2017 IL App (3d) 150587-U

Order filed December 6, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0587 Circuit No. 09-CF-2067
MARIO C. BOLDEN,	)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of defendant's postconviction petition at the second stage of postconviction proceedings was proper where the petition failed to allege a substantial showing of a due process violation.

¶ 2 Defendant, Mario C. Bolden, appeals the second-stage dismissal of his postconviction petition. Defendant initially calls our attention to a form order signed by the circuit court stating a *bona fide* doubt existed with regard to defendant's fitness. Relying on this form order, defendant argues that his petition made a substantial showing that the circuit court violated his

due process rights when it accepted defendant's guilty plea without first conducting a fitness hearing. We affirm.

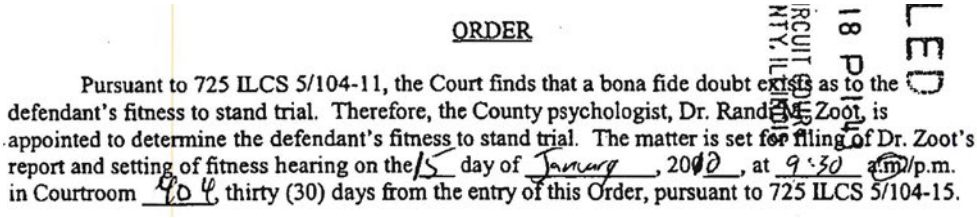
¶ 3 FACTS

¶ 4 Defendant was charged with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), aggravated battery (720 ILCS 5/12-4(a) (West 2008)), and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2008)).

¶ 5 At a pretrial hearing, defense counsel made an oral motion to have defendant evaluated by the county psychologist, Dr. Randi Zoot. The State did not object. The circuit court granted the motion, stating:

> "All right. [Defendant], Dr. Zoot's going to examine you, and we will have you back in court on January 15th for receipt of that report. That's at the defendant's request, no objection by the State."

The circuit court also entered a written order that day. The written order was a form order on which the circuit court filled in blanks to indicate the date of the next hearing. Below is a copy of the pertinent portion of the form order.



ORDER

Pursuant to 725 ILCS 5/104-11, the Court finds that a bona fide doubt exists as to the defendant's fitness to stand trial. Therefore, the County psychologist, Dr. Randi M. Zoot, is appointed to determine the defendant's fitness to stand trial. The matter is set for filing of Dr. Zoot's report and setting of fitness hearing on the 15 day of January, 2010, at 9:30 a.m./p.m. in Courtroom 404, thirty (30) days from the entry of this Order, pursuant to 725 ILCS 5/104-15.

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¶ 6 Zoot filed a psychological evaluation report on February 8, 2010. The report noted that defendant was being treated with the psychotropic medication Risperdal for a psychotic disorder. Defendant was also taking Cogentin. Defendant told Zoot that he did not know why he had been prescribed psychotropic medication. Defendant did not like how the medication made him feel, and he did not believe he needed the medication. During the examination, defendant was alert,

cooperative, and oriented to person, place, date, and situation. There was no evidence of delusions or hallucinations. Zoot opined that defendant had an adequate understanding of court proceedings, the charges against him, and the role of the court participants. Zoot also opined that defendant would be able to cooperate with his defense attorney. Zoot concluded that defendant was mentally fit to stand trial, and his medication did not interfere with his ability to stand trial. Zoot also noted that defendant indicated that he intended to stop taking his medication. Zoot stated that defendant could be reevaluated "if any deterioration [was] noted."

¶ 7 At a pretrial hearing on March 11, 2010, defense counsel stated that he had received Zoot's report, but he wanted one week to speak to defendant about it. The circuit court continued the matter for one week. Several more pretrial hearings were held, but the parties did not discuss the fitness evaluation.

¶ 8 On December 23, 2010, the State filed an information charging defendant with attempted first degree murder as a Class 1 felony (720 ILCS 5/8-4(a), (c)(1)(E), 9-1(a)(1) (West 2010)) rather than a Class X felony. Defendant agreed to plead guilty to that charge in exchange for a sentence of 14 years' imprisonment and the dismissal of the remaining charges. At the guilty plea hearing, the circuit court asked defendant if he was taking any medication. Defendant said "no." After admonishing defendant, the court accepted defendant's guilty plea and sentenced him to 14 years' imprisonment.

¶ 9 Defendant filed a *pro se* motion to withdraw guilty plea, but he later retracted it. He then filed a motion to reduce sentence, which the circuit court denied on the basis that it was untimely. Defendant did not file a direct appeal.

¶ 10 Defendant filed a *pro se* postconviction petition on April 29, 2013. The circuit court advanced the petition to the second stage of postconviction proceedings and appointed counsel.

Defendant filed an amended postconviction petition through counsel. Defendant then filed a second amended postconviction petition. The second amended petition alleged that the circuit court found that a *bona fide* doubt as to defendant's guilt existed, and the court ordered Zoot to conduct a fitness examination of defendant. The petition stated that Zoot examined defendant and filed her report, but no fitness hearing was held. The petition further alleged that once a *bona fide* doubt as to fitness has been raised, the circuit court must make an inquiry as to defendant's fitness to stand trial.

¶ 11 The State filed a motion to dismiss the second amended petition. The circuit court granted the State's motion to dismiss, finding that defendant had not substantiated his claim that he was unfit at the time of his plea. The court subsequently denied defendant's motion to reconsider.

¶ 12 ANALYSIS

¶ 13 Defendant argues that his second amended postconviction petition made a substantial showing that the circuit court violated his due process rights. Specifically, defendant alleges that after the court signed the form order finding a *bona fide* doubt of defendant's fitness and ordering a psychological evaluation, the court erred when it failed to hold the statutorily required fitness hearing before accepting defendant's guilty plea. "[O]nce the trial court concludes that a *bona fide* doubt exists concerning the defendant's fitness, the defendant becomes constitutionally entitled to a fitness hearing." *People v. Smith*, 353 Ill. App. 3d 236, 240 (2004). We begin our analysis with a review of section 104-11 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/104-11(West 2010)). In relevant part, section 104-11 states:

> "(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(a), (b) (West 2010).

¶ 14 In *People v. Hanson*, 212 Ill. 2d 212, 217-18 (2004), the supreme court explained the distinction between sections 104-11(a) and (b) of the Code. Specifically, the court stated:

"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. 725 ILCS 5/104-11(b) (West 2000). 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) (725 ILCS 5/104-11(a) (West 2000)). *People v. Haynes*, 174 Ill. 2d 204, 226 (1996), citing 725 ILCS 5/104-11(a) (West 1992). Conversely, if after the examination the trial court finds no *bona fide* doubt, no

> further hearings on the issue of fitness would be necessary. Alternatively, section 104-11(b) may be bypassed entirely if the trial court has already determined without the aid of a section 104-11(b) examination that there is a *bona fide* doubt of the defendant's fitness. In that instance, the trial court would be obliged under section 104-11(a) to hold a fitness hearing before proceeding further. 725 ILCS 5/104-11(a) (West 2000). 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) aids the trial court in deciding whether there is a *bona fide* doubt of fitness. See Ill. Const. 1970, art. I, § 2; U.S. Const., amends. VI, XIV." *Id.*

¶ 15 Viewing the record in totality, we hold that the circuit court in the instant case merely granted defendant's motion for a psychological evaluation under section 104-11(b). We do not believe the court, upon orally granting the motion, actually found a *bona fide* doubt existed under section 104-11(a). Several facts support this interpretation.

¶ 16 First, we note that all defendants are initially presumed "fit to stand trial or to plead." 725 ILCS 5/104-10 (West 2010). Second, defense counsel, when orally moving for the psychological examination, did not allege that he believed a *bona fide* doubt existed with regard to defendant's fitness. Instead, counsel stated: "I would make an oral motion to have my client examined by Dr. Zoot." Third, the State did not raise any concern of defendant's fitness. Therefore, neither party, at any point in the proceedings, raised a *bona fide* doubt of defendant's fitness. Fourth, and perhaps most significantly, the circuit court's oral pronouncement granting defendant's motion is devoid of any language indicating that the court believed a *bona fide* doubt existed. The court

granted the oral motion noting the motion was made by defense counsel and the State offered no objection. The court informed defendant that Dr. Zoot was going to evaluate him, and instructed the parties that they would be "back in court on January 15th for receipt of that report."

¶ 17 We believe the above facts, when viewed in conjunction with one another, establish that the court's oral pronouncement was intended to simply allow the psychological evaluation for the limited purpose of determining whether a *bona fide* doubt *actually* existed. See 725 ILCS 5/104-11(b) (West 2010). "The mere act of granting a defendant's motion for a fitness examination cannot, by itself, be construed as a definitive showing that the trial court found a *bona fide* doubt of the defendant's fitness." *Hanson*, 212 Ill. 2d at 222. Here, upon the parties return to court, defense counsel acknowledged he received Zoot's report, which opined defendant was fit to stand trial. The circuit court granted counsel's request that he be allowed a one-week continuance to speak with defendant regarding the report. The question of defendant's fitness was never revisited and defendant ultimately pled guilty to the charged offenses. We hold that a defendant's due process rights are not implicated under such a scenario as he is presumed fit and only entitled to a fitness hearing if the circuit court *actually* determines a *bona fide* doubt exists as to his fitness. See *id.* at 218; see also 725 ILCS 5/104-11(b) (West 2010) (providing "no order entered pursuant to this subsection shall prevent further proceedings in the case"). Here, the court's oral pronouncement does not constitute such a finding.

¶ 18 In coming to this conclusion, we acknowledge the circuit court's oral pronouncement conflicts with its written form order (*supra* ¶ 5). At the outset, we note that "[w]hen the oral pronouncement of the court and the written order are in conflict, the oral pronouncement of the court controls." *People v. Truesdell*, 2017 IL App (3d) 150383, ¶ 15. Moreover, we emphasize that the written order is merely a form order, which simply bears the court's signature and the

date it selected for the parties to return to court. Stated another way, we do not believe the written form order actually reflects the intent of the court. Instead, we believe the actual intent of the court is born out via its oral pronouncement and interaction with the parties. Finally, we note that the written form order does not identify any specific subsection—(a) or (b). Instead, it simply states: "Pursuant to 725 ILCS 5/104-11, the Court finds ***."

¶ 19 We recently addressed a similar situation in *People v. Edwards*, 2017 IL App (3d) 130190-B. The defendant in *Edwards* argued plain error where the circuit court failed to hold a fitness hearing after it signed an order finding a "*bona fide* doubt" of the defendant's fitness and ordering a psychological evaluation. In response, the State argued that the court did not actually raise or find a *bona fide* doubt of the defendant's fitness but merely granted the defendant's motion for a fitness examination. On review, we found no error, plain or otherwise, in the circuit court's decision to proceed to trial without holding a fitness hearing. *Id.* ¶ 73. Specifically, we stated:

> "[D]efendant here brought his motion pursuant to section 104-13(a), requesting that the court appoint a qualified expert to evaluate defendant's fitness to stand trial, not under 104-11(a). Although the order the court signed contained the language '*bona fide* doubt,' it was defendant who drafted this order. A review of the record gives us no indication whatsoever that the trial court or the State implicitly agreed with defense counsel, or raised on their own a *bona fide* doubt of defendant's fitness. We note that under *Hanson*, even if defendant filed a motion 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. [Citation.] Considering

that contemporaneously with the substance of defendant's motion, we find that defendant merely requested an expert evaluation." *Id.* ¶ 71.

¶ 20 Like *Edwards*, the record before us does not contain any evidence that the circuit court, or even the parties for that matter, *actually* believed a *bona fide* doubt existed with regard to defendant's fitness. Accordingly, defendant's due process rights were not violated when the circuit court accepted his plea in the absence of a fitness hearing.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County dismissing defendant's second amended postconviction petition is affirmed.

¶ 23 Affirmed.