

2012 IL App (2d) 101030-U
No. 2-10-1030
Order filed June 1, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Du Page County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 99-CF-1056 |
| |) | |
| CHRISTIAN J. SCHROEDER, |) | Honorable |
| |) | Kathryn E. Creswell and |
| |) | John J. Kinsella, |
| Defendant-Appellant. |) | Judges, Presiding. |

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: The trial court lacked jurisdiction to accept defendant's admission to a petition to revoke his probation, as a finding of unfitness (despite a later finding of fitness, which the trial court did have jurisdiction to enter) was pending on appeal; thus, we vacated the revocation of probation and remanded for new proceedings on the petition.

¶ 1 Defendant, Christian J. Schroeder, appeals from an order granting the State's petition to revoke his probation.¹ He asserts that, because his appeal of an earlier finding of unfitness was

¹Although defendant's notice of appeal stated that he was appealing from an August 24,

pending in this court, the trial court lacked jurisdiction to accept his admission to a probation violation and to rule on the State's petition, so that the court's order was void. We agree.

¶ 2

BACKGROUND

¶ 3 On May 10, 2002, defendant entered a negotiated guilty plea to obstructing justice (720 ILCS 5/31-4(a) (West 1998)) and to driving with a revoked or suspended license (625 ILCS 5/6-303(a) (West 1998)) in this case (No. 99-CF-1056) and to misdemeanor theft (720 ILCS 5/16-1(a)(1)(A) (West 2000)) in another case (No. 01-CF-1725). Under the plea agreement, defendant received two years' probation. The State filed a petition to revoke his probation on October 20, 2003. Two amended petitions followed, the second of which alleged, among other things, that defendant had violated his probation by committing aggravated battery, as charged in another case (No. 04-CF-960).

¶ 4 On September 4, 2009, the trial court in this case found that a *bona fide* doubt existed as to defendant's fitness and appointed counsel to represent him. Meanwhile, in the aggravated battery case (No. 04-CF-960), defendant had a jury trial on the issue of his fitness to stand trial and was found unfit. In response, the trial court in this case took judicial notice of that finding and deemed defendant unfit for revocation proceedings. Defendant appealed the unfitness findings in this case (No. 99-CF-1056), the aggravated battery case (No. 04-CF-960), and the misdemeanor theft case (No. 01-CF-1725), in which the trial court had also taken judicial notice of the unfitness finding.

2010, order striking his postjudgment motion to rescind his admission to a probation violation, because we are to construe notices of appeal liberally (*People v. Gutierrez*, 2012 IL 111590, ¶ 9), we conclude that defendant's notice of appeal adequately informed the State that he was appealing from the order revoking his probation, not the order striking his postjudgment motion.

¶ 5 On January 7, 2010, with the appeal of the unfitness findings still pending, the trial court in this case (No. 99-CF-1056) held a hearing on whether defendant had been restored to fitness. It concluded that he had. On January 21, 2010, defendant admitted that he had violated his probation. The court entered an order granting the State’s petition to revoke his probation, and declaring the case closed. On February 19, 2010, defendant moved, on bases unrelated to those that he raises on appeal, to rescind his admission to the probation violation. The court entered an order striking the motion on the basis that the case was closed. Defendant moved for leave to file a late notice of appeal, and this court granted it.

¶ 6 Meanwhile, on December 30, 2010, this court decided defendant’s earlier appeal and affirmed the findings of unfitness. *People v. Schroeder*, Nos. 2-09-0978, 2-09-1057, 2-09-1058 cons. (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 ANALYSIS

¶ 8 On appeal, defendant now argues for the first time that, under *People v. Elsholtz*, 136 Ill. App. 3d 209 (1985), the trial court lacked jurisdiction to accept his admission and to rule on the State’s petition to revoke his probation.² Our review of whether the trial court properly exercised jurisdiction is *de novo*. *Schlosser v. State*, 2012 IL App (3d) 110115, ¶ 18.

¶ 9 The general rule is that, although the filing of a notice of appeal vests jurisdiction in the appellate court, the trial court retains jurisdiction to decide matters that are independent of, or collateral to, the judgment on appeal. *Moening v. Union Pacific R.R. Co.*, 2012 IL App (1st)

²We note that a “challenge to an alleged void order is not subject to forfeiture.” *People v. Marshall*, 242 Ill. 2d 285, 302 (2011). Therefore, no bar exists to defendant’s raising this issue for the first time on appeal.

101866, ¶ 22. “ ‘Collateral or supplemental matters include those lying outside the issues in the appeal or arising subsequent to delivery of the judgment appealed from.’ ” *Moening*, 2012 IL App (1st) 101866, ¶ 22 (quoting *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1073 (1987)). Under facts similar to the facts of this case, this court has held that the trial of a criminal defendant is not a matter that is independent of, or collateral to, an earlier finding of unfitness to stand trial. *Elsholtz*, 136 Ill. App. 3d at 211. Therefore, this court has held that the pendency of an appeal of an unfitness finding deprives a trial court of jurisdiction to decide the defendant’s guilt. *Elsholtz*, 136 Ill. App. 3d at 211.

¶ 10 In *Elsholtz*, the trial court found the defendant unfit to stand trial, and the defendant appealed. *Elsholtz*, 136 Ill. App. 3d at 209. While the appeal was pending, the trial court ruled that the defendant had been restored to fitness, held a bench trial for the defendant, and found him guilty of theft of a motor vehicle. *Elsholtz*, 136 Ill. App. 3d at 209-10. At the time of the trial, the defendant’s motion to dismiss his appeal was pending in this court, but this court had not ruled on it. *Elsholtz*, 136 Ill. App. 3d at 210. This court held that, although the trial court retained jurisdiction to hold the fitness hearing and to rule that the defendant was fit, it did not retain jurisdiction to try the defendant. *Elsholtz*, 136 Ill. App. 3d at 210-11.

¶ 11 The *Elsholtz* court first explained why the trial court had jurisdiction to hold the fitness hearing and to rule that the defendant was fit:

“The parties agree that the trial court had jurisdiction to reexamine defendant’s fitness during the pendency of the appeal from the original finding of unfitness. It could not rationally be otherwise. In cases such as that at bar, where a defendant is expected to become

fit with treatment, the statute provides for hearings to reexamine fitness at maximum intervals of 90 days.” *Elsholtz*, 136 Ill. App. 3d at 210.

The *Elsholtz* court then explained why the trial court did not have jurisdiction to try the defendant:

“A defendant who is fit may be tried; one who is unfit may not be tried. [Citation.] As this court has recognized in another context, a defendant’s unfitness can render subsequent proceedings void. [Citation.] Trial of a defendant is therefore not independent of, but rather totally dependent on, a defendant’s fitness.” *Elsholtz*, 136 Ill. App. 3d at 211.

The court concluded that, because the trial of a defendant is not independent of, or collateral to, a defendant’s fitness, the trial court lacked jurisdiction to try him. *Elsholtz*, 136 Ill. App. 3d at 211.

¶ 12 Applying the *Elsholtz* court’s reasoning to this case, we conclude that the trial court lacked jurisdiction to accept defendant’s admission and to rule on the State’s petition to revoke probation. Just as the trial of a defendant is not independent of, or collateral to, a defendant’s fitness, neither is the acceptance of a defendant’s admission to a probation violation. Although only the minimum requirements of due process must be followed in a probation revocation proceeding, due process at least requires that an admission to a probation violation be voluntary. *People v. Harris*, 392 Ill. App. 3d 503, 508 (2009). In turn, the voluntariness of an admission depends, in a significant way, on the defendant’s fitness. See *People v. Slater*, 228 Ill. 2d 137, 161 (2008) (a defendant’s unfitness to stand trial is a factor in determining that the defendant’s confession was involuntary (citing *People v. Braggs*, 209 Ill. 2d 492, 517 (2003))). Therefore, the acceptance of a defendant’s admission to a probation violation is not independent of, but largely dependent upon, the defendant’s fitness. Thus, as long as defendant’s appeal from the earlier unfitness finding remained pending, the trial court lacked jurisdiction to accept his admission and to rule on the State’s petition, thereby rendering the

trial court's order void. See *Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 926-27 (2009) (“[A]ny order entered while the circuit court is divested of jurisdiction during the pendency of an appeal *** is void.”).

¶ 13 In its brief, although the State accepted the general rule that the filing of a notice of appeal divests the trial court of jurisdiction to rule on matters that are not independent of the judgment on appeal, the State argued that, in *Elsholtz*, this court failed to consider that a finding that a defendant had been restored to fitness would render an appeal of an earlier unfitness finding moot, thereby depriving the reviewing court of jurisdiction and restoring jurisdiction to the trial court. In oral argument, however, the State conceded that this court has jurisdiction to decide whether an exception to the mootness doctrine applies, so that the law cannot be that a reviewing court automatically loses jurisdiction when a defendant is restored to fitness. The State's concession was proper. Even if a party brings to the attention of a reviewing court facts rendering an appeal moot, that court continues to have jurisdiction to decide whether a mootness exception applies.

¶ 14 In sum, once defendant filed his notice of appeal, the parties were required either to wait for jurisdiction to return to the trial court or to take positive steps to end the appeal. Of course, before the reviewing court has made a decision on the merits, an appellant has the right to have the appeal dismissed. *People ex rel. Waite v. Bristow*, 391 Ill. 101, 111 (1945); *Safeway Insurance Co. v. American Arbitration Ass'n*, 247 Ill. App. 3d 355, 358-59 (1993). Thus, the appellant can return jurisdiction to the trial court nearly at will. That, of course, would be at the expense of review of the unfitness finding, a finding that might have collateral consequences for a defendant. Where, as here, a defendant-appellant is *pro se* in the trial court, the interests of efficiency might be best served if

the trial court explained to such a defendant that he or she has a choice between going forward with the appeal or dismissing the appeal and recommencing the trial court proceedings.

¶ 15

CONCLUSION

¶ 16 Under the reasoning of *Elsholtz*, the trial court lacked jurisdiction to accept defendant's admission and to rule on the State's petition to revoke his probation. The trial court's order revoking defendant's probation was therefore void. We vacate the revocation order and remand the matter for new proceedings on the petition to revoke probation.

¶15 Vacated and remanded.