

2012 IL App (2d) 110162-U
No. 2-11-0162
Order filed June 14, 2012

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-394
)	
RONALD W. BUTZ,)	Honorable
)	Kurt P. Klein,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: (1) Because defendant was convicted of two counts of aggravated DUI based on the same act, cause is remanded for the trial court to vacate the less serious conviction; (2) because the trial court was required to set restitution at sentencing, the court's order reserving the issue for a later hearing is vacated, but cause remanded for the court to hold a restitution hearing.

¶ 1 Following a bench trial, defendant, Ronald W. Butz, was found guilty of two counts of driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (a)(2) (West 2008)) and two counts of aggravated DUI (625 ILCS 5/11-501(d)(1)(C) (West 2008)). The court sentenced defendant to three years' imprisonment on the aggravated DUI counts and ordered the parties to "set

[the] matter for hearing on restitution on [a] future date[.]” Nothing in the record indicates that a restitution hearing has been held. Defendant appeals, arguing that: (1) under the one-act, one-crime rule, only one conviction of aggravated DUI may stand; and (2) the order setting restitution for a future date is invalid and must be vacated, without remanding the case for the court to determine restitution. For the reasons that follow, we agree that only one conviction of aggravated DUI is proper and remand the cause for the trial court to determine which conviction of aggravated DUI is more serious, and we remand the cause for the trial court to hold a restitution hearing.

¶ 2 The facts relevant to resolving this appeal are as follows. On the morning of July 23, 2009, defendant was driving in extremely foggy conditions when he attempted to pass a car driving in front of him. A car driven by Billie Brendel was driving in the opposite lane of traffic. When defendant saw Brendel’s car, it was too late for him to avoid hitting it. Defendant’s car collided with Brendel’s. As a result of the car accident, Brendel sustained severe brain and orthopedic injuries. Some of Brendel’s injuries are permanent.

¶ 3 When he was questioned by the police, defendant stated that he had not slept the night before, and he admitted that he had been drinking at his brother’s house before the accident occurred. However, defendant claimed that he stopped drinking and sobered up before he got in the car. A blood test conducted at the hospital revealed that defendant’s blood-alcohol concentration was 0.12. All four counts of the indictment were based on these facts.

¶ 4 The trial court found defendant guilty of two counts of DUI and two counts of aggravated DUI. At the sentencing hearing, the State tendered a document to defense counsel that was, according to the State, a list, but not an exhaustive list, of the expenses Brendel had incurred. The

State advised the court that, as of the date of sentencing, Brendel had incurred \$905,914.33 in medical expenses. No other evidence concerning restitution was presented to the court.

¶ 5 Following the sentencing hearing, the court sentenced defendant to three years' imprisonment, but the court did not indicate on what counts that sentence was imposed. The written sentencing order provides that defendant was convicted of both counts of aggravated DUI¹ and that he was sentenced to three years' imprisonment. A handwritten notation at the bottom of the sentencing order reflects that the two counts of aggravated DUI were merged.²

¶ 6 After imposing the sentence, the court asked, "Is the State telling me that they are not interested in pursuing a restitution order in this case?" The State responded, "[W]e would ask that a judgment of restitution be entered against the defendant." The court set the issue of restitution for a future hearing. The record does not establish that any future hearing date was ever set. This appeal followed.

¶ 7 At issue in this appeal is whether one of defendant's aggravated DUI convictions must be vacated, and whether the order setting a restitution hearing at a later date must be vacated without remanding the cause to the trial court for a restitution hearing. We address each issue in turn.

¹We presume, given the court's sentencing order and the fact that the parties make no argument regarding the misdemeanor counts of DUI, that the court merged the misdemeanor counts into the aggravated DUI counts.

²Although this notation might suggest that one of the convictions was vacated, it does not specify which, if either. The parties assume that both convictions remain intact. We adopt that assumption for our purposes here.

¶8 The first issue we consider is whether one of defendant's convictions of aggravated DUI must be vacated. Although defendant did not raise this issue in the trial court, we may reach it in order to correct a plain error that affects substantial rights. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); see *People v. Carter*, 213 Ill. 2d 295, 299 (2004). The State confesses error, and we agree that one conviction of aggravated DUI must be vacated.

¶9 Under *People v. Crespo*, 203 Ill. 2d 335, 344 (2001), multiple acts will not support multiple convictions if the State has treated all such acts as one offense. We review *de novo* whether the State has treated all of a defendant's acts as one offense. See *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶10 Here, in the indictment and at trial, the State treated the two counts of aggravated DUI as charging not separate acts but, rather, alternative theories of liability for the same act. Therefore, more than one conviction may not stand. Accordingly, we remand the cause to the trial court to decide which offense of aggravated DUI is more serious and to vacate the conviction of the other offense. See *In re Samantha V.*, 234 Ill. 2d 359, 379-80 (2009).

¶11 The next issue we consider is whether we must vacate the order setting a future restitution hearing. In addressing this issue, we first observe that defendant failed to challenge this order in the trial court. Ordinarily, a sentencing issue, like the amount of restitution to impose (see *People v. White*, 146 Ill. App. 3d 998, 1003 (1986) (noting that restitution is an increment of the sentence)), not raised during the sentencing hearing or in a postsentencing motion results in forfeiture of that issue on appeal. See *People v. Watkins*, 325 Ill. App. 3d 13, 17 (2001). Here, however, defendant claims that the trial court lacked the authority to set a restitution hearing at a later date. A sentencing provision that lacks authority is void and may be attacked at any time. *People v. Mancilla*, 331 Ill.

App. 3d 35, 37 (2002). Thus, we will address defendant's argument, and, because whether the trial court had the power to order that a restitution hearing would take place at a future date presents a pure question of law, we review this issue *de novo*. See *Brown v. ACMI Pop Division*, 375 Ill. App. 3d 276, 283 (2007).

¶ 12 Section 5-5-6 of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-6 (West 2010)) provides that the trial court shall determine at the sentencing hearing whether restitution is appropriate. Sections 5-5-6(a), (b), and (f) of the Code (730 ILCS 5/5-5-6(a), (b), (f) (West 2010)) delineate that the trial court shall determine whether restitution shall be paid in cash, the amount of restitution, and whether restitution shall be paid at once or in installments. In construing these sections of the Code, courts have found that "a definite amount of restitution must be set by the court at the sentencing hearing." *White*, 146 Ill. App. 3d at 1003.

¶ 13 Here, the court did not set the amount of restitution at the sentencing hearing. Thus, its order reserving the issue was invalid. *People v. Stinson*, 200 Ill. App. 3d 223, 224 (1990). However, the remedy available is not simply to vacate the order, as defendant claims. Rather, although we must vacate the order, we also must remand the cause for the trial court to comply with section 5-5-6 of the Code. *Id.* at 225.

¶ 14 For these reasons, we remand the cause for the trial court to determine which of the two aggravated DUI convictions must be vacated. We also vacate the order setting a future restitution hearing and remand the cause for the trial court to comply with section 5-5-6 of the Code. In all other respects, the judgment of the circuit court of De Kalb County is affirmed.

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