

NOTICE
Order filed 05/13/21. Modified
on denial of rehearing
06/18/21.

2021 IL App (5th) 170488-U

NO. 5-17-0488

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under
Supreme Court Rule 23 and is
not precedent except in the
limited circumstances allowed
under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Fayette County.
)	
v.)	No. 16-CF-233
)	
THOMAS McCALL,)	Honorable
)	Kevin S. Parker,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held:* Because, as the parties agree, the defendant in this case is entitled by law to new fitness proceedings at which he is represented by counsel, we vacate the trial judge’s finding of fitness and remand to the circuit court of Fayette County for that limited purpose. Because the sole issue raised in this appeal—whether the defendant voluntarily waived his right to counsel—is inextricably tied to the question of the defendant’s fitness at that time, we decline to address that issue until the defendant has had new fitness proceedings at which he is represented by counsel to advocate on his behalf, and the results of those proceedings have been made known to this court.

¶ 2 The defendant, Thomas McCall, appeals his convictions and sentences, in the circuit court of Fayette County, for methamphetamine and cannabis related offenses. He does not challenge the facts related to those offenses, instead contending only that he was

deprived of his right to counsel in this case. For the following reasons, we vacate the trial judge's finding of fitness and remand for the limited purpose of new fitness proceedings for the defendant at which he is represented by counsel to advocate on his behalf.

¶ 3

I. BACKGROUND

¶ 4 The facts of relevance to our present disposition of this appeal are largely undisputed. Following several court appearances at which the defendant, who was unrepresented by counsel in all of the proceedings in the circuit court, acted in a manner that made it difficult for the criminal proceedings against the defendant to move forward in a coherent way, the trial judge announced that he found “that a *bona fide* doubt exists as to the defendant's fitness.” The trial judge asked the State who it recommended to conduct a fitness examination. The State suggested either “Dr. Klug or Dr. Cuneo.” The trial judge asked the State to prepare an order for the defendant to be examined by Dr. Klug. The trial judge did not appoint counsel to represent the defendant for purposes of the fitness examination, or for any other purposes, although the trial judge did, over the objection of the defendant, appoint standby counsel. Thereafter, the defendant was found fit to stand trial. Because the defendant refused to attend his jury trial, the trial was conducted without his presence. He was convicted by the jury and thereafter sentenced by the trial judge—at a hearing the defendant did not attend—to imprisonment in the Illinois Department of Corrections. This timely appeal followed.

¶ 5

II. ANALYSIS

¶ 6 On appeal, the defendant contends that he was deprived of his right to counsel in this case. He contends that he never made a valid waiver of his right to counsel, and that

the trial judge erred by allowing the case to proceed without counsel to represent the defendant. The defendant further contends that the appointment of standby counsel did not cure the judge's error in this case. The defendant contends that this is true even if, legally speaking, the defendant was fit to stand trial in this case, because that does not change the fact that he never made a valid waiver of his right to counsel. The State argues that the defendant, by his words and actions, made a knowing, intelligent, and voluntary waiver of his right to counsel, but concedes that the defendant is correct that once the trial judge found a *bona fide* doubt as to the fitness of the defendant, the trial judge was required to appoint counsel to represent the defendant, and that the appointment of standby counsel was not sufficient. The State concedes that because of this error, this court must vacate the trial judge's finding of fitness and remand for new fitness proceedings at which the defendant is represented by counsel. We agree.

¶ 7 In *People v. Washington*, 2017 IL App (4th) 150054, ¶¶ 18-22, our colleagues in the Fourth District examined longstanding Illinois caselaw and concluded that it is well established in this state that once a trial judge finds that there exists a *bona fide* doubt as to the fitness of a defendant, the trial judge must appoint counsel—not merely standby counsel—to represent the defendant at the defendant's subsequent fitness hearing, even if the defendant does not wish for counsel to be appointed. The *Washington* court specifically noted the importance of appointed counsel acting “ ‘as an active adversary on the defendant's behalf instead of as a passive bystander to the proceedings.’ ” *Id.* ¶ 19 (quoting *People v. Rath*, 121 Ill. App. 3d 548, 551 (1984)). The court reasoned that “where a trial court finds a *bona fide* doubt exists as to a defendant's fitness to stand trial,

the defendant loses the ability to knowingly and intelligently waive the right to counsel,” and concluded that “[o]nce this *bona fide* doubt is established, the court is required—even over the defendant’s objection—to appoint counsel to represent the defendant until [the defendant] regains fitness to stand trial.” *Id.* ¶ 21. The proper remedy when that does not happen is to remand to the trial court for new fitness proceedings at which the defendant is represented by counsel. *Id.* ¶ 23. Although in the past retrospective fitness proceedings were viewed with skepticism and were disfavored, they are now considered an acceptable way to handle a situation where a defendant has been convicted after an error in earlier fitness proceedings. See, e.g., *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 38. Under appropriate circumstances, if on remand the defendant’s fitness at his prior trial can be accurately assessed and confirmed, it is possible for the defendant’s convictions and sentences to be affirmed on appeal thereafter. *Id.* If, on the other hand, following the proceedings on remand the circuit court determines that the evidence with regard to the defendant’s fitness at his prior trial is inconclusive or suggests that the defendant was unfit, the defendant is entitled to a new trial. *Id.*

¶ 8 In this case, the requirement for remand notwithstanding, the State, in its brief on appeal, appears to suggest that this court should nevertheless consider the merits of the defendant’s contention on appeal, so that the defendant’s convictions and sentences may be affirmed quickly if the retrospective fitness hearing shows the defendant was fit at the time of his prior trial. We acknowledge that, in some cases, courts of review have proceeded in this fashion. However, because the sole issue raised in this appeal—whether the defendant voluntarily waived his right to counsel—is inextricably tied to the question

of the defendant's fitness at that time, we decline to address that issue until the defendant has had new fitness proceedings at which he is represented by counsel to advocate on his behalf, and the results of those proceedings have been made known to this court, because we believe the results of the proceedings on remand will be an important factor in our analysis of whether the defendant made a valid waiver of his right to counsel in this case. Of course, if the trial judge determines, following the proceedings on remand, that the evidence with regard to the defendant's fitness at his prior trial is inconclusive or suggests that the defendant was unfit, and therefore grants the defendant a new trial, the trial judge may do so without further input from this court. See, *e.g.*, *id.* ¶ 80.

¶ 9

III. CONCLUSION

For the foregoing reasons, we vacate the trial judge's finding of fitness and remand this case to the circuit court of Fayette County for the limited purpose of new fitness proceedings for the defendant at which he is represented by counsel to advocate on his behalf. We expressly note that if the retrospective fitness hearing in the circuit court results in a finding that the defendant was fit for trial, then pursuant to our reasoning in *People v. Moore*, 408 Ill. App. 3d 706, 713 (2011), we retain jurisdiction, pursuant to Illinois Supreme Court Rule 615(b)(2) (eff. Jan. 1, 1967), to consider the merits of the defendant's claim that he was deprived of his right to counsel, which we have declined to consider until the retrospective fitness hearing occurs. Also pursuant to *Moore* (see *id.*), we direct the circuit court to deliver to the clerk of the Appellate Court a report of its findings and a record of the proceedings on remand.

¶ 10 Fitness finding vacated; cause remanded with directions.