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No. 3--09--0953

Order filed May 13, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 12th Judicial Circuit
	)	Will County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08--CF--2042
	)	
LEE E. SMITH,	)	Honorable
	)	Amy Bertani-Tomczak
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Carter and Justice Wright concurred in the judgment.

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**ORDER**

Held: Trial court's finding of fitness did not violate defendant's due process rights where it was based not entirely on the parties' stipulations but also on the contents of a psychological report and the observations of the trial court.

Defendant, Lee Smith, was charged with sexual assault (720

ILCS 5/12--13(a)(1), (a)(4) (West 2008)). On the day defendant's trial was scheduled to begin, defendant's attorney requested that defendant undergo a psychiatric examination to determine his fitness to stand trial. The trial court entered an order, requiring defendant to undergo a fitness examination. The psychologist who examined defendant prepared a report in which she found defendant fit to stand trial. The State and defense counsel stipulated to the report, and the court found defendant fit. Defendant's case proceeded to trial. The court found defendant guilty of all of the charges against him and sentenced him to two consecutive five-year terms of imprisonment. On appeal, defendant argues that the trial court erred in finding him fit to stand trial. We affirm.

In February 2008, when defendant was 44 years old, he was charged with four counts of sexual assault against his girlfriend's 17-year-old daughter, T.S. Defendant's case was assigned to Judge Amy Bertani-Tomczak. Defendant first appeared before Judge Bertani-Tomczak on November 7, 2008. Thereafter, defendant was present in court before Judge Bertani-Tomczak on at least five occasions from December 9, 2008, to May 19, 2009.

Defendant's trial was scheduled to begin on June 25, 2009. On that date, defendant's attorney informed Judge Bertani-Tomczak that

he had "serious doubt" about whether defendant was fit to stand trial and asked for a fitness examination. The State did not object. Defendant was given an opportunity to speak. He explained that he was not crazy but was upset because "the State's Attorney made a [sic] illegal background report up on me." He claimed that T.S. was raped by someone else and that he considered T.S. to be like a daughter. Defendant said he had "no problem" with undergoing a fitness evaluation. The trial court entered an order finding that "a bona fide doubt exists as to the defendant's fitness to stand trial." The court appointed Dr. Randi Zoot to examine defendant to determine his fitness to stand trial.

Dr. Randi Zoot evaluated defendant on July 16, 2009, and prepared her report on July 23, 2009. In her report, Dr. Zoot concluded that defendant was not suffering from a mental disorder. Defendant demonstrated to Dr. Zoot that he adequately understood the charges against him, the role of the court participants and court proceedings and could cooperate with his attorney in his defense. Dr. Zoot noted that defendant might be difficult to represent because "he can be concrete and rigid in his beliefs with regard to what should be presented at trial." Nevertheless, she found no evidence that a mental disorder prevented defendant from cooperating with his attorney; rather, "any lack of cooperation

should be considered volitional."

On August 5, 2009, the parties appeared before Judge Bertani-Tomczak for a fitness determination. Judge Bertani-Tomczak indicated that she had a copy of Dr. Zoot's report. The prosecutor stated: "I believe, judge, the State and the defense will stipulate to the contents and the finding of Dr. Zoot for purpose of fitness hearing and that by that stipulation, Judge, he would be found fit." Immediately thereafter, defendant stated that he wanted to fire his attorney, claiming that he was not adequately representing him. The trial court discussed the situation with defendant and his attorney for some time. After those discussions, defendant indicated that he was ready to go to trial with his current attorney.

Immediately thereafter, the court returned to the fitness issue and asked if the parties "were stipulating to the report." The prosecutor responded: "State is stipulating to the report, Judge." Defense counsel responded: "I will stipulate to the report." The trial court then stated: "[B]ased upon the stipulations and the contents of the report, the Court finds that the defendant is present [sic] currently fit to stand trial."

Defendant's bench trial took place on September 14 and 15, 2009. After all of the evidence was presented, the trial court

found defendant guilty of four counts of sexual assault. The trial court sentenced defendant to two five-year terms of imprisonment, to be served consecutively. Defendant filed a motion for a new trial, which the trial court denied.

#### ANALYSIS

Defendant argues that his due process rights were violated because the trial court failed to make an independent evaluation of his fitness. The State responds that the issue is waived or, alternatively, lacks merit because the trial court independently determined that defendant was fit.

Defendant concedes that he did not raise this issue at trial or in his posttrial motion. While errors that are not raised at trial and contained in a posttrial motion are generally deemed waived, an issue may be reviewed as plain error where it concerns a substantial right. *People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001). The determination of a defendant's fitness to stand trial concerns a substantial right, and plain-error review is appropriate. *Id.* Thus, we review this issue for plain error.

The due process clause of the fourteenth amendment bars prosecuting a defendant who is unfit to stand trial. *People v. Shum*, 207 Ill. 2d 47, 57 (2003). A defendant is unfit to stand trial if, based on a 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 2008); *People v. Burton*, 184 Ill. 2d 1, 13 (1998).

When a bona fide doubt of fitness has been raised, the party alleging that the 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. Baugh*, 358 Ill. App. 3d 718, 732 (2005). A trial court's determination of fitness may not be based solely on stipulations to the existence of psychiatric conclusions or findings. *Contorno*, 322 Ill. App. 3d at 179. However, a trial court may consider stipulated testimony in determining a defendant's fitness. *Id.*

The ultimate decision about a defendant's fitness must be made by the trial court, not by the experts. *Contorno*, 322 Ill. App. 3d at 179. A trial court must analyze and evaluate the basis for an expert's opinion instead of merely relying on the expert's ultimate opinion. *Id.* "The court should not be passive, but active in making the assessment as to fitness which the law requires." *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987).

Normally, a court's ruling on the issue of fitness will not be reversed absent an abuse of discretion. *People v. Jones*, 349 Ill. App. 3d 255, 261 (2004). However, the trial record must

affirmatively show that the trial court exercised judicial discretion in determining the defendant's fitness. Id.

Where a trial court fails to conduct an independent inquiry into a defendant's fitness but, instead, relies exclusively on the parties' stipulations to a psychological report finding defendant fit, a defendant's due process rights are violated. See *People v. Cleer*, 328 Ill. App. 3d 428, 431-32 (2002); *Contorno*, 322 Ill. App. 3d at 179; *Thompson*, 158 Ill. App. 3d at 865; *People v. Greene*, 102 Ill. App. 3d 639, 643 (1981). However, where a trial court's finding of fitness is based not only on stipulations but also on its observations of defendant and a review of a psychological report, a defendant's due process rights are not offended. See *People v. Lewis*, 103 Ill. 2d 111, 116 (1984); *People v. Robinson*, 221 Ill. App. 3d 1045, 1050 (1991); *People v. Mounson*, 185 Ill. App. 3d 31, 37-38 (1989).

Here, the trial court explained that its fitness determination was not based entirely on the parties' stipulations, but also on the content of Dr. Zoot's psychological report. Additionally, the trial court was able to observe defendant on several occasions prior to making its fitness determination. During the fitness hearing and at the court proceeding immediately prior thereto, the trial court engaged in lengthy discussions with defendant. Thus,

the fitness finding was also based on the court's independent, in-court observations of defendant. Because the record shows that the court did more than simply rely on the parties' stipulations in reaching its fitness determination, defendant's due process rights were not violated. See Robinson, 221 Ill. App. 3d at 1050; Mounson, 185 Ill. App. 3d at 37-38.

#### CONCLUSION

The judgment of the Circuit Court of Will County is affirmed.

Affirmed.