

NOTICE
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NO. 4-09-0821

Order Filed 3/9/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JODY D. PRICE,)	No. 08CF1277
Defendant-Appellant.)	
)	Honorable
)	Paul G. Lawrence,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court. Justices Steigmann and Myerscough concurred in the judgment.

ORDER

Held: Pursuant to *Anders v. California*, no meritorious issue can be raised on appeal. Accordingly, OSAD's motion to withdraw as counsel on appeal is allowed, and the trial court's judgment is affirmed.

This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree.

I. BACKGROUND

In June 2009, a jury found defendant, Jody D. Price, guilty of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d) (West 2008)), driving while license revoked (625 ILCS 5/6-303(a) (West 2008)), reckless driving (625 ILCS 5/11-503(a)(1) (West 2008)), and fleeing or attempting to elude a

police officer (625 ILCS 5/11-204(a) (West 2008)). Additionally, defendant was found not guilty of operation of an uninsured motor vehicle (625 ILCS 5/3-707(b) (West 2008)).

At defendant's June 2009 jury trial, Officer Amy Keil, a police officer for the Bloomington police department, testified as follows. On October 9, 2008, she followed a vehicle after she observed it traveling at a high rate of speed on Colton Street and then quickly turn on Walnut Street. She noticed the driver of the vehicle was wearing dark clothing. She testified she was driving a marked police squad car and wearing her police uniform. As she followed the vehicle, she observed it drive through several stop signs without making a complete stop.

According to Officer Keil, the vehicle continued at a fast rate of speed and appeared like the driver was attempting to avoid her. She activated her emergency lights when she noticed the vehicle slow down to make a turn. Instead of stopping, the vehicle accelerated, and turned east on Empire Street, traveling the wrong direction on the one-way street. The vehicle then turned south on a street between Prairie and East Streets. As Officer Keil followed the vehicle, she noticed it "flying" through intersections without slowing. According to Officer Keil, the vehicle was traveling so fast, it would "bottom out," and she observed sparks caused from the vehicle's fender hitting the road.

The distance between the vehicle and Officer Keil increased because she slowed down as she approached the intersections. She observed the vehicle turn north on Evans Street. When she also turned, she noticed the driver was no longer in the moving vehicle, and she observed the vehicle hit a tree.

She testified her squad car was equipped with a video-recording device, which had recorded the pursuit. This video was shown to the jury.

Officer Keil called dispatch to report the incident and was informed the vehicle's owner lived at 917 1/2 North Madison. She dispatched another officer to the residence to search for the driver. The dispatched officer reported he stopped an individual near the residence. The officer advised the individual was carrying a cell phone without a battery and requested Officer Keil search the vehicle for the battery. She searched the vehicle and found a battery on the floorboard behind the driver's seat. She gave the battery to another officer, and he took it to the location where the suspect was being held. Officer Keil remained with the vehicle and noticed the driver's side floorboard was wet, and there was a strong odor of alcohol in the vehicle.

Officer Keil next testified as to her observations of the suspect. At the trial, she identified defendant as the suspect. Officer Keil testified defendant was brought to the

scene of the occurrence, and Officer Keil noticed he smelled of alcohol. She also noticed he was wearing dark clothing and had cuts on his left wrist, index finger, and lip. Defendant advised he was involved in an altercation with his girlfriend's ex-boyfriend at Thornton's gas station, but he would not identify the ex-boyfriend.

Defendant was arrested and transferred to the Bloomington police department for further questioning. Officer Keil testified defendant's eyes were bloodshot, his breath smelled of alcohol, his clothing was wet, and he refused a Breathalyzer test. During the interview, defendant stated he had been drinking with his girlfriend, and he did not believe he was sober enough to operate a motor vehicle. Officer Keil's interview with defendant was recorded, and a portion of the interview was played for the jury.

After the interview was concluded, Officer Keil transported defendant to jail. During the transfer, defendant advised he would tell the truth if Officer Keil would drop a couple of his tickets.

Officer Keil testified defendant never produced proof of car insurance, and she did not find an insurance card in the vehicle. Based on her observations of defendant during the entire encounter, she opined defendant was under the influence of alcohol.

On cross-examination, Officer Keil acknowledged she was unable to identify the driver of the vehicle. She also acknowledged she lost sight of the vehicle for approximately five seconds. Although she had testified she first observed the vehicle traveling southbound on Colton Street, her report indicated the suspect was instead traveling northbound. Additionally, she acknowledged defendant never admitted being the driver of the vehicle. She testified she was not involved in the investigation at Thornton's gas station, which was located approximately two blocks from 917 1/2 North Madison.

Officer Justin Shively, a patrol officer for the City of Bloomington, testified he was dispatched to the 900 block of North Madison Street on October 9, 2008. When he arrived, he observed a black male running in the direction of 917 North Madison. At the hearing, he identified the individual as defendant.

Officer Shively testified he stopped defendant and noticed he was wearing a dark jacket and blue jeans. He also noticed defendant was sweating and was out of breath. Defendant advised he was involved in an altercation with two men at Thornton's gas station, and he was attempting to flee. Officer Shively did not observe any signs of pursuit from the two men.

Defendant advised he lived at 917 1/2 North Madison with his girlfriend, Rebecca Stone. Officer Shively asked

defendant if he had been driving the vehicle found by Officer Keil, and defendant denied being the driver. Defendant stated he noticed the vehicle was not in the driveway when he left the house, but he had assumed his girlfriend loaned it to a friend. The vehicle's registered owner was Stone.

Officer Shively testified defendant's pants were wet, his breath smelled like alcohol, and he had a cut on his left wrist. Defendant claimed he was cut when he jumped a fence trying to flee his pursuers. When Officer Shively conducted a pat-down search of defendant's person, he felt a hard object in defendant's coat pocket. When questioned about the object, defendant advised it was a cell phone and retrieved it from his pocket to give to Officer Shively. Because the Motorola cell phone was missing a battery, Officer Shively called Officer Keil to ask her to search the abandoned vehicle for a cell-phone battery.

When the battery found in the vehicle was brought to Officer Shively, he noticed it was a Motorola battery, and it fit the phone found in defendant's pocket. Defendant advised he had multiple cell phones with interchangeable batteries at his residence.

On cross-examination, Officer Shively acknowledged he never checked defendant's residence for additional cell phones or cell-phone batteries. He also acknowledged he never checked the

area to see if anyone was chasing defendant.

Officer Michael Perry, an officer with the Bloomington police department, testified he was dispatched to Thornton's gas station to investigate defendant's claim of an altercation. Officer Perry testified the store clerk advised he was not aware of any altercation outside the store. Although the store had security cameras, Officer Perry did not check the video because the cameras only recorded the inside of the store and the doorway, and defendant had claimed the altercation occurred on the street. On cross-examination, he acknowledged he did not check the video to verify whether defendant had been inside the store.

After the State rested its case, defense counsel called Rebecca Stone to the stand. She testified she resided at 917 1/2 North Madison Street with defendant. On October 9, 2008, a police officer knocked on her door and advised her vehicle had been involved in a police chase. She told the officer she had let her friend, Melissa Gibson, borrow the car, and defendant was not at home when Gibson borrowed the vehicle. She also testified she owned several cell phones and multiple batteries for some of the phones.

On cross-examination, she testified Melissa had borrowed her vehicle but denied telling officers Michelle had borrowed the car. She also denied telling the officers she did not know Michelle's last name.

On rebuttal, the State recalled Officer Perry to the stand. Officer Perry testified Stone had said her friend, Michelle, had borrowed the vehicle when he questioned her. She also said she did not remember Michelle's last name, and Michelle was taking the vehicle to Chicago.

The jury thereafter found defendant guilty of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d) (West 2008)), driving while license revoked (625 ILCS 5/6-303(a) (West 2008)), reckless driving (625 ILCS 5/11-503(a)(1) (West 2008)), and fleeing or attempting to elude a police officer (625 ILCS 5/11-204(a) (West 2008)). Additionally, defendant was found not guilty of operation of an uninsured motor vehicle (625 ILCS 5/3-707(b) (West 2008)).

The trial court later sentenced defendant as follows. He was sentenced to concurrent 4-year terms of imprisonment with credit for 202 days served for the convictions of aggravated driving under the influence of alcohol and driving while license revoked--both sentences to run consecutive to defendant's previous conviction of unlawful delivery of a controlled substance within 1,000 feet of a church--and concurrent sentences of 364 days in jail for the convictions for reckless driving and fleeing or attempting to elude a police officer to run concurrent to the 4-year prison terms.

In October 2009, defendant filed a notice of appeal and

the trial court appointed OSAD to serve as his attorney. In November 2010, 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 December 23, 2010, 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.

II. ANALYSIS

OSAD contends the record shows no meritorious issues that can be raised on appeal. Specifically, OSAD contends (1) the trial court did not err by refusing to consider defendant's *pro se* motion to suppress, (2) defense counsel was not ineffective in failing to adopt defendant's *pro se* motion to suppress, (3) defendant was proved guilty beyond a reasonable doubt, and (4) the court did not abuse its discretion in sentencing defendant to concurrent terms of 4 years' imprisonment for his two felony convictions and concurrent 364-day terms in jail for his two misdemeanor convictions.

A. Defendant's *Pro Se* Motion To Suppress

First, OSAD argues the trial court did not err by refusing to consider defendant's *pro se* motion to suppress. Additionally, OSAD argues defense counsel was not ineffective in

failing to adopt the *pro se* motion. We agree.

In May 2009, defendant filed a *pro se* motion to suppress evidence illegally seized. At the May 2009 hearing, defense counsel advised she had determined a motion to suppress was not appropriate in this case. The trial court informed defendant that his appointed attorney was required to file any motions on his behalf, and his counsel had determined she would not proceed on his *pro se* motion because she believed a motion to suppress was not warranted. The court asked defendant if he understood, and defendant responded in the affirmative.

"When a defendant is represented by counsel, he generally has no authority to file *pro se* motions, and the court should not consider them." *People v. Serio*, 357 Ill. App. 3d 806, 815, 830 N.E.2d 749, 757 (2005). Because a defendant is not entitled to both representation by counsel and self-representation, a defendant represented by counsel generally has no authority to file *pro se* motions. *Serio*, 357 Ill. App. 3d at 815, 830 N.E.2d at 757.

Here, defendant filed a *pro se* motion to suppress while he was represented by counsel. Therefore, defendant lacked authority to file the *pro se* motion, and the trial court was correct in refusing to consider his motion.

Next, OSAD argues defense counsel was not ineffective in failing to adopt defendant's *pro se* motion to suppress. In

his *pro se* motion, defendant argued "[t]here was no probable cause for the unlawful search and seizure the peace officer knowingly and willingly proceeded with." Although defendant failed to allege any specifics, it appears from the record he is complaining about the pat-down search of his person and the seizure of his cell phone by Officer Shively.

To establish ineffective assistance of counsel, a party must first demonstrate his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Additionally, the party must establish a reasonable probability that, but for the deficient performance of counsel, the proceeding would have been resolved differently. *Strickland*, 466 U.S. at 694.

Here, Officer Shively testified he was dispatched to the 900 block of North Madison Street to search for the driver of the abandoned vehicle. While he searched the area, he observed defendant running behind a house located between the area where the car was deserted and the residence of the vehicle's registered owner. When defendant was detained for questioning, Officer Shively learned defendant resided at 917 1/2 North Madison Street, the residence of the abandoned vehicle's registered owner.

Additionally, Officer Shively noticed defendant was wearing dark clothing. He also noticed defendant was sweating, his pants were wet, and his breath smelled like alcohol. Based

on these observations, Officer Shively conducted a pat-down search of defendant's person and noted a hard object in defendant's coat pocket. When questioned regarding the object, defendant advised it was a cell phone and retrieved it from his pocket to give to Officer Shively.

A police officer may conduct a brief investigatory stop "if the officer has a reasonable and articulable suspicion the person is committing, has committed, or is about to commit a crime." *People v. Austin*, 365 Ill. App. 3d 496, 503, 849 N.E.2d 112, 118 (2006). Additionally, under section 107-14 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/107-14 (West 2008)),

"A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit[,] or has committed an offense as defined in [s]ection 102-15 of this Code, and may demand the name and address of the person and an explanation of his actions."

However, before a police officer may arrest an individual, the officer must have probable cause. *People v. Mata*, 178 Ill. App. 3d 155, 159-60, 533 N.E.2d 370, 373-74

(1988). Probable cause requires "the facts and circumstances within the arresting officer's knowledge [be] sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense." *Mata*, 178 Ill. App. 3d at 161, 533 N.E.2d at 375. However, probable cause does not require evidence sufficient to convict the individual. *Mata*, 178 Ill. App. 3d at 161, 533 N.E.2d at 375.

OSAD first argues Officer Shively had reasonable suspicion to briefly detain defendant for questioning, and we agree. Shortly after the vehicle was abandoned, defendant was observed running behind a house located between the area where the vehicle was deserted and the residence of the vehicle's registered owner. Based on this observation, Officer Shively had reasonable suspicion defendant had committed a crime. Therefore, Officer Shively had authority to detain defendant for a reasonable period of time to question him regarding his activities.

OSAD next argues Officer Shively had probable cause to arrest defendant at the time he conducted the search of defendant's person, and we agree. In addition to the location where defendant was found, Officer Shively learned defendant lived at the same residence as the abandoned vehicle's registered owner. Additionally, both defendant and the vehicle's driver were wearing dark clothing on the night in question. Also, Officer

Shively noted defendant's pants were wet, he smelled like alcohol, and he had a cut on his left wrist.

Despite defendant's claim of being involved in an altercation, Officer Shively had probable cause to arrest defendant at the time he conducted the pat-down search. The facts and circumstances known to Officer Shively were sufficient to warrant an individual of reasonable caution to believe an offense had been committed by defendant. Therefore, although Officer Shively had not yet obtained sufficient evidence to convict defendant, he had sufficient information to satisfy probable cause and justify an arrest. Accordingly, because Officer Shively had probable cause to arrest defendant at the time he conducted the pat-down search, defendant's counsel was not ineffective in failing to adopt defendant's *pro se* motion to suppress.

B. Sufficiency of the Evidence

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

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. *Smith*, 185 Ill. 2d at 541, 708 N.E.2d at 369.

Here, the jury heard Officer Keil testify regarding the circumstances surrounding the pursuit of the vehicle and also had the opportunity to watch the recording of the pursuit. Although Officer Keil was unable to identify the driver, she noticed both the driver and defendant were wearing dark clothing on the night in question. Defendant was apprehended when he was found running behind a house located between the area where the vehicle was abandoned and the residence of the vehicle's registered owner shortly after Officer Keil noticed the vehicle had been abandoned.

Officer Keil searched the vehicle and noticed the driver's side floorboard was wet and the car smelled like alcohol. Officers Keil and Shively noticed defendant was sweating, his pants were wet, he smelled like alcohol, and he had various cuts on his body. Additionally, the cell-phone battery found in the deserted vehicle fit the cell phone defendant was carrying when he was detained by Officer Shively.

Looking at the evidence in the light most favorable to the State, sufficient evidence was presented for the jury to determine defendant was the driver of the abandoned vehicle. Accordingly, the State proved defendant guilty of aggravated driving under the influence of alcohol, driving while license

revoked, reckless driving, and fleeing or attempting to elude a police officer beyond a reasonable doubt.

C. Defendant's Sentence

Last, OSAD contends no colorable argument can be made the trial court erred in sentencing defendant to concurrent terms of 4 years' imprisonment for his two Class 4 felony convictions and concurrent 364-day terms in jail for his two misdemeanor convictions. We agree.

The trial court's determination of an appropriate sentence should not be disturbed absent an abuse of discretion. *People v. Smith*, 318 Ill. App. 3d 64, 74, 740 N.E.2d 1210, 1218 (2000).

According to section 5-8-1(a)(7) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(a)(7) (West 2008)), the sentencing range for a Class 4 felony is one to three years' imprisonment. However, if a defendant is eligible for extended-term sentencing, the sentencing range for the Class 4 felony conviction is three to six years' imprisonment under section 5-8-2(a)(6) of the Unified Code (730 ILCS 5/5-8-2(a)(6) (West 2008)). Under section 5-5-3.2(b)(1) of the Unified Code (730 ILCS 5/5-5-3.2(b)(1) (West 2008)), a defendant is eligible for extended-term sentencing:

"When a defendant is convicted of any felony, after having been previously con-

victed *** of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction[.]"

Defendant was previously convicted of (1) a Class 2 felony for unlawful possession of a controlled substance with the intent to deliver in 2000, (2) a Class 4 felony for possession of a controlled substance in 2005, and (3) a Class 4 felony for aggravated driving under the influence of alcohol in 2006. Therefore, defendant was eligible for extended-term sentencing with a sentencing range of 3 to 6 years' imprisonment because these previous convictions occurred within 10 years of his present conviction.

After the trial court considered all aggravating and mitigating factors, defendant was sentenced to concurrent terms of four years' imprisonment for his two felony convictions. Because defendant's sentence was within the sentencing range for an extended-term sentence, and the court considered the appropriate aggravating and mitigating factors, the trial court did not abuse its discretion in sentencing defendant to concurrent terms of four years' imprisonment.

III. CONCLUSION

For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

Affirmed.