

NOTICE

Decision filed 1/11/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0364

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
Plaintiff-Appellee,) Circuit Court of
) Fayette County.
)
v.) Nos. 07-DT-21, 07-DT-105, & 07-TR-
905)
)
ROBERT W. HANKS,) Honorable
) S. Gene Schwarm,
Defendant-Appellant.) Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Chapman and Justice Welch concurred in the judgment.

Held: The evidence was sufficient to support the defendant's conviction for driving under the influence; the defendant cannot complain that the trial court improperly rescinded a prior DUI arrest as evidence in aggravation because the defendant's sentence was based on a joint recommendation; and the trial court properly dismissed the defendant's petition to revoke his statutory summary suspension because it was untimely.

RULE 23 ORDER

Defendant, Robert W. Hanks, appeals his conviction for driving under the influence of alcohol and the denial of his motion to rescind the statutory summary suspension of his driver's license. The Office of the State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), alleging that there is no merit to the appeal and requesting leave to withdraw as counsel. See *McCoy v. Court of Appeals*, 486 U.S. 429, 100 L. Ed. 2d 440, 108 S. Ct. 1895 (1988). Defendant was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. Defendant has filed a response.

We have considered the State Appellate Defender's motion to withdraw as counsel on appeal and the attached memorandum, as well as defendant's response thereto. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Fayette County.

On March 26, 2007, Hanks was charged with one count of driving under the influence of alcohol (No. 07-DT-21) and one count of improper lane usage (No. 07-TR-905), as a result of a February 24, 2007, motor vehicle accident. Hanks's driver's license was also summarily suspended for three months pursuant to section 11-501.1 of the Illinois Vehicle Code (625 ILCS 5/11-501.1 (West 2006)).

On March 23, 2007, Hanks filed a petition to rescind the summary suspension of his driving privileges. Following a hearing on April 25, 2007, the trial court denied the petition to rescind. On May 16, 2007, Hanks filed a motion to reconsider the denial of his petition to rescind the statutory summary suspension. The motion to reconsider was denied on May 30, 2007.

On October 25, 2007, Hanks was again charged with driving under the influence of alcohol (No. 07-DT-105). Hanks's driver's license was again summarily suspended, this time for a period of three years. On January 28, 2009, the State dismissed the charges in No. 07-DT-105. On February 20, 2009, Hanks filed a petition to rescind the statutory summary suspension in that case, arguing that the underlying charge of driving under the influence had been dismissed. The State filed a motion to dismiss the petition to rescind, arguing that it was untimely. On April 15, 2009, the trial court granted the State's motion and dismissed the petition. On May 14, 2009, Hanks filed a motion to reconsider, which the trial court denied on July 1, 2009.

The following evidence was adduced at Hanks's May 26, 2009, bench trial in Nos.

07-DT-21 and 07-TR-905. Patrick Moore testified that he was self-employed in the field of cable communications. Around 1 or 1:15 a.m. on February 24, 2007, Moore was returning home from repairing some storm damage. Moore was driving a Ford F-550 bucket truck and pulling a trailer designed to hold a reel of cable wire. As he was traveling north on United States Highway 51 just north of Vandalia, Illinois, he observed a vehicle heading toward him on the opposite side of the road. The vehicle was swerving from side to side. Moore attempted to get off the road on the right shoulder, but the oncoming vehicle swerved into Moore's lane, striking Moore's vehicle on the driver's side door. The vehicle also struck Moore's trailer and the vehicle behind Moore.

Deputy Josh Wattles of the Fayette County sheriff's office testified that he responded to a reported accident around 1:24 a.m., February 24, 2007, on United States Highway 51 just north of Ramsey, Illinois. At the scene, Wattles observed that a pickup truck had crashed into two larger utility trucks, one with a trailer, and was sideways across the northbound lane. Wattles spoke with the driver of the pickup truck, whom he identified as Hanks, and smelled the odor of alcohol. Wattles described Hanks's condition: "wobbly, mumbly, appeared to me he was possibly under the influence of alcohol." Hanks admitted to Wattles that he had a couple of drinks while in Decatur. Believing Hanks to be impaired by alcohol, Wattles asked Hanks to sit back in his vehicle so Wattles could control traffic.

Illinois State Police Trooper John Faulkner testified that sometime after 1:30 a.m. on February 24, 2007, he was dispatched to the area north of Ramsey, Illinois. The weather was cold and windy. It took Faulkner approximately an hour to arrive. At the scene, Faulkner observed a three-vehicle accident involving a white truck, a large electric truck with an orange trailer, and a pickup truck. The pickup truck, which belonged to Hanks, was sideways across the highway. Hanks admitted that he had been drinking earlier in Decatur. Although Faulkner did not smell any alcohol on Hanks's breath, he nevertheless had Hanks

perform several field sobriety tests, all of which Hanks failed. Faulkner placed Hanks under arrest for driving under the influence and transported him to the Fayette County sheriff's office. Hanks was cited for driving under the influence of alcohol and for improper lane usage. At the sheriff's office, Faulkner detected a strong odor of alcohol on Hanks's breath and observed Hanks swaying and staggering. Hanks was given a breath test at 4:25 a.m., and the results indicated a blood-alcohol level of 0.113.

Hanks testified that after eating at a restaurant in Decatur, he met a friend at a bar. They ordered a pizza and Hanks consumed a total of eight alcoholic drinks over a period of approximately six hours. Hanks left for home around midnight, approximately an hour after his last alcoholic drink. On the way home he was watching for deer on the side of the road. He took a drink of water and then set the water bottle down. As he looked up, he was blinded by headlights. Hanks stated that the crash occurred when Moore's truck crossed the center line. Hanks spoke to Deputy Wattles first. Although his knees hurt as a result of the accident, Hanks told Wattles that he did not need medical attention. After a long period of time, Trooper Faulkner arrived on the scene and questioned Hanks. Hanks told Faulkner about the pain in his knees, but Faulkner nevertheless instructed Hanks to perform several field sobriety tests. Hanks had difficulty performing the tests because of the pain in his knees and because it was cold and windy. Faulkner placed him under arrest. Approximately four hours later he was given a breath test.

Hanks further testified that he suffers from a medical condition known as Barrett's Esophagus, which, he explained, prevents the sphincter at the top of his stomach from closing off completely and causes the contents of his stomach to rise into his throat. This condition is aggravated by alcohol, carbonated beverages, smoking, and rich foods, all of which Hanks had consumed on the night of the accident. The symptoms of Barrett's Esophagus include a burning sensation in the throat and a rancid taste in the mouth. Hanks

testified that he was experiencing these symptoms immediately prior to his breath test.

Dr. Ronald Henson testified that he is an independent consultant in drug and alcohol testing, as well as forensic investigations. Henson stated that he is a graduate of the Illinois State Police Academy and has a bachelor's degree in criminal justice from the University of Illinois, a master's degree in public administration from Governor's State University, and a Ph.D. from Walden University. Henson testified that he had 30 years' experience in field sobriety testing, as well as blood, breath, and urine testing, and had been qualified as an expert witness more than 200 times.

Dr. Henson testified about the nature of Barrett's Esophagus, the mechanism of how a breath-test machine works, the effects that a substantial time delay and Barrett's Esophagus would have on the results of a breath test, and field sobriety testing. Dr. Henson stated that a condition such as Barrett's Esophagus could create a false positive in a breath-test machine because the machine is unable to distinguish between alcohol molecules rising out of the stomach and alcohol molecules present in the breath. Dr. Henson also stated that the three-hour delay between the accident and the test could compromise the test results. Dr. Henson opined that under the circumstances, a blood test, rather than a breath test, should have been used to determine Hanks's blood-alcohol level.

The trial court found Hanks guilty of driving under the influence of alcohol and improper lane usage. The court stated that the testimony of Moore, Wattles, and Faulkner, all of whom the court found to be credible, was sufficient to meet the State's burden of proof. The trial court did not find Hanks's testimony to be credible and assigned little weight to the opinion of Dr. Henson, noting that his Ph.D. in applied management and decision sciences from an online university and his master's degree in public administration did not qualify him as either a doctor or a scientist.

On June 19, 2009, Hanks filed a posttrial motion seeking either a judgment

notwithstanding the verdict or a new trial. Hanks argued that numerous discrepancies between Trooper Faulkner's trial testimony and his testimony at the April 25, 2007, hearing on Hanks's petition to rescind his statutory summary suspension demonstrate that Faulkner was not credible. Hanks also argued that the trial court should not have considered the results of the breath test.

A hearing on Hanks's posttrial motion was held on June 23, 2009. At that hearing, Hanks added a claim that the trial court erred in finding Moore to be a credible witness, because Moore was eligible for restitution. The trial court denied the motion and proceeded with a sentencing hearing. At the sentencing hearing, evidence was presented regarding the damage to the other two vehicles involved in the accident. Testimony was also presented regarding Hanks's October 25, 2007, arrest for driving under the influence and driving while the statutory summary suspension was in effect on the first charge. Following the presentation of all the evidence in aggravation and mitigation, the parties agreed to a joint-sentencing recommendation. Pursuant to that joint recommendation, the trial court sentenced Hanks to 18 months' probation and ordered him to make restitution.

Hanks appeals the judgment in Nos. 07-DT-21 and 07-TR-905, as well as the trial court's July 1, 2009, denial of his motion to reconsider the dismissal of his petition to rescind the statutory summary suspension in No. 07-DT-105.

The first potential issue identified by the State Appellate Defender in its motion to withdraw as counsel on appeal is whether there was sufficient evidence to support the guilty verdicts. When a court reviews the sufficiency of the evidence, the issue 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. Taylor*, 381 Ill. App. 3d 251, 257, 886 N.E.2d 523, 528 (2008). A conviction will not be reversed on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory that

it raises a reasonable doubt regarding the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004). A reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses unless the evidence is so palpably contrary to the judgment or so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Ramos*, 339 Ill. App. 3d 891, 901, 791 N.E.2d 592, 600 (2003).

In his posttrial motion, Hanks argued first that Trooper Faulkner's trial testimony differed considerably from the testimony he gave at the hearing on Hanks's petition to rescind the statutory summary suspension. Specifically, Hanks argued that at Hanks's bench trial, Faulkner testified that when he arrived at the scene, Hanks was standing outside his vehicle and that he was swaying and staggering. At the hearing on the petition to rescind, however, Faulkner testified that when he arrived, Hanks was sitting in the passenger seat of his wife's vehicle and that Hanks was not swaying and staggering. Hanks also argued that the trial court erred in considering the results of the breath test because the State failed to introduce evidence that the machine had been properly certified, because of the three-hour delay between the time of the accident and the time of the test, and because Dr. Henson's testimony established that the breath-test results would not be accurate given the time between the accident and the administration of the test and Hanks's medical condition. Hanks also argued that the trial court erred in considering evidence of his failure to successfully perform the field sobriety tests, because the injury to Hanks's knees and the windy conditions at the scene negatively affected Hanks's ability to perform those tests. Finally, Hanks argued that Moore's testimony was not credible because he was eligible for restitution.

The issues raised in Hanks's posttrial motion all relate to the weight the trial court accorded to certain evidence and its evaluation of the credibility of the witnesses. As noted

above, we will not substitute our judgment for that of the fact finder on these questions unless the evidence is so palpably contrary to the judgment or so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. Whether considered singly or in aggregate, Hanks's claims do not so undermine the credibility of the witnesses that the evidence is palpably contrary to the judgment or so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of Hanks's guilt.

The second potential issue identified by the appellate defender in its motion to withdraw as counsel is whether the trial court improperly considered Hanks's October 25, 2007, arrest for driving under the influence as an aggravating factor when imposing the sentence. Proof of prior misconduct that does not result in a prosecution or a conviction is admissible at sentencing because it is relevant to the issue of the defendant's character. *People v. Johnson*, 114 Ill. 2d 170, 205, 499 N.E.2d 1355, 1371 (1986). More importantly, the sentence in the present case was the result of a joint recommendation by the State and Hanks rather than a sentence devised by the trial court after considering the evidence in mitigation and aggravation.

Finally, we address the question of whether there are any issues of merit that could be raised on appeal from the order dismissing Hanks's petition to rescind his three-year statutory summary suspension in No. 07-DT-105. We note that although Hanks's notice of appeal clearly indicates that he is appealing this order, the appellate defender's motion to withdraw as counsel on appeal advances no argument for why an appeal from this order is meritless. In fact, the appellate defender's motion to withdraw makes no mention of this statutory suspension at all. However, our own review of the record reveals that no issues of merit could be raised on appeal of this order.

Section 2-118.1(b) of the Illinois Vehicle Code provides that a person seeking a rescission of a statutory summary suspension entered pursuant to section 11-501.1 must

make a written request for a judicial hearing in the circuit court within 90 days of service of the notice of suspension (625 ILCS 5/2-118.1(b) (West 2006)). In the present case, written notice of the suspension was served on Hanks on October 25, 2007, the same day as his arrest. Hanks filed his petition to rescind the suspension on February 20, 2009, long after the expiration of the 90-day period. Consequently, the trial court's dismissal of the petition to rescind the statutory summary suspension was proper.

For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Fayette County is affirmed.

Motion granted; judgment affirmed.