

No. 1-09-1243

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FIRST DIVISION
FILED: April 18, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
) Circuit Court of
Plaintiff-Appellee,) Cook County.
)
v.) No. 08 C3 30805
)
MIGUEL SOLIS,) Honorable
) Thomas P. Fecarotta, Jr.,
Defendant-Appellant.) Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

HELD: Where defendant failed to establish plain error, his claim that the trial court erroneously admitted evidence was forfeited. Also, trial counsel did not render ineffective assistance where defendant was not prejudiced by counsel's failure to object to the admission of the evidence. In addition, defendant was not entitled to a new sentencing hearing where the court did not impose a harsher sentence based upon an improper aggravating factor. Affirmed.

Following a bench trial, defendant Miguel Solis was convicted of aggravated driving while under the influence of alcohol (DUI) as a Class 1 felony and was sentenced to eight

years' imprisonment. On appeal, defendant challenges his conviction, contending that he was denied his right to a fair trial because the trial court erroneously admitted his three driving abstracts into evidence and considered them in reaching its finding of guilt. Defendant also contends that his trial counsel rendered ineffective assistance because he failed to prevent defendant's prior DUI convictions from being admitted into evidence. In addition, defendant claims he is entitled to a new sentencing hearing because the trial court improperly used his prior DUI convictions as aggravating factors after they had already been used to elevate his offense to a Class 1 felony. For the reasons that follow, we reject the defendant's assertions and affirm his conviction and sentence.

Defendant was charged with aggravated driving while under the influence of alcohol as a Class 1 felony based upon his four previous DUI violations pursuant to section 11-501(d)(2)(D) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(2)(D) (West 2008)). At trial, Illinois State Trooper Christopher Price testified that shortly after midnight on November 17, 2008, he observed defendant fail to signal when making a lane change while driving on Interstate 90. Defendant was also exhibiting improper lane usage by weaving in and out of traffic and not maintaining his vehicle in one lane. Trooper Price followed the vehicle for one and a half miles and determined that defendant was speeding,

driving 68 miles per hour in a 55 mile-per-hour zone. Trooper Price initiated a traffic stop, and defendant stopped his vehicle on the shoulder of the highway. Defendant's wife was sitting in the front passenger seat and defendant's daughter was sitting in the rear passenger seat. During a conversation, Trooper Price determined that defendant's daughter was about 12 years old.

When Trooper Price approached the car, he noticed that defendant's eyes were "bloodshot and glassy" and "his speech was slurred and somewhat confusing." Trooper Price also observed a "[s]trong odor of alcohol emanating from his breath." Defendant admitted to the officer that he had been drinking and said he had a couple beers. He also claimed he left his driver's license at home. Defendant then asked Trooper Price to "give him a break and allow a sober driver [to] drive."

Trooper Price asked defendant to exit his vehicle to perform three field sobriety tests. The officer first conducted a horizontal gaze nystagmus test, the results of which were not revealed in court. Next, the officer administered a walk-and-turn test. Trooper Price instructed defendant to stand with his right foot in front of his left, heel to toe, and to maintain that stance with his hands to the side while the officer gave him the test instructions. Trooper Price demonstrated the test, directing defendant to take nine steps heel to toe in a straight line, counting the steps aloud. After the initial nine steps,

defendant was to turn around, then take nine heel-to-toe steps back. Trooper Price testified that defendant was unable to maintain his balance during the instructional phase. During the test, defendant stepped "completely" off the imaginary line by one foot for every step, and missed going heel to toe for each step. The officer acknowledged that defendant did not raise his arms to keep his balance and turned properly. Trooper Price concluded that defendant failed the test.

Next, Trooper Price administered a one-leg stand test. He explained and demonstrated for defendant that he needed to stand on whichever leg he chose for approximately 30 seconds with his other leg extended in front of him about six inches off the ground with his toes pointed. Defendant was directed to maintain eye contact with his extended foot while counting aloud for about 30 seconds. During the test, defendant exhibited three clues that he was not sober: he swayed left to right to the point he was almost falling, he used both arms to maintain his balance, and he put his extended foot down on multiple occasions. The officer acknowledged that defendant held his foot up for the last 20 seconds of the test. Trooper Price concluded that defendant failed this test and placed him under arrest. Trooper Price acknowledged that he administered all of the field sobriety tests in about four minutes.

At the police station, defendant refused to take a breath alcohol test and gave the officer a false name and false date of birth. Trooper Price submitted defendant's fingerprints to an FBI database which identified defendant by his correct name and date of birth. The database also listed additional alias names used by defendant which Trooper Price could not recall in court. The officer informed the prosecutor that his field report and defendant's driving abstract would refresh his recollection. The prosecutor showed Trooper Price three of defendant's driving abstracts, and the officer then recalled the alias names. After being advised of his *Miranda* rights, defendant told Trooper Price that he had a couple drinks at a friend's house.

Based on defendant's driving, the field sobriety tests, the strong odor of alcohol on his breath, and his bloodshot and glassy eyes, Trooper Price concluded that defendant was under the influence of alcohol and unable to operate his vehicle safely. The officer described defendant as "extremely impaired." At the close of its case, the State moved to admit defendant's three driving abstracts into evidence. Defense counsel stated that he had no objection.

In finding defendant guilty, the trial court first noted that anytime a defendant is charged with a DUI and there is no scientific blood or breath test to aid the court in its findings, "the Court has to look at all the facts" to determine if the

defendant was proven guilty beyond a reasonable doubt. The court stated that it found Trooper Price credible and his testimony was unimpeached. The court then summarized the evidence, expressly noting that defendant was driving erratically, speeding and switching lanes without using his signals. The court further noted that the officer smelled a strong odor of alcohol, that defendant's eyes were bloodshot, that his speech was slurred and confused, and that he did not have a driver's license. The court found that Trooper Price's testimony supported the conclusion that defendant did not pass the two field sobriety tests, noting that defendant swayed and had difficulty maintaining his balance. The court also found it significant that defendant refused a breathalyzer test because it inferred consciousness of guilt. The court then found that there was "ample evidence and more than beyond a reasonable doubt" to find defendant guilty.

At the hearing on defendant's motion for a new trial, the court explained that it not only considered defendant's driving, but also his actions after being stopped, including his inability to perform the tests, and whether the officer administered the tests properly. The court again reviewed all of the evidence in this case as stated above, and restated that it found Trooper Price's testimony credible. The court said it also considered that defendant gave several different names, including giving an identification card to Trooper Price that did not match the name

on the fingerprint card. The court noted that defendant admitted he had a couple drinks at a friend's house, and that he asked the officer if he could let someone sober drive the car, which the court found was an admission of guilt. The court concluded that "based upon the totality of the evidence, clearly the defendant was proven guilty beyond a reasonable doubt." The court further commented "I don't think that this is even close." The court then denied defendant's posttrial motion.

At sentencing, the State argued in aggravation that defendant had an extensive criminal background and noted his prior convictions. The State argued that defendant drives under various names and falsifies information he gives police. It further argued that defendant was endangering the lives of others on the roadway and noted that defendant's 12-year-old daughter was in the car at the time of this arrest.

In mitigation, defense counsel argued that defendant was the sole provider for his four children, ages 3 through 13. Counsel also noted that defendant lived in Illinois for 20 years and was employed. Counsel acknowledged that in 2007, after defendant served his last prison term for aggravated DUI, he was deported and then illegally re-entered this country and committed the offense in this case. In allocution, defendant stated that he has a family to support, including an ill mother in Mexico.

The trial court noted that the presentence investigation report (PSI) indicated that defendant is known by seven aliases in addition to the name used in this case. The court stated that it had listened intently to the arguments in aggravation and mitigation, and reviewed the PSI. The court then stated:

"I note for the record that in my opinion this defendant is probably one of those individuals that we have in this country that is an extreme danger to our community. He's extremely dangerous because he gives absolutely no credence to our laws. He could care less about our laws. He could care less about any law, whether it be a federal immigration deportation or our laws about driving under the influence of alcohol. He is unlicensed. He has a child in the car when he commits this offense. And the record should reflect that this is the defendant's background according to the PSI."

The court recounted defendant's prior convictions as listed in the PSI and stated that it considered all the other information contained in the PSI. The court opined that defendant's

rehabilitative potential was "slim to none," and that defendant deserved "a stiff and harsh sentence." The court questioned what it could do to protect society against defendant. It then found that the maximum sentence of 15 years' imprisonment would be too harsh of a sentence, but that defendant was also not entitled to the minimum sentence. The court sentenced defendant to a term of eight years' imprisonment, which it found to be "a fair and just sentence." The court also stated that all mandatory fines and costs would be assessed.

At the hearing on defendant's motion to reconsider his sentence, defense counsel argued that the sentence was excessive in light of defendant's nonviolent criminal background. Counsel argued that none of defendant's DUI convictions involved an accident or personal injury. Counsel further argued that the court failed to consider the excessive hardship defendant's imprisonment will cause on his family. The State argued that the sentence was reasonable and noted that one of defendant's children was inside the vehicle at the time of this offense.

The trial court first stated that it considered all of the information contained in the PSI, and through that report, learned of defendant's numerous aliases. The court noted that defendant has a driver's license under several of those names, and that he gives police a different name when he is stopped for a DUI offense. The court next noted that defendant had been

deported then sneaked back into this country, which it could consider in aggravation, but did not give much weight. The court stated that a factor it did give weight to was that defendant then committed another aggravated DUI using another name. The court commented that the legislature had enough with people like defendant, and made the repeated offense a Class 1 felony with a sentence that could be up to 15 years. The court stated that defendant now had five DUI convictions, and that there were additional aggravating circumstances in this case, including that he had a child in the car, he was speeding, and all the other facts the court heard that were proper to consider for sentencing. The court stated that defendant was a "menace to every citizen" and had absolutely no regard for the laws of our state or country.

The court explained that it gave strong consideration to the appropriate sentence in this case and followed its duty to consider the statutory factors in aggravation and mitigation. It also considered defendant's potential for rehabilitation, which it found to be "small almost to null." In addition, the court remarked that defense counsel's statement that defendant did not have much of a criminal record was "nonsense" because aggravated DUI is a crime. The court commented that it was not going to wait until defendant killed someone before he receives a harsh sentence. The court stated that defendant probably deserved more

than eight years, but it did not feel that was proper, and thought the eight-year sentence was fair and just. The court then denied defendant's motion to reconsider the sentence.

On appeal, defendant first argues that he was denied his right to a fair trial because the trial court erroneously admitted his three driving abstracts into evidence and considered them in reaching its finding of guilt. In support of this argument, defendant contends that the abstracts were irrelevant and inadmissible at trial, and only served to highlight his prior DUIs and show his propensity to commit such offenses.

In response, the State concedes that the trial court erred in admitting the abstracts at trial, but argues that defendant forfeited review of this issue because he failed to object to the admission of the evidence at trial and failed to raise the issue in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (a contemporaneous objection and a written post-trial motion raising the issue are necessary to preserve a question for review). Defendant acknowledges that he has forfeited this issue on appeal, but requests that we review the admission of his driving abstracts as plain error under Supreme Court Rule 615(a) (eff. Aug. 27, 1999).

The plain error doctrine is a limited and narrow exception to the forfeiture rule that applies only where the error is so substantial that it deprived defendant of a fair trial, or where

the evidence is so closely balanced that the finding of guilt may have resulted from the error. *People v. Caffey*, 205 Ill. 2d 52, 103 (2001). The burden of persuasion is on defendant, and if he fails to meet his burden, the forfeiture will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

Defendant claims that the admission of his driving abstracts is subject to review under the plain error doctrine because the evidence was closely balanced. In support of this claim, defendant notes that there was no scientific evidence to show he was under the influence of alcohol. Yet, defendant concedes that he was speeding and weaving in and out of traffic without signaling, but asserts that the traffic was light and that he pulled his car over to the shoulder without difficulty. He also concedes that he failed the two field sobriety tests, but contends he did well on portions of those tests.

We find that the plain error doctrine does not apply in this case. Our review of the record shows that the evidence against defendant was not closely balanced, but instead, was overwhelming. Trooper Price testified that he observed defendant speeding, weaving in and out of traffic, and not maintaining his vehicle in one lane. After approaching defendant at his car, Trooper Price saw that defendant's eyes were "bloodshot and glassy," his speech was "slurred and somewhat confusing," and there was a "[s]trong odor of alcohol emanating from his breath."

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Notably, defendant admitted that he had been drinking, then asked the officer to "give him a break and allow a sober driver [to] drive."

Trooper Price also explained in detail how defendant failed the two field sobriety tests. During the walk-and-turn test, defendant stepped "completely" off the imaginary line by one foot for every step, and missed going heel to toe for each step. During the one-leg stand test, defendant swayed left to right to the point he was almost falling, he used both arms to maintain his balance, and he put his extended foot down on multiple occasions. We find that this evidence supported Trooper Price's conclusion that defendant was under the influence of alcohol and "extremely impaired." The trial court found Trooper Price's testimony credible and unimpeached. The court also found it significant that defendant refused a breathalyzer test because it inferred consciousness of guilt. This evidence allowed the trial court to easily conclude that there was "ample evidence and more than beyond a reasonable doubt" to find defendant guilty of aggravated DUI. In denying defendant's posttrial motion, the court again stated that defendant was "clearly" proven guilty beyond a reasonable doubt and commented "I don't think that this is even close." Based on this record, we find that defendant failed to meet his burden of establishing that the evidence was

closely balanced. Accordingly, defendant's procedural default of this issue cannot be excused. *Hillier*, 237 Ill. 2d at 545.

Alternatively, defendant argues that trial counsel rendered ineffective assistance because he failed to prevent the driving abstracts, which listed his prior DUI convictions, from being admitted into evidence. Defendant also argues that counsel was ineffective because he failed to object to the testimony regarding defendant's prior use of aliases during traffic violations. Defendant contends that admission of the abstract and alias evidence was extremely prejudicial because it highlighted the similarities between his prior DUI violations and the facts in this case where the evidence was closely balanced. Defendant claims that if counsel would have prevented the admission of his prior DUI violations, there is a reasonable probability that the absence of such evidence would have tipped the scale in favor of a not guilty finding. Defendant asks this court to reverse his conviction and remand his case for a new trial.

Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a

result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687; *Givens*, 237 Ill. 2d at 331. If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331.

Here, we find that defendant was not prejudiced by counsel's failure to object to the admission of the driving abstracts or defendant's use of aliases. When rendering its finding, the trial court made absolutely no mention of the driving abstracts, defendant's prior convictions or his use of alias names. As discussed above, the court relied upon Trooper Price's testimony regarding his observations of defendant's driving, physical appearance and failure of the field sobriety tests, and found there was "ample evidence" to find defendant guilty. We recognize that in denying defendant's posttrial motion, the court said it considered that defendant gave police several different names. The court, however, then specified that in this case, defendant gave Trooper Price a name that did not match his fingerprints in the FBI database. The court again reviewed all the evidence from Trooper Price's testimony and found that defendant was "clearly" guilty. Consequently, we find that even if the driving abstracts and defendant's use of alias names had not been admitted, the result of the trial would not have been any different. In light of the overwhelming evidence of

defendant's guilt, we find that defendant cannot satisfy the second prong of the *Strickland* test. Therefore, counsel's failure to object to the admission of the evidence did not constitute ineffective assistance. See *People v. Diaz*, 377 Ill. App. 3d 339, 348 (2007).

Finally, defendant contends that he is entitled to a new sentencing hearing because the trial court improperly used his prior DUI convictions as aggravating factors after they had already been used to elevate his offense to a Class 1 felony. Defendant argues that the court's attention to his criminal history and discussion of his repeated violations of the law constituted a substantial portion of the aggravating evidence at sentencing. Defendant concedes that the court stated that his conviction was for a Class 1 felony. However, he points to the court's comment at the hearing on his post-sentencing motion that counsel's suggestion that he does not have much of a criminal record was "nonsense" because aggravated DUI is a crime. Defendant claims that this comment shows the court improperly considered his criminal history as an aggravating factor.

Initially, we note that defendant asserts this court must apply a *de novo* standard of review. We disagree. Whether the trial court considered an improper factor in aggravation at sentencing is reviewed for an abuse of discretion. *People v. Cotton*, 393 Ill. App. 3d 237, 265 (2009).

Defendant was charged with aggravated DUI as a Class 1 felony based upon his four prior DUI violations. 625 ILCS 5/11-501(d)(2)(D) (West 2008). Defendant's criminal history is also a statutory factor in aggravation that the court may consider at sentencing. 730 ILCS 5/5-5-3.2(a)(3) (West 2008). However, the trial court is generally prohibited from considering a factor implicit in the offense as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). In other words, one factor cannot be used as both an element of the offense, and as a basis for imposing a sentence that is harsher than what might otherwise have been imposed. *Id.* at 11-12. The court may consider the nature of the offense when imposing a sentence, including the circumstances and extent of each element as committed. *People v. Bowman*, 357 Ill. App. 3d 290, 304 (2005).

In determining the propriety of a sentence, the reviewing court must consider the record as a whole and should not focus on a few words or statements made by the trial court. *People v. Ellis*, 401 Ill. App. 3d 727, 730 (2010), citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986). The court's statements at sentencing cannot be considered in isolation. *People v. Csaszar*, 375 Ill. App. 3d 929, 952 (2007). Where the trial court mentions an improper factor, but gives insignificant weight to that factor which does not result in a greater sentence, the case does not need to be remanded for resentencing. *Id.*

Here, we find no merit in defendant's claim that the trial court gave improper consideration to his criminal history when it imposed his sentence. Our review of the record as a whole reveals that, although the court mentioned defendant's criminal history, it did not give significant weight to that factor or impose a greater sentence based upon his criminal history. The record shows that the court's emphasis at sentencing was on its finding that defendant "is an extreme danger to our community" and the need to protect society against defendant. The court noted that defendant had a child in the car at the time of this offense. The court also opined that defendant's rehabilitative potential was "slim to none," and that he deserved "a stiff and harsh sentence."

At the hearing on the post-sentencing motion, the court mentioned defendant's criminal history in conjunction with its comment that the legislature had made the repeated offense a Class 1 felony with a sentence of up to 15 years' imprisonment. The court again commented that defendant was a "menace to every citizen" with no potential for rehabilitation, and that it would not wait for defendant to kill someone before imposing a harsh sentence. The court expressly stated that it gave careful consideration to the appropriate sentence in this case and found the eight-year prison term to be fair and just. We find no indication in the record that the trial court used defendant's

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criminal history as a basis for imposing a harsher sentence than what it might have otherwise imposed. Accordingly, it is not necessary to remand this case for resentencing.

For the reasons set forth above, we affirm the defendant's conviction and sentence.

Affirmed.