

THIRD DIVISION
FEBRUARY 19, 2014

No. 1-12-1936

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
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 12593
)	
JAN P. WOZNIAK,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not violate defendant's due process rights under *Apprendi v. New Jersey* when it considered a prior offense of operating while intoxicated from Wisconsin to sentence defendant for a Class 2 felony.
- ¶ 2 Following a bench trial, defendant Jan P. Wozniak was found guilty of aggravated driving under the influence (DUI) and subsequently sentenced to three years in prison.

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Defendant appeals, arguing that the trial court violated his due process rights when it enhanced his conviction of aggravated DUI to a Class 2 felony because his prior offense in Wisconsin of operating while intoxicated (OWI) was not proven beyond a reasonable doubt.

¶ 3 In August 2011, defendant was charged by information with six counts of aggravated DUI. Two counts charged him as a Class 2 felony offender under section 11-501(d)(2)(B) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(2)(B) (West 2010)). At trial, Trooper Seth Stephens testified that on June 30, 2011, he was an Illinois State Trooper assigned to Chicago. He responded to a two vehicle crash at Interstate 90 southbound at North Avenue. He observed two vehicles in the right shoulder. A red Kia was in front and showed damage from a rear end collision and a silver Toyota was behind the Kia. Trooper Stephens saw a person in the driver's seat of the Toyota and identified that person as defendant. He asked defendant to exit the vehicle and after a brief conversation, he relocated the crash to 1600 North Bosworth. During this conversation, the officer did not notice anything unusual about defendant.

¶ 4 After the vehicles were relocated, Trooper Stephens spoke with defendant and observed "the smell of an alcoholic beverage emanating from his breath and person." He was also able "to detect some slurred speech and noticed that the condition of his eyes were bloodshot and glassy." The officer testified that he had encountered over 100 intoxicated individuals in his time as a state trooper.

¶ 5 Trooper Stephens asked defendant for a driver's license and was given an expired Wisconsin driver's license. Trooper Stephens called for a Polish translator after defendant indicated he was having difficulty understanding the officer. Officer Kogylarczyk arrived at the

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location and translated between Trooper Stephens and defendant.

¶ 6 Trooper Stephens asked defendant to perform field sobriety tests. The first test was the horizontal gaze nystagmus (HGN) test, which involves holding a stimulus approximately 12 inches away from the subject, moving that stimulus and watching the nystagmus present in an impaired person's eyes. He described this as "basically an involuntary muscle spasm." Trooper Stephens performed this test and observed "the nystagmus present at prior to 45 degrees onset as well as at maximum deviation from the stimulus." The test indicated impairment.

¶ 7 Next, Trooper Stephens asked defendant to perform the walk and turn test, but defendant indicated that he had trouble with his leg and would not be able to complete it. Trooper Stephens moved to a third test, the one leg stand, which involved having the subject raise one leg six inches off the ground, pointing the toe of that raised leg outward, keeping the subject's arms at his side and attempting to balance for 30 seconds. Defendant attempted this test and Trooper Stephens observed "him put his foot down and sway as he was attempting the test."

¶ 8 After the field sobriety tests, they relocated to the District 18 Chicago police station. At the station, Trooper Stephens had defendant blow into the Intoxilyzer ECIR breathalyzer machine, and the machine printed out the results of the breathalyzer test. Trooper Stephens identified that printout at trial, which indicated that defendant's blood alcohol concentration was .114. Based on his observations of the car accident, defendant's condition and performance of field sobriety tests, Trooper Stephens' opinion was the defendant was under the influence of alcohol on June 30, 2011.

¶ 9 On cross-examination, Trooper Stephens admitted that he did not see the car accident.

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He also admitted that at a preliminary hearing, he stated that defendant was driving the Kia, but he testified that he misspoke at that hearing. Trooper Stephens also stated that when they relocated the vehicles, defendant drove his vehicle and Trooper Stephens did not observe any erratic driving.

¶ 10 The State presented defendant's Illinois driving record which showed that a revocation was in effect on June 30, 2011. The State also submitted a certified driving abstract from Wisconsin which showed that defendant's driving privileges were expired.¹ The parties stipulated that a video recording from Trooper Stephens' dashboard camera was an accurate recording of what occurred on the night of the arrest.

¶ 11 Officer Kogylarczyk testified that she was an officer with the Chicago police department and on June 30, 2011, she received a call to assist a state trooper at 1600 North Bosworth. She responded to the scene and acted as a translator for defendant during the sobriety tests. She translated Trooper Stephens' explanations of the different sobriety tests to defendant. When Trooper Stephens explained the walk and turn test, defendant said he had a leg injury and he did not complete the test.

¶ 12 After the State rested, defendant moved for a directed finding, which the trial court denied. Defendant did not present any evidence. The trial court found defendant guilty of three counts of aggravated DUI, including one count for a Class 2 felony. At the sentencing hearing,

¹At the time the prosecutor presented defendant's Wisconsin driving abstract, he only noted defendant's expired driving privileges. However, the abstract also includes defendant's prior conviction for OWI in April 2004.

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the trial court stated that defendant would be sentenced under the Class 2 conviction with the other counts merging. The State asserted that his offense was defendant's third DUI conviction. Defendant made no objection. The trial court sentenced defendant to three years in prison with credit for 348 days.

¶ 13 This appeal followed.

¶ 14 Defendant argues on appeal that the prior Wisconsin OWI violation was not subject to the prior conviction exception to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and was not proven guilty beyond a reasonable doubt. Defendant asks this court to vacate his sentence for Class 2 felony aggravated DUI and remand for resentencing.

¶ 15 Initially, we observe that defendant failed to object to the admission of the prior Wisconsin OWI violation at trial, nor did he raise this issue in a posttrial motion. Defendant concedes that he failed to raise this claim in his motion for a new trial, but asks this court to review it for plain error.

¶ 16 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error

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alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.'" *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177.

¶ 17 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that this court may consider the issue under both prongs of the plain error test. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43. We will review defendant's claim to determine if there was any error before considering it under plain error.

¶ 18 A person commits aggravated DUI, a Class 2 felony, when he drives under the influence of alcohol after committing two prior violations of the Illinois DUI statute or "a similar provision." 625 ILCS 5/11-501(d)(2)(B) (West 2010). "Section 11-501(d)(1) of the Vehicle Code increases the classification of the offense, enhances the sentence, and requires compliance with section 111-3(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(c) (West 1998))." *People v. Thompson*, 328 Ill. App. 3d 360, 364 (2002). Section 111-3(c) provides:

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial." 725 ILCS 5/111-3(c) (West 2010)

¶ 19 The State charged defendant accordingly. Count I specifically demonstrated the State's intention to sentence defendant "AS A CLAS 2 OFFENDER PURSUANT TO SECTION (d) (1) (A) / (2) (B), IN THAT HE HAS COMMITTED TWO PREVIOUS VIOLATIONS OF CHAPTER 625 OF THE ILLINOIS COMPILED STATUTES ACT 5 SECTION 11-501(a) OR A SIMILAR PROVISION."

¶ 20 At the sentencing hearing, the State asserted that defendant had two prior DUI convictions. Defendant's presentence investigation (PSI) listed a DUI conviction from January 2006. Defendant's Wisconsin certified driving abstract was also admitted into evidence and it listed a "conviction" from April 2004 for OWI with a notation of "GUILTY." Defendant did not object to the representation that he had two prior DUI convictions before being sentenced for a Class 2 felony.

¶ 21 In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

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submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. "The Court explained that the procedural safeguards attached to any 'fact' of a prior conviction mitigate the due process concerns otherwise implicated in allowing a judge to determine a 'fact' which increases punishment beyond the statutory maximum penalty." *People v. Askew*, 341 Ill. App. 3d 548, 550-51 (2003) (citing *Apprendi*, 530 U.S. 488-90).

¶ 22 The reviewing court in *Thompson* concluded that the commission of prior DUI's fell within the recidivist exception to *Apprendi*. There, the defendant challenged his conviction for aggravated DUI under *Apprendi* when no evidence of his two prior DUI offenses was presented at trial, but only at sentencing. *Thompson*, 328 Ill. App. 3d at 361. The *Thompson* court noted the Illinois Supreme Court's finding in *People v. Sheehan*, 168 Ill. 2d 298, 308 (1995), that charges resulting in supervision could be considered as prior committed offenses when imposing subsequent penalties. "For this purpose, both of the defendant's prior commissions of DUI, under the particular facts of this case, are the functional equivalent of the 'convictions' discussed in *Apprendi*. They are not elements of the crime that needed to be proved to the trier of fact beyond a reasonable doubt. Rather, they are factors in aggravation that had to be proved at sentencing." *Thompson*, 328 Ill. App. 3d at 365. Further, "[a] court properly may consider a presentencing report to determine a defendant's criminal record; such a report is a reliable source for the purpose of inquiring into a defendant's criminal history." *People v. DiPace*, 354 Ill. App. 3d 104, 115 (2004).

¶ 23 Defendant asserts that the *Apprendi* exception for prior convictions does not apply to his Wisconsin OWI violation because the "first-time OWI proceeding in Wisconsin lacks many of

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the fundamental procedural safeguards attendant to criminal trials."

¶ 24 Wisconsin courts have already considered and rejected the argument advanced by defendant. In *State v. Verhagen*, 827 N.W.2d 891 (Wis. Ct. App. 2013), multiple defendants challenged their enhanced sentences for OWI based on prior violations of the OWI statute. They contended that "their first-offense OWIs should not be counted because their convictions for those offenses were secured without the procedural safeguards of a criminal trial." *Verhagen*, 827 N.W.2d at 899. In interpreting *Apprendi*, the reviewing court observed that "the Supreme Court did not declare unconstitutional enhanced penalties based on prior convictions obtained in the absence of the jury guarantee and criminal burden of proof." *Verhagen*, 827 N.W.2d at 899 (citing *Apprendi*, 530 U.S. at 488). The court noted that "Wisconsin courts have repeatedly upheld the constitutionality of Wisconsin's OWI penalty structure." *Verhagen*, 827 N.W.2d at 900. "First-offense OWI convictions are 'valid for all purposes, including providing a basis for incarcerating [a] defendant as a second [or subsequent] offender pursuant to [Wis. Stat. § 346.65(2)(am)].'" *Verhagen*, 827 N.W.2d at 900 (quoting *State v. Novak*, 318 N.W.2d 364, 370 (1982)). The *Verhagen* court concluded that:

"the appellants have not argued their prior convictions were unlawful or obtained in violation of their constitutional rights, including their right to counsel. Instead, they broadly attack a legislative scheme that, according to prior decisions of this court and our supreme court, comports with both the state and federal constitutions. We decline to hold that the underlying facts of a

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first-offense OWI must be submitted to the jury in a subsequent prosecution to impose an enhanced penalty. Accordingly, we reject the appellants' as-applied challenges." *Verhagen*, 827 N.W.2d at 900.

¶ 25 Defendant has made the same as-applied challenge rejected by the *Verhagen* court. We are guided by *Verhagen's* well reasoned analysis, and find it compelling that Wisconsin courts consider first time OWI violations to be part of the recidivist exception to *Apprendi*. We believe that the same result is required in this case.

¶ 26 Additionally, an Illinois court has found the Wisconsin OWI statute similar to the Illinois DUI statutory scheme. In *People v. Hamalainen*, 341 Ill. App. 3d 205, 207 (2003), the trial court denied the defendant's request for supervision for a DUI conviction based on a prior conviction in Wisconsin for driving with a prohibited blood-alcohol concentration. The defendant contended on appeal that the Wisconsin statute was unlike the Illinois statute because punishment under the Wisconsin statute is by a fine and considered civil in nature. *Hamalainen*, 341 Ill. App. 3d at 207. The reviewing court examined the language of both statutes at issue and found them to be similar.

"When viewed side by side, the two statutes are "similar," as we have defined the term above. Both represent comprehensive schemes to regulate the use of motor vehicles by persons who are or may be impaired by alcohol or other substances. Both are clearly designed to enhance the safety of the public by prohibiting

dangerous conduct. The fact that Wisconsin chooses to punish first-time offenders only by a fine without the possibility of jail time is not sufficient, standing alone, to render the two statutes dissimilar for purposes of section 5-6-1(d) of the Code of Corrections. Instead, we hold that the two statutes are similar under the Code of Corrections and that the trial court did not err in concluding that defendant was foreclosed from receiving a sentence of court supervision by virtue of his prior finding of guilt in violating section 346.63 of the Wisconsin Statutes."

Hamalainen, 341 Ill. App. 3d at 210.

¶ 27 While the defendant in *Hamalainen* did not assert the same argument as defendant has, *Hamalainen's* comparison of the statutes lends support to our conclusion that the prior OWI violation falls within the prior conviction exception to *Apprendi* when considered with the *Verhagen* decision. In sum, Wisconsin courts have held that a first time OWI violation can be considered to enhance a sentence without implicating *Apprendi* and the Wisconsin statute has been held to be similar to the Illinois DUI statute. See *Verhagen*, 827 N.W.2d at 900; *Hamalainen*, 341 Ill. App 3d at 210. Thus, section 11-501(d)(2)(B) has been satisfied when proof two prior violations of DUI statute or a similar provision was presented to the trial court at sentencing.

¶ 28 Here, the State presented evidence at sentencing of two prior DUI violations by defendant, one in Illinois in 2006 and one in Wisconsin in 2004. Defendant has not asserted that

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either prior DUI violation was inaccurate or included in error. Accordingly, the State sufficiently showed that defendant was subject to sentencing as a Class 2 offender and the trial court properly imposed the sentence of three years' incarceration. Since we have concluded that there was no error, there cannot be plain error.

¶ 29 Based on the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 30 Affirmed.