2012 IL App (4th) 110243-U

NO. 4-11-0243

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 6, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
DAVID DUPREE,	)	No. 09CF689
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in finding defendant in direct criminal contempt of court.

¶ 2 On August 20, 2009, defendant, David Dupree, was charged with burglary, a Class 2 felony (720 ILCS 5/19-1(a), (b) (West 2010)); criminal damage to property in excess of $300, a Class 4 felony (720 ILCS 5/21-1(1)(a), (2) (West 2010)); and unlawful damage to a vehicle, a Class A misdemeanor (625 ILCS 5/4-102(a)(1), (b) (West 2010)).

¶ 3 On appeal, defendant argues that the trial court abused its discretion by summarily convicting him of direct criminal contempt of court, because there was a substantial question as to whether he possessed the mental capacity to willfully commit contempt at the time of his conviction. We reverse.

¶ 4 I. BACKGROUND

¶ 5 On August 20, 2009, defendant was charged with burglary, a Class 2 felony (720 ILCS 5/19-1(a), (b) (West 2010); criminal damage to property in excess of $300, a Class 4 felony (720 ILCS 5/21-1(1)(a), (2) (West 2010)); and unlawful damage to a vehicle, a Class A misdemeanor (625 ILCS 5/4-102(a)(1), (b) (West 2010)). The following day, Assistant Public Defender Lindsay Evans was assigned to represent defendant.

¶ 6 On January 22, 2010, defendant expressed to the trial court his dissatisfaction concerning assistant public defender Evans' performance and requested a new attorney. The case was reassigned to Assistant Public Defender Joseph Miller.

¶ 7 On September 20, 2010, the trial court granted Assistant Public Defender Miller's motion for a continuance over defendant's objection. In response, defendant said "[f]uck you" to defense counsel. The court allowed defendant to apologize and warned him that it would not tolerate the further use of such language. During the continuance hearing, defendant also repeatedly expressed his desire for new counsel. The court noted that public defender Miller had been "acting diligently in trying to represent this [defendant], but clearly, there's maybe a clash of personalities and I don't think that's coming from you, Mr. Miller."

¶ 8 On October 8, 2010, the case was reassigned to Assistant Public Defender Robert Scherschligt.

¶ 9 On November 19, 2010, defendant was placed in segregation because of sexual advances he made towards another inmate. After being placed in segregation, defendant threatened to kill himself. Less than a week later, defendant was evaluated by Lydia Hicks who has a master's degree in social work and is a licensed clinical social worker. She found

defendant's suicidal statements were "incongruent" with his mood and affect, which were "appropriate" and "normal."

¶ 10 On November 29, 2010, Hicks evaluated defendant for a second time. She found defendant's threats of suicide were for secondary gain.

¶ 11 On December 8, 2010, the trial court held a hearing on defendant's motion to quash arrest and suppress physical evidence. Defendant repeatedly interrupted the proceedings to express his displeasure with the motion and desire for new defense counsel. He told the court that he did not want to proceed with the motion because defense counsel failed to consult with him about it. The court told defendant that it would hear the motion and advised him to stop disrupting the proceedings. Shortly thereafter, defendant requested to leave the courtroom. The court then excused defendant from the courtroom, and, in response, defendant stated "[f]uck that" and "[f]uck him." The court then ordered defendant removed from the courtroom. As defendant was walking to the holding cell he yelled: "Fuck all that. I ain't listening to that. Fuck all of that." Immediately afterwards, the court stated "I want [defendant] to know that he is in [c]ontempt of [c]ourt. I will give him an opportunity to address the [c]ourt but he will be held in [c]ontempt. We will do the motion, give him a minute to settle down."

¶ 12 After argument, the trial court denied the suppression motion. Defense counsel then requested that defendant undergo a fitness evaluation, because he believed a *bona fide* doubt existed as to defendant's fitness to stand trial. The court agreed with defense counsel "having observed repeated incorrect behavior in open court by this [d]efendant."

¶ 13 Next, the trial court called Barbara Krueger, a correctional officer, to testify regarding defendant's outburst in court. She testified to hearing defendant say the entire way to

the holding cell "[f]uck all that" or "[f]uck all of you."

¶ 14 Following Officer Krueger's testimony, the trial court ordered defendant back into the courtroom to explain its ruling on the suppression motion and to provide defendant with the opportunity to address the court. Once back in the courtroom, defendant continued to disrupt the proceedings. In regards to the suppression motion, defendant stated that defense counsel knew the judge was going to "deny this stupid shit." He also threatened to "file everything against" defense counsel. The court then found defendant in direct criminal contempt and sentenced him to 120 days in the Sangamon County jail, commencing that date. Later that day, the court issued an order setting forth its finding of direct criminal contempt. The court also issued a separate order requiring defendant to undergo a fitness examination pursuant to section 104-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-13 (West 2010)). The court appointed Dr. Philip Pan, a psychiatrist, to examine defendant's mental fitness.

¶ 15 On January 7, 2011, and January 27, 2011, defendant met with Dr. Pan for a fitness examination. According to Dr. Pan, he was unable to form an opinion of defendant's fitness because defendant refused to cooperate during the scheduled examinations.

¶ 16 On February 15, 2011, defense counsel filed a motion for a fitness hearing and finding that defendant was unfit to stand trial (725 ILCS 5/104-16 (West 2010)). In the motion, defense counsel alleged that defendant was unfit, because of his (1) refusal to cooperate with Dr. Pan; (2) mood disorder and symptomatology of antisocial personality diagnosed during his stay at the Mental Health Centers of Central Illinois from August 4, 2006, through December 29, 2008; (3) irrational and abusive behavior towards current defense counsel; and (4) refusal to cooperate with previously appointed counsel.

¶ 17 On February 17, 2011, after a hearing, the trial court granted defense counsel's motion for a fitness hearing. Immediately thereafter, a fitness hearing was held. The court found defendant unfit to stand trial and placed him in the custody of the Illinois Department of Human Services (DHS) for inpatient treatment. In making its determination, the court specifically noted defendant's irrational behavior, inability and unwillingness to effectively assist counsel in his representation, and failure to comply with the scheduled fitness examinations.

¶ 18 On February 25, 2011, defendant filed a *pro se* notice of appeal pursuant to Illinois Supreme Court Rule 604(e) (eff. July 1, 2006) appealing the February 17, 2011, order finding him unfit to stand trial.

¶ 19 The record was certified on May 13, 2011.

¶ 20 On May 16, 2011, the circuit clerk filed a second notice of appeal on defendant's behalf from the February 17, 2011, order finding him unfit to stand trial. That same day, the office of the State Appellate Defender (OSAD) filed a motion for leave to file late notice of appeal pursuant to Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009) on the ground that defendant's February 21, 2011, *pro se* notice of appeal "failed to include the correct dates of judgment," and inserted in the proposed notice of appeal the December 8, 2010, order finding defendant in direct criminal contempt.

¶ 21 On May 18, 2011, this court granted defendant's motion for leave to file late notice of appeal from the orders issued on February 17, 2011, and December 8, 2010.

¶ 22 According to the docket sheets in the supplemental record submitted by the State, on June 29, 2011, the trial court conducted a hearing and found defendant fit to stand trial. In making its determination, the court relied on the reports from DHS and stipulation from

defendant and the State. On July 20, 2011, defendant entered a negotiated plea to burglary to a motor vehicle in exchange for a sentence of seven years' imprisonment and the dismissal of the other two charges. The court gave defendant 715 days' sentencing credit that included his 120-day sentence for direct criminal contempt.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant argues that the trial court abused its discretion by summarily convicting him of direct criminal contempt of court when there was a substantial question as to whether he possessed the mental capacity to willfully commit contempt at the time of his conviction. Defendant further argues that his contempt conviction should be reversed because he has already served his 120-day sentence. In the alternative, defendant urges the court to remand for a hearing to allow him to present a defense.

¶ 25 In contrast, the State claims that this court lacks jurisdiction to hear defendant's appeal from the December 8, 2010, order finding him in direct criminal contempt. The State also argues that the appeal is moot because defendant has already served his 120-day sentence for contempt.

¶ 26 A. Jurisdiction

¶ 27 "The timely filing of a notice of appeal is both jurisdictional and mandatory." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009). If the notice of appeal is not properly filed, then the reviewing court has no jurisdiction over the appeal and must dismiss it. *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008).

¶ 28 " 'An order finding a person or entity in contempt of court which imposes a

monetary or other penalty' is final for purposes of appeal. [Citation.] An appeal must be filed within 30 days of the entry of the order appealed. [Citation.]" *People v. Goodwin*, 381 Ill. App. 3d 927, 933, 888 N.E.2d 140, 145 (2008). However, Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009) provides for the filing of a late notice of appeal. Under Rule 606(c), "the appellate court can allow a defendant to file a late notice of appeal within 30 days of the expiration of the appeal period, if the defendant shows a reasonable excuse, or within six months of the expiration of the appeal period, if the defendant shows a meritorious issue and a lack of culpable negligence." *People v. Ross*, 229 Ill. 2d 255, 264, 891 N.E.2d 865, 871 (2008).

¶ 29 We find that defendant filed a timely notice of appeal in sufficient compliance with Rule 606(c). The six-month extension period authorized under Rule 606(c) did not begin to run until January 7, 2011. OSAD filed a motion for leave to file a late notice of appeal on May 16, 2011, therefore the appeal was filed within the six-month period set forth in Rule 606(c). In accordance with Rule 606(c), defendant's late notice of appeal was sufficiently supported by an affidavit. Accordingly, this court has jurisdiction over defendant's appeal pursuant to Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 30 B. Mootness

¶ 31 Next we consider whether this appeal should be dismissed as moot since defendant has already served his 120-day sentence for contempt. An appeal from a contempt order is ordinarily considered moot if the party held in contempt has already completed the sentence. *In re J.L.D.*, 178 Ill. App. 3d 1025, 1030, 534 N.E.2d 190, 193 (1989). An issue raised in an otherwise moot appeal may be reviewed when (1) addressing the issues involved is in the public interest; (2) the case is capable of repetition, yet evades review; or (3) the respondent will

potentially suffer collateral consequences as a result of the trial court's judgment. *In re Alfred H.H.*, 233 Ill. 2d 345, 355-61, 910 N.E.2d 74, 80-83 (2009).

¶ 32 We first address whether the public-interest exception to the mootness doctrine applies. "The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *Alfred H.H.*, 233 Ill. 2d at 355, 910 N.E.2d at 80.

¶ 33 In this case, the underlying issue, preserving the due process rights of persons suffering with a mental illness, is of a public nature. "The due process clause of the fourteenth amendment prohibits the conviction and sentencing of a defendant who is not fit to stand trial. [Citations.]" *People v. Hill*, 345 Ill. App. 3d 620, 625, 803 N.E.2d 138, 143 (2003). There is a presumption that a defendant is fit to stand trial. *Hill*, 345 Ill. App. 3d at 625, 803 N.E.2d at 143. A defendant is considered unfit only if defendant's mental or physical condition prevents defendant from (1) understanding the nature and purpose of the proceedings against him or her or (2) assisting in his or her own defense. *Hill*, 345 Ill. App. 3d at 625, 803 N.E.2d at 143. If there is a *bona fide* doubt as to defendant's fitness to stand trial, then the court must order a fitness hearing to resolve the question of fitness before the case proceeds any further. *Hill*, 345 Ill. App. 3d at 625, 803 N.E.2d at 143.

¶ 34 In terms of the second requirement, an authoritative determination is necessary to provide guidance to judges presiding over a trial where the defendant's fitness is in question.

¶ 35 In terms of the final requirement, the likelihood of recurrence is not limited to the party on appeal. *People v. Coupland*, 387 Ill. App. 3d 774, 777, 901 N.E.2d 448, 453 (2008).

Mental illness is a recurrent issue within the criminal justice system.

¶ 36 Because the public-interest exception applies, we do not address the other two exceptions to the mootness doctrine.

¶ 37 C. Direct Criminal Contempt

¶ 38 On appeal, the standard of review for direct criminal contempt is whether sufficient evidence exists to support a finding of contempt and whether the judge considered facts outside his or her personal knowledge. *People v. Simac,* 161 Ill. 2d 297, 306, 641 N.E.2d 416, 420 (1994). "Criminal contempt of court has been generally defined as conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute." *People v. Javaras,* 51 Ill. 2d 296, 299, 281 N.E.2d 670, 671 (1972). Direct criminal contempt occurs when the contemptuous conduct takes place in the presence of the judge. *People v. Willson,* 302 Ill. App. 3d 1004, 1005, 706 N.E.2d 1075, 1077 (1999).

¶ 39 In *Trial Handbook for Illinois Lawyers,* Robert S. Hunter addresses mental illness in direct criminal contempt proceedings:

> "Courts confront complex problems when someone in the courtroom becomes unruly, either because of actual or feigned mental illness or simply because of an evident desire to disrupt the proceedings.
>
> On the one hand, a court is responsible to ensure that the proceedings are conducted in a dignified, orderly manner. On the other hand, there may be a duty to determine whether the person creating the disruption is legally accountable and to protect

> his or her rights if the person is sufficiently unbalanced." Robert S. Hunter, 1 Trial Handbook for Illinois Lawyers, Criminal § 20:7 at 489 (8th ed. 2002).

Where the record reveals a substantial issue as to the defendant's mental capacity to commit contempt, it cannot be said that all of the elements are within the court's knowledge. *People v. Sheahan*, 150 Ill. App. 3d 572, 577, 502 N.E.2d 48, 52 (1986). That is not to say that a summary finding of direct criminal contempt is never possible, that every incident of courtroom disruption requires a mental fitness hearing. In *Sheahan* the defendant, among other things, stated " 'I am Elijah, son of God,' " and the court found the defendant guilty but mentally ill. *Sheahan*, 150 Ill. App. 3d at 573, 502 N.E.2d at 50. In *Willson* the court, at the same time as it found defendant in direct criminal contempt, granted defense counsel's motion for a fitness examination. *Willson*, 302 Ill. App. 3d at 1005, 706 N.E.2d at 1076-77. *Willson* did note that the trial court's subsequent determination of unfitness did not preclude a finding of fitness at the time of the alleged contemptuous conduct. *Willson*, 302 Ill. App. 3d at 1006, 706 N.E.2d at 1077; see also *People v. Duff*, 2012 IL App (5th) 100479, ¶ 4, 970 N.E.2d 1281, 1283 (defendant stated that President Bush and Senator Demuzio had confirmed that allegations of sexual molestation of defendant's children had to be investigated).

¶ 40 In this case, defendant repeatedly interrupted the proceedings and used obscene language. In some cases that may not have raised a substantial issue as to the defendant's mental capacity to commit contempt. In this case, however, as in *Willson* and in *Sheahan*, the trial court ordered a fitness evaluation at the same time he found defendant to be in contempt, agreeing with defense counsel that a *bona fide* doubt existed as to defendant's fitness to stand trial.

¶ 41 In the interests of judicial economy, we decline to send this case back to the trial

court. Defendant has already been given credit against his burglary sentence for the 120 days at issue. Accordingly, we reverse the court's finding of direct criminal contempt.

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we reverse the trial court's judgment.

¶ 44 Reversed.