NOTICE
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2012 IL App (4th) 100909-U Filed 2/10/12

NO. 4-10-0909

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DEBRA S. DEATON,	)	No. 09CF1520
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and affirmed the trial court's judgment where counsel concluded that no meritorious issues could be raised on appeal as to the following issues: whether (1) the State failed to properly charge defendant with a criminal offense; (2) defendant knowingly and voluntarily waived her right to a jury trial; (3) the State failed to prove defendant guilty beyond a reasonable doubt; (4) defendant was denied effective assistance of counsel; or (5) defendant's sentence is excessive.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2009, the State charged defendant, Debra S. Deaton, with three counts of aggravated driving under the influence of alcohol (aggravated DUI), based on driving

under the influence with three prior DUIs (count I), driving under the influence with two prior DUIs (count II), and driving under the influence with a suspended license (count III) (625 ILCS 5/11-501(d)(1)(A), (d(1)(G) (West 2008). Defendant later waived her right to a trial by jury. In August 2010, defendant's bench trial commenced.

¶ 5 At trial, Officer Steve Hagemeyer testified that on September 18, 2009, he observed a Ford pickup truck drive "very fast" from the 22nd Discount Liquor Bar onto the street, causing another vehicle "to slam on its brakes to avoid hitting the truck." After initiating a traffic stop, Hagemeyer made contact with defendant. Hagemeyer noted that defendant had "a strong odor of alcoholic beverage on her breath," bloody and glassy eyes, and slurred speech. Defendant told Hagemeyer that she had consumed two beers.

¶ 6 Hagemeyer then instructed defendant to exit her vehicle and move to the back of her truck. After advising defendant that he wanted to conduct field sobriety tests, Hagemeyer administered the horizontal-gaze-nystagmus test, which defendant failed. Hagemeyer next requested that defendant perform the one-legged-stand and walk-and-turn tests. Defendant refused. Defendant did not alert Hagemeyer that she had a physical ailment that would prevent her from performing those tests. Hagemeyer arrested defendant on suspicion of DUI and later transported her to the police station, where she refused to submit to chemical testing.

¶ 7 Defense counsel cross-examined Hagemeyer concerning inconsistencies between his testimony and the report that he filed at the time of defendant's arrest. Defense counsel objected to the admission of People's exhibit No. 2, the warning to motorist packet, on the grounds that it merely repeated Hagemeyer's testimony. The trial court sustained the objection.

¶ 8 At the State's request and without objection, the trial court admitted into evidence

defendant's driving abstract, which showed that defendant's driving privileges had been statutorily suspended on September 18, 2009, the date of defendant's arrest.

¶ 9 Defendant testified that on September 18, 2009, she attended her cousin's funeral visitation. She identified defendant's exhibit No. 3, a remembrance card from the funeral. Defendant continued that she was "very upset" that night and that she "cried most of the evening." After the funeral, defendant went to the home of her cousin, Dave Weaver, where she consumed part of a "Coors Light in a can." Defendant then went to 22nd Street Discount Liquor Bar, where she partially consumed another beer. Defendant stated that she (1) was not driving impaired when Hagemeyer stopped her and (2) had bloodshot eyes because she had been crying.

¶ 10 The State cross-examined defendant about her refusal to do a walk-and-turn test, one-legged-stand test, and breath test. Defendant claimed that she "didn't know" why she did not submit to a breath test.

¶ 11 Adelle Small, defendant's daughter, and Dave Weaver, defendant's cousin, both testified that they observed defendant consuming part of one beer at Weaver's home. Small also observed defendant crying at the visitation. Neither Small nor Weaver accompanied defendant to the bar later that evening.

¶ 12 Based on this evidence, the trial court found defendant guilty on count III, DUI with a suspended license, and that she had been proved guilty of DUI, with the State to prove the prior convictions at sentencing.

¶ 13 At a November 2010 sentencing hearing, the trial court admitted into evidence defendant's driving abstract, which showed that defendant was convicted of a DUI on September 1, 2009. The court also admitted into evidence certified copies of defendant's two other prior

DUI convictions. The court found that the State had proved up defendant's three prior DUI convictions, and thus entered judgment on count I, finding that counts II and III were lesser included offenses of count I and thus merged with count I. The court thereafter sentenced defendant to four years in prison.

¶ 14 In November 2010, defendant filed a notice of appeal, and OSAD was appointed to represent her. Later that month, OSAD filed a motion to withdraw, attaching to the motion a brief conforming to the requirements of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (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 January 2, 2012, but she did not respond.

¶ 15 II. ANALYSIS

¶ 16 OSAD raises the following five potential issues and concludes that all five would be frivolous: (1) the State failed to properly charge defendant; (2) defendant's waiver of a jury trial was not knowing and voluntary; (3) defendant was not proved guilty beyond a reasonable doubt; (4) defendant was denied the effective assistance of counsel; and (5) defendant's sentence constituted an abuse of discretion. After reviewing the record consistent with our responsibilities under *Anders*, we grant OSAD's motion and affirm.

¶ 17 OSAD first argues that no colorable argument can be made that the State failed to properly charge defendant. We agree.

¶ 18 When attacked on appeal, an information is sufficient if it outlined the offense charged with sufficient specificity to allow defendant to prepare a defense and plead a resulting conviction as a bar to future prosecution arising out of the same conduct. *People v. Smith*, 337

Ill. App. 3d 819, 823, 786 N.E.2d 1121, 1124 (2003).

¶ 19 Here, the State charged defendant by information with aggravated DUI (three counts). Under section 11-501 of the Illinois Vehicle Code, a person is guilty of aggravated DUI if she commits the offense of DUI (1) and has two or more prior convictions for DUI (625 ILCS 5/11-501(d)(1)(A) (West 2008)) or (2) at a time when her driving privileges were suspended due to a prior conviction for DUI (625 ILCS 5/11-501(d)(1)(G) (West 2008)).

¶ 20 Our review of the record shows that each charge in this case contained all of the elements necessary to establish the offense of aggravated DUI, and we agree with OSAD that it would be frivolous to argue that the charges were insufficient to apprise defendant of the precise offense charged with sufficient specificity.

¶ 21 OSAD next argues that no legitimate legal or factual argument can be made that defendant's jury waiver was not knowing and voluntary. We agree.

¶ 22 The right to a jury trial is a fundamental right that may only be waived knowingly and voluntarily. *People v. Bracey*, 213 Ill. 2d 265, 269, 821 N.E.2d 253, 255 (2004). The record must show that the right to a jury trial was "understandingly waived by defendant in open court." *People v. Bannister*, 232 Ill. 2d 52, 66, 902 N.E.2d 571, 581 (2008) (quoting725 ILCS 5/103-6 (West 2008)).

¶ 23 Here, defendant waived her right to a jury trial in open court on January 26, 2010. The trial court informed defendant that after she gave up her right to a jury trial, the only type of trial to which she would be entitled was a bench trial. The court further informed her that in a bench trial, the court would determine the facts and decide whether the State had proved defendant guilty beyond a reasonable doubt. Defendant indicated that she understood and wished

to give up her right to a jury trial, and she signed a written jury waiver. We agree with OSAD that defendant's jury waiver was knowing and voluntary.

¶ 24 OSAD next argues that no colorable argument can be made that the evidence presented by the prosecution was insufficient to establish all of the elements of aggravated DUI beyond a reasonable doubt. We agree.

¶ 25 When reviewing the sufficiency of the evidence, this court considers "whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *People v. Martin*, 2011 IL 109102, ¶ 15, 955 N.E.2d 1058, 1062 (2011). Generally, the trier of fact is in a better position to determine the credibility of witnesses and weigh the evidence, and its decision will not be reversed unless "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007).

¶ 26 As previously explained, a person is guilty of aggravated DUI when she commits the offense of DUI (1) and has two or more prior convictions for DUI (625 ILCS 5/11-501(d)(1)(A) (West 2008)) or (2) at a time when her driving privileges were suspended due to a prior DUI conviction (625 ILCS 5/11-501(d)(1)(G) (West 2008)).

¶ 27 In this case, Hagemeyer testified that after he stopped defendant, he smelled "a strong odor of alcoholic beverage on her breath" and noticed that her eyes were glassy and bloodshot and her speech was slurred. He administered the horizontal-gaze-nystagmus test, which defendant failed. Defendant then refused to perform the walking test, the walk-and-turn test, and the one-legged-stand test. When Hagemeyer transported defendant to the police station, she refused to submit to a breath test. Hagemeyer testified that he believed, based on his training,

that defendant was driving while impaired. The trial court found Hagemeyer to be credible.

¶ 28 Further, the State admitted into evidence defendant's driving abstract, showing that defendant's driver's license was suspended on September 18, 2009, due to a conviction for DUI. We agree with OSAD that this evidence was sufficient to establish all of the elements of the offense of aggravated DUI.

¶ 29 OSAD next argues that no colorable argument can be made that defendant was denied the effective assistance of counsel. We agree.

¶ 30 To prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel's assistance was deficient under prevailing professional norms and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

¶ 31 Here, OSAD has explored and rejected a number of potential claims of ineffective assistance, at both the pretrial and trial phases of defendant's case, and concluded that it would be frivolous to argue that defense counsel's assistance fell below prevailing professional norms. Our review of the record reveals that OSAD is correct.

¶ 32 OSAD next argues that no colorable argument can be made that defendant's sentence constituted an abuse of discretion. We agree.

¶ 33 Sentences imposed within the statutory guidelines are presumed to be proper and will not be overturned unless the sentence substantially departs from the spirit and purpose of the law and nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871 N.E.2d 1, 16 (2007).

¶ 34 In this case, the trial court held a sentencing hearing, at which the State presented evidence that this was defendant's fourth DUI. The court thereafter sentenced defendant to four

years in prison, well within the statutory range of three to seven years (730 ILCS 5/5-4.5-35 (West 2008)). Thus, we agree with OSAD that no colorable argument can be made that defendant's sentence is excessive.

¶ 35 III. CONCLUSION

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

¶ 37 Affirmed.