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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 22924
)	
RYAN LOWE,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 **Held:** Evidence established defendant waived his right to a jury trial despite defendant having signed a pre-sentence investigation waiver instead of a jury waiver. State proved defendant guilty of driving on a suspended license where defendant did not successfully raise a necessity defense. Cause remanded for a new sentencing hearing where State failed to prove necessary elements to permit defendant to be sentenced as a Class 3 offender.

¶ 2 In a bench trial, defendant Ryan Lowe was convicted of four counts of driving while his license was suspended or revoked (DWLS) pursuant to section 5/6-303 of the Illinois Vehicle Code (Code). 625 ILCS 5/6-303 (West 2008). The trial court merged the four counts into one and sentenced defendant as a Class 3 offender to four years in prison. Defendant contends his conviction must be reversed and the cause remanded for a new trial because he did not knowingly waive his right to a jury trial. Alternatively, defendant contends his conviction should be reversed because the State failed to negate his affirmative defense of necessity beyond a reasonable doubt. Finally,

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defendant contends his sentence must be vacated and the cause remanded for resentencing because the State failed to prove the requisite elements for elevating his offense to a Class 3 offense for sentencing purposes.

¶ 3 At trial, the court asked defendant if he wanted a bench trial or a jury trial. Defendant responded he wanted a bench trial. Defendant acknowledged his signature on a document which the court characterized as a jury waiver. Defendant then informed the court that he freely and voluntarily waived his right to a jury trial after conferring with his attorney stating he knew what a jury trial was. The court accepted the jury waiver and trial commenced.

¶ 4 The State's evidence at trial established that on August 30, 2008, at approximately 8:30 p.m., defendant was stopped for speeding at 91st Street and South Chicago Avenue and cited for DWLS. The State introduced a partial copy of defendant's driving abstract which established that on the date in question, defendant's driver's license was revoked.

¶ 5 Testifying on his own behalf, defendant stated that on June 19, 2008, he was shot six times in his legs and his torso. He underwent an operation to place a rod in his right leg, where the thigh bone had been shattered. Because of the pain, Vicodin, as well as an antibiotic for a recurring infection, was prescribed for him. Defendant was on those medications on the date he was stopped for speeding. Defendant testified he was driving to Walgreens to have his prescriptions refilled. He also testified he was in a lot of pain. Defendant first called a cab. When the cab did not arrive after 30 to 40 minutes, defendant drove himself to Walgreens. According to defendant, there was no one else available to drive him there. Defendant denied he knew, the day before his arrest, that his pills would run out, saying he did not pay attention. On previous occasions, when he needed to refill the prescriptions, he had someone else drive him. Defendant admitted that when he was stopped for speeding that day, he had no driver's license because his license had been suspended.

¶ 6 The State agreed to stipulate to certain medical records pertaining to defendant. Those records were admitted into evidence and reviewed by the trial court. However, those records have

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not been included in the record on appeal. In rebuttal, for purposes of impeachment, the State introduced defendant's 2004 conviction for possession of a controlled substance.

¶7 The trial court rejected defendant's claim, in final argument, that a life-threatening emergency existed, stating there was no competent evidence of that, either in testimony, or in the medical records that were submitted. The court also noted defendant would have known the day before this occurrence that he was running out of his medications. Based on this evidence, or lack thereof, the court found the facts did not establish the affirmative defense of necessity. The trial court convicted defendant of all four counts, merged them into one count, and sentenced defendant as a Class 3 offender.

¶8 After defendant was convicted, the State moved to revoke his bond. In doing so, the State, without objection from defendant, described defendant's criminal record as including 14 DWLS convictions and a conviction for a violation of section 11-401(a) of the Code—leaving the scene of a personal injury accident. 625 ILCS 5/11-401(a) (West 2008). Based upon the State's representations, the court increased defendant's bond to \$500,000 and he was taken into custody.

¶9 At the sentencing hearing, without objection from defendant, the State informed the court that defendant had 11 prior DWLS convictions, two of which were felony convictions. The State also noted, defendant's license had been revoked for a violation of section 11-401(a) of the Code. *Id.* Other offenses noted by the State were a 1998 Class 2 conviction for delivery of a controlled substance, and a 2003 Class 4 conviction for delivery of a controlled substance. Based upon these representations the State asked that defendant be sentenced to an extended-Class 3 sentence. In answer to these assertions, defense counsel did not challenge any of the representations of defendant's record, but noted defendant had never been convicted of a violent offense.

¶10 The court refused the State's request for an extended-term sentence and sentenced defendant to four years in prison. This appeal ensued.

¶11 Defendant first contends he did not knowingly waive his right to a jury trial. Because

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defendant offered no objection at trial and did not raise the issue in his posttrial motion, this ground for appeal has been forfeited. *People v. Bannister*, 232 Ill. 2d 52, 64-65 (2008). Furthermore, even on the merits, we would find this contention to be without merit. Defendant notes, the document he signed and the court termed a jury waiver, was actually a waiver of a presentence-investigation report form. There is no signed jury waiver in the record. Instead, the presentence-investigation waiver is contained in the record and is dated the same date the jury waiver was purportedly signed. Nonetheless, the failure to sign a jury waiver, although statutorily required (725 ILCS 5/115-1 (West 2008)) does not necessitate reversal where the fundamental inquiry is whether the facts of the case demonstrate defendant waived his right to a jury trial in open court. *People v. Eyen*, 291 Ill. App. 3d 38, 41 (1997). Here defendant elected a bench trial when the court gave him the choice of either a jury trial or a bench trial. Defendant stated he had not been pressured to make this decision, that he had discussed the matter with his trial counsel, and he understood what a jury trial was. We also note, a factor we may consider, is defendant's previous extensive experience with the criminal justice system, which tends to bolster the conclusion that defendant understood the difference between a jury trial and a bench trial. *Bannister*, 232 Ill. 2d at 71. The State's un rebutted and unchallenged representation to the court at the sentencing hearing in this case was that defendant had previously been convicted of numerous prior offenses. Under all of these circumstances we find no basis for overturning defendant's conviction on this ground.

¶ 12 We next consider defendant's claim, that he successfully raised the affirmative defense of necessity, which the State then failed to rebut beyond a reasonable doubt. To establish an affirmative defense of necessity, a defendant must present some evidence he was without blame in creating the situation causing the necessity, and that he reasonably believed his actions were necessary to avoid a greater public or private injury than his conduct might have reasonably caused. *People v. Janik*, 127 Ill. 2d 390, 399 (1989). Defendant admitted at trial that he drove his vehicle while his driver's license was suspended. However, defendant testified he did so out of necessity because he was in

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pain from gunshot wounds he had sustained, he had run out of the prescription medication he had been given, and the taxi he called to take him to the pharmacy had not arrived after 30 to 40 minutes. Defense counsel argued this was a life or death situation because defendant had an ongoing infection arising from the gunshot wounds requiring prescribed antibiotics which defendant had run out of, along with Vicodin, a pain medication. However, there was no testimony at trial that defendant's infection was life-threatening. Defendant testified he was in pain. Defendant introduced medical records at trial but has not included them in the record on appeal. Therefore, we must infer the medical records supported the trial court's conclusion that defendant's case for a necessity defense had not been established. *Id.* at 394. Defendant had no satisfactory explanation for his lack of anticipation of running out of his medication the day before, stating only that he had not noticed. Defendant did not explain why he could not have simply waited longer for the cab to arrive. All of these factors negate the element of lack of fault by defendant in causing the necessity and, therefore, his attempt to establish this affirmative defense fails.

¶ 13 Finally, we consider defendant's challenge to his four-year prison term, which was imposed upon his conviction for violating section 6-303(d)(4) of the Code. 625 ILCS 5/6-303(d)(4) (West 2008). The underlying offense for DWLS is set out in section 6-303(a) of the Code and provides that any person who drives a motor vehicle when their driver's license is revoked or suspended, except where they qualify for limited driving privileges, shall be guilty of a Class A misdemeanor. 625 ILCS 5/6-303(a) (West 2008). Defendant was charged with violating four sections of the Code, which elevated the offense to a felony. We will summarize the pertinent parts of these sections.

¶ 14 Section 6-303(d-4) of the Code provides that any person convicted of a 10th, 11th, 12th, 13th or 14th violation of the statute, is guilty of a Class 3 felony, and is not eligible for probation or conditional discharge, if the revocation or suspension was for leaving the scene of an accident involving physical injuries (625 ILCS 5/11-401(a) (West 2008)). 625 ILCS 5/6-303(d-4) (West (2008)). That person is also not eligible for probation or conditional discharge. 625 ILCS 5/6-

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303(d-2.5) (West (2008)).

¶ 15 Section 6-303(d-3) of the Code provides that if the person had previously been convicted of a fourth through ninth violation of the statute, they are guilty of a Class 4 felony. 625 ILCS 5/6-303(d-3) (West 2008). If the revocation or suspension was for violating section 11-401(a) of the Code, then the person must serve a minimum term of 180 days' imprisonment. 625 ILCS 5/11-401(a) (West 2008).

¶ 16 Section 6-303(d-2) of the Code provides that if the person had previously been convicted of a second violation of the statute, they are guilty of a Class 4 felony. 625 ILCS 5/6-303(d-2) (West 2008). If the suspension or revocation was for violating section 11-401(a) of the Code, they must serve a minimum term of 30 days' imprisonment. 625 ILCS 5/11-401(a) (West 2008).

¶ 17 Section 6-303(d) of the Code provides that if the person had previously been convicted of a single violation of the statute, they are guilty of a Class 4 felony. 625 ILCS 5/6-303(d) (West 2008). If the suspension or revocation of their license was for violating section 11-401(a) of the Code, they must serve a minimum term of 30 days' imprisonment or 300 hours of community service, as determined by the court. 625 ILCS 5/11-401(a) (West 2008).

¶ 18 Defendant was convicted of violating all four of these sentence-enhancing sections. However, defendant alleges on appeal, that the State failed to prove the sentence-enhancing prior convictions and, therefore, the cause must be remanded for resentencing. We agree.

¶ 19 The State contends defendant waived this issue by failing to object on this ground at trial or in his motion to reconsider sentence. A sentence unauthorized by statute is void – the contention cannot be waived and the sentence can be attacked on this basis at any time. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Therefore, the State's waiver argument is unavailing.

¶ 20 We have noted the State orally represented to the trial court that defendant had either 14 or 11 prior DWLS convictions. The Code provides that in a prosecution under section 6-303(f), a certified copy of defendant's driving abstract shall be admitted as proof of any prior convictions. 625

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ILCS 5/6-303(f) (West 2008). Other methods of proof of prior convictions for purposes of sentence enhancement include the presentence investigation report. *People v. Johnson*, 372 Ill. App. 3d 772, 781 (2007). The State did introduce a partial abstract to prove defendant was driving while his license was revoked when he was stopped for speeding in this case. But neither in the trial court nor on appeal has the State attempted to point to any documentary proof of prior convictions necessary to enhance his sentence to a Class 3 felony. The presentence investigation report established only that defendant had previously been convicted of two independent DWLS offenses. Indeed, the State, in its brief on appeal, concedes it failed to provide proper evidence of enough prior DWLS convictions, so as to permit sentencing defendant as a Class 3 offender, but argues that in all likelihood, the court would resentence defendant to a four-year enhanced term upon remand for resentencing. The State suggests we impose that sentence ourselves, thereby ignoring the fact that as to the conviction at issue, the court specifically declined to impose an extended term. We will not attempt to speculate as to the trial court's sentencing decisions on remand. Instead, we affirm defendant's conviction for DWLS but vacate defendant's sentence and remand this cause for a new sentencing hearing.

¶ 21 Conviction affirmed; sentence vacated; and cause remanded for a new sentencing hearing.