defendant can be fit for trial, although his mind may be otherwise unsound, as long as he is able to function within the context of a trial). Due process does not mandate a particular procedure for an inquiry into fitness, but requires an adequate procedure to implement the right to an inquiry. *Mitchell*, 189 Ill. 2d 312. Here, the court determined defendant's fitness based on the evidence before it and properly determined that defendant was fit for trial. Therefore, we conclude defendant's due process rights were not violated. Since we find no error, the plain error exception does not apply, and we must therefore honor defendant's forfeiture of this issue. See *Thompson*, 238 Ill. 2d 598.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Kankakee County is affirmed.

¶ 21 Affirmed.