

2015 IL App (2d) 140623-U
No. 2-14-0623
Order filed September 3, 2015

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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 Lake County.
)	
Plaintiff-Appellee,)	
)	No. 12-CF-2304
v.)	
)	
DAVID HATYINA,)	Honorable
)	Clint T. Hull,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly denied defendant's motions to withdraw his guilty plea and to reconsider his sentence; affirmed.

¶ 2 Defendant, David Hatyina, pled guilty to the offense of aggravated driving under the combined influence of alcohol and cocaine, in that defendant knowingly operated a watercraft while defendant was under the combined influence of alcohol and cocaine to a degree that rendered him incapable of safely operating a watercraft, in violation of section 11-501(a)(5) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(5) (West 2012)), and in so doing, defendant was involved in a boating accident which resulted in the death of 10-year old Antonio

Borcia, and defendant's violation of section 11-501(a)(5) was the proximate cause of the victim's death in violation of section 11-501(d)(1)(F) (625 ILCS 5/11-501(d)(1)(F) (West 2012)). The trial court sentenced defendant to 10 years' imprisonment, and defendant appealed. We remanded the matter for compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). On remand, defendant filed motions to withdraw his guilty plea and to reconsider his sentence, which were denied. Defendant contends on appeal that the trial court abused its discretion by denying his motions because (1) there was an insufficient factual basis to support the guilty plea and (2) the trial court considered improper factors in determining his sentence. We affirm.

¶ 3

I. BACKGROUND

¶ 4

A. Guilty Plea

¶ 5 Defendant was charged by indictment with five counts of aggravated driving under the influence and four counts of reckless homicide. The charges stemmed from a boating incident that resulted in the death of the victim on July 28, 2012. On April 9, 2013, defendant pled guilty to the offense of aggravated driving under the combined influence of alcohol and drugs. In exchange, the State *nolle prossed* the remaining counts.

¶ 6 After the court's admonishments as to the potential sentence, defendant responded that he understood he was pleading guilty to a Class 2 felony with a sentence between 3 and 14 years' imprisonment. As part of the plea deal, the State no longer sought the extended term of 7 to 14 years. Additionally, the trial court further advised defendant of the rights he was giving up by virtue of the guilty plea. Defendant stated that he understood the admonishments, had no questions, and told the court he still wished to plead guilty.

¶ 7

B. Factual Basis for the Plea

¶ 8 The prosecutor stated the following factual basis. On July 28, 2012, the victim was

riding a tube with his sister on Petite Lake in Lake County. The tube was being towed by his father, Jim Borcia, who was driving a pontoon boat. The victim fell off the tube and began waving his arms above the water. The victim's siblings, Kaleigh and Joe, were on the pontoon boat. They immediately pointed out to Jim that the victim had fallen. Jim turned the boat around and, as he turned, they noticed a 29-foot-Baja speed boat, which was operated by defendant, traveling around 40 m.p.h. towards the victim. The victim's family began waving their arms and yelling in defendant's direction. Defendant did not divert course or slow down, and he hit Anthony, causing the injuries that resulted in his death.

¶ 9 Several hours after the incident, police took defendant to Centegra Medical Center in McHenry, Illinois, where he submitted a blood sample. The results showed a blood-alcohol content (BAC) of .052. After executing a search warrant of defendant's boat, police found several alcoholic beverages and cocaine residue.

¶ 10 Illinois State Police crime laboratory toxicologist, Jennifer Bash, would testify that she applied the theory of retrograde extrapolation and, in her opinion, defendant's BAC at the time of the accident would have been between .09 and .128. She also would testify to finding the presence of cocaine and cocaine metabolites in defendant's blood.

¶ 11 Defense counsel stipulated that, if those witnesses were called to testify, they would testify as to what the State recited. Additionally, counsel informed the court that the plea was being entered with regard to the holding in *People v. Martin*, 2011 IL 109102. Counsel agreed the facts would be sufficient for a finding of guilt. Defendant confirmed no one had forced him to enter into the plea or had made any promises. The court determined that defendant entered into the plea knowingly and voluntarily and accepted the guilty plea.

¶ 12 C. Presentencing Investigation Report (PSI)

¶ 13 The PSI noted that defendant is 51 years old, 6'3" in height, and weighs 215 pounds. He did not report any history of mental or physical health issues. Defendant had informed the police that he estimated he had been traveling at 40 m.p.h. at the time of the collision. He also told the police that he drank alcohol that day and had consumed "a few a while ago." In preparation for the PSI, defendant advised the probation officer that approximately 45 minutes prior to the incident, he drank two shots of vodka with cranberry juice. Defendant further informed the probation officer that the day before the incident, he found cocaine in his golf bag and used it at home. Defendant denied using cocaine on the day of the incident.

¶ 14 The PSI indicated that defendant had a prior offense for operating a water craft vehicle while under the influence of alcohol in August 1996. Defendant was discovered driving his boat at an excessive speed in a no-wake zone. He was stopped by police and it was reported that defendant smelled of alcohol. Defendant admitted to drinking five or six beers and stating "I know I had too much to drink and I shouldn't be driving." Defendant failed field sobriety testing.

¶ 15 D. Sentencing Hearing

¶ 16 The sentencing hearing was held on June 13, 2013. The victim impact statements from Kaeleigh and Erin Borcia stated that on July 28, 2012, they saw defendant's boat flying towards their brother in the water. Kaeleigh stated that she watched defendant's boat run over her brother and decapitate his head and both arms. The life preserver her brother was wearing held together his carcass. Jim Borcia testified that it was a beautiful sunny day, the lake was calm, there were not a lot of boats on the water, and his son was wearing a bright red life jacket. When he was informed that his son had fallen off the tube, he immediately turned the boat around and accelerated to pick up his son. Jim observed defendant's boat flying down the middle of the

lake, the front of the boat was tilted up in the air, and defendant was looking up and not in the water. Jim explained that his pontoon was positioned in front and to the left of defendant's boat and defendant passed right by the pontoon boat. Jim stated that he and Kaeleigh began waving their arms and screaming loudly at defendant, and his son also was waving his arms in the water. Jim stated that defendant did nothing in response to the waving and screaming and never changed direction or slowed down. Jim described defendant's boat going through his son, leaving his son's body parts in the water.

¶ 17 Officer Michael Shep, deputy of the Lake County Sheriff's Marine Unit, explained that Petite Lake is part of Chain O'Lakes. He stated that, once you get onto Petite Lake, "the entire lake is in front of you" and there are no obstructions on the lake. In his experience, Shep explained that it is important that a person operating a boat pay keen attention to their surroundings because the lake has no lanes, stop lights, stop signs, and no speed limits until after sunset.

¶ 18 Shep further testified that he and his partner, Officer Mike Bock, responded to a call regarding a crash with injuries on Petite Lake at approximately 4:47 p.m. on July 28, 2012. When they arrived, they saw a Lake County Marine boat, a pontoon boat next to it, and one of the Marine officers holding up the victim. Shep stated a deputy signaled to him that a couple of boats, about 50 yards away, had been involved in or witnessed the incident. One boat was a white Baja, which Shep described as large and very powerful. Two people were on the Baja, identified as defendant and Rene Melbourn. Defendant told Shep that he was the driver and that he was driving northbound on Petite Lake at approximately 40 m.p.h. when the pontoon boat suddenly cut in front of him. Defendant told him that to avoid striking the pontoon boat, he swerved sharply to the right, at which point he thought he saw somebody or a person in the

water.

¶ 19 While interviewing defendant, Shep observed that defendant's eyes were a "little bloodshot." He also detected a moderate odor of alcohol on defendant's breath and asked defendant if he had been drinking. Defendant admitted to having a few a while ago. Shep asked defendant to perform a field sobriety test. The time was approximately 5 p.m.

¶ 20 In Shep's opinion, defendant failed the "ABC" test because defendant recited the alphabet to the letter "R" and from "R" he then recited "T, V, Y, Z." Shep opined that defendant failed the "finger to nose test" because he made two mistakes. Shep asked defendant if he wished to take the "portable breath test" and defendant asked if he could wait to think about it. Shep gave defendant five minutes to decide, but the Department of Natural Resources Police (DNR) took over the investigation before the time limit expired. Shep believed, based on the field sobriety tests, that defendant was borderline impaired.

¶ 21 DNR Officer Chris Winters testified that he and his partner, Officer Van Wilentburg, were assigned to boat patrol on Chain O'Lakes on July 28, 2012. Winters testified that, when he arrived around 5:15 p.m., defendant was in the sheriff's boat. He talked to defendant for 30 to 60 seconds and did not notice anything unusual about defendant. Winters stated that defendant admitted to him that he had two beers around 1:30 p.m., but he did not disclose that he had taken any other substance.

¶ 22 Around 5:40 p.m., Winters conducted field sobriety tests consisting of a horizontal gaze nystagmus test (HGN), "alphabet test," "hand pat test," "finger point test," and PBT. Winters stated that the "finger point test" was not a pass or fail test and indicated that defendant started before he was instructed to do so, but he completed the test. As to the HGN test, defendant received five to six points, which indicated that defendant had consumed alcohol. Also,

defendant's PBT results were .069.

¶ 23 The officers transported defendant to Centegra Medical Center around 7:35 p.m., where his blood was drawn. Defendant was asked to write a statement at approximately 8:43 p.m., and then he was released.

¶ 24 The following evening, officers Winter, Wiltenburg, and Wheatley did an initial search of defendant's boat. They found a cooler containing two Mike's hard cranberry, one Mike's hard black cherry lemonade, a plastic bag with two empty Mike's hard cranberries, and one empty Mike's hard lemonade. They also found a water bottle in one of the cup holders that contained a small amount of liquid that smelled of an alcoholic beverage. Winter testified that Illinois State Police searched defendant's boat on a later date pursuant to a search warrant. They took multiple swabs in the cabin area which were sent to the Illinois State Police Crime Lab.

¶ 25 Illinois State Police toxicologist, Jennifer Bash, testified about the blood drawn from defendant. She stated that defendant's BAC was .052 grams per deciliter at the time the blood was drawn. Bash explained metabolic rate and post-absorption of alcohol in the body; once the alcohol is absorbed, most people fall within a normal range. Bash testified to performing a back extrapolation to determine defendant's BAC at the time of the incident and listed the details needed to perform the extrapolation. Bash needed to know the time defendant's blood was drawn, the time the incident occurred, and then certain assumptions that must be made.

¶ 26 These assumptions included that the individual stopped drinking at least an hour before in order to reasonably determine that the person was post-absorptive; the person is a healthy individual and does not have any medical problems that might place them outside the normal metabolic range; and, if the person was treated at the hospital and given I.V. fluids, then the BAC would be potentially lower when analyzed. Bash explained that there were things which

took a person outside the normal metabolic range, such as age, and medical conditions like liver dysfunction. Bash explained that she was not aware of any of these factors regarding defendant, nor was there information that defendant was injured at the time of the incident or that he had received any I.V. fluids. She concluded that all of her assumptions, for purposes of calculating, were valid at the time she performed the calculations.

¶ 27 Bash stated that defendant's blood was drawn at 8:26 p.m. and the incident occurred at 4:35 p.m. Bash knew that defendant had not had anything to drink up to three hours prior to the incident and therefore, she made the assumption that defendant was post-absorptive. The results of the back extrapolation resulted in a range from 0.09 to .128 grams per deciliter at the time of the incident. Bash confirmed the fact that there was not another blood test did not make her analysis any less accurate because her test accounts for varying degrees of people within the normal metabolic range.

¶ 28 Bash also performed a full drug screen on defendant's blood. She found cocaine and cocaine metabolites in defendant's blood stream. Bash explained that usually after 12 hours cocaine can no longer be detected after a dosage of a hundred milligrams of the active compound. She stated that the earliest time defendant ingested cocaine would have been around 8:30 a.m. on July 28, 2012, the day of the incident. Bash explained that, if defendant had ingested cocaine before 8:30 a.m., or on July 27, 2012, she would not expect to find the parent compound but would expect to find metabolites. Bash further stated that she analyzed the swabs submitted from defendant's boat and confirmed that the residue taken from the starboard side cup holder was cocaine.

¶ 29 Dr. Eugene Youkilis, an expert in the field of toxicology, testified for the defense. He did not agree with Bash's scientific opinion that defendant's BAC was between 0.09 and .12. He

stated that back extrapolation was “not an exact scientific method at all.” Youkilis explained that back extrapolation was a guess or estimate. He opined that “the only way to really do [back extrapolation] that’s scientifically acceptable is to get more blood draws *** obviously in the real world that doesn’t happen, but in theory that is where the direction is going, that you theoretically would need to have more blood draws.” Youkilis also confirmed that “if you believe defendant,” that he had two beers prior to the incident, then the assumption that defendant was in the post-absorptive phase at the time of the accident would be correctly applied.

¶ 30 Youkilis also disagreed with Bash’s cocaine analysis that cocaine could not be detected outside of a 12-hour period in a person’s blood. He testified that there is literature showing that a person could have measurable cocaine in their blood system up to or over 24 hours after ingesting it. Youkilis confirmed that, if defendant ingested cocaine either the afternoon of the 28th or the afternoon of the 27th, Bash’s findings would be the same.

¶ 31 Defendant spoke in allocution that, since he struck and killed the victim, he had been extremely distraught and would never forgive himself for drinking alcohol on the boat and ingesting a “small amount of cocaine the day before.”

¶ 32 Following argument, the trial court summarized its findings of the victim impact statements; law enforcement witnesses; the evidence that defendant admitted to drinking a couple of drinks; defendant admitting to driving the boat and estimating his speed at approximately 40 m.p.h.; the field sobriety testing; and the evidence from Bash estimating that defendant’s BAC ranged from .09 to .128. The court also summarized its finding regarding defendant’s evidence, factors in mitigation and aggravation, and defendant’s statement in allocution.

¶ 33 In sentencing defendant, the trial court found:

“[A]fter considering all of the arguments made, taking into consideration the nature of the circumstances of the offense, and all of the evidence that has been noted *** that a sentence of probation in this case would deprecate the seriousness of the offender’s conduct and would be inconsistent with the ends of justice.”

¶ 34 The trial court cited *People v. Dowding*, 338 Ill. App. 3d 936 (2009), and *People v. Malin*, 359 Ill. App. 3d 257 (2005), noting that it may consider, as an aggravating factor, the degree of harm caused to the victim even when serious bodily harm is implicit in the offense, and that the need to protect the public may outweigh the mitigating factors in the goal of rehabilitation. The court stated:

“The evidence established that [defendant was] operating a 29-foot boat *** [defendant was] boating on a Saturday in the middle of the afternoon in July, during a time when boat traffic at Petite Lake was considered high, *** unlike driving, there were no rules of the road and that boats drive in all sorts of different directions. Unlike a roadway, where there are lane markings and traffic indicators, nothing like that exists on any lake and not on Petite Lake, and that requires a boat operator, including [defendant] on July 28, to be keenly aware of the surroundings when operating a boat.”

¶ 35 The trial court further observed the conflicting evidence from the deputies who observed defendant regarding impairment because evidence was provided that defendant passed field sobriety tests, but evidence also showed that defendant’s tests were “borderline.” However, the trial court stated that the fact remained that defendant was drinking alcohol on July 28 and “the corroboration for that is [defendant’s] own admission, the PBT, the blood test, and the containers found on the boat itself. I do find [defendant] was impaired in some fashion by the alcohol, although the level of impairment has been disputed.”

¶ 36 The court observed:

“[T]he fact that at the time [defendant was] boating with alcohol and cocaine in [his] system was a significant fact which the court considered *** by combining alcohol and drugs [defendant] impacted [his] ability to observe, to make decisions, and react when confronted with situations that required quick thinking and decision making.”

¶ 37 The trial court noted defendant’s August 1996 offense of operating while under the influence, and stated that this was the exact activity upon which defendant was being sentenced in the present case, except this case involved a death. The court thus concluded that defendant could not “stand before this Court and argue that [he] didn’t know that it was illegal to boat while impaired. [He] had knowledge.” The trial court found that neither a sentence near the maximum of 14 years nor a sentence near the minimum of 3 years would be appropriate, and it sentenced defendant to 10 years’ imprisonment.

¶ 38 As stated, we dismissed defendant’s direct appeal and remanded the matter for compliance with Rule 604(d). On remand, defendant filed a motion to withdraw his guilty plea and vacate the judgment and filed a modified motion to reconsider his sentence, which the trial court denied. Defendant timely appeals.

¶ 39

II. ANALYSIS

¶ 40

A. Motion to Withdraw Guilty Plea

¶ 41 Defendant pled guilty to aggravated driving under the combined influence of alcohol and cocaine to a degree that rendered him incapable of safely driving and, as a result, he proximately caused the death of the victim in violation of section 11-501(a)(5) and (d)(1)(F) of the Code (625 ILCS 5/11-501(a)(5), (d)(1)(F) (West 2012)). Defendant maintains that he entered into his plea agreement based on his counsel’s incorrect advice in reliance on *People v. Martin*, 2011 IL

109102,¹ and that, under *Martin*, impairment was a necessary element which the State would have had to prove if the present case had gone to trial. Defendant contends that *Martin* does not apply to the section of the statute that he pled guilty to. Because the State's factual basis did not support the conclusion that defendant was impaired at the time of the incident, defendant argues that the trial court abused its discretion when it denied his motion to withdraw his guilty plea.

¶ 42 The decision on whether to allow a defendant to withdraw his guilty plea is within the sound discretion of the trial court. *People v. Kokoraleis*, 193 Ill. App. 3d 684, 685 (1990). The factual basis of a guilty plea will be established as long as there is a basis anywhere in the record, up to the final judgment, from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent, if any, required constituting the offense to which he is pleading guilty. *People v. Jackson*, 199 Ill. 2d 286, 298-99 (2002); *People v. Brazee*, 316 Ill. App. 3d 1230, 1236 (2000). It is not necessary that it appear on the record beyond a reasonable doubt or even by a preponderance of the evidence that the defendant committed the offense. See Ill. S. Ct. R. 402(c) (eff. July 1, 2012). Even though the guilty plea previously had been accepted, facts disclosed at the sentencing hearing can be considered in determining whether an adequate factual basis for the plea had been established. *People v. Bleitner*, 199 Ill. App. 3d 146, 147 (1990). The trial court properly exercises its discretion when it examines the relevant facts, applies proper legal standards, and reaches a reasonable conclusion. When no reasonable person would agree with the trial court's decision whether to accept or reject a guilty plea, an abuse of discretion exists. *People v. Peterson*, 311 Ill. App. 3d 38, 39 (1999).

¹ Defendant does not raise any claim on appeal concerning ineffective assistance of counsel.

¶ 43 In this case, the incident occurred around 4:30 p.m. on a weekend afternoon. The day was clear and sunny. There were no lanes, stop lights, stop signs, or other means of controlling the lake traffic, and thus boaters, like defendant, had “to be keenly aware of their surroundings while boating.” Defendant was operating his boat at 40 m.p.h. with alcohol and cocaine in his system. The victim was wearing a red life preserver in the water and was waving his arms. The family of the victim was standing on a pontoon boat waving and screaming at defendant while he passed their pontoon boat. Defendant was not paying attention to the water; his head was facing upwards; he did not divert course or slow down; and defendant’s boat went through the victim with such force that the victim’s head and both arms were detached from his body. Although he told the officers that he drank two beers earlier, he stated in his PSI that he drank two shots of vodka with cranberry juice that day. We also note that defendant said that he had ingested cocaine the day before, but Jennifer Bash testified that the earliest defendant could have ingested cocaine was 8:30 a.m. on the day of the incident. Bash’s testimony would show that defendant’s BAC at the time of the incident was somewhere from .09 to .12. Officer Shep detected a moderate odor of alcohol on defendant’s breath, defendant failed the “ABC” test, and received a five to six on the HGN test, which indicated that defendant consumed alcohol. Additionally, alcohol and cocaine residue were found on defendant’s boat. Given the evidence presented at the plea proceedings, defendant’s PSI, and the evidence presented at sentencing, the trial court could reasonably have concluded that defendant committed the offense of aggravated driving under the combined influence of alcohol and drugs to a degree that rendered him incapable of safely driving and, as a result, proximately causing the death of the victim.

¶ 44 Defendant argues that, because there was no mention during the plea proceedings of any factors noted in *People v. Floyd*, 2014 IL App (2d) 120507, Bash’s retrograde extrapolation

analysis should be put into doubt and therefore the factual basis was insufficient for defendant's guilty plea. In *Floyd*, because the State's expert witness acknowledged that he was unaware of many of the factors necessary to determine whether the defendant was in the elimination phase and because the police conducted only one BAC test, we found the extrapolation calculation to be inherently unreliable. *Id.* ¶ 27.

¶ 45 We reject defendant's reliance on *Floyd*. First, as the State correctly points out, the factual basis of a guilty plea can be established as long as there is a basis anywhere in the record up to the final judgment from which the trial court could reasonably reach the conclusion that the defendant actually committed the acts required to constitute the offense to which he is pleading guilty. *Brazee*, 316 Ill. App. 3d at 1236. It does not require proof beyond a reasonable doubt or even by a preponderance of the evidence that defendant committed the offense. The State was not required to establish every factor set forth in *Floyd* because it was a plea, not a trial as in *Floyd*, where the State was required to prove the defendant's guilt beyond a reasonable doubt.

¶ 46 Second, our holding in *Floyd* was "limited to the specific circumstances" of the case, and we recognized that retrograde extrapolation has its place in proving that a defendant was driving under the influence. *Floyd*, 2014 IL App (2d) 120507, ¶ 25.

¶ 47 Third, Bash's testimony is distinguishable from the testimony provided in *Floyd*. Her assumptions were based on information that led her to reasonable assumptions for conducting her calculations. Here, Bash testified that defendant's BAC at the time his blood was drawn was .052 grams per deciliter. His blood was drawn at 8:26 p.m. and the incident occurred at 4:35 p.m. At the time the test was taken, defendant had not had anything to drink for up to three hours before the incident and she made the reasonable assumption that he was post-absorptive. Bash testified to assuming that defendant was healthy because she did not receive any

information that he was in his late 70's or 80's or had any medical conditions, such as a liver dysfunction, which would take him outside the normal metabolic range. Bash also testified that there was no information that defendant was injured at the time of the incident or that he had received any I.V. fluids. Her assumptions for purposes of calculating therefore were valid at the time she performed the calculations. Notably, defendant admitted to drinking two beers (or as he stated in the PSI, two shots of vodka) around 1:30 p.m. Defendant is 51 years old, 6'3" in height, and weighs 215 lbs. Defendant did not report any history of mental or physical health issues and was not injured during the incident. Defendant's expert, Dr. Youkilis confirmed that, "if you believed" defendant had two beers hours before the incident, then the assumption that defendant was in the post-absorptive phase at the time of the accident would be correctly applied. Bash's testimony regarding back extrapolation was sufficiently supported by the evidence and aided the trial court in reaching its reasonable conclusion that defendant committed the offense of aggravated driving under the combined influence of alcohol and drugs for the purpose of his guilty plea.

¶ 48 Defendant contends that further support for the conclusion that the factual basis was insufficient to find he was boating in an impaired condition was the testimony from the law enforcement officers who responded to the scene. In addition to defendant's own stipulations, the officers could detect a moderate odor of alcohol on defendant's breath, could see that his eyes were a little bloodshot, had failed field sobriety tests. Furthermore, the trial court considered the evidence as a factual basis and concluded that defendant was guilty of aggravated driving while under the combined influence of alcohol and drugs which rendered defendant unable to operate his boat safely, and as a result, caused the death of the victim. Given this evidence, along with defendant's own admissions at the plea proceedings, we cannot say that the

trial court abused its discretion when it found a sufficient factual basis for defendant's guilty plea and denied his motion to withdraw his guilty plea.

¶ 49 B. Modified Motion to Reconsider Sentence

¶ 50 The trial court has great discretion to assign an appropriate sentence within the statutory limits and is entitled to great deference because the trial court has observed the defendant and the proceedings and has had a better opportunity than the reviewing court to consider all of the factors. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The trial court has wide discretion in sentencing defendant to any term within the statutory range prescribed for an offense, as long as it does not consider incompetent evidence, consider improper aggravating factors, or ignore pertinent mitigating factors. *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990). The balance which is to be struck amongst aggravating and mitigating factors in imposing a sentence is a matter of judicial discretion which should not be disturbed on review absent abuse of that discretion. *Id.* Imposition of a sentence is an abuse of discretion only when the judgment of the trial court is manifestly unjust or palpably erroneous.

¶ 51 Defendant contends that the trial court abused its discretion in sentencing him to a 10-year term of imprisonment because it considered and relied on what he calls "factors" that were not supported by the evidence. Defendant maintains the court considered the following three factors for which there was no evidentiary support: (1) that the minuscule amounts of cocaine or cocaine metabolites in his blood sample resulted in operating the boat in an impaired condition where no witness testified to what the effect of such a small amount of cocaine or its metabolites might be; (2) that retrograde extrapolation showed the blood-alcohol content at the time of the collision, where not only the witnesses called the theory into doubt but this court, in *Floyd*, reversed and remanded the case on the basis that the theory of retrograde extrapolation was

faulty; and (3) that law enforcement officers, while finding that defendant did not pass the HGN test, testified that defendant passed all other field sobriety tests and did not appear to be functioning in an impaired condition.

¶ 52 Defendant's argument really is just an extension of his argument that the factual basis for the guilty plea was insufficient rather than an argument that his 10-year sentence, which was within the sentencing range, was an abuse of discretion. Defendant, in fact, comments that he is not raising a claim that his sentence is excessive *per se*. Rather, he is alleging that the trial court followed improper procedures in sentencing him, in that it relied on improper facts in sentencing defendant.

¶ 53 However, from the record it is obvious that the trial court relied on a proper factual basis in sentencing defendant. The essence of the offense is that the alcohol and the other drug or drugs, acting together, render the person incapable of driving safely. It is axiomatic that the other drug or drugs must have some intoxicating effect, either on its own or because of being combined with alcohol. *People v. Vanzandt*, 287 Ill. App. 3d 836, 845 (1997). It does not require that a person have enough alcohol or sufficient drugs to render a person incapable of driving, but there must be some alcohol and some other drug combined to render the person incapable of driving safely. *Id.* at 844. Thus, even if defendant had a "minuscule" amount of cocaine and metabolites, it would not change the fact that defendant had cocaine in his blood system while consuming alcohol, which combined, rendered him incapable of driving safely. At defendant's guilty plea, his counsel stipulated that, if the witnesses were called to testify, the facts they would testify to would be sufficient for a finding of guilt. Section 11-501(a)(5) does not require a particular amount of drug or drugs to be in a person's blood stream in order to render a person impaired; it only requires an amount of both alcohol and drugs, combined, to

cause the defendant to drive unsafely. Additionally, Bash's testimony supported defendant's admission that defendant had cocaine and cocaine metabolites in his blood on the day of the incident and that, at the time of the accident, his BAC was between .09 and .12.

¶ 54 We also do not find that the trial court abused its discretion in considering the retrograde extrapolation theory at sentencing since defendant stipulated to this theory. Likewise, as considered under the first issue, Officers Shep, Winters, and Wiltenburg's report illustrated that defendant had failed two sobriety tests, his eyes were bloodshot, defendant appeared "borderline" impaired, and they detected a moderate smell of alcohol on defendant's breath. It was not improper for the trial court to consider this testimony as it directly supported defendant's guilty plea to aggravated driving under the combined influence of alcohol and drugs, and as a result, was the proximate cause of the victim's death.

¶ 55 In sentencing defendant, the trial court found that neither the maximum sentence of 14 years nor the minimum sentence of 3 years would be appropriate. The court considered the evidence and found significant the following facts: defendant was operating a boat on a Saturday afternoon in July during a time when boat traffic was considered high and he was not paying attention to his surroundings; he had alcohol and cocaine in his system; and the combination of the two impacted defendant's ability to quickly think and make decisions; defendant had been arrested in 1996 for operating a boat under the influence; and, although no death resulted then, the court believed that defendant could not stand before the court and argue that he did not know that it was illegal to boat while impaired. Based upon a review of the record, we cannot say that the trial court abused its discretion in imposing a 10-year sentence, and the sentence is therefore affirmed.

¶ 56

III. CONCLUSION

¶ 57 For the preceding reasons, we affirm the judgment and sentence of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 58 Affirmed.