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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-3201
)	
FARREN T. CARIDINE,)	Honorable
)	George J. Bakalis,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Defendant's DUI was improperly enhanced to aggravated DUI in light of two prior convictions of DUI that were in the record at sentencing: because one of the convictions was for a DUI that occurred after the present DUI, the present offense was defendant's second, not his third; we vacated defendant's conviction and remanded for the trial court to resolve whether an additional conviction, for a DUI that occurred before the present offense, was valid under *Scott v. Illinois*, such that a conviction of aggravated (as opposed to misdemeanor) DUI could be entered.

¶ 1 Following a jury trial in the circuit court of Du Page County, defendant, Farren T. Caridine, was found guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (a)(2) (West 2006)). The offense occurred on August 18, 2007. Finding that defendant had committed

DUI on two other occasions, the trial court entered a judgment of conviction of aggravated DUI pursuant to section 11-501(d)(1)(A) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(d)(1)(A) (West 2006)). On June 30, 2010, the trial court sentenced defendant to a three-year prison term. On appeal, defendant argues that the trial court erred in enhancing the offense from DUI to aggravated DUI. We vacate defendant's conviction and remand for further proceedings to determine whether the offense qualifies for such enhancement.

¶ 2 At sentencing the State proffered records from the circuit court of Cook County indicating that defendant had pleaded guilty or had been found guilty of DUI or aggravated DUI on three other occasions. The first offense occurred in Burbank in April 1990. On September 4, 1990, the case was continued to November 9, 1990, "for atty." On the latter date, defendant entered a guilty plea and was placed on court supervision. In June 1994, defendant was convicted of a DUI that occurred in Chicago in July 1991, and, according to the court records, he was "sentenced to jail." Finally, in September 2009, defendant pleaded guilty to aggravated DUI. The offense occurred on July 20, 2008. Defendant objected to the use of these convictions and testified under oath that he did not have counsel in the 1990 and 1991 DUI cases. Defendant testified that the trial court did not offer to appoint counsel in either case. He also testified that he did not waive the right to counsel in the 1991 case. Defendant argued that *People v. Finley*, 209 Ill. App. 3d 968 (1991), barred the use of uncounseled convictions to enhance the offense in this case to a felony. The trial court did not indicate whether it found defendant's testimony credible. However, the court ruled that the 1990 DUI could be used for enhancement purposes because defendant "had the opportunity to secure counsel if he wished." The trial court also ruled that the 2008 aggravated DUI could be used to enhance defendant's conviction in this case to aggravated DUI.

¶ 3 Defendant first argues that the trial court erred in relying on the DUI that occurred in Cook County on July 20, 2008, to enhance the offense in this case—which occurred in 2007—to aggravated DUI. Section 11-501(a) Code defines the offense of DUI (625 ILCS 5/11-501(a) (West 2006)). Section 11-501(d) (625 ILCS 5/11-501(d) (West 2006)) defines the offense of aggravated DUI. Defendant was prosecuted under subsection (1)(A) of section 11-501(d), which provides as follows:

“(d)(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof if:

(A) the person committed a violation of subsection (a) or a similar provision *for the third or subsequent time[.]*” (Emphasis added.) 725 ILCS 5/11-501(d)(1)(A) (West 2006).

¶ 4 The trial court ruled that defendant’s 1990 DUI and his 2008 DUI could be used to enhance the offense in this case to aggravated DUI. The trial court did not explicitly indicate whether the 1991 DUI could be used for that purpose. Assuming for the time being that it cannot,¹ the DUI in this case would be only defendant’s second for purposes of section 11-501(d)(1)(A). The State argues, “where, as here, the charging instrument alleges only that defendant has committed ‘at least two prior’ DUI violations, at sentencing, an offense *committed* subsequent to the instant offense is nonetheless a prior violation of the statute.” (Emphasis in original.) The argument is flies in the face of the clear language of the statute. It is well established that “[t]he cardinal rule of statutory

¹Defendant’s objection to the use of 1990 DUI will be addressed below. For the time being, it will be assumed that the trial court did not err in ruling against defendant on this point.

construction is to ascertain and give effect to the legislature's intent." *People v. Barrow*, 2011 IL App (3d) 100086, ¶ 20. As this court has stated, "[o]rdinarily, the statutory language itself is the best guide to legislative intent, and, if the language is unambiguous, we must follow it." *People v. Danenberger*, 364 Ill. App. 3d 936, 941 (2006). Under the plain language of section 11-501(d)(1)(A), a defendant's *third violation* of section 11-501(a), and all subsequent violations, may be enhanced to aggravated DUI. It is true that, prior to sentencing, defendant had committed DUI on three occasions. It is also true, however, that the violation in this case was only defendant's second. Indeed, the State itself acknowledges that section 11-501(d)(1) "uses the phrase 'third or subsequent' to refer to the *present* offense." (Emphasis in original.) Nonetheless, the State argues that "the plain language of the statute does not compel any specific chronological order in ascertaining a driver's 'third' violations [*sic*]." The statement is an oxymoron. "Third," as used in section 11-501(d)(1)(A), is an ordinal number, that is "a number designating the place (as first, second, third) occupied by any item in an ordered sequence." Webster's Third New International Dictionary 1588 (1986). While discounting the significance of the sequence in which defendant's three violations occurred, the State offers no explanation of how a court is to determine which is the third, other than with reference to the sequence in which they occurred. And although the State stresses that the statute "does [not] use the adjective 'prior' or even refer specifically to *prior* offenses" (emphasis in original), there can be no third or subsequent violation unless there have been at least two prior violations.

¶ 5 The State cites *People v. Sheehan*, 168 Ill. 2d 298 (1995), which held that a DUI may be enhanced to aggravated DUI on the basis of other violations of section 11-501(a), even if those violations do not result in convictions. In *Sheehan*, each defendant had successfully completed a

term of court supervision for his initial DUI offense. Nothing in *Sheehan* suggests that a subsequent violation (whether it results in a conviction or not) can be used to enhance a prior violation to aggravated DUI. Another case cited by the State, *People v. Jones*, 306 Ill. App. 3d 793 (1999)—which simply held that the term “violation,” as used in a statute increasing the penalty for a “second or subsequent violation” of the statute defining the offense of domestic battery, includes conduct not resulting in a conviction—is likewise inapposite. In no way does *Jones* speak to the question of whether the penalty for domestic battery could be increased on the basis of a subsequent domestic battery.

¶ 6 Equally unavailing is the State’s attempt to contrast section 11-501(d)(1)(A) with other statutory provisions that in the State’s view illustrate that, when it is the intent of the General Assembly that the application of a law depend on a specific sequence of events, the General Assembly has outlined the sequence in specific terms. For instance, the State cites section 5—4.5—95(a) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(a) (West 2010)), which classifies an offender convicted three times of certain crimes as a “habitual criminal,” specifically provides that the third offense must have been committed after the conviction on the second offense, and that the second offense must have been committed after the conviction on the first offense. 730 ILCS 5/5-4.5-95(a)(1), (a)(4)(C), (a)(4)(D) (West 2010). Returning to the statute at issue in this case, however, we fail to see how the General Assembly could have been any more clear in expressing its intent that enhancement of DUI to aggravated DUI on the basis of multiple offenses depends on the sequence of the violations; as seen, the word “third” denotes a position within a sequence. Thus, while it is true that, at the time of sentencing, defendant had committed *three* violations of section 11-501(d)(1)(A), the violation at issue in this case was not defendant’s *third*

violation, unless, as will be discussed below, it is proper to consider *both* the 1990 and the 1991 Cook County violations.

¶ 7 Finally, we note that the State's reliance on cases holding that post-offense conduct may be considered at sentencing is misplaced. That general principle has no application in this case, which is controlled by specific statutory language.

¶ 8 Defendant next argues that the trial court erred in finding that defendant waived counsel in the prosecution for the 1990 DUI. Citing *Finley*, defendant argues that, absent a proper waiver of counsel, the 1990 DUI cannot be used to enhance the present offense to a felony. The State correctly points out, however, that *Finley* is no longer good law. *Finley* followed the rule of *Baldasar v. Illinois*, 446 U.S. 222 (1980), that when an indigent defendant who is not afforded counsel is convicted of a misdemeanor, that conviction cannot be the basis for enhancement of a subsequent misdemeanor to a felony carrying a prison term. The Court did not disturb the holding of *Scott v. Illinois*, 440 U.S. 367 (1979), that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."² *Id.* at 373-74. Later, in *Nichols v. United States*, 511 U.S. 738 (1994), the Court overruled *Baldasar* and held that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."³ *Id.* at 749.

²*Scott* has been interpreted to preclude imprisonment of an unrepresented nonindigent defendant who has not validly waived the right to retain counsel. See *State v. Hindman*, 441 N.W.2d 770, 772 (Iowa 1989).

³In *People v. Laskowski*, 287 Ill. App. 3d 539 (1997), the Fourth District stated, in *dicta*, that

Defendant received court supervision, not a jail sentence, for the 1990 DUI. Accordingly, whether defendant waived his sixth amendment right to counsel or not, the conviction is valid under *Scott*. In contrast, records from the circuit court of Cook County indicate that defendant was “sentenced to jail” for the 1991 DUI. The validity of that conviction under *Scott* therefore depends on whether defendant was represented by counsel in that case and, if not, whether there was a valid waiver of counsel. The trial court made no express findings on these points. Having concluded that defendant’s 1990 DUI and his 2008 DUI could be considered for enhancement purposes under section 11-501(d)(1)(a), the trial court had no occasion to consider whether there was a valid waiver of counsel with respect to the 1991 conviction. Accordingly, we remand the case to the trial court with instructions to determine whether the 1991 conviction is valid under *Scott*. If it is, a conviction of aggravated DUI may be entered. If it is not, the present DUI is only defendant’s second and his conviction must be reduced to misdemeanor DUI.

¶9 For the foregoing reasons, the judgment of the circuit court of Du Page County is vacated and the cause is remanded for proceedings consistent with this order.

¶10 Vacated and remanded with directions.

“a sentencing court may consider a prior uncounseled misdemeanor conviction in sentencing for a subsequent offense even though the prior misdemeanor conviction resulted in a sentence of imprisonment.” *Id.* at 544. We fail to see how this statement can be reconciled with the holding of *Nichols* that the prior conviction must be valid under *Scott*. Accord *United States v. Charles*, 389 F.3d 797, 799 (8th Cir. 2004) (holding of *Nichols* is limited to cases where no prison term was imposed for an uncounseled misdemeanor conviction).