

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).

2013 IL App (4th) 120501-U
NO. 4-12-0501
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
February 15, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
Plaintiff-Appellee,) Circuit Court of
v.) Champaign County
OLGA SUMWALT,) No. 11DT412
Defendant-Appellant.)
) Honorable
) John R. Kennedy,
) Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when sentencing defendant to 18 months' conditional discharge rather than a term of court supervision. There was no indication from the record the court based its decision on anything but the nature and circumstances of the particular offense.

¶ 2 Defendant, Olga Sumwalt, pleaded guilty to driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)) and the trial court sentenced to her to 18 months' conditional discharge. She appeals her sentence, arguing the court inappropriately refused to grant her court supervision. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 1, 2011, defendant was issued two citations for DUI (625 ILCS 5/11-501(a)(1), (a)(2) (West 2010)), both Class A misdemeanors (625 ILCS 5/11-501(c)(1) (West 2010)). On February 22, 2012, she entered an open plea of guilty. The State provided its factual

basis, showing defendant had stopped her vehicle in a lane of traffic with the engine running. When the deputy approached her, he noticed a strong odor of alcohol and her bloodshot and glassy eyes. She admitted she had been drinking. After showing signs of impairment on field-sobriety tests, the officer arrested her. She submitted to a Breathalyzer examination, which revealed an alcohol concentration of 0.173. The trial court advised defendant of her rights and accepted her plea as being knowingly, intelligently, and voluntarily made.

¶ 5 In March 2012, defendant participated in an alcohol and drug evaluation. The evaluator classified defendant as a "moderate risk" based on her blood-alcohol concentration (BAC) at the time of her arrest and the fact she had no prior history of DUI.

¶ 6 On April 5, 2012, the trial court conducted a sentencing hearing. The court noted it had considered defendant's evaluation, the presentence investigation report (which indicated defendant was a married 43 year old with no criminal history), and the testimony of the only witness, Christopher Todd Sumwalt, defendant's husband. He testified that on the night of defendant's arrest, she had called him and told him she had gotten lost on her way home from Champaign. She was sitting in her vehicle on the side of the road, trying to figure out how to work the navigation system in the vehicle when an officer approached. Since that night, defendant has not consumed any alcohol and has taken a "rather militantly anti-alcohol" stance.

¶ 7 Defendant submitted letters from three acquaintances showing her good character. The trial court considered all of the above, along with the recommendations of counsel. The State recommended the court not sentence defendant to court supervision so as to not "deprecate the seriousness of the offense." On the other hand, defendant's counsel argued court supervision would be appropriate. The court stated:

"As to the nature and circumstances of the offense, the significant factor for the court is the very high level of breath alcohol concentration, exceeding .17. It's a significant factor in sentencing. A statutory factor in aggravation, is a sentence necessary to deter others from similar conduct.

In mitigation, the defendant does not have a prior history of criminal activity or delinquency. The defendant has pled guilty. Her plea of guilty and her obvious acknowledgment of responsibility is given mitigation weight. I also agree that it's correct that Ms. Sumwalt has significant reasons to which to comply with the court order.

The sentence that's imposed is, Ms. Sumwalt, you are sentenced to a period of conditional discharge for a period of 18 months."

The court then ordered defendant to pay a \$1,250 fine, pay a \$5 local anti-crime assessment fee, pay a monthly \$25 court services fee, perform 75 hours of public service work, and attend a victim impact panel presentation.

¶ 8 On May 2, 2012, defendant filed a motion to reconsider her sentence, claiming she "was an appropriate candidate for court supervision" based on numerous mitigating circumstances including, but not limited to, her age, lack of criminal history, her voluntary submission to testing, and her general character. After considering counsels' arguments, the court denied defendant's motion, finding "at the time of sentencing, weight was given to both factors in aggravation and

mitigation and considering the nature and circumstances of the offense." This appeal followed.

¶ 9

II. ANALYSIS

¶ 10 On appeal, defendant argues the trial court improperly sentenced her to 18 months' conditional discharge rather than court supervision. Specifically, she argues the court erred by refusing to consider the mitigating factors and, instead, "created a new class of defendants who are ineligible for court supervision" when it found conditional discharge was more appropriate due to the "very high level of breath alcohol concentration."

¶ 11 The Illinois Constitution provides "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. On review, substantial deference is given to the trial court's sentencing decision because it had the opportunity to observe the defendant and the proceedings and "is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. "Therefore, a reviewing court may not modify a defendant's sentence absent an abuse of discretion." *Snyder*, 2011 IL 111382, ¶ 36.

¶ 12 The Unified Code of Corrections (Unified Code) provides that defendant was eligible for a sentence of probation, conditional discharge, or supervision. 730 ILCS 5/5-4.5-55(d) (West 2010); 730 ILCS 5/5-4.5-70 (West 2010). However, as this court as previously noted, "[s]upervision is not a right of any defendant, but a sentencing alternative to be employed in the discretion of the court." *People v. Price*, 247 Ill. App. 3d 787, 790 (1993). Section 5-6-1 provides as follows:

"(c) The court may, upon a plea of guilty *** enter an order
for supervision of the defendant, if the defendant is not charged with:

(i) a Class A misdemeanor, as defined by the following provisions of the Criminal Code of 1961 [sections defining offenses with which defendant was not charged]; (ii) a Class A misdemeanor violation of Section 3.01, 3.03-1, or 4.01 of the Humane Care for Animals Act [(510 ILCS 70/3.01, 3.03-1, 4.01 (West 2010))]; or (iii) a felony. If the defendant is not barred from receiving an order for supervision as provided in this subsection, the court may enter an order for supervision after considering the circumstances of the offense, and the history, character and condition of the offender, if the court is of the opinion that:

(1) the offender is not likely to commit further crimes;

(2) the defendant and the public would be best served if the defendant were not to receive a criminal record; and

(3) in the best interests of justice an order of supervision is more appropriate than a sentence otherwise permitted under this Code." 730 ILCS 5/5-6-1(c) (West 2010 (eff. July 1, 2011)).

¶ 13 In this case, the trial court did not specifically state why it rejected defendant's request for supervision. Rather, it noted conditional discharge was more appropriate due to the nature and circumstances of the offense, with the "very high level of breath alcohol concentration" as a

"significant factor" for deterrence. Defendant argues, by making this observation, the court intended to continue its policy of not ordering supervision to defendants with a high BAC. She insists the court created a new class of defendants who, in the court's mind, should not be eligible for supervision.

¶ 14 Defendant relies on *People v. Jones*, 284 Ill. App. 3d 975 (1996), to argue that a disposition of court supervision was appropriate in her case. In *Jones*, this court found the trial court had adopted a blanket policy of denying court supervision to defendants found guilty of DUI based on a belief that such sentences were inconsistent with the public policy evidenced by the mandatory suspension provisions of section 6-205(a)(2) of the Illinois Vehicle Code (625 ILCS 5/6-205(a)(2) (West 1994)). *Jones*, 284 Ill. App. 3d at 981. We found the trial court misapplied the law in its belief that the public policy of keeping drunk drivers off the road *always* outweighs the public's best interest in seeing that a defendant does not have a permanent criminal record. *Jones*, 284 Ill. App. 3d at 981. We vacated the defendant's sentence and remanded for a new sentencing hearing. *Jones*, 284 Ill. App. 3d at 981.

¶ 15 This court's decision in *Price* is both factually and legally similar to the case before us. The defendant in *Price* argued on appeal that the trial court erred by sentencing him to a period of conditional discharge rather than granting him supervision after pleading guilty to DUI. *Price*, 247 Ill. App. 3d at 790. At sentencing, the trial court found " 'the real troubling aspect' " was the defendant's BAC of 0.25. *Price*, 247 Ill. App. 3d at 789. On review, this court rejected the defendant's argument "that the trial court improperly used his high blood-alcohol level as an additional statutory prohibition against court supervision." *Price*, 247 Ill. App. 3d at 790. We found no evidence in the record the trial court was "inflexible, or refused to exercise its discretion in cases

involving a high BAC." *Price*, 247 Ill. App. 3d at 790. This court found no error and affirmed the sentence. *Price*, 247 Ill. App. 3d at 791.

¶ 16 The trial court in *Price* specifically stated it did not "have a [strict] cutoff" in terms of a BAC before it would refuse to order supervision. The court noted it was flexible and had no predetermined maximum BAC level for allowing supervision. Defendant points to that court's specific comments in an attempt to distinguish the outcome in *Price* by arguing that the trial court here did not offer *any* explanation as to its denial of court supervision other than defendant's "very high" BAC.

¶ 17 We find defendant's reliance on *Jones* misplaced and his attempt to distinguish *Price* unavailing. In this case, there is no indication in the record the trial court's determination that defendant was not eligible for court supervision was based on a blanket personal policy or upon a misapplication of the law as in *Jones*. Instead, it appears the court properly reached its conclusion after considering the nature of the offense and the particular circumstances of defendant's case as in *Price*.

¶ 18 We note "[a] trial judge's inclusion of some personal observations does not necessarily rise to an abuse of discretion." *People v. Thurmond*, 317 Ill. App. 3d 1133, 1142 (2000). While the trial court in this case expressed some personal observation regarding defendant's BAC level, noting it was "very high," those observations did not amount to reversible error. Overall, the court's comments emphasized its belief in the seriousness of the offense and the need to deter other drivers from operating a vehicle while impaired, both relevant and proper considerations. The court had discretion to order a sentence of court supervision, but its comments undeniably show it believed the second two factors listed in section 5-6-1 of the Unified Code weighed against court supervision.

See 730 ILCS 5/5-6-1(c) (West 2010). The court based its decision upon its belief that defendant's offense was serious in nature and there was a need to deter other similarly situated individuals. The court properly exercised its discretion and did not commit reversible error.

¶ 19

III. CONCLUSION

¶ 20 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 21 Affirmed.