2017 IL App (2d) 150877-U
No. 2-15-0877
Order filed December 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 13-DT-3266
STEVEN W. O'NEILL,	)	Honorable James J. Konetski,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's jury waiver was invalid, as the record contained no discussion of it, and thus we remanded the cause for a new trial on DUI, the evidence of which was sufficient; (2) the State failed to prove defendant guilty beyond a reasonable doubt of possessing drug paraphernalia, specifically that the pipe he possessed to consume cannabis was intended for cannabis consumption as opposed to tobacco consumption or some other legitimate use, and thus we reversed outright his conviction of that offense.

¶ 2 Defendant, Steven W. O'Neill, appeals from the judgment of the circuit court of Du Page County finding him guilty of driving with any amount of cannabis in his urine (DUI) (625 ILCS 5/11-501(a)(6) (West 2012)) and possession of drug paraphernalia (720 ILCS 600/3.5 (West

2012)), contending that he never waived his right to a jury trial and that he was not proved guilty beyond a reasonable doubt of possessing drug paraphernalia. Because defendant did not waive his right to a jury trial, we reverse and remand for a new trial on the DUI offense but reverse the drug-paraphernalia conviction, as the State did not prove defendant guilty beyond a reasonable doubt.

¶ 3 I. BACKGROUND

¶ 4 The following facts were established at the bench trial. At around 6:49 a.m. on October 3, 2013, Trooper Albert Wodowiak of the Illinois State Police was on patrol when he was dispatched to a traffic accident on I-290.

¶ 5 When Trooper Wodowiak arrived at the scene, he observed a vehicle in the ditch adjacent to the eastbound lanes. Defendant, who was unresponsive, was in the driver's seat, and the keys were in the ignition. Trooper Wodowiak unsuccessfully tried to rouse defendant. Trooper Wodowiak confirmed with the dispatcher that emergency medical services (EMS) were en route.

¶ 6 As EMS arrived, defendant regained consciousness. When Trooper Wodowiak tried to speak to defendant, defendant was incoherent. When he asked defendant what happened, defendant said that he did not know.

¶ 7 Defendant became physically combative with the EMS personnel who were trying to remove him from his vehicle. According to Trooper Wodowiak, defendant was flailing his hands, disobeying commands from the EMS personnel, and resisting their help. Defendant was eventually removed from the vehicle.

¶ 8 After the EMS personnel removed defendant from the vehicle, one of them found a glass pipe in defendant's pocket and handed it to Trooper Wodowiak. Trooper Wodowiak smelled cannabis on the pipe and seized it.

¶ 9 Trooper Wodowiak admitted that at the time of the accident he had not yet been trained in detecting whether someone was under the influence of cannabis. Nor could he recall ever having seen anyone under the influence of cannabis. He never testified as to whether he had any training or experience regarding the smell of cannabis.

¶ 10 Trooper Wodowiak followed the ambulance to the hospital. There, he observed defendant continuing to be physically combative. Defendant would not remain on the stretcher, flailed his arms, and would not obey commands from the hospital staff.

¶ 11 Violet Ellington, a registered nurse, was working in the emergency room. While Ellington was treating defendant, a physician ordered a drug screen of defendant's urine. According to Ellington, no law-enforcement personnel requested that a drug screen be performed.

¶ 12 The urine was sent to the hospital lab. The results showed that defendant had THC[1] in his urine.

¶ 13 Nancy Muskat, a certified medical technician at the hospital, performed the drug screen on defendant's urine. According to Muskat, the urine tested positive for both benzodiazepine and cannabinoids.

¶ 14 Larry Shelton, a forensic toxicologist with the Illinois State Police forensic sciences command, tested defendant's blood sample. The only drug he found present was diphenhydrocaine. A test for benzodiazepine was negative. He did not test the blood for THC.

[1] THC, tetrahydrocannabinol, is a cannabinoid (chemical unique to cannabis) that is primarily responsible for the psychoactive effects of cannabis. Http:adai.uw.edu/marijuana/factsheets/cannabinoids.htm (last visited December 4, 2017).

¶ 15 The trial court found defendant guilty of DUI, because the urine showed that defendant had THC in his system while driving his vehicle. The court also found defendant guilty of possessing drug paraphernalia, as Trooper Wodowiak testified credibly that he smelled cannabis on the pipe. The court found defendant not guilty of a traffic offense.

¶ 16 The trial court sentenced defendant to 18 months' court supervision on both convictions. Defendant filed a motion for a new trial, contending, among other things, that he was not proved guilty beyond a reasonable doubt of either offense. Defendant did not raise any claim regarding a waiver of his right to a jury trial. The court denied the motion for a new trial, and defendant filed a timely notice of appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends that: (1) he is entitled to a new trial, because the record does not show that he waived his right to a jury trial; and (2) he was not proved guilty beyond a reasonable doubt of possession of drug paraphernalia. The State responds that: (1) because defendant did not waive his right to a jury trial, this case must be remanded for a new trial; (2) on remand, defendant may be retried for possession of drug paraphernalia, as the evidence was sufficient to prove beyond a reasonable doubt that the glass pipe constituted drug paraphernalia.

¶ 19 We first address the issue of whether defendant understandingly waived his right to a trial by jury.[2] The State concedes that he did not. We agree.

¶ 20 The right to a trial by jury in a criminal case is constitutionally guaranteed, and the court has a duty to ensure that a defendant's waiver was express and understanding. *People v. Taylor*,

[2] Although defendant did not raise the issue at trial or in his posttrial motion, it is cognizable as plain error. See *People v. Gatlin*, 2017 IL App (1st) 143644, ¶ 32; *People v. Lundgren*, 309 Ill. App. 3d 230, 232-33 (1999).

291 Ill. App 18, 20 (1997) (citing *People v. Smith*, 106 Ill. 2d 327, 333-34 (1985)). Although courts have recognized the validity of a waiver made by defense counsel in the presence of the defendant and without his objection, the validity of the waiver depends on the existence of an adequate memorialization of the event. *Taylor*, 291 Ill. App. 3d at 20. Where it appears that the record on appeal is sufficiently complete, and an understanding waiver cannot be found to exist in the record, the cause will be remanded for a new trial. *Taylor*, 291 Ill. App. 3d at 20.

¶ 21 In this case, we have carefully reviewed the record. We find nothing in the report of proceedings or in the common-law record indicating that defendant waived his right to a jury trial. Nothing in the record shows that: defendant's attorney expressly advised the trial court, while defendant stood silent, of defendant's desire to proceed with a bench trial; or that defendant signed a written waiver of his right to a jury trial; or that a jury waiver was ever discussed. See *Lundgren*, 309 Ill. App. 3d at 233. Thus, defendant is entitled to a new trial.

¶ 22 We must next determine the charges upon which defendant can be retried. On a remand arising out of the denial of a defendant's right to a jury trial, a reviewing court must determine whether the retrial will violate double jeopardy. See *Taylor*, 291 Ill. App. 3d at 21. In doing so, the reviewing court must assess whether there was sufficient evidence to sustain the conviction. *Taylor*, 291 Ill. App. 3d at 21.

¶ 23 Here, neither defendant nor the State addresses the issue of whether there was sufficient evidence to convict defendant on the DUI charge. Nonetheless, we have reviewed the evidence and conclude that there was sufficient evidence to prove beyond a reasonable doubt that defendant had THC in his urine while operating a motor vehicle. Thus, he may be retried on the DUI charge without offending double-jeopardy principles.

¶ 24 As for the charge of possession of drug paraphernalia, defendant challenges the sufficiency of the evidence.[3] In assessing whether the evidence was sufficient to establish proof beyond a reasonable doubt, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Applying that standard, we must view in the State's favor all reasonable inferences drawn from the record. *People v. Bush*, 214 Ill. 2d 318, 326 (2005).

¶ 25 In determining the essential elements of the offense of possession of drug paraphernalia, we turn to the applicable statutory provisions. Section 3.5(a) of the Drug Paraphernalia Control Act (Act) provides, in pertinent part, that a person who knowingly possesses an item of drug paraphernalia with the intent to use it to ingest, inhale, or otherwise introduce cannabis into the human body is guilty of a Class A misdemeanor. 720 ILCS 600/3.5(a) (West 2012). Section 3.5(b) of the Act adds that, in determining intent, the trier of fact may consider the presence of cannabis on the drug paraphernalia. 720 ILCS 600/3.5(b) (West 2012).

¶ 26 The term "drug paraphernalia," in turn, is defined in section 2(d) of the Act. 720 ILCS 600/2(d) (West 2012). Section 2(d) defines drug paraphernalia, in relevant part, as all equipment, products, and materials of any kind that are "intended to be used unlawfully" to ingest, inhale, or otherwise introduce cannabis into the human body. 720 ILCS 600/2(d) (West 2012). Further, section 2(d) provides that drug paraphernalia includes, but is not limited to, objects intended to be used to ingest, inhale, or otherwise introduce cannabis into the human

[3] Because we find the evidence was insufficient on the drug paraphernalia charge, we need not separately decide whether double jeopardy bars retrial. See *People v. Feld*, 267 Ill. App. 3d 56, 66 (1994).

body, including such items as water pipes and carburetor pipes. 720 ILCS 600/2(d) (West 2012). Section 4 creates exemptions from the Act for items that are historically and customarily used in connection with the consumption of tobacco, including tobacco pipes. 720 ILCS 600/4(b) (West 2012). Additionally, in determining whether an item is exempt, the trier of fact should consider, in addition to all other logically relevant factors, the general, usual, customary, and historical use of the item and the existence and scope of legitimate uses for the item in the community. 720 ILCS 600/4(d)(1), (d)(8) (West 2012)).

¶ 27 Also relevant to the inquiry is section 6 of the Act, which provides, in pertinent part, that the Act is intended to apply only to items that are "clearly and beyond a reasonable doubt intended for the illegal and unlawful use of cannabis." 720 ILCS 600/6 (West 2012). To that end, "all reasonable and common-sense inferences shall be drawn in favor of the legitimacy of any *** item." 720 ILCS 600/6 (West 2012).

¶ 28 In this case, when viewed in the light most favorable to the State, the evidence was sufficient to prove that defendant intended to use the glass pipe to consume cannabis. As noted, evidence of cannabis on the pipe could be considered by the trier of fact in determining whether defendant intended to use the pipe to consume cannabis. See 720 ILCS 600/3.5(b) (West 2012). Thus, Trooper Wodowiak's testimony that he smelled cannabis on the pipe was sufficient to establish that defendant intended to use the pipe to consume cannabis. Although Trooper Wodowiak's testimony was not accompanied by any evidence of his expertise relating to detection of the odor of cannabis, the lack of such evidence affected merely the weight of the evidence.[4] Further, the urine test showed that defendant had THC in his system. When viewed

[4] Defendant does not challenge the admissibility of Trooper Wodowiak's testimony regarding the smell of cannabis on the pipe. Nor did he do so in the trial court. Thus, the issue is

in the light most favorable to the State, the evidence of the odor of cannabis on the pipe, combined with the THC in defendant's urine, was sufficient to prove beyond a reasonable doubt that defendant possessed the pipe with the intent to use it to consume cannabis.

¶ 29 We must next decide whether the State proved beyond a reasonable doubt that the glass pipe met the definition of drug paraphernalia. It did not.

¶ 30 As noted, section 2(d) requires proof that an item was intended to be used unlawfully to consume cannabis. The State did not offer sufficient proof, even when viewed most favorably to the State, that the pipe was intended to be used to consume cannabis within the meaning of section 2(d). The only evidence regarding the nature of the pipe was that it smelled like cannabis and that there was THC in defendant's system. Although that evidence was sufficient to show that defendant intended to use the pipe to consume cannabis, it was not sufficient to show that the pipe was intended to be used for cannabis consumption within the meaning of section 2(d). See *People v. Carreon*, 2011 IL App (2d) 100391, ¶¶ 9-10. Nor was there any evidence as to whether the pipe was made to be used to consume cannabis as opposed to tobacco. Nor was there any evidence that it was a water or carburetor pipe within the meaning of section 2(d). Therefore, when all reasonable and common-sense inferences are drawn in favor of finding that the pipe was intended for a legitimate use, the State did not prove beyond a reasonable doubt that the pipe was intended to be used for the consumption of cannabis. See 720 ILCS 600/6 (West 2012). Thus, the evidence was insufficient to prove that defendant possessed drug paraphernalia.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the judgment of the circuit court of Du Page County and remand for a new trial only on the DUI offense.

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forfeited. See *People v. Naylor*, 229 Ill. 2d 584, 592 (2008).

¶ 33 Reversed and remanded.