2015 IL App (3d) 130342-U

Order filed May 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0342 Circuit No. 12-CF-488
JERRY L. PORTER,	)	Honorable Edward Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The failure of the jury to find the aggravating sentencing factor was error, and we reverse and remand the cause to the trial court for resentencing.

¶ 2 After a jury trial, defendant, Jerry L. Porter, was found guilty of aggravated driving while under the influence (DUI) (625 ILCS 5/11-501(a)(2), (d)(1)(G) (West 2012)) and driving while his license was suspended (625 ILCS 5/11-501.1 (West 2012)). Defendant was sentenced to 30 months' imprisonment. On appeal, defendant argues that his DUI conviction must be reversed because he was convicted of an enhanced Class 4 felony based on a fact that was not found by

the jury beyond a reasonable doubt. We modify in part, reverse in part and remand with direction.

¶ 3 FACTS

¶ 4 In case No. 12-CF-488, defendant was charged by indictment with aggravated DUI, a Class 4 felony. The indictment alleged that defendant drove a vehicle while under the influence of alcohol at a time when he was suspended for a violation of section 11-501.1 of the Illinois Vehicle Code (Code). The indictment was later supplanted by an information charging two counts of aggravated DUI (625 ILCS 5/11-501(a)(2), (d)(1)(G); (a)(5), (d)(1)(H) (West 2012)). In case No. 12-TR-17850, defendant was charged with failure to notify of an accident, and in case No. 12-TR-17851 defendant was charged with driving while his license was suspended (625 ILCS 5/6-303(a) (West 2012)).

¶ 5 On February 6, 2013, the DUI case was called for a hearing along with its traffic companion cases, Nos. 12-TR-17850 and 12-TR-17851. The State moved to *nolle prosequi* the charge for failure to notify of an accident in case No. 12-TR-17850 and elected to proceed on the driving while suspended charge in case No. 12-TR-17851 and DUI in case No. 12-CF-488. Thereafter, the following exchange took place:

> "THE COURT: 12 TR 17850 is dismissed on motion of the People. The issue of whether the defendant was suspended or not is not an issue for proof beyond a reasonable doubt, that's a sentencing.
>
> [State]: As to the DUI, your Honor, not as to the traffic matters.
>
> THE COURT: Yes. I'm not going to advise the jury that that's in the Indictment.
>
> [State]: Yes.
>
> THE COURT: Just that it's an aggravated DUI."

After the exchange, the case proceeded to jury selection.

¶ 6 The State called Joliet Police Officer Benjamin Grant as its first witness. At approximately 2:15 a.m. on March 1, 2012, Grant was dispatched to the Citgo gas station on Chicago Street in Joliet. As Grant pulled into the parking lot, he made eye contact with defendant, the driver of a nearby minivan. Defendant then backed the van into a concrete sign and drove away from the gas station.

¶ 7 Grant pursued defendant and made a traffic stop. Defendant's eyes were bloodshot, and he smelled of alcohol. Defendant stated that he was coming from the Grapevine Club, a restaurant or bar, where he had consumed three beers. Defendant did not possess a driver's license. Grant instructed defendant to exit the vehicle and noticed that defendant had trouble maintaining his balance. Grant instructed defendant to perform various field sobriety tests and concluded that defendant was unable to safely operate a motor vehicle. Defendant was arrested for DUI.

¶ 8 The State also called Joliet police officer Eric Zettergren to testify. Zettergren assisted Grant with the traffic stop. Zettergren spoke with defendant as he prepared a tow sheet for defendant's vehicle. Zettergren noticed that defendant's breath smelled of alcohol and concluded that defendant was under the influence of alcohol.

¶ 9 After Zettergren's testimony, the State entered a stipulation into evidence. The parties stipulated that defendant's license was suspended on March 1, 2012.

¶ 10 Following deliberations, the jury found defendant guilty of aggravated DUI and driving while his license was suspended. The trial court sentenced defendant to 30 months' imprisonment.

¶ 11 On March 3, 2015, we issued an order affirming defendant's conviction and sentence. In response, defendant filed a petition for rehearing, asserting that this court overlooked the fact that the evidence that was before the jury was insufficient to sustain defendant's aggravated DUI sentence, and as a result, the error was not harmless. We granted rehearing on March 27, 2015.

¶ 12 ANALYSIS

¶ 13 Defendant argues that his conviction must be reversed because the jury never found beyond a reasonable doubt that his driver's license was suspended at the time he was arrested for DUI and this fact was used to enhance the conviction to a Class 4 felony. The State responds that defendant has forfeited review of this issue, and the error was harmless because evidence concerning defendant's license suspension was uncontested and overwhelming. We agree that defendant has forfeited review. As a result, the issue can only be reversed for plain error.

¶ 14 The plain error doctrine allows unpreserved errors to be considered if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the 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). The first step in plain error analysis is to determine whether error occurred. *People v. Wilmington*, 2013 IL 112938, ¶ 31.

¶ 15 In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that any fact, other than a prior conviction, that is used to increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Section 111-3(c-5) of the Code of Criminal Procedure of 1963 codified the *Apprendi* principal. 725 ILCS 5/111-3(c-5) (West 2012). Where an alleged fact, other than a prior conviction, is not an element of an offense, but is instead sought to be used to increase the

sentencing range for the charged offense beyond the statutory maximum, the alleged fact must be: (1) included in the charging instrument; (2) submitted to the trier of fact as an aggravating factor; and (3) proved beyond a reasonable doubt. *Id.* Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing the sentencing range beyond the statutory maximum that could otherwise be imposed for the offense. *Id*.

¶ 16 Here, defendant was charged with and convicted of aggravated DUI under section 11-501(d)(1)(G) of the Code. 625 ILCS 5/11-501(d)(1)(G) (West 2012). This subsection elevates a DUI charge to a Class 4 felony based on the additional fact that defendant's driving privileges were revoked or suspended at the time of the DUI due to a violation of section 11-501.1 of the Code. 625 ILCS 5/11-501(d)(1)(G), (d)(2)(A) (West 2012). The suspension factor was not an element of the offense but was a sentence enhancement factor. See *People v. Van Schoyck*, 232 Ill. 2d 330, 337 (2009) (noting that the enhancing factors in section 11-501(c) did not create a new offense, but served only to enhance the punishment). Therefore, it was required to be in the charging instrument, submitted to the jury, and proved beyond a reasonable doubt. However, this fact was not submitted to the jury or proved beyond a reasonable doubt. The jury received no evidence in connection with defendant's aggravated DUI charge that defendant's driver's license was suspended due to a violation of section 11-501.1. Due to this omission, the jury could not find the enhancing element, and defendant's enhanced sentence violated the *Apprendi* principals and section 111-3 of the Code.

¶ 17 The State argues that the error was harmless because defendant stipulated, in connection with his driving on a suspended driver's license charge, that his driver's license was suspended on the date of the DUI. However, this stipulation did not provide a reason for defendant's

suspended driver's license. Under section 11-501(d)(1)(G) of the Code, and as charged in the instant case, the State was required to prove that defendant's driver's license was suspended due to a violation of section 11-501.1 to warrant the enhanced sentence. Because the parties' stipulation did not specify the reason for the suspension, it was insufficient to establish the sentence enhancement factor.

¶ 18 The absence of evidence on the sentence enhancement factor necessitates reversal under the first prong of the plain error doctrine. Such an omission of evidence goes beyond the closely balanced requirement of the first prong and tips the scales of justice against defendant. Prejudice resulted when defendant was subjected to Class 4 felony sentencing in the absence of evidence of the enhancing factor and a jury finding. Therefore, we reverse defendant's sentence and proceed to consider the proper sentencing remedy for this error.

¶ 19 We note that the evidence of defendant's guilt of DUI was not close. Grant saw defendant attempt to leave the Citgo parking lot, and in the process, defendant backed into a sign before driving away. A field sobriety test indicated that defendant was under the influence of alcohol and was impaired. Additionally, Zettergren's testimony substantiated Grant's conclusion that defendant was under the influence of alcohol. From this evidence, the State readily established defendant's guilt of DUI. Nevertheless, defendant asks this court to reverse his aggravated DUI conviction without requesting a remand for resentencing.

¶ 20 An outright reversal is not an ordinary remedy for an *Apprendi* violation. When a sentence has been improperly enhanced following an *Apprendi* error, the appropriate remedy is to remand the cause to the trial court for resentencing. See *People v. Swift*, 202 Ill. 2d 378, 392 (2002). However, defendant's aggravated DUI, a Class 4 felony, was charged under section 11-501(d)(1)(G) of the Code. This offense differed from the section 501(a)(2) Class A

misdemeanor DUI charge by the addition of the sentence enhancement factor. Viewing section 11-501 in light of the facts in the instant case, we conclude that the evidence was sufficient to sustain the conviction, but was insufficient to support the enhanced sentence. To remedy this unique *Apprendi* violation, we exercise our power under Illinois Supreme Court Rule 615(b)(3) to reduce the charge of aggravated DUI to the lesser-included charge[1] of DUI. *People v. Lee*, 294 Ill. App. 3d 738, 746 (1998) (reviewing court may exercise its authority to reduce the degree of an offense only where a lesser-included offense is involved). We further remand the cause to the trial court with direction to resentence defendant on the charge of DUI, a Class A misdemeanor.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is modified in part, reversed in part and remanded with direction.

¶ 23 Modified in part, reversed in part and remanded with direction.

[1] Under the charging instrument approach, DUI is a lesser-included offense of aggravated DUI because aggravated DUI contains the broad foundation or main outline of the lesser offense of DUI. See *People v. Kennebrew*, 2013 IL 113998, ¶ 30. The offenses are differentiated only by the addition of the sentence enhancement factor.