

NOTICE
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2017 IL App (5th) 170053-U

NO. 5-17-0053

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Randolph County.
)	
v.)	No. 16-DT-50
)	
BRAD J. DAVENPORT,)	Honorable
)	Eugene E. Gross,
Defendant-Appellee.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Barberis and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order is affirmed where the law enforcement officer's sworn report contained a serious defect, warranting rescission of the defendant's statutory summary suspension of his driver's license.

¶ 2 On January 9, 2017, the circuit court of Randolph County granted defendant-appellee Brad J. Davenport's petition to rescind the statutory summary suspension of his driver's license. The plaintiff-appellant, the People of the State of Illinois (State), appeals the trial court's decision. For the following reasons, we affirm.

¶ 3 On November 26, 2016, Officer Josh Wirth initiated a traffic stop of the defendant, suspecting that he was driving under the influence of alcohol (DUI). Officer

Wirth provided the defendant with a "warning to motorist" form. The form stated in relevant part that, pursuant to a DUI arrest, if the motorist refuses or fails to complete all of the chemical tests requested and is not a first offender, then his driving privileges will be suspended for a minimum of three years; if the motorist submits to a chemical test disclosing an alcohol concentration of 0.08 or more and is not a first offender, then his driving privileges will be suspended for a minimum of one year. The form was signed by both Officer Wirth and the defendant and dated November 26, 2016, at 11:10 p.m.

¶ 4 Officer Wirth additionally filled out a notice of summary suspension/revocation, also known as the law enforcement sworn report. The notice informed the defendant of his license's suspension, which would take effect on the forty-sixth day following the notice. In the report, Officer Wirth wrote that he "observed Davenport operating a motor vehicle, and he appeared to be under the influence of alcohol." The notice's "refusal or test date" was November 26, 2016, at 11:27 p.m., and indicated that the notice was immediately served on the defendant. Officer Wirth failed to check any box regarding the length of the defendant's suspension.¹

¹The relevant options that can be check-marked on the form are as follows:

"Because you refused to submit or failed to complete testing, your driving privileges will be suspended for a minimum of 12 months.

Because you submitted to testing conducted pursuant to Section 11-501.2, which disclosed:

¶ 5 On December 7, 2016, the defendant was charged by information with the offense of driving under the influence of alcohol in violation of section 11-501 of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(A)(2) (West 2016)).

¶ 6 The Secretary of State sent the defendant a letter confirming his statutory summary suspension, which was filed with the Randolph County circuit clerk on December 8, 2016. The notice informed the defendant that his suspension was effective at 12:01 a.m. on January 11, 2017, with a provisional reinstatement date of January 11, 2020.

¶ 7 On December 15, 2016, the defendant filed a petition to rescind the statutory summary suspension. At the January 5, 2017, hearing on the petition, no witnesses were called to testify. The parties stipulated that Officer Wirth failed to check the box indicating whether the defendant refused to test or failed the test, thereby failing to indicate the defendant's potential suspension time. The defendant's attorney stated that the Secretary of State's office never sent back the papers to correct the deficiency. The court asked the defendant's attorney how the Secretary of State's office knew to suspend the defendant's license for three years instead of one year. The court noted that, because nothing on the sworn report indicated whether the defendant refused the test or failed the test, "I can only assume based on the length of his suspension that he refused." The

An alcohol concentration of ____, which is .08 or more; *** your driving privileges will be suspended for a minimum of 6 months."

defendant's attorney confirmed that the defendant refused the test. The court agreed to give the parties time to submit more legal authority on the matter of the report's deficiency. The court twice confirmed with the parties that there would be no more evidence presented and "the only issue is whether or not the sworn report is sufficient."

¶ 8 On January 9, 2017, the court entered a written order, stating:

"The defect in this report is a serious defect. The officer's failure to check *any* box means that it is pure speculation as to length of suspension. The results of the test (or refusal to take the test) are the most important items in the report. The sworn report fails to establish on its face the validity of the suspension." (Emphasis in original.)

The court granted the defendant's request to rescind his statutory summary suspension.

¶ 9 On January 11, 2017, the State filed a motion to reconsider, arguing that: the court never found that the defendant met his burden of proof; the State should have been allowed to present evidence showing that the defendant refused the test; and the State should have been allowed to amend the sworn report to mark the box showing that the defendant refused the test.

¶ 10 At a hearing on the State's motion, held on February 6, 2017, the State asked to be permitted to amend the sworn report. The court noted that it did not remember any discussion at the previous hearing about burden-shifting and reminded the State that the only issue presented was the sufficiency of the sworn report. The court told the State that, "if you would have asked to amend the report [at the previous hearing], that would have been a different issue on that day." The court told the State that the proofs were

closed after the January 5, 2017, hearing, and "you both agreed that was the only evidence and the only issue and, you know, that's why I asked that question twice." The court found that the State's request was untimely and denied the motion. The State appeals.

¶ 11 In considering an appeal of a ruling on a petition to rescind, the reviewing court defers to the trial court's factual findings and considers *de novo* whether the petition to rescind should be granted. *People v. Hacker*, 388 Ill. App. 3d 346, 350 (2009).

¶ 12 A defendant's driving privileges may be summarily suspended as a result of the defendant's arrest for DUI. See 625 ILCS 5/11-501.1 (West 2016). Section 11-501.1(a) of the Code provides that "[a]ny person who drives or is in actual physical control of a motor vehicle upon the public highways of this State shall be deemed to have given consent *** to a chemical test or tests of blood, breath, other bodily substance, or urine for the purpose of determining the content of alcohol *** in the person's blood if arrested *** for [DUI]." 625 ILCS 5/11-501.1(a) (West 2016). A person asked to submit to testing "shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test will result in the statutory summary suspension of the person's privilege to operate a motor vehicle." 625 ILCS 5/11-501.1(c) (West 2016). If the person refuses testing or the testing reveals a blood alcohol level in excess of the legal limit, the officer "shall immediately submit a sworn report to the circuit court of venue and the Secretary of State, certifying that the test *** was *** requested under paragraph (a) and the person refused to submit to a test *** or submitted to testing that disclosed an alcohol concentration of 0.08 or more." 625 ILCS 5/11-501.1(d) (West 2016).

¶ 13 The Secretary of State's office shall enter the statutory summary suspension "[u]pon receipt of the sworn report of a law enforcement officer." 625 ILCS 5/11-501.1(e) (West 2016). The law enforcement officer submitting the sworn report must serve immediate notice of the suspension on the person. 625 ILCS 5/11-501.1(f) (West 2016). The summary suspension "shall take effect on the 46th day following the date the notice of the statutory summary suspension *** was given to the person." 625 ILCS 5/11-501.1(g) (West 2016). The Secretary of State's office confirms the suspension by mailing a notice of the effective suspension date to the defendant. 625 ILCS 5/11-501.1(h) (West 2016). However, if the sworn report is defective for failing to supply sufficient information or is completed in error, then the confirmation shall not be mailed to the person or entered to the record, but rather, "the sworn report shall be forwarded to the court of venue with a copy returned to the issuing agency identifying any defect." *Id.*

¶ 14 The defendant may petition to rescind the suspension. 625 ILCS 5/2-118.1(b) (West 2016). The scope of the hearing on the petition is generally limited to whether (1) the motorist was placed under arrest for DUI; (2) the arresting officer had reasonable grounds to believe that the motorist was driving under the influence; (3) the motorist, after proper warnings, refused to submit to testing; and (4) the motorist, after proper warnings, submitted to testing and the test revealed a blood alcohol concentration of 0.08 or greater. *Id.* However, the trial court may also consider defects in the officer's sworn report. *People v. Badoud*, 122 Ill. 2d 50, 54 (1988).

¶ 15 The officer's sworn report plays a unique role in a summary suspension proceeding; it is similar to a complaint in a civil case, the jurisdictional step which starts

the proceeding. *People v. Cooper*, 174 Ill. App. 3d 500, 502 (1988). The defendant bears the burden of proof and, if he establishes a *prima facie* case for rescission, the burden shifts to the State to produce evidence justifying the suspension. *People v. Pollitt*, 2011 IL App (2d) 091247, ¶ 13. "These holdings assume, however, that the sworn report establishes on its face the validity of the suspension." *Cooper*, 174 Ill. App. 3d at 503.

¶ 16 The State asserts that "[it] thought defendant has to prove his burden before addressing the form, and because the State felt the error was so minor, the correct box was not marked before the trial court rescinded the summary suspension." It argues that a minor error not impacting notice on a sworn report should not allow the defendant to escape responsibility for drunk driving. We find the State's argument unavailing.

¶ 17 The summary suspension statute explicitly states that the officer "shall" submit a sworn report certifying that the driver was asked to take a test and that he refused to submit to the test. 625 ILCS 5/11-501.1(d) (West 2016). The statute is clear that this is a requirement. Here, Officer Wirth failed to include whether or not the defendant refused or failed the test. This is a necessary element of the sworn report, as it informs the Secretary of State and the defendant of the length of his suspension. See *People v. Farris*, 2012 IL App (3d) 100199, ¶ 30 (trial court correctly rescinded defendant's statutory summary suspension because the sworn report was defective; the law enforcement officer did not check the appropriate box indicating that the defendant refused testing, rather than submitted to testing and failed). Similarly, we find that failing to check *any* box regarding the defendant's suspension length is a fatal defect in the sworn report.

¶ 18 The State stipulated to the fact that neither box was checked on the sworn report, and, despite what it now argues, agreed at the suspension hearing that no more evidence would be presented and that the only issue was whether this deficiency was sufficient to justify rescission. The trial court correctly concluded that the sworn report, as presented, failed to establish on its face the validity of the suspension.

¶ 19 The State next argues that it should have been allowed to amend the sworn report. The State first raised this issue in its motion to reconsider the trial court's decision to grant the defendant's petition, which the court denied.

¶ 20 Where the denial of a motion to reconsider is based on new matters, such as additional facts or new arguments that were not presented during the proceedings leading to the issuance of the order being challenged, the abuse of discretion standard applies. *People v. Pollitt*, 2011 IL App (2d) 091247, ¶ 18 (citing *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 300 (2008)). In determining whether the trial court abused its discretion, the question is not whether the reviewing court agrees with the trial court, but whether the trial court acted arbitrarily without the employment of conscientious judgment, or, in the view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. *Id.* (citing *In re Marriage of Gowdy*, 352 Ill. App. 3d 301, 307 (2004)).

¶ 21 The State correctly points out that defects in an officer's sworn report can generally be cured by amendment. *People v. Badoud*, 122 Ill. 2d 50, 59 (1988). However, it is generally contemplated that such defects would be corrected either before or at the suspension hearing. *Id.* at 61; *Cooper*, 174 Ill. App. 3d at 502. For this

argument, we find instructive *People v. Pollitt*, 2011 IL App (2d) 091247, in which a similar issue was raised.

¶ 22 In *Pollitt*, the appellate court affirmed that the trial court did not err in granting the defendant's petition to rescind his statutory summary suspension. *Id.* ¶ 17. The reviewing court found that the officer's sworn report failed to establish on its face the validity of the suspension because the report indicated that notice was given a day before the defendant completed the breath test, and therefore, the Secretary of State commenced the suspension 46 days from the wrong date. *Id.* In moving to reconsider, the State requested an opportunity to either amend the sworn report or reopen the proofs. *Id.* ¶ 18. The State did not move to amend the report before or at the hearing but moved to amend it after the judgment. *Id.* ¶ 19. The court noted that the sworn report is effectively the complaint in a summary suspension proceeding, and after judgment, a complaint may be amended only to conform to the proofs. *Id.* As the officer did not testify at the hearing, the request to amend was not to make the sworn report conform to any proofs. *Id.* Therefore, the court found that the trial court did not abuse its discretion in denying the State's motion to reconsider. *Id.*

¶ 23 We find *Pollitt* analogous to the case before us. Here, in moving to reconsider, the State argued that it should have been allowed to present evidence showing that the defendant refused the test and that the State should have been allowed an opportunity to amend the sworn report to mark the box showing that the defendant refused the test. Like the officer in *Pollitt*, Officer Wirth did not testify at the hearing, so the request to amend the sworn report was not to conform to any proofs. While this court cannot say whether

the State would have been permitted to amend the sworn report before or at the hearing, here, the State's request to amend the sworn report came too late.

¶ 24 Finally, the State argues that the Secretary of State's notice to the defendant of his summary suspension demonstrated sufficient notice for the summary suspension to be advanced, noting that the Secretary of State found the report sufficient enough to send additional notice to the defendant in the mail rather than send the report back for insufficiency. The State asserts that the defendant "had notice of suspension, yet he claims he could not determine the length of time for that suspension."

¶ 25 This court will not speculate as to why the Secretary of State failed to send back a sworn report that was insufficient per the course of action outlined in section 11-501.1(h) of the Code (625 ILCS 5/11-501.1(h) (West 2016)), just as we will not speculate why the State failed to properly amend that same sworn report in a timely manner. The Code does not require the defendant to decipher the length of his suspension, and the State fails to cite any meaningful law supporting the proposition that the Secretary of State's notice nullifies the issue of the sworn report's deficiency.

¶ 26 For the foregoing reasons, we affirm the trial court's order granting the defendant's petition to rescind the statutory summary suspension of his driver's license.

¶ 27 Affirmed.