

NOTICE
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2011 IL App (4th) 100227-U

Filed 8/4/11

NO. 4-10-0227

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
AARON J. YOUNG,)	No. 08CF1111
Defendant-Appellant.)	
)	Honorable
)	Richard P. Klaus,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Where the State presented sufficient evidence to find defendant guilty of aggravated driving under the influence of alcohol (DUI), his conviction need not be overturned; and
- ¶ 2 (2) Where the trial court erred in sentencing defendant as a Class 2 felon, his sentence is void and must be vacated and remand is necessary for a new sentencing hearing.
- ¶ 3 In September 2009, a jury found defendant, Aaron J. Young, guilty of four counts of aggravated DUI. In November 2009, the trial court sentenced him to 12 years in prison.
- ¶ 4 On appeal, defendant argues (1) he was improperly convicted of one count of aggravated DUI, (2) his Class 2 felony sentence is void and must be vacated, and (3) if he was eligible for sentencing as Class 2 felon, his 12-year sentence was excessive. We affirm in part, vacate in part, and remand for further proceedings.

¶ 5

I. BACKGROUND

¶ 6 In June 2008, the State charged defendant by information with aggravated DUI with two prior DUI convictions, a Class 2 felony (625 ILCS 5/11-501(a)(2), (c-1)(2) (West Supp. 2007) (as amended by Pub. Acts 94-113, 94-609, 94-963, 95-149, and 95-355)), alleging he drove or was in actual physical control of a motor vehicle at a time when he was under the influence of alcohol on March 30, 2008. In July 2009, the State filed three additional aggravated DUI charges against defendant (counts II, III, and IV). Count II alleged defendant drove a motor vehicle at a time when his blood-alcohol concentration (BAC) was 0.08 or more and he had twice previously committed DUI or similar offenses (625 ILCS 5/11-501(a)(1) (West Supp. 2007)).

¶ 7 In September 2009, the State filed two additional counts, charging defendant with aggravated DUI, a Class 4 felony, alleging he drove or was in actual physical control of a motor vehicle and did not possess a driver's license at the time of the DUI (count V) (625 ILCS 5/11-501(d)(1)(G) (West Supp. 2007) (as amended by Pub. Acts 94-114, 94-963, 95-149, and 95-355)), and aggravated DUI, a Class 4 felony, alleging he drove or was in actual physical control of a motor vehicle with a BAC of 0.08 or more when he did not have a driver's license (count VI) (625 ILCS 5/11-501(d)(1)(G) (West Supp. 2007) (as amended by Pub. Acts 94-114, 94-963, 95-149, and 95-355)). Defendant pleaded not guilty.

¶ 8 In September 2009, defendant's jury trial commenced. The State dismissed counts III and IV. Champaign County sheriff's deputy Billy Pryor testified he was on duty as a Rantoul police officer on March 30, 2008, at approximately 12:31 a.m. In a shopping center parking lot, he heard a loud stereo coming from a parked vehicle. He observed defendant sitting behind the wheel of the vehicle with the engine running. He also noticed "a strong odor of alcohol" coming

from defendant, who stated he had several beers. Defendant failed several field-sobriety tests. Deputy Pryor then arrested him. On cross-examination, Deputy Pryor testified three people were in the car. A female sat in the front passenger seat and a Hispanic male sat in the back.

¶ 9 Rantoul police officer Christina Reifsteck testified to the loud car stereo and the three occupants inside. She stated the engine was running and smoke could be seen coming from the exhaust. She also stated defendant could not finish the field-sobriety tests.

¶ 10 The parties stipulated defendant's driver's license had been revoked at the time of the offense. The parties also stipulated defendant's BAC was 0.183. The State then rested.

¶ 11 Defendant testified he went to Keefer's bar at approximately 8 or 9 p.m. with Tiffany Green and her boyfriend. Green, the designated driver, drove defendant's mother's car. At approximately 12:30 a.m., all three left the bar to smoke cigarettes in the car. Defendant stated he had no intention of exercising physical control over the vehicle.

¶ 12 On cross-examination, defendant testified he was in the driver's seat, but he could not remember if the car was on. He stated he possessed the keys and could have driven the car. He did not dispute he was under the influence of alcohol.

¶ 13 Following closing arguments, the jury found defendant guilty on all four counts. Defendant filed a motion for a new trial, which the trial court denied. In November 2009, the court conducted the sentencing hearing. The State informed the court that defendant was not eligible for Class X sentencing, contrary to earlier belief, because he committed his second Class 2 felony before he had been convicted of the first. The court sentenced defendant to 12 years in prison on count II and treated the other counts as merged.

¶ 14 On November 18, 2009, a notice of appeal was filed. On December 23, 2009,

defendant filed a *pro se* motion for reduction of sentence. The trial court took no action on the motion. This court remanded the cause with instructions to strike the notice of appeal and consider defendant's motion. *People v. Young*, No. 4–09–0870 (February 10, 2010) (unpublished order under Supreme Court Rule 23).

¶ 15 In March 2010, defendant's newly appointed counsel filed a supplemental motion for a new trial, alleging defendant might have pleaded guilty had he not been wrongly told he was eligible for Class X sentencing. Counsel also filed a motion to reconsider sentence, arguing the sentence was excessive and the trial court erred in using his prior DUI convictions as aggravation after they had been used to elevate the current DUI charge to a Class 2 felony. The court denied the motions. This appeal followed.

¶ 16

II. ANALYSIS

¶ 17

A. Sufficiency of the Evidence

¶ 18 Defendant was convicted of four counts of aggravated DUI—counts I, II, V, and VI. Counts I, V, and VI alleged he drove or was in actual physical control of a vehicle at a time when he was under the influence of alcohol. Count II, however, alleged defendant drove a vehicle but did not allege he was in actual physical control of it. Defendant argues he was improperly convicted on count II, when the evidence showed he merely sat in a parked car. We disagree.

¶ 19 "When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006).

The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 20 In setting out the offense of DUI, section 11–501(a) of the Illinois Vehicle Code (Code) (625 ILCS 5/11–501(a) (West 2008)) provides a defendant "shall not drive or be in actual physical control of any vehicle" while under the influence. Courts have found section 11–501(a) of the Code does not define "two disparate and alternative offenses." *People v. Borst*, 162 Ill. App. 3d 830, 834, 516 N.E.2d 854, 857 (1987) (quoting *People v. Clark*, 47 Ill. App. 3d 568, 570, 362 N.E.2d 407, 409 (1977)). A defendant need not actually drive to be in actual physical control of the vehicle. *City of Naperville v. Watson*, 175 Ill. 2d 399, 402, 677 N.E.2d 955, 957 (1997). Actual physical control can be established based on "whether the motorist is positioned in the driver's seat of the vehicle, has possession of the ignition key[,] and has the physical capability of starting the engine and moving the vehicle." *City of Naperville*, 175 Ill. 2d at 402, 677 N.E.2d at 957.

¶ 21 In the case *sub judice*, the evidence showed defendant was behind the wheel of the car, the key was in the ignition, and the motor was running at the time of the offense. "[T]he term "driving" is used to include both the actual operation of a moving vehicle and the circumstance of being "in actual physical control" of the vehicle, even though the vehicle may not be moving." *Clark*, 47 Ill. App. 3d at 570, 362 N.E.2d at 409 (quoting *People v. Guynn*, 33 Ill.

App. 3d 736, 738, 338 N.E.2d 239, 240 (1975)). Moreover, the evidence clearly showed defendant's BAC was 0.183 and his driver's license had been revoked. The evidence was sufficient to find defendant guilty beyond a reasonable doubt on count II. As defendant does not contend he was not adequately put on notice of the charge or unable to properly prepare his defense, his conviction on count II stands.

¶ 22 B. Sentencing

¶ 23 Defendant argues his extended-term sentence for a Class 2 felony on count II is void and must be vacated. The State agrees the sentence must be vacated.

¶ 24 "The *ex post facto* clauses of the United States Constitution prohibit retroactive application of a law inflicting greater punishment than the law in effect when a crime was committed." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 208, 909 N.E.2d 783, 800 (2009). A *ex post facto* violation can be shown by the following: "(1) a legislative change; (2) the change imposed a punishment; and (3) the punishment is greater than the punishment that existed at the time the crime was committed." *Neville v. Walker*, 376 Ill. App. 3d 1115, 1118-19, 878 N.E.2d 831, 834 (2007).

¶ 25 At the time defendant committed the offense in this case (March 2008), section 11-501 of the Code provided anyone committing a DUI for a third time is guilty of aggravated DUI. 625 ILCS 5/11-501(d)(1)(A) (West Supp. 2007). Except as otherwise provided, "a person convicted of aggravated [DUI] *** is guilty of a Class 4 felony." 625 ILCS 5/11-501(d)(2) (West Supp. 2007). At the time of defendant's sentencing in November 2009, a third aggravated DUI conviction resulted in a Class 2 felony. 625 ILCS 5/11-501(d)(2)(B) (West Supp. 2009). Thus, the punishment for the crime increased after defendant committed the offense. See *People*

v. McCleary, 278 Ill. App. 3d 498, 500, 663 N.E.2d 22, 24 (1996) (noting "[a] defendant is entitled to be sentenced in accord with the law in effect at the time of the offense"). As defendant's sentence on count II does not conform to the statute, it is void and must be vacated.

People ex rel. Ryan v. Roe, 201 Ill. 2d 552, 557, 778 N.E.2d 701, 704 (2002).

¶ 26 Although the State agrees defendant's Class 2 felony sentence must be vacated and the cause remanded, it argues the trial court on remand should not be limited to sentencing defendant on a Class 4 felony. In referencing count I, the State contends the statute in effect at the time of defendant's offense classified aggravated DUI as a Class 3 felony offense if the defendant committed a third DUI while his driving privileges were suspended or revoked. 625 ILCS 5/11-501(c-1)(2) (West Supp. 2007) (as amended by Pub. Acts 94-114, 94-963, 95-149, and 95-355). However, count I did not charge defendant with committing a third DUI while his driving privileges were suspended or revoked. Instead, the State alleged defendant drove or was in actual physical control of a motor vehicle at a time he was under the influence of alcohol and he had two previous DUI convictions. No allegation was made that defendant's driving privileges were suspended or revoked. Thus, section 11-501(c-1)(2) did not apply. Under section 11-501(d)(2) of the Code, a person convicted of aggravated DUI is guilty of a Class 4 felony. As defendant's convictions on counts I, II, V, and VI all involve Class 4 felonies, the trial court is limited on remand to sentencing defendant as a Class 4 felon subject to any enhanced penalties that might be applicable. Because we are remanding for a new sentencing hearing, we need not address defendant's claim that his sentence was excessive.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we affirm in part, vacate defendant's sentence on count II,

and remand for further proceedings. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed in part and vacated in part; cause remanded.