2016 IL App (1st) 141761-U

FIFTH DIVISION
March 18, 2016

No. 1-14-1761

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 C5 5058701
	)	
KENNETH PRIMM,	)	
	)	Honorable
Defendant-Appellant.	)	Colleen Ann Hyland,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming defendant's conviction for a Class A misdemeanor DUI, vacating defendant's aggravated DUI sentence, and remanding for resentencing where no evidence was presented establishing his license was summarily suspended on the date of his DUI arrest.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Kenneth Primm was convicted of aggravated driving under the influence of alcohol (DUI), a Class 4 felony, pursuant to sections 11-501(a)(2) and 11-501(d)(1)(G) of the Illinois Vehicle Code (Code) (625 ILCS

5/11-501(a)(2), (d)(1)(G) (West 2012), and was sentenced to 24 months of probation, with 62 days in the Cook County Department of Corrections considered time actually served. On appeal, defendant contends his conviction should be reduced to a Class A misdemeanor DUI because the State failed to prove beyond a reasonable doubt the charged aggravating factor, *i.e.*, that defendant's driver's license was summarily suspended at the time of the offense due to a violation of section 11-501.1 of the Code (625 ILCS 5/11-501.1 (West 2012)). In response, the State agrees it did not present any evidence regarding the aggravating factor, that defendant's conviction should be reduced to a Class A misdemeanor DUI, and that this matter should be remanded for resentencing. For the following reasons, we affirm defendant's DUI conviction, vacate his aggravated DUI sentence, and remand the matter to the trial court for resentencing.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with one count of aggravated DUI. The State alleged that on June 30, 2013, defendant was in physical control of a vehicle while under the influence of alcohol in violation of section 11-501(a)(2) of the Code (625 ILCS 5/11-501(a)(2) (West 2012)). The State notified defendant of its intent to seek a Class 4 felony conviction and sentence for aggravated DUI pursuant to section 11-501(d)(1)(G) of the Code (625 ILCS 5/11-501(d)(1)(G) (West 2012)) based on an allegation that defendant's driver's license was summarily suspended on the date of the offense for a violation of section 11-501.1 of the Code (625 ILCS 5/11-501.1 (West 2012)).

¶ 5 Prior to trial, the trial court granted "by agreement" defendant's motion *in limine* which requested the State be barred from presenting evidence that at the time of the offense defendant's license was summarily suspended. The State also filed a "motion *in limine* to admit evidence" of defendant's pending Will County DUI charge. After hearing arguments, the trial court denied the

State's motion.

¶ 6 Trial in this matter commenced on April 22, 2014. At trial, the State's evidence established that on the evening of June 30, 2013, Erika Torres was driving north on Harlem Avenue near 44th Street in Stickney, Illinois when a silver Jeep turned left in front of her and struck her vehicle causing the airbags to deploy. The windshield of her vehicle was shattered and the front end of the passenger side of her vehicle was significantly damaged. The Jeep stopped briefly, but then drove away proceeding east on 44th Street. Eyewitness Armando Vasquez testified he heard the automobile crash and then observed the Jeep traveling toward him, "flying down 44th [S]treet." Vasquez memorized the license plate number and called 911. Another eyewitness, Hatem El Shabrawy, testified he wrote down the license plate number of the Jeep and provided it to a police officer. Officer Colin Lochridge of the Stickney police department testified that after speaking with Vazquez he broadcasted a description of the Jeep over the police radio.

¶ 7 The State's evidence further established that, as a result of the coordinated efforts of officers from the Stickney and Lyons police departments, defendant's vehicle was ultimately stopped and defendant was placed under arrest. Officer Pedro Garcia testified that as he placed defendant under arrest he noted a strong odor of alcohol on defendant's breath, that he appeared to be confused, and that his speech was slurred. In searching the interior of defendant's vehicle, Officer Nathan O'Connor of the Lyons police department testified he discovered an empty, crushed can of beer on the passenger seat, an unopened can of beer and two, small unopened bottles of wine in the center console, and an opened case of beer in the back seat. According to Officer Garcia, he discovered another empty beer can when he inventoried the vehicle.

¶ 8 Thirty minutes after defendant's arrest, Officer Lochridge administered field sobriety tests

at the Stickney police department, which included the one-legged stand test, the walk-and-turn test, and the Horizontal Gaze Nystagmus test. Officer Lochridge determined defendant failed all three tests. In addition to failing the field sobriety tests, Officer Lochridge also observed that defendant's breath had a strong odor of alcohol, his speech was slurred, and his eyes were glassy and bloodshot. According to Officer Lochridge, defendant informed him that he suffered from vertigo, which defendant asserted caused nystagmus and prevented him from being able to balance without holding onto something for support. On cross-examination, however, Officer Lochridge testified he did not know how having vertigo may have affected the validity of the tests he administered.

¶ 9 The State rested. The State did not produce any evidence regarding the status of defendant's license at the time of his arrest. Defendant then moved for a directed finding, which was denied.

¶ 10 Dr. Timothy Kaiser, an ear, nose, and throat physician, testified as an expert in otolaryngology for the defense. Upon examining defendant and reviewing his medical history, Dr. Kaiser opined that defendant suffered from vertigo caused by a perilymph fistula. Dr. Kaiser explained that a perilymph fistula is a leak of fluid in the inner ear. As a result, defendant had "profound hearing loss" in his right ear, a deviation in his gait, and an inability to stand up straight when his eyes were closed. Dr. Kaiser further testified that the affects of vertigo can mimic being under the influence of alcohol and that a person with vertigo would probably not pass a traditional field sobriety test. Dr. Kaiser, however, testified he did not know whether defendant was experiencing vertigo at the time of his arrest, but assumed defendant was experiencing it because he was provided medication for vertigo while he was in jail.

¶ 11 Following closing arguments and jury instructions, the jury deliberated and found

defendant guilty of DUI.

¶ 12 Thereafter, defendant filed a motion for a new trial, which the trial court denied. At sentencing on May 20, 2014, a presentencing investigation report (PSI) revealed that defendant had a DUI case in Will County with a disposition date of May 14, 2014; it did not reference the status of defendant's license as of June 30, 2013. The State presented no evidence in aggravation. After considering all the factors in aggravation and mitigation, the trial court sentenced defendant to 24 months of probation plus 62 days in Cook County Department of Corrections, time actually served.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant maintains his Class 4 felony aggravated DUI conviction should be reduced to a Class A misdemeanor DUI because the State failed to prove beyond a reasonable doubt that his license was summarily suspended at the time of his offense. Defendant asserts no evidence of a summary suspension was submitted for the trial court's consideration during sentencing or during trial. Consequently, because the State failed to prove the aggravating factor alleged in the information beyond a reasonable doubt, his Class 4 felony conviction should be reduced to a Class A misdemeanor.

¶ 15 The State agrees no evidence was submitted and, like defendant, requests that this court reduce defendant's conviction to a Class A misdemeanor DUI and remand the matter for resentencing.

¶ 16 The relevant inquiry when reviewing a challenge to the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Ciechanowski*, 379 Ill. App. 3d 506, 516 (2008). A reviewing court will not reverse a criminal

conviction unless the evidence was so unsatisfactory, improbable, or implausible as to justify a reasonable doubt as to the defendant's guilt. *People v. Johnson*, 392 Ill. App. 3d 127, 130 (2009).

¶ 17 Section 11-501 of the Code (625 ILCS 5/11-501 (West 2012)) sets forth the elements of a misdemeanor offense, then provides sentencing enhancements based upon the presence of other factors. *People v. Martin*, 2011 IL 109102, ¶ 14; *People v. Van Schoyck*, 232 Ill. 2d 330, 337 (2009). "[A]ggravated DUI occurs when an individual commits some form of misdemeanor DUI, in violation of paragraph (a), and other circumstances are present. The legislature added aggravating factors that change the misdemeanor DUI to a Class 4 felony." *People v. Quigley*, 183 Ill. 2d 1, 10 (1998). Here, defendant was found guilty of aggravated DUI under section 501(d)(1)(G) of the Code. See 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 the defendant's driving privileges were revoked or suspended at the time of the DUI. *Id.*

¶ 18 Generally, 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. 725 ILCS 5/111-3(c-5) (West 2012); see *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Defendant on appeal, however, does not challenge his DUI conviction *per se*, but argues instead that the State did not produce any evidence to elevate the misdemeanor DUI conviction to a felony aggravated DUI at sentencing. The parties agree that no evidence was presented at trial or at sentencing regarding the status of defendant's driver's license at the time of his arrest.

¶ 19 Our review of the record reveals that the State presented no evidence that defendant's

driving privileges were summarily suspended on June 30, 2013. At no point during trial or sentencing did the State attempt to enter defendant's driving abstract into evidence. See *cf. People v. Blair*, 2015 IL App (4th) 130307, ¶ 30 (finding the evidence was sufficient to support defendant's felony conviction for driving while license suspended where his driving abstract revealed that his license was under a statutory suspension at the time of his arrest). Although the PSI was before the trial court during sentencing, it merely indicated that defendant had a DUI case in Will County; it did not set forth that defendant had a summarily suspended driver's license when the offense at issue here occurred. See *cf. People v. DiPace*, 354 Ill. App. 3d 104, 115 (2004) (considering the PSI to determine a defendant's criminal record where the PSI revealed "not only defendant's prior driving-under-the-influence convictions, but also the fact that at the time of his arrest his license was revoked due to those prior driving-under-the-influence convictions"). In addition, a copy of defendant's criminal record is before us on appeal, however, it too does not state that defendant's driver's license was summarily suspended on June 30, 2013. As the State produced no evidence establishing defendant's driver's license was statutorily suspended when defendant was arrested on this charge, we vacate defendant's sentence for aggravated DUI and remand the matter for resentencing as a Class A misdemeanor DUI pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967). See 625 ILCS 5/11-501(c)(1) (West 2012).

¶ 20 CONCLUSION

¶ 21 For the reasons stated, we affirm defendant's conviction for DUI (625 ILCS 5/11-501(a)(2) (West 2012), vacate his sentence based on the aggravated DUI (625 ILCS 5/11-501(a)(2), (d)(1)(G) (West 2012)), and remand the matter to the trial court for resentencing as a Class A misdemeanor pursuant to section 11-501(c)(1) of the Code (625 ILCS 5/11-501(c)(1)

(West 2012)).

¶ 22 Judgment of conviction affirmed; sentence vacated and cause remanded for resentencing.