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2012 IL App (3d) 100801-U

Order filed August 21, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0801
)	Circuit No. 08-DT-2193
)	
LEONARD POLLARD,)	Honorable
)	Raymond A. Bolden,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant did not receive ineffective assistance of counsel; (2) the evidence was sufficient to convict defendant; (3) the court did not deny defendant a fair trial; and (4) the cause is remanded so the court can impose the proper fine.

¶ 2 Defendant, Leonard Pollard, was convicted of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2008)). Defendant appeals, arguing that: (1) he was denied effective assistance of counsel because counsel failed to file a motion to quash his arrest; (2) the evidence was not sufficient to prove him guilty beyond a reasonable doubt; (3) he was

denied a fair trial; and (4) the trial court improperly imposed a \$750 fine against him without assessing his ability to pay. We affirm in part, vacate in part, and remand the cause to impose the correct fine.

¶ 3

FACTS

¶ 4 Defendant was charged with DUI (625 ILCS 5/11-501(a)(2) (West 2008)). The citation alleged that police officers came upon a vehicle with its engine running and its driver passed out behind the wheel. Defendant's breath had a strong odor of alcohol, his eyes were red and glossy, and his speech was slurred. The citation further alleged that defendant failed to recite the alphabet and admitted to consuming alcohol. Defense counsel did not file a motion to quash arrest, and the cause proceeded to a bench trial.

¶ 5 At trial, the State presented the testimony of Debora Schenk. She testified that she had been a police officer for the city of Lockport for approximately three years and that she had been trained to detect the characteristics of a person under the influence of alcohol. On November 23, 2008, Schenk was on duty and was advised that an individual had fallen asleep in a vehicle in the parking lot of a Speedway gas station. She was informed that the vehicle was parked in a location that restricted access to one of their pumps.

¶ 6 Schenk was the first officer to respond to the call. When she arrived at the gas station, she saw defendant's car parked between two lanes that contained gasoline pumps but not close enough so that gas could be pumped into it. She noticed that the engine was running. When she approached the vehicle she found defendant asleep behind the wheel. Schenk knocked on the window. Defendant did not immediately respond, and Schenk knocked again. This time,

defendant awoke and appeared startled. Schenk motioned for defendant to roll down his window; however, he had difficulty comprehending what she wanted.

¶ 7 Eventually, defendant rolled down his window. Schenk asked him if he was okay, and defendant responded that he had stopped to get gasoline. At this point, Schenk noticed a strong odor of alcohol coming from his breath and that his speech was slurred. It took defendant approximately five attempts to retrieve his driver's license from his wallet. Once Schenk received defendant's license, Officer Kevin Brauch arrived at the scene, and she turned the investigation over to him. After speaking briefly with defendant, Brauch began a field sobriety test. Thereafter, defendant was placed under arrest.

¶ 8 Schenk transported defendant to the police station. During the five minute trip to the police station, defendant fell asleep with his feet stuck under the front passenger's seat. Upon arriving at the station, defendant could not understand how to get his feet out from underneath the seat, and he required assistance. While being processed, defendant made derogatory comments towards the officers. He informed Schenk that he preferred to call her, "Officer Skank[.]" and stated that he believed she was a "lesbian cop[.]" Defendant also had trouble reading an analog clock and, after going to the bathroom once, could not remember where the restroom was located. Based on her training and her observations of defendant, Schenk testified that it was her opinion defendant was under the influence of alcohol.

¶ 9 The State also produced the testimony of Brauch. During Brauch's testimony, a recording of the arrest was played. Brauch testified that he was employed by the Lockport police department. He had been trained in the administration of field sobriety tests and in detecting the characteristics that may indicate a person is under the influence of alcohol.

¶ 10 On November 23, 2008, Brauch was dispatched to the Speedway gas station to check on an individual who had fallen asleep behind the wheel of his vehicle. When Brauch arrived at the scene, he observed defendant's car parked in the middle of the pump area of the gas station. The car was parked so that gasoline could not be pumped into it; however, it also was not parked in a designated parking space.

¶ 11 Brauch received defendant's driver's license from Schenk and spoke with defendant. He noticed that defendant's eyes were glassy and red and that there was a strong odor of alcohol on his breath. Defendant informed Brauch that he had a few drinks earlier in the night while at a bachelor party. Brauch asked defendant if he would submit to a field sobriety test and told defendant to recite the alphabet from D to X. Defendant said "D, F, G[,] " and then stopped. Brauch then instructed defendant to do a finger dexterity test; however, defendant did not want to. Thereafter, Brauch concluded that defendant was unable to safely operate a motor vehicle, and he placed defendant under arrest.

¶ 12 At the station, defendant was given the opportunity to take a chemical test; however, he declined to give a sample. Defendant became agitated and argumentative. He stated that he was going to make it as difficult as possible for the officers until they became so frustrated that they had to beat him. He also complained that he was arrested because the officers had voted for John McCain and they were upset that Barack Obama had won the presidential election.

¶ 13 The State rested, and defendant moved for a directed finding. The trial court denied the motion, and closing arguments were heard. The trial court ultimately found the officers' testimony credible and found defendant guilty of DUI. In so finding, the court stated it did not place much weight on the fact that defendant had failed a field sobriety test because it knew that

such tests are unreliable. The court also noted that one of the ways defendant had demonstrated he was impaired was by pulling off the road and not being able to turn off his car before going to sleep and passing out. The court sentenced defendant to conditional discharge and a \$750 fine. Defendant appeals.

¶ 14

ANALYSIS

¶ 15

I. Ineffective Assistance of Counsel

¶ 16 Defendant first argues that he was denied effective assistance of counsel because counsel failed to file a motion to quash his arrest. To establish ineffective assistance of counsel a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 17 Here, defendant has not established a reasonable probability that the result of the proceeding would have been different had counsel filed a motion to quash arrest. In order to establish such a probability, defendant was required to show that the motion would have been granted. *People v. Velez*, 388 Ill. App. 3d 493 (2009). In finding defendant guilty of DUI, the trial court found credible the officers' testimony that defendant had red and glossy eyes, smelled of alcohol, slurred his speech, and otherwise exhibited signs of intoxication while being questioned outside the gas station. This same evidence would have been sufficient to establish probable cause for an arrest. Therefore, had trial counsel filed a motion to quash arrest,

defendant would have had to discredit the evidence the trial court ultimately found credible. Based on its ultimate finding, we do not believe that the trial court would have granted defendant's motion to quash arrest. Thus, defendant cannot establish ineffective assistance of counsel.

¶ 18

II. Reasonable Doubt

¶ 19 Next, defendant argues that the evidence was not sufficient to prove him guilty of driving under the influence of alcohol. When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry defendant; rather, the relevant question 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. Collins*, 106 Ill. 2d 237 (1985). A conviction will only be overturned where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532 (1999).

¶ 20 Here, we find that evidence produced at trial was sufficient to allow a rational trier of fact to find that the essential elements of the crime had been proven. The State presented evidence that defendant was confronted by police officers after falling asleep in the driver's seat of a vehicle with its engine running. Defendant was parked in an unusual location outside of a gas station. According to the officers' testimony, it took defendant five attempts before he could remove his license from his wallet, his eyes were red and glossy, he smelled as though he had been drinking alcoholic beverages, he admitted to drinking alcohol earlier in the night, his speech was slurred, and he exhibited rude and obnoxious behavior. Based on the evidence presented at trial, we find that a rational trier of fact could have concluded that defendant was guilty of DUI.

¶ 21

III. Fair Trial

¶ 22 Defendant's third argument is that he was denied a fair trial where the trial court: (1) considered matters outside the record; (2) relied on a personal inference; and (3) did not consider a recording of the arrest. For the following reasons, we do not find that any of defendant's arguments warrant a reversal.

¶ 23

A. Matters Outside the Record

¶ 24 First, defendant alleges that the court considered matters outside of the record when it mentioned that it would not place much weight on the fact that defendant failed a field sobriety test because of its knowledge that such tests are unreliable. It has long been held that a determination made by the trial court based upon private knowledge constitutes a denial of due process. *People v. Wallenberg*, 24 Ill. 2d 350 (1962). Here, the court's comment regarding its personal knowledge of the reliability of field sobriety tests does constitute error. However, we find that the error was harmless. Where a constitutional error is at issue, as it is here, the State has the burden of proving beyond a reasonable doubt that the error did not affect the trial court's decision. *People v. Rowjee*, 308 Ill. App. 3d 179 (1999). The State has met its burden. The alleged error actually benefitted defendant because the court decided not to place much reliance on the fact that he had failed a field sobriety test. Therefore, it is clear that the error was harmless.

¶ 25

B. Trial Court's Inference

¶ 26 Defendant also claims that the trial court denied him a fair trial by making an inference from the evidence that defendant had "passed out." Our supreme court has consistently held that a conviction may be based solely on circumstantial evidence, and to prove guilt beyond a

reasonable doubt does not mean that the trier of fact must disregard the inferences that flow normally from the evidence before it. *People v. Patterson*, 217 Ill. 2d 407 (2005). Here, we find that the court's inference that defendant had "passed out" was appropriate in that it flowed naturally from the evidence presented at trial. Therefore, the trial court did not err in making the inference.

¶ 27 C. Failure to Consider Recording

¶ 28 Defendant further claims that the trial court denied him a fair trial by ignoring the crux of his evidence when it failed to consider a recording of the arrest. A defendant does not receive a fair trial where the record affirmatively indicates that the trial court failed to consider the crux of defendant's defense when entering judgment. *People v. Mitchell*, 152 Ill. 2d 274 (1992). In this case we find that the record does not affirmatively indicate that the trial court failed to consider the recording; it only failed to specifically mention the recording while pronouncing judgment. The fact that the court did not specifically mention the recording does not mean that the court did not consider it. See *In re Marriage of Berk*, 215 Ill. App. 3d 459 (1991). Therefore, absent affirmative evidence to the contrary, we cannot find that the trial court failed to consider the crux of defendant's defense.

¶ 29 IV. Improper Fine

¶ 30 Finally, defendant argues that the trial court improperly imposed a \$750 fine against him without assessing his ability to pay. In response, the State argues that the \$750 fine is void because defendant should have been subject to a mandatory fine of \$1,000 based on a prior conviction for DUI. Pursuant to section 11-501.01(f) of the Illinois Vehicle Code, a person previously convicted of DUI is subject to a fine of \$1,000 for a second violation. 625 ILCS 5/11-

501.01(f) (West 2008). Based on our review of the record, defendant had previously been convicted of DUI; therefore, the court should have imposed a \$1,000 fine. Thus, the \$750 fine is void, and we remand the cause to the trial court for the imposition of the correct fine. In doing so, we note that the imposition of a higher fine will not violate defendant's right to due process. See *People v. Garcia*, 179 Ill. 2d 55 (1997).

¶ 31

CONCLUSION

¶ 32 The judgment of the circuit court of Will County is affirmed in part and vacated in part, and the cause is remanded to impose the correct fine.

¶ 33 Affirmed in part and vacated in part.

¶ 34 Cause remanded.