

2014 IL App (2d) 130789-U
No. 2-13-0789
Order filed June 26, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 13-DT-71
)	
VIANNE APPELL,)	Honorable
)	John H. Young,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly granted defendant's petition to rescind her summary suspension, as there was no evidence that defendant was served with actual written notice of the suspension; the officer's mere placement of notice among defendant's personal effects was insufficient.
- ¶ 2 Defendant, Vianne Appell, was arrested for driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2012)), and her driving privileges were summarily suspended (see 625 ILCS 5/11-501.1 (West 2012)). She petitioned to rescind that suspension, claiming, among other things, that she was never served with notice of the summary suspension.

Following a hearing, the trial court granted that petition, and the State appealed. For the reasons that follow, we affirm.

¶ 3 The following facts are relevant to resolving the issue raised. At the hearing on the petition to rescind, Officer Michelle Bogdonas testified that she was on patrol on April 17, 2013, at approximately 1:35 a.m., when she saw defendant driving and fail to stop at a stop sign. During the officer's subsequent interaction with defendant, the officer noticed that defendant was under the influence of alcohol, so the officer arrested defendant for DUI and transported defendant to the public safety building.

¶ 4 At the public safety building, Officer Bogdonas filled out various papers, including the "Warning to Motorist" and the "Law Enforcement Sworn Report" (sworn report). On the sworn report, Officer Bogdonas indicated that she "[s]erved immediate Notice of Summary Suspension/Revocation of driving privileges on [defendant.]" At the hearing on defendant's petition to rescind, Officer Bogdonas was asked about whether she served defendant with notice of the suspension. That questioning proceeded as follows:

"Q. So you never handed [defendant] a copy of [the sworn report] yourself; right?

A. I explained to her with her citations and then all of that paperwork, the corrections officer just put with her property as she was being escorted up into the jail.

Q. So to directly answer my question about whether you handed her a copy of it, the answer would be no; is that right?

A. No, no."

¶ 5 Delving into this point further, Officer Bogdonas confirmed that she never spoke to anyone at the jail about giving notice of the suspension to defendant. Rather, Officer Bogdonas stated that, because she "saw [the sworn report] go right in with all the rest of [defendant's]

property which [defendant] received,” the officer assumed that defendant received the sworn report. However, Officer Bogdonas admitted that she was unaware of whether defendant was ultimately given the sworn report.

¶ 6 On cross-examination, Officer Bogdonas testified about the procedure she follows when she arrests someone for DUI. Specifically, the officer indicated that, at the public safety building, she “read[s] the Warning to Motorist and the sworn report and explain[s] those to the defendant.” When Officer Bogdonas follows this procedure, she never hands the sworn report to a defendant. Rather, the sworn report is always placed with the defendant’s personal items at the Boone County jail.

¶ 7 The State moved for a directed finding as to service, and the court denied that motion. In doing so, the court found that Officer Bogdonas “explained [the sworn report] and gave it to the correction officer, expect[ing it] to be served” on defendant. However, nothing indicated that the sworn report was given to defendant. Thus, the court found that “[the sworn report] was not served here.” After the State indicated that it had no evidence to present, the court granted defendant’s petition to rescind. The State moved to reconsider, and the court denied that motion. This timely appeal followed.

¶ 8 At issue in this appeal is whether the petition to rescind was properly granted. Before addressing that issue, we note that defendant has not filed an appellee’s brief. However, because the record is simple and the claimed error is such that we can reach a decision without the aid of an appellee’s brief, we shall consider the issue raised. See *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 9 Turning to the merits, at a statutory-summary-suspension hearing, the defendant bears the burden of establishing a *prima facie* case for rescission, which means that a defendant must

present, by a preponderance of the evidence, a proper basis for rescission. *People v. Clayton*, 2014 IL App (4th) 130340, ¶ 17. Once the defendant establishes a *prima facie* case, the burden shifts to the State to come forward with evidence justifying the suspension. *Id.* On appeal, we defer to the trial court's factual findings, but we review *de novo* whether the petition to rescind should have been granted. *Id.*

¶ 10 The State first argues that defendant's petition to rescind should have been denied because defendant failed to establish a proper statutory basis for rescission. Section 2-118.1(b) of the Illinois Vehicle Code (Code) (625 ILCS 5/2-118.1(b) (West 2012)) provides for the grounds upon which a petition to rescind a suspension may be based. Specifically, as relevant here, a petition to rescind a suspension may be based on whether: (1) the defendant was lawfully arrested for DUI; (2) the arresting officer had reasonable grounds to believe that the defendant was under the influence of alcohol; (3) the defendant refused to submit to chemical testing after being advised that such a refusal would result in the statutory summary suspension of the defendant's driving privileges; and (4) the defendant submitted to chemical testing and failed the test. *Id.* Although the scope of a petition to rescind is generally limited to these grounds, our supreme court has determined that a defendant may also challenge defects in the officer's sworn report. *Clayton*, 2014 IL App (4th) 130340, ¶ 20. Moreover, this court, after recognizing that the *manner* of service was not a proper statutory basis to challenge a suspension, nevertheless considered whether a suspension was proper when someone other than the arresting officer served the defendant with notice of the suspension. See *People v. Lent*, 276 Ill. App. 3d 80, 81-82 (1995). Given *Lent* and the fact that the sworn report arguably is defective because it contradicts the evidence presented at the hearing concerning whether defendant was served with

notice, we reject the State's claim that defendant failed to challenge her suspension under a proper basis.

¶ 11 The State also argues that the petition to rescind should have been denied because defendant received notice of the suspension, as evidenced by the fact that she petitioned to rescind her suspension, and because no authority requires that notice of the suspension be given directly to a defendant by the arresting officer as soon as a defendant is arrested for DUI.

¶ 12 Addressing the State's second claim first, we agree that "immediate" service of notice, as used in section 11-501.1(f) of the Code (625 ILCS 5/11-501.1(f) (West 2012)), does not mean instantaneous. See, e.g., *People v. Marley*, 176 Ill. App. 3d 401, 404-05 (1988). Indeed, the statute providing for "immediate" service indicates that notice of the suspension may occur days after a defendant is released from custody. That is, section 11-501.1(f) allows for notice to be mailed to the defendant when chemical tests conducted after the defendant is no longer in custody reveal that the defendant was DUI. Similarly, courts have found that notice of the suspension need not come directly from the arresting officer. Rather, service of notice is proper when service is effected by, for example, jail personnel (*Lent*, 276 Ill. App. 3d at 82) or the defendant's mother (*Kalita v. White*, 342 Ill. App. 3d 796, 800, 806 (2003)).

¶ 13 This is not to say, however, that we agree with the State's first argument, *i.e.*, that defendant received valid notice of the suspension. This court has already found that the fact that a defendant files a petition to rescind a suspension does not mean that the defendant was served with valid notice of the suspension. See *People v. Osborn*, 184 Ill. App. 3d 728, 729-30 (1989). Moreover, the Code, the cases to which the State cites, and the cases that we found during our own research, all indicate that *actual written* notice must be given to the defendant. See 625 ILCS 5/2-118.1(a) (West 2012) (statutory summary suspension does not become effective until

the defendant is “notified in writing”); see also *Clayton*, 2014 IL App (4th) 130340, ¶¶ 6, 23 (because the defendant was given actual written notice of the suspension of his driving privileges, court could not conclude that rescission was warranted when the defendant’s notice did not indicate how notice was served); *Kalita*, 342 Ill. App. 3d at 800, 806 (rescission not warranted when the defendant received actual written notice of the suspension); *Lent*, 276 Ill. App. 3d at 82 (same); *Osborn*, 184 Ill. App. 3d at 730 (after observing that a defendant must be notified in writing of suspension, we commented that “the service of the notice is a necessary part of the summary suspension of a driver’s license”).

¶ 14 Here, as the trial court found, the evidence did not indicate that actual written notice was ever served on defendant. Rather, the evidence established that Officer Bogdonas put the sworn report and other documents with defendant’s personal effects when defendant was transported to the Boone County jail. After doing so, the officer never spoke to anyone at the jail about giving that notice to defendant, checked with the jail to see if defendant received that notice, or returned to the jail to serve defendant with notice. In our view, simply placing the notice with a defendant’s personal effects while the defendant is being escorted to jail does not amount to serving a defendant with actual written notice. Accordingly, we must affirm the trial court’s order granting defendant’s petition to rescind.

¶ 15 For these reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 16 Affirmed.