2015 IL App (1st) 123158-U

THIRD DIVISION
March 11, 2015

No. 1-12-3158

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 6405
	)	
REINALDO AYALA,	)	Honorable
	)	Sharon Sullivan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Mason concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's Class 4 felony conviction for driving with a revoked or suspended license is affirmed because the trial court could infer from his certified driving abstract that his license was originally revoked or suspended for driving under the influence.

¶ 2 Following a bench trial, defendant, Reinaldo Ayala, was convicted of felony driving while his license was revoked or suspended (DWLR) and sentenced to one year in prison. He appeals, arguing his Class 4 felony conviction must be reduced to a Class A misdemeanor because the State failed to prove that his prior DWLR conviction occurred while his license was

revoked or suspended for driving under the influence (DUI) or because of a statutory summary suspension. For the reasons that follow, we affirm.

¶ 3 At trial, Sergeant Matthew Price testified that he observed a 1990 Cadillac drive through a red light at the intersection of Cicero and Cortland at approximately 1 a.m. on March 8, 2012. Price initiated a traffic stop and another squad car arrived shortly thereafter. Defendant, who was in the driver's seat of the Cadillac, had glassy, bloodshot eyes and his breath contained a "moderate odor" of alcohol. He could not produce a driver's license or proof of insurance.

¶ 4 Defendant was placed into custody and read his *Miranda* rights. At the police station, defendant admitted to drinking "a couple beers" earlier in the night. Price administered the horizontal gaze nystagmus (HGN) and walk-and-turn tests, which defendant failed, but defendant refused to complete the one-legged-stand test and the finger-to-nose test. Based on the field sobriety tests, Price concluded that defendant was intoxicated. He asked defendant to submit to a Breathalyzer examination, and defendant agreed. However, defendant was unable to provide a sufficient breath sample. Afterward, defendant turned to Officer Harris and "laughingly" said, "it's your turn, you blow for me." The State entered into evidence defendant's certified driving abstracts.

¶ 5 The trial court found defendant guilty of two counts of felony DWLR (counts 8 and 9). The State sought Class 4 sentences on both counts under two different provisions of section 6-303(d) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/6-303(d) (West 2012)). Count 8 alleged that defendant had previously been convicted of DWLR and the original revocation of his license was for driving under the influence (DUI) under section 11-501 of the Vehicle Code

(625 ILCS 5/11-501 (West 2012)) or a similar out-of-state offense or local ordinance provision. Count 9 alleged that defendant had previously been convicted of DWLR and the original suspension of his license was for a statutory summary suspension under section 11-501.1 of the Vehicle Code (625 ILCS 5/11-501.1 (West 2012)).

¶ 6 At sentencing, the State asked the trial court to admit defendant's driving abstract as an amendment to his presentence investigation report and in aggravation. The State argued defendant had four prior DUI convictions from 1986, 1988, 2003, and 2006, and one prior conviction for driving on a suspended license from 1988. Defense counsel indicated that defendant admitted he had a "2005 ticket" and a 2006 DUI conviction but denied having more than two DUI convictions. The trial court sentenced defendant to one year in prison, merging count 9 into count 8. Defendant's mittimus reflects a single Class 4 felony conviction under count 8. Defendant's motion to reconsider sentence was denied. This appeal followed.

¶ 7 On appeal, defendant argues his felony DWLR conviction must be reduced to a Class A misdemeanor because the State failed to prove his prior DWLR conviction occurred while his license was revoked or suspended for either a DUI or pursuant to a statutory summary suspension. Defendant asserts that the Class 4 form of DWLR should be considered a separate offense from the misdemeanor form of DWLR; accordingly, defendant contends the State was required to prove beyond a reasonable doubt as an element of his crime that his license was originally revoked or suspended for DUI or pursuant to a statutory summary suspension. Defendant further argues that, even if it was only a sentencing factor, the State failed to prove the original revocation of his license rested on a DUI conviction or statutory summary suspension.

He observes his driving abstract shows only that the original suspension or revocation of his license was for an unspecified out-of-state offense under section 6-206(a)(6) of the Vehicle Code (Ill. Rev. Stat. 1985, ch 95 1/2, ¶ 6-206(a)(6)), which allows for suspension or revocation for various offenses unrelated to DUI.

¶ 8 Initially, we note the State argues that defendant has forfeited review of his claim by failing to both object at sentencing and raise his specific claim in a post-sentencing motion. Defendant responds that no forfeiture occurred because a defendant may raise the State's failure to prove the elements of a crime beyond a reasonable doubt for the first time on appeal. In the alternative, defendant argues we should review his case pursuant to the plain-error doctrine. We need not decide whether defendant has forfeited his claim because whether we review his arguments on the merits or under the plain-error doctrine, we find no error. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (the first step in plain-error analysis is to determine whether error occurred).

¶ 9 A person commits DWLR when he "drives or is in actual physical control of a motor vehicle on any highway of this State at a time when such person's driver's license, permit or privilege to do so *** is revoked or suspended as provided by this Code or the law of another state." 625 ILCS 5/6-303(a) (West 2012). Generally, DWLR is a Class A misdemeanor. 625 ILCS 5/6-303(a) (West 2012). However, DWLR is a Class 4 felony when a person has previously been convicted of DWLR and "the original revocation or suspension was for a violation of Section 11-401 or 11-501 of this Code, or a similar out-of-state offense, or a similar

provision of a local ordinance, or a statutory summary suspension or revocation under Section 11-501.1 of this Code." 625 ILCS 5/6-303(d) (West 2012).

¶ 10 Generally, where a statute initially sets forth the elements of an offense and separately provides sentencing classifications based on other factors, the enhancing factors do not create a new offense but serve only to enhance the punishment. *People v. Van Schoyck*, 232 Ill. 2d 330, 337 (2009). Despite defendant's argument to the contrary, our appellate court has concluded that the State is not required to prove as an element of a defendant's enhanced DWLR offense that the original revocation of his license rested upon a DUI conviction. *People v. Bowman*, 221 Ill. App. 3d 663, 665-66 (1991). The court reached a nearly identical conclusion in *People v. DiPace*, 354 Ill. App. 3d 104, 113-15 (2002). There, the defendant was convicted of Class 4 felony DWLR based on the fact that he committed DWLR while his license was revoked for DUI and that he had previously been convicted of DWLR. *Id.* 114. The *DiPace* court rejected the defendant's argument that the State was required to prove, as an element of his crime, that his license was revoked for DUI. *Id.* 113-15. In reaching its conclusion, the *DiPace* court reasoned that requiring the State to prove the grounds for the revocation of a defendant's license at trial would effectively require the State to prove a prior conviction as an element of the crime, which would contradict the plain language of section 111-3(c) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/111-3(c) (West 2002)). *Id.* 115; see also *Bowman*, 221 Ill. App. 3d at 666 (relying on section 111-3(c) of the Procedure Code to conclude the trial court properly imposed an enhanced sentence after considering the defendant's prior convictions for DWLR and DUI at sentencing). Section 111-3(c) of the Procedure Code explicitly provides that when the State

seeks to enhance a defendant's sentence based on a prior conviction, "the fact of such prior conviction" is not an element "of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during trial." 725 ILCS 5/111-3(c) (West 2012). In considering section 6-303(d) of the Vehicle Code in conjunction with section 111-3(c) of the Procedure Code, our supreme court has recognized that section 111-3(c) of the Procedure Code makes clear that prior convictions for DWLR and DUI "are not elements of the offense" of DWLR, subsequent offense. *People v. Lucas*, 231 Ill. 2d 169, 181 (2008).

¶ 11 Defendant acknowledges the holding in *DiPace* but contends the reasoning in that case was invalidated by the decisions in *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2013 IL App (1st) 120929, *pet. for leave to appeal allowed*, No. 117387 (May 28, 2014). In *Aguilar*, the supreme court found that the Class 4 form of a portion of the aggravated unlawful use of a weapon (AUUW) statute was unconstitutional without invalidating the other forms of that offense. *Aguilar*, 2013 IL 112116, ¶¶ 21-22. The supreme court stated it was making "no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute." *Id.* ¶ 22, n. 3. Thereafter, this court determined in *Burns* that the Class 2 form of the same AUUW offense invalidated by *Aguilar*, which was elevated to a Class 2 offense based on a defendant's prior felony conviction, was constitutional. *Burns*, 2013 IL App (1st) 120929, ¶¶ 23-27.

¶ 12 Defendant observes that the DWLR statute mirrors the AUUW statute in that it initially sets forth a lower class offense and then provides for an elevated form of the offense based on a defendant's criminal history. Thus, defendant argues that pursuant to *Aguilar* and *Burns*, the

Class 4 form of DWLR should be considered a separate offense from the Class A misdemeanor form of DWLR, and the fact that defendant's license was originally revoked or suspended for DUI or a statutory summary suspension was an element of his Class 4 offense that the State was required to prove beyond a reasonable doubt. We disagree.

¶ 13 The supreme court recently considered the constitutionality of other portions of the AUUW statute in *People v. Mosley*, 2015 IL 115872. In doing so, the supreme court explained that, to sustain a defendant's AUUW conviction, the State was required to prove beyond a reasonable doubt that (1) the defendant either carried a firearm on his person or in a vehicle, outside the home, or carried a firearm upon any public way, and (2) one of several aggravating factors was present. *Mosley*, 2015 IL 115872, ¶ 18. All of these elements are contained in subsection (a) of the AUUW statute. *Id.* ¶¶ 3, 18. The supreme court explained that, in addition, subsection (d) of the statute, "entitled 'Sentence,' provides that AUUW is a Class 4 felony unless certain circumstances exist which mandate a greater sentence. 720 ILCS 5/24-1.6(d) (West 2012)." *Id.* ¶ 18. Based on this language, it is clear that a defendant's prior felony conviction under the AUUW statute is a sentence-enhancing factor, not an element of the AUUW offense.

¶ 14 Moreover, defendant has provided no authority suggesting that other courts have extended *Aguilar* and *Burns* in the manner he suggests they should be extended, *i.e.*, as support for the proposition that sentencing enhancements should now be treated as elements of a crime. We refuse to extend *Aguilar* and *Burns* to reach such a result. Although *Aguilar* and *Burns* treated the Class 2 and Class 4 forms of the AUUW statute differently, we believe those cases were limited to the issues presented therein—whether the Class 2 and Class 4 forms of a portion

of the AUUW statute were constitutional. In other words, *Aguilar* and *Burns* did not create a blanket rule that any time a criminal statute contains multiple levels of sentences with different elements for the same crime, each level is a distinct offense. To hold otherwise would be to disregard our supreme court's consistent conclusion that where a statute initially sets forth the elements of an offense and then provides sentencing enhancements, the sentencing enhancements are not elements of the offense. See, *e.g.*, *Van Schoyck*, 232 Ill. 2d at 338-39 (felony DUI charge did not allege a different offense than prior misdemeanor DUI charge but merely elevated the misdemeanor DUI); *Lucas*, 231 Ill. 2d at 181 (prior DUI and DWLR convictions are not elements of DWLR, subsequent offense, but are instead used after a defendant's conviction to increase the classification of the crime at sentencing); *People v. Robinson*, 232 Ill. 2d 98, 112 (2008) (the legislature did not create a separate offense of "involuntary manslaughter of a family or household member" but instead provided for one crime of involuntary manslaughter and set forth a sentence-enhancing element where the victim was a family or household member); *People v. Green*, 225 Ill. 2d 612, 619-20 (2007) ("robbery" and "robbery of a person 60 years of age or over" are not distinct crimes; rather, Illinois has a single crime of "robbery" that is enhanced depending upon the nature of the victim). Moreover, requiring the State to prove the nature of defendant's prior conviction beyond a reasonable doubt would contradict the language contained in section 111-3(c) of the Procedure Code. *DiPace*, 354 Ill. App. 3d at 115. That language clearly provides that "[w]hen the State seeks an enhanced sentence because of a prior conviction, *** the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense." 725 ILCS 5/111-3(c) (West 2012). Furthermore, we

note that the Supreme Court has specifically 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 submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In light of all of the foregoing, we conclude the State was not required to prove beyond a reasonable doubt, as an element of defendant's offense, that his license was originally revoked or suspended for DUI.

¶ 15 We turn then to defendant's argument that the State failed to establish at sentencing that the original revocation of his license was for a DUI. To elevate defendant's misdemeanor DWLR conviction to a Class 4 felony, the State relied on defendant's PSI and driving abstract. Evidence is admissible in a sentencing hearing if it is relevant and reliable. *People v. Williams*, 149 Ill. 2d 467, 490 (1992). "[A] certified copy" of a defendant's driving abstract "shall be admitted as proof of any prior conviction." 625 ILCS 5/6-303(f) (West 2012). Moreover, a certified abstract issued by the Secretary of State as to the status of a defendant's driver's license "shall be prima facie evidence of the facts therein stated" and constitutes "proof of any prior conviction." 625 ILCS 5/2-123(g)(6) (West 2012). A trial court's sentencing decision is entitled to great deference and will not be altered on review absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). However, where a sentencing judge relies on an improper factor, the sentence should be vacated and the cause remanded for resentencing. *People v. Zapata*, 347 Ill. App. 3d 956, 964-66 (2004) (remanding for resentencing where the trial court's distaste for gang violence was the dominant factor in its sentencing determination and no evidence was presented at trial that the murder was gang-related).

¶ 16 Defendant acknowledges his abstract shows that (1) he had a prior DWLR conviction and (2) his license was suspended or revoked at the time Officer Price observed him driving. However, he argues the abstract fails to show that the original revocation or suspension of his license, which occurred on November 5, 1986, was for either DUI or a statutory summary suspension. We disagree.

¶ 17 Defendant's driving abstract reflects that on November 5, 1986, his license was suspended or revoked pursuant to section 6-206(a)(6) of the Vehicle Code, which authorizes the Secretary of State to suspend or revoke a defendant's license where he has "been lawfully convicted of an offense or offenses in another State, including the authorization contained in Section 6-203.1, which if committed within this State would be grounds for suspension or revocation." Ill. Rev. Stat. 1985, ch. 95 1/2,¶ 6-206(a)(6). Section 11-501 provides that the Secretary of State "shall revoke the driving privileges of any person convicted" of a DUI under section 11-501 of the Vehicle Code or a similar provision of a local ordinance. Ill. Rev. Stat. 1985, ch. 95 1/2,¶ 11-501. Section 6-203.1of the Vehicle Code also authorizes the Secretary of State to suspend the driving privileges of a person arrested in another state for DUI who has refused to submit to chemical testing "or tests under the provisions of implied consent." Ill. Rev. Stat. 1985, ch. 95 1/2,¶ 6-203.1. As defendant points out, several offenses unrelated to DUI would also be "grounds for suspension or revocation" of a defendant's license, such as committing a felony using a motor vehicle, leaving the scene of a traffic accident involving death or personal injury, or making false statements under oath to the Secretary of State relating to vehicle ownership. Ill. Rev. Stat. 1985, ch. 95 1/2, ¶ 6-205(a)(3), (4), (5); ¶ 6-206(a)(6).

Defendant speculates that his license could have been revoked due to one of those provisions, in which case he would not be guilty of the Class 4 form of the DWLR.

¶ 18 However, as the State correctly notes, defendant's driving abstract shows that seven months before his license was revoked in November 1986, defendant was arrested and convicted of a DUI offense in another state. Specifically, defendant's driving abstract shows that he was arrested for "DUI/ALCOHOL" on March 29, 1986, and convicted on March 31, 1986. Defendant's out-of-state conviction was premised on section 11-501 of the Code, which prohibits a person from committing DUI. Ill. Rev. Stat. 1985, ch. 95 1/2, ¶ 11-501. The March 1986 conviction does not show that a revocation or suspension was imposed for that conviction. However, it can be inferred that defendant's November 4, 1986, revocation or suspension was based on the March 1986 DUI conviction.

¶ 19 In his opening brief, defendant seemingly agrees with the State that the March 1986 conviction on his abstract was for DUI. His brief states as follows. "It should be noted that the abstract reveals that in March of 1986, [defendant] was arrested and, two days later, convicted for a DUI in Illinois." However, when discussing the State's arguments as to his March 1986 conviction in his reply brief, defendant contends "the State completely ignores the fact that nothing in the abstract indicates that the conviction was *for DUI*." Defendant's argument is unpersuasive. While the November 1986 DWLR conviction does not definitively state defendant's license was revoked for DUI, the March 1986 conviction clearly indicates it is based on section "501," which corresponds to the Illinois DUI provision. It is also listed as "DUI/ALCOHOL." We reject defendant's argument that if the 1986 conviction were for DUI, his

license would have been subject to statutory summary suspension, not a discretionary suspension. Defendant's contention ignores the plain language of section 6-206(a)(6) of the Code, which provides that "[t]he Secretary of State is authorized to suspend or revoke the driving privileges" of a person without a preliminary hearing where the person "[h]as been lawfully convicted of an offense or offenses in another State, including the authorization contained in Section 6-203.1, which if committed within this State would be grounds for suspension or revocation." Ill. Rev. Stat. 1985, ch. 95 1/2,¶ 6-206(a)(6). Section 11-501 of the Vehicle Code provides for the revocation of a defendant's driving privileges where he has been convicted of a DUI. Ill. Rev. Stat. 1985, ch. 95 1/2,¶ 11-501. In addition, section 6-203.1 of the Vehicle Code authorizes the Secretary of State to suspend the driving privileges of a person arrested in another state for DUI if the person refused to submit to certain testing. Ill. Rev. Stat. 1985, ch. 95 1/2,¶ 6-203.1. Accordingly, a revocation for DUI could have appeared on defendant's abstract as a revocation under section 6-206(a)(6) of the Vehicle Code.

¶ 20 In sum, defendant's abstract shows that he was convicted of an out-of-state DUI-related offense in March 1986 and his license was suspended approximately seven months later in Illinois under a provision of the Vehicle Code that allowed for the suspension of a defendant's license when he had committed an out-of-state DUI offense. From this, the trial court could infer that defendant's original license suspension was for his March 1986 DUI conviction. The court thus properly enhanced defendant's sentence to a Class 4 felony based on his prior criminal history.

¶ 21 For the reasons stated, we affirm the trial court's judgment.

¶ 22 Affirmed.