

NOTICE
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2011 IL App (4th) 100022-U

Filed 8/4/11

NO. 4-10-0022

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
CLYDE T. LEVITT III,)	No. 09DT359
Defendant-Appellant.)	
)	Honorable
)	Richard P. Klaus,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirm the trial court's judgment where counsel concludes no meritorious issues could be raised on appeal as to the following: whether (1) the complaint was sufficient; (2) the State introduced sufficient evidence to prove defendant guilty beyond a reasonable doubt; or (3) defendant's sentence is excessive.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2009, after a bench trial, the trial court found defendant, Clyde T. Levitt III, guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2008)). In addition, the court found defendant not guilty of DUI with a blood alcohol content

(BAC) of .08 or greater (625 ILCS 5/11-501(a)(1) (West 2008)) and ruled that the charge of operating an uninsured vehicle (625 ILCS 5/3-707 (West 2008)) merged with the conviction on the other DUI count. The sentencing document in the record shows the insurance charge was later dismissed.

¶ 5 At defendant's November 2009 bench trial, Ryan Kumler testified as follows. At approximately 6:30 on the evening of May 24, 2009, Kumler saw a Jeep "turning out into a freshly planted farm field" behind his home. On cross-examination, Kumler testified he had a clear view of the Jeep but he was unsure of its color. Kumler also admitted he could not see the driver of the vehicle from his home, which was approximately 1,000 to 1,500 meters away. At that point, Kumler called the owner of the property, Don Flessner, to inform him a vehicle was driving in his field. Kumler did not contact the police, but he was contacted by a police officer approximately 20 minutes after he called Flessner. Eventually, Kumler discovered the alleged driver of the Jeep was defendant, whom he had known for eight years. Kumler testified he was unaware of what type of vehicle defendant drove prior to that evening.

¶ 6 Cale Wallace, a deputy with the Champaign County Sheriff's office, was the only other witness to testify. He testified as follows. On the evening of May 24, 2009, at approximately 6:45, Wallace was dispatched to 2304 Johnson Lane in Urbana, where a dispute had arisen between Flessner and defendant. Upon arrival, Wallace was informed by Flessner that defendant had been driving his vehicle in Flessner's field. Wallace then contacted Kumler by phone, and Kumler informed him of what he had observed. However, Wallace testified that during their conversation, contrary to Kumler's earlier testimony, Kumler told him the vehicle was a black Jeep Wrangler. Wallace then spoke to defendant about the accusations, and

defendant stated he had not been driving in Flessner's field and had no idea who was responsible. Defendant claimed his clutch was inoperable and it would have been impossible for him to drive the vehicle in the field. Wallace noted there were tire tracks leading directly from the field to where defendant's vehicle was parked. Wallace then questioned defendant about the tire tracks, but defendant again claimed he did not know who had been driving in the field.

¶ 7 While speaking with defendant, Wallace noticed a strong odor of an alcoholic beverage on his breath. He also noticed defendant's eyes were glassy and his speech was slurred. When asked whether he had been drinking that evening, defendant stated he had consumed two beers. Wallace then asked defendant whether he felt he was intoxicated, and defendant said he was. Wallace then administered field sobriety tests to defendant. The first two tests Wallace conducted were a counting test and an alphabet test. Defendant passed both of those tests without any problems. Wallace then administered the walk-and-turn test and the one-legged-stand test, both of which defendant failed. Defendant was then placed under arrest on suspicion of DUI.

¶ 8 After taking defendant into custody, Wallace searched his vehicle. Wallace found the key in the ignition and stated the "vehicle smelled extremely warm and had the distinct smell of a clutch that was extremely hot." On cross-examination Wallace testified he had worked in a body shop for nine years and was familiar with the smell of a warm car. In his opinion, the smell of the clutch indicated the car had been driven recently. Wallace admitted he had not checked the engine itself to see if it was warm, nor did Wallace observe any mud or grass on the body of the Jeep or on the tires. When the tow truck arrived to remove defendant's car from the scene, nothing appeared to be wrong with the clutch.

¶ 9 After searching the vehicle, Wallace transported defendant to the satellite jail. While at the jail, a breath-analysis test was administered to defendant, though Wallace was not the officer who administered the test. Wallace attempted to relay his observations of the breath test, but the trial court refused to allow the testimony into evidence. The court also refused to admit the report containing the results of the breath test into evidence at that time. However, on cross-examination, defense counsel elicited defendant had registered a 0.302 BAC on his breath test. Wallace testified someone with a BAC of 0.302 would likely be extremely intoxicated, but it depended on the person. Wallace also admitted an individual's BAC tends to increase for a period of time right after consuming a large amount of alcohol, but nothing indicated defendant had been drinking immediately prior to his arrest.

¶ 10 Finally, on redirect, Wallace testified he searched defendant's car for proof of insurance but was unable to locate any. On re-cross-examination, Wallace testified he also looked in defendant's wallet for proof of insurance but did not find any. At that point, the State rested its case, and defendant decided not to offer any evidence or testimony.

¶ 11 After closing arguments, the trial court found defendant guilty of DUI, not guilty of DUI with a BAC of .08 or greater, and ruled the insurance charge merged with the other charge. In December 2009, the court sentenced defendant to 18 months' probation and 125 hours of community service and ordered him to pay a \$1,250 fine. In January 2010, notice of appeal was filed, and OSAD was appointed to represent defendant. In January 2011, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by

February 28, 2011, but defendant has not done so. After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 12

II. ANALYSIS

¶ 13 OSAD contends the record shows no meritorious issues can be raised on appeal. Specifically, OSAD contends (1) the charging instruments were sufficient to properly inform defendant of the charges against him, (2) the State introduced sufficient evidence to prove defendant guilty beyond a reasonable doubt, and (3) the trial court did not abuse its discretion in sentencing defendant to 18 months' probation and 125 hours of community service and ordering him to pay a \$1,250 fine.

¶ 14

A. The Charging Instruments

¶ 15 OSAD first contends no colorable argument can be made the charging instruments in this case were insufficient to properly inform defendant of the charges against him. We agree.

¶ 16

Defendant was charged with two counts of DUI via uniform citation and complaint. The record does not contain any paperwork regarding the insurance charge other than a reference to it on the notice of arrest without warrant. As defendant was only convicted of one count of DUI, we need not address the other two counts.

¶ 17

Section 111–3 of the Code of Criminal Procedure of 1963 governs what information must be included in a charging instrument. 725 ILCS 5/111–3 (West 2008). Section 111–3(a) requires a written charge that states the name of the offense and of the accused, cites to the statute violated, lists the elements of the crime, and lists the date of the offense. 725 ILCS 5/11–3(a)(1) through (a)(5) (West 2008). Our supreme court has found uniform traffic citations to be sufficient to charge a misdemeanor offense where the citation names the offense and lists

the applicable statutory cite. *People v. Tammen*, 40 Ill. 2d 76, 78-79, 237 N.E.2d 517, 518 (1968). The court in *Tammen*, 40 Ill. 2d at 79, 237 N.E.2d at 518-19, went on to state the accused may object to the citation and request a bill of particulars; but absent such actions, a uniform citation is perfectly sufficient. This court has interpreted *Tammen* as giving "special leeway to the pleader in cases tried on a uniform traffic ticket where the sufficiency of the charge is not raised before trial." *People v. Sikes*, 141 Ill. App. 3d 773, 776, 491 N.E.2d 168, 171 (1986). In the instant case, the citation in question correctly cited the charge of DUI and referenced the relevant statutory citation, as well as all the other information required under section 111-3. Further, defendant failed to challenge the sufficiency of the citation prior to his trial. No meritorious argument can be made the charging instrument in this case was insufficient.

¶ 18

B. Sufficiency of the Evidence

¶ 19

OSAD next contends no colorable argument can be made defendant was not proved guilty beyond a reasonable doubt. We agree.

¶ 20

The crime of DUI has two elements: (1) defendant drove a motor vehicle, and (2) defendant was under the influence of alcohol. See 625 ILCS 5/11-501(a)(2) (West). When presented with a challenge to the sufficiency of the evidence, the question on review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). It is not the reviewing court's role to retry a defendant. *Id.*

¶ 21

Here, testimony showed defendant's vehicle was seen driving in a field, tracks led directly from the field to where the vehicle was parked, the condition of the vehicle indicated it

had recently been driven, and no evidence suggested anyone else had been driving defendant's vehicle. This evidence, when taken in the light most favorable to the State, is sufficient to conclude defendant was driving the vehicle on the evening in question; thus, element one is met. Evidence also showed defendant smelled of alcohol, had glassy eyes, admitted being intoxicated, and failed two field sobriety tests. Again, this evidence, when taken in the light most favorable to the State, is sufficient to show defendant was under the influence of alcohol on the evening in question. In fact, the trial court specifically addressed each element in turn when it found defendant guilty. The State, therefore, introduced sufficient evidence to prove defendant guilty of DUI beyond a reasonable doubt.

¶ 22 C. Excessive Sentence

¶ 23 Last, OSAD contends no colorable argument can be made the trial court erred in sentencing defendant to 18 months' probation and 125 hours of community service and ordering him to pay a fine of \$1,250. We agree.

¶ 24 The imposition of a sentence is a matter of judicial discretion for the trial court, and this court will not disturb the trial court's sentencing determination absent an abuse of that discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). A trial court's ruling constitutes an abuse of discretion when it is " 'arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Sutherland*, 223 Ill. 2d 187, 272-73, 860 N.E.2d 178, 233 (2006) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)). Sentences imposed within the statutory guidelines are presumed to be proper and will not be overturned unless the sentence substantially departs from the spirit and purpose of the law and the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871

