No. 125203

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate
	)	Court of Illinois,
Plaintiff-Appellant,	)	Third Judicial District,
	)	No. 3-17-0119
	)	
v.	)	There on Appeal from the
	)	Circuit Court for the Tenth
	)	Judicial Circuit, Peoria
	)	County, No. 16 CF 315
	)	
SHAWN MARLON BROWN,	)	The Honorable
	)	Jodi M. Hoos,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. Because Judge Kouri Never Found a Bona Fide Doubt of Defendant's Fitness, No Fitness Hearing Was Required.

The People's opening brief demonstrated that the appellate court's judgment should be reversed on any of three independent bases. First, no fitness hearing was required because Judge Kouri never found a bona fide doubt of defendant's fitness. Second, even if Judge Kouri had found a bona fide doubt of defendant's fitness (and he did not), Judge Hoos properly exercised her independent discretion to find that defendant was fit for trial. And third, even if a fitness hearing was required and Judge Hoos did not exercise her independent discretion in finding defendant fit for trial, the proper remedy was a retrospective fitness hearing, not a new trial.

On the first point, defense counsel merely sought an evaluation to determine *whether* there was a bona fide doubt of defendant's fitness, which Judge Kouri granted without comment. R23. These circumstances are insufficient to satisfy defendant's "burden of proving that his demeanor and behavior provided evidence of bona fide doubt of his fitness." *People v. Hanson*, 212 Ill. 2d 212, 224 (2004). Judge Kouri never stated that he found a bona fide doubt of defendant's fitness, and counsel never requested a fitness hearing. Because Judge Kouri never found a bona fide doubt of defendant's fitness, no fitness hearing was necessary. *Id.* at 217; *People v. Schnoor*, 2019 IL App (4th) 170571, ¶¶ 48-49; *People v. Westfall*, 2018 IL App (4th) 150997,

¶ 57; *People v. Edwards*, 2017 IL App (3d) 130190-B, ¶ 72; *People v. Vernon*, 346 Ill. App. 3d 775, 779 (3d Dist. 2004).

Defendant's argument that defense counsel "was, in effect, alerting the court that he believed Brown's fitness to stand trial was in question," Def. Br. 9,[1] effectively concedes the People's point that counsel sought an evaluation to determine *whether* there was a bona fide doubt of defendant's fitness, which fails to distinguish this case from *Hanson*. The mere fact that counsel requested an evaluation (or even that the judge granted one) does not establish that the court found a bona fide doubt of defendant's fitness. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 132 (where defense counsel expressed doubt about the defendant's fitness, but trial court never found a bona fide doubt, fitness evaluation ordered pursuant to section 104-11(b)); *Hanson*, 212 Ill. 2d at 218 (section 104-11(b) aids trial court in deciding whether there is a bona fide doubt of fitness).

Nor is the fact that Judge Kouri vacated the scheduled trial date proof that he found a bona fide doubt of defendant's fitness. *See* Def. Br. 10. Instead, defense counsel's oral motion for a fitness evaluation came a mere week before the scheduled trial date, and the court vacated the trial date and set the matter out for 30 days to permit the evaluator sufficient time to

[1] "R." denotes the record on appeal, "C" the common law record, "SC" the supplemental common law record, "Def. Br." defendant's brief before this Court, and "Peo. Br." the People's opening brief before this Court.

conduct the fitness evaluation. R23 (court confirming with parties that "we are going to vacate the trial date," "order an evaluation," and "come back in 30 days"); R24 (prosecutor notes that Dr. Finkenbine's office usually performs "pretty timely" evaluations; court says that if defense counsel has no objection, it will order that the evaluation be conducted by Dr. Finkenbine's office and "we'll set this out").

The People's opening brief further explained that although the argument that the court never found a bona fide doubt as to defendant's fitness was not raised in the appellate court or in the PLA, it is not barred by forfeiture. Peo. Br. 9 n.3 (citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009), and *People v. McKown*, 236 Ill. 2d 278, 310 (2010) (omission from PLA presents no jurisdictional bar and review is appropriate where issue is inextricably intertwined with other matters properly before the Court)).

Defendant's contrary arguments are unavailing. *See* Def. Br. 6-8. Although the People did not raise the no-bona-fide-doubt argument in the appellate court, defendant's waiver arguments fail. Defendant does not dispute that the bona fide doubt issue is inextricably intertwined with the question of whether Judge Hoos appropriately exercised her independent discretion to find defendant fit to stand trial. *See In re Rolandis G.*, 232 Ill. 2d 13, 37 (2008) (although Court's discretion to review matter not properly preserved should not be exercised arbitrarily, review of issue not specifically mentioned in PLA will be appropriate when that issue is inextricably

intertwined with other matters properly before Court). And defendant concedes that "the waiver rule is generally enforced against the State only when the State seeks to overturn the trial court's ruling." Def. Br. 6.

Defendant's reliance on *People v. Carter*, 208 Ill. 2d 309 (2003), Def. Br. 6-7, is also misplaced. In *Carter*, the defendant argued in the appellate court that the trial evidence warranted an involuntary manslaughter instruction. 208 Ill. 2d at 318. This Court held that the People had waived their argument, raised for the first time in their appellee's brief before the Court, that the evidence did not warrant the instruction. *Id.* The Court reasoned that although the defendant had raised the argument in the appellate court, the State had failed to respond to it there and did not argue in its PLA that the appellate court erred in holding that the evidence warranted the involuntary manslaughter instruction. *Id.* Here, unlike *Carter*, defendant never argued below that he had established a bona fide doubt of his fitness; at most, his argument that Judge Hoos erred when she failed to affirmatively exercise her discretion "to make a conclusion about his fitness" merely proceeded from the *assumption* that Judge Kouri had found a bona fide doubt of fitness. *See* Appellant's brief, *People v. Brown*, No. 3-17-0119, at 7. The State's brief below responded to the claim as defendant presented it and argued that (1) the claim was forfeited; (2) because the only evidence of defendant's fitness was Dr. Clore's report, Judge Hoos could not have reached any conclusion other than that the defendant was fit to stand trial; and (3)

the record affirmatively established that the judge exercised her discretion in making the fitness determination. Appellee's Brief, *People v. Brown*, No. 3-17-0119, at 2-8. In short, unlike *Carter*, the People cannot be faulted because their appellee's brief below did not respond to a bona fide doubt argument that defendant never raised.

Nor is it true that the People "agreed below that [defendant] was constitutionally entitled to a fitness hearing," such that the People should be "estopped" from raising the contrary argument here. Def. Br. 8. Tellingly, defendant fails to provide any record citation in support of this assertion. *Id.* Nor could he provide such a citation, for nowhere in the record or in the appellate briefing below did defendant argue or the People agree that defendant had established a bona fide doubt of his fitness such that he was entitled to a fitness hearing. *People v. Keller*, 93 Ill. 2d 432 (1982), on which defendant relies, Def. Br. 6, thus *undermines* defendant's waiver/estoppel argument. Because here, as in *Keller*, the People did not previously make any assertion contrary to the position they adopt in this Court, nor was there any acquiescence on their part because defendant never argued that there was a bona fide of his fitness, the People did not waive their right to raise the bona fide doubt issue in this appeal. 93 Ill. 2d at 438-39.

Even if the Court were to find that the People waived this argument, it is beyond dispute that this Court may excuse a litigant's waiver because "waiver is a limitation on the parties and not on the [C]ourt." *People v. Pelt*,

207 Ill. 2d 434, 440 (2003) (choosing to address issue omitted from State's PLA); *Donoho*, 204 Ill. 2d at 169 (same). It is equally well-established that the Court "may override considerations of waiver in furtherance of its responsibility to maintain a sound and uniform body of precedent." *In re D.F.*, 208 Ill. 2d 223, 239 (2003). That consideration carries substantial weight here because the facts of this case are virtually indistinguishable from those presented in *Hanson*, 212 Ill. 2d 212, and the appellate court reached a contrary outcome. To reach a different outcome on indistinguishable facts would frustrate, rather than promote, uniformity.

In sum, because neither counsel's request for a fitness evaluation nor the fact that the court vacated the trial date pending completion of the fitness evaluation establishes that the court found a bona fide doubt of defendant's fitness, defendant had no right to a fitness hearing, and the court was not required to hold one. Accordingly, there was no error, much less plain error, and this Court should affirm defendant's conviction. *Edwards*, 2017 IL App (3d) 130190-B, ¶¶ 71-73 (finding "no error, plain or otherwise, in the trial court's decision to proceed to trial without holding a fitness hearing" where court made no finding of bona fide doubt).

II. Alternatively, Judge Hoos Exercised Her Independent Discretion to Find Defendant Fit to Stand Trial.

Because the fairest reading of the record reveals that Judge Kouri never found a bona fide doubt of defendant's fitness, Judge Hoos was not required to hold a fitness hearing, and thus the September 29, 2016

proceedings before Judge Hoos were not a fitness hearing, but instead merely a status date for return of the fitness evaluation report. R23; C44 (court set matter for "review" on September 29, 2016).

But even if Judge Kouri found a bona fide doubt of defendant's fitness during the August 29th pre-trial conference (and he did not), such that the September 29th proceedings are properly considered to be a fitness hearing, the record establishes that Judge Hoos exercised her independent judicial discretion to find that defendant was fit to stand trial. Peo. Br. 14-16.

Both the judge's written order and her contemporaneous remarks rebut defendant's assertion that she impermissibly relied upon a stipulation by the parties that defendant was fit to stand trial. Instead, the court's written order establishes that the parties "stipulate[d] to [the] *contents* of [the] report." C54 (emphasis added). And though defendant complains that "there is no indication that Judge Hoos even read the report," Def. Br., 13, in her oral remarks, the judge "acknowledge[d] receipt of the report *with the findings contained therein*," R27 (emphasis added), from which this Court can infer that she was familiar with the report's contents. Defendant's further complaint that the parties never "stipulated" that, if called to testify, Dr. Clore would testify consistent to her report, rests on mere semantics, for he concedes both that defense counsel represented to the court that the ""report [found] there [was] no reason to believe" Brown was "unfit to stand trial in any way" and that the prosecutor agreed. Def. Br. 12 (citing R27). Judge

Hoos could properly describe this agreement as a stipulation to the contents of Dr. Clore's report. Nor is it logical to infer that because "Judge Hoos was not the judge assigned to Brown's case . . . she was relying on counsel's interpretation of Dr. Clore's findings, rather than the report itself." Def. Br. 13. It simply does not follow from the fact that Judge Hoos was not the assigned judge that she would rely on the attorneys' representations rather than the report itself.

Indeed, the judge could not have relied upon any stipulation to the report's ultimate conclusion about defendant's fitness because the report made no conclusion about the ultimate legal question of defendant's fitness. Dr. Clore did not purport to explicitly find defendant either fit or unfit. SC4.

Defendant's remaining attacks on the fitness report and its conclusions, Def. Br. 13-15, effectively amount to an argument that Judge Hoos erred when she found defendant fit to stand trial, rather than any argument that the judge did not appropriately exercise her discretion. But because defendant never argued below that Judge Hoos's ultimate conclusion that defendant was fit was in error, any argument that the fitness determination itself was improper is forfeited. *People v. Cherry*, 2016 IL 118728, ¶ 30. In any event, the argument is belied by the record, including the fitness report, SC1-4, defendant's trial testimony, R187-89, and his statement in allocution, R234.

Thus, even if Judge Kouri, *sub silentio*, found a bona fide doubt of defendant's fitness, Judge Hoos properly exercised her independent judicial discretion to find defendant fit to stand trial.

III. If Judge Hoos Failed to Exercise Independent Discretion, the Proper Remedy Is a Retrospective Fitness Hearing.

If this Court were to find that Judge Kouri found a bona fide doubt of defendant's fitness *and* that Judge Hoos did not exercise her independent discretion to find defendant fit to stand trial, then the appropriate remedy is a retrospective fitness hearing.

As explained in the People's opening brief, the appellate court was wrong to think that retrospective fitness hearings are impermissible unless no more than two years have passed since trial and then only if the defendant's unfitness was the result of some "single, readily assessed factor." *Brown*, 2019 IL App (3d) 170119-U, ¶ 19. Indeed, this Court has held that retrospective fitness hearings are "the norm." *People v. Mitchell*, 189 Ill. 2d 312, 338-39 (2000).

Unless it is apparent from the record that the defendant's fitness at the time of trial cannot be fairly determined, a retrospective fitness hearing is the proper remedy. If the court determines that the defendant was unfit at the time of his original trial, or that no meaningful hearing may be had on that question, only then is defendant entitled to a new trial. *People v. Gipson*, 2015 IL App (1st) 122452, ¶ 38. But if the court determines that the defendant was fit when tried, his conviction may be affirmed. *Id.*

Here, as in *People v. Cook*, 2014 IL App (2d) 130545, ¶ 22, because the parties stipulated to the contents of Dr. Clore's report, upon remand for a retrospective fitness hearing, the circuit court can review that stipulated evidence, along with defendant's demeanor and testimony at trial and sentencing, and determine whether defendant was fit at the time. The clarity and relevance of this type of evidence will not have diminished over time.

As explained in the People's opening brief, Peo. Br. 18-19, and contrary to defendant's argument, Def. Br. 16-20, retrospective fitness hearings are not limited to cases in which a defendant was statutorily entitled to a fitness hearing due to his ingestion of psychotropic medication. As this Court recognized in *People v. Neal*, the dispositive question is instead whether "the defendant's fitness or lack of fitness at the time of trial may be fairly and accurately determined long after the fact." 179 Ill. 2d 541, 554 (1997); *see People v. Melka*, 319 Ill. App. 3d 431, 439 (1st Dist. 2000) (explaining that "exceptional circumstances" language in *Neal* permitted retrospective fitness hearing where there was "contemporaneous evidence regarding defendant's fitness to stand trial"). While ingestion of psychotropic medication may present one circumstance in which a defendant's fitness may be fairly determined in a retrospective hearing, it is by no means the only circumstance in which it is possible to do so. Accordingly, the appellate court has remanded for retrospective fitness hearings even in cases in which the record was not limited to stipulated testimony. *See Gipson*, 2015 IL App (1st)

122452, ¶ 38; *People v. Moore*, 408 Ill. App. 3d 706, 713 (1st Dist. 2011) (remanding for retrospective fitness hearing "to determine what effect, if any, defendant's failure to regularly receive his medication had on his fitness to stand trial"). Given the contemporaneous evidence of defendant's fitness — Dr. Clore's fitness evaluation report, as well as defendant's demeanor and testimony at trial and sentencing — the appropriate remedy here is a retrospective fitness hearing.

A retrospective fitness hearing is sufficient to address defendant's professed concern, *see* Def. Br. 23, about whether he continued to suffer from hallucinations and, if so, whether they interfered with his ability to communicate with his attorney. If, following a hearing, the court determines that defendant was unfit at the time of his original trial, or that no meaningful hearing may be had, then he is entitled to a new trial. *Gipson*, 2015 IL App (1st) 122452, ¶ 38. If the court can determine that defendant was fit, his conviction should be affirmed. *Id.*

Thus, the appellate court's judgment should be reversed on any of these three independent bases. First, because Judge Kouri never found a bona fide doubt of defendant's fitness, no fitness hearing was required. Second, even if Judge Kouri had found a bona fide doubt of defendant's fitness, Judge Hoos properly exercised her independent discretion to find defendant fit for trial. And third, even if a fitness hearing was required and

Judge Hoos did not exercise her independent discretion to find defendant fit for trial, the proper remedy was a retrospective fitness hearing.

CONCLUSION

This Court should reverse the appellate court's judgment.

July 7, 2020

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 12 pages.

s/Katherine M. Doersch
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STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 7, 2020, the foregoing Reply Brief of Plaintiff-Appellant People of the State of Illinois was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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