2018 IL App (3d) 150868-U

Order filed May 29, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

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. 3-15-0868 Circuit No. 15-DT-557
THOMAS M. HAYS,	)	Honorable M. Thomas Carney,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant did not knowingly and voluntarily relinquish his right to a jury trial on the new charges that the State filed after the defendant executed a written jury waiver.

¶ 2 The defendant, Thomas M. Hays, appeals from the circuit court's finding of guilt for the offense of driving under the influence of alcohol (DUI). He contends that he did not validly waive his right to a jury trial on the charge. We reverse and remand for further proceedings.

¶ 3 FACTS

¶ 4 On April 23, 2015, the defendant was ticketed for driving under the influence. The ticket referenced the statutory provision for the offense of driving under the influence of any other drug or combination of drugs (625 ILCS 5/11-501(a)(4) (West 2014)). However, the ticket included a description of the nature of the offense as "DUI combo alcohol/drugs." Despite the difference between the statutory citation and the description of the offense, the docket sheet indicates that the defendant was charged with the offense of driving under the influence of any other drug or combination of drugs. *Id.*

¶ 5 On June 23, 2015, the defendant appeared in court with counsel. The defendant signed a written jury trial waiver and entered a written plea of "not guilty to DUI." No transcripts exist for the proceedings on this date.

¶ 6 On June 30, 2015, the State filed an information charging the defendant with driving under the influence of alcohol (*id.* § 11-501(a)(2)), driving under the influence of any other drug or combination of drugs (*id.* § 11-501(a)(4)), driving under the combined influence of alcohol, other drug or drugs, or intoxicating compounds (*id.* § 11-501(a)(5)), and driving under the influence while there is any amount of a drug, substance or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of illegal drugs (*id.* § 11-501(a)(6)).

¶ 7 On the day of trial, the following discussion ensued in the defendant's presence:

> "THE COURT: All right. So then we'll proceed. What is it up for today?
>
> [THE STATE]: Bench trial—or is it—
>
> [DEFENSE COUNSEL]: It's a bench trial."

Neither the court nor the parties discussed whether the defendant waived his right to a jury trial as to the new charges filed after the defendant executed his written jury waiver.

¶ 8 Following the trial, the defendant was found guilty of driving under the influence of alcohol (*id.* § 11-501(a)(2))—a charge that was filed after the defendant executed his written jury waiver. The court found the defendant not guilty of the remaining charges. The court placed the defendant on court supervision and did not enter a judgment of conviction. The State has supplemented the appellate record with minutes from the circuit clerk which indicates that the defendant satisfied his court supervision and the instant prosecution was satisfactorily terminated while the matter remained pending on appeal (December 15, 2016).

¶ 9 ANALYSIS

¶ 10 I. Jurisdiction

¶ 11 At the outset, we address the State's argument that this court lacks jurisdiction to consider the defendant's appeal because an order of court supervision may not result in a final judgment. Generally, appellate jurisdiction only extends to final judgments and there is no judgment in a criminal case unless a sentence is imposed. *People v. Relerford*, 2017 IL 121094, ¶ 71. A disposition of court supervision is not a sentence because it defers judgment on the underlying offense until the period of supervision is completed. 730 ILCS 5/5-1-21 (West 2014). When the term of court supervision is successfully completed, the defendant is discharged and a judgment dismissing the charges is entered. *Id.* If the supervision is revoked, then a sentence may be imposed, thereby making it a final judgment. In other words, the finality of a judgment in this context depends on the outcome of court supervision. Here, the defendant was placed under court supervision at the time he filed his notice of appeal. The court, therefore, had not yet entered a final judgment.

¶ 12 Nevertheless, our supreme court may, and has, "provide[d] by rule for appeals to the Appellate Court from other than final judgments." Ill. Const. 1970, art. VI, § 6. Specifically, our

supreme court authorizes appeals from court supervision orders in Illinois Supreme Court Rule 604(b) (eff. Dec. 3, 2015). Rule 604(b) provides a defendant "may appeal from the judgment and may seek review of the conditions of supervision, or of the finding of guilt or the conditions of the sentence, or both." *Id*. The defendant here is seeking review of the finding of guilt which preceded the order of court supervision, as explicitly allowed by Rule 604(b). See *People v. Utsinger*, 2013 IL App (3d) 110536; *People v. Love*, 2013 IL App (3d) 120113. Therefore, we conclude Rule 604(b) provides this court with jurisdiction to consider the defendant's appeal. *Id.*

¶ 13 In reaching this conclusion, we summarily reject the State's reliance on *Kirwin v. Welch*, 133 Ill. 2d 163 (1989), *People v. Rozborski*, 323 Ill. App. 3d 215 (2001), and *People v. Bushnell*, 101 Ill. 2d 261 (1984), for the proposition that the State's argument "does not rely on Rule 604(b), rather it rests with established precedent that because court supervision was successfully completed, there is no conviction, no sentence and therefore no final judgment from which the defendant may appeal and which is needed to vest jurisdiction." None of the above authority addressed the appellate court's jurisdiction to entertain direct appeals from a finding of guilt and subsequent order of court supervision. Moreover, we decline the State's invitation to selectively apply our supreme court's rules. Supreme Court Rules are not "mere suggestions," they have the force of law and should be followed. *People v. Campbell*, 359 Ill. App. 3d 281, 284 (2005).

¶ 14 To the extent the State implies that the defendant's claim is moot because he successfully completed court supervision while this matter was pending on appeal, we note that even a successfully completed term of court ordered supervision resulting from a DUI can have future consequences for a defendant and can be used as an enhancing offense in subsequent prosecutions. *People v. Sheehan*, 168 Ill. 2d 298, 308 (1995).

¶ 15 II. Right to a Jury Trial

¶ 16 We now turn to the defendant's claim that he did not validly waive his right to a jury trial. Initially, the defendant acknowledges that he did not challenge the validity of his jury waiver in the circuit court and therefore has forfeited this claim of error on appeal. *People v. Hood*, 2016 IL 118581, ¶ 17. However, he contends we may review his claim for second-prong plain error, which allows review of a forfeited claim if the error is clear or obvious and "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. McDonald*, 2016 IL 118882, ¶ 48. Whether a defendant's fundamental right to a jury trial has been violated may be considered under the second prong of the plain error doctrine. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004).

¶ 17 The validity of a jury waiver turns on the particular facts and circumstances of the case. *Id.* at 269. Although the circuit court is not required to provide a defendant with any particular admonishment or information regarding the constitutional right to a jury trial, it has a duty to ensure that any waiver of that right is made expressly and understandingly. *People v. Rincon*, 387 Ill. App. 3d 708, 717 (2008). Regardless of whether the defendant executed a written jury waiver, the record must show that the defendant understandingly relinquished the right to a jury trial. *Bracey*, 213 Ill. 2d at 270.

¶ 18 In this case, the only charge originally pending against the defendant was for the offense of driving under the influence of any other drug or combination of drugs. 625 ILCS 5/11-501(a)(4) (West 2014). At that time, the defendant executed a written waiver of his right to a jury trial for this charge and pled not guilty. There is no record of the proceedings from this date other than the common law record. However, if the record is insufficient, this court must presume that the circuit court complied with the law. *People v. Hart*, 371 Ill. App. 3d 470, 472 (2007).

Consequently, we presume the defendant validly waived his right to a jury trial for the offense of driving under the influence of any other drug or combination of drugs.

¶ 19 Our analysis does not end there. The defendant was found not guilty of the above offense. Instead, the defendant was found guilty of driving under the influence of alcohol—an offense that was charged *after* the defendant executed his jury waiver. Therefore, the question we must resolve is whether the defendant's original jury waiver remained in effect from the time it was executed, thereby encompassing the later-filed charge for the offense of driving under the influence of alcohol. Under the present circumstances, we find that it does not.

¶ 20 In considering this argument, we find *People v. Hernandez*, 409 Ill. App. 3d 294 (2011), instructive. In *Hernandez* the court held that a written jury waiver could not be construed as a waiver of the defendant's right to a jury trial on later-filed charges. *Id.* at 297. In that case, the court found that the defendant's waiver of a jury trial on the charges of domestic battery did not apply to the charges of obstruction of a police officer added almost five months later. *Id.* In coming to this conclusion, the court noted, " '[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' " *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). In other words, a defendant must be at least aware of the charges he faces before he can knowingly and intelligently decide whether guilt for those charges should be determined by a jury or judge. *Id.*

¶ 21 As noted above, the only charge the defendant faced when he waived his right to a jury trial was for the offense of driving under the influence of any other drug or combination of drugs. Thus, the defendant was not aware that he faced the charge of driving under the influence of alcohol at the time he waived his right to a jury trial. As in *Hernandez*, the record does not

indicate that, at the time of the waiver, the defendant was aware of, or intended his waiver to cover, any later-filed charges. See *Id*. Accordingly, the defendant's written jury waiver cannot be construed as a waiver of the defendant's right to a jury trial for the charge of driving under the influence of alcohol—a charge that was not pending at the time the defendant waived his right to a jury trial.

¶ 22 In reaching this conclusion, we reject the State's argument that the defendant's jury waiver should apply to the later filed charge of driving under the influence of alcohol because that charge was not "new" but merely a formal change to the charging instrument. According to the State, the defendant was not prejudiced because the original charge provided the defendant adequate notice to prepare a defense against the later-filed charges. However, this is not a case where the later-filed charging instrument merely corrected statutory citations or clerical errors. Instead, the later-filed charge alleged an entirely distinct offense. The original charge alleged the defendant committed driving under the influence of drugs. 625 ILCS 5/11-501(a)(4) (West 2014). By contrast, the later-filed charge (which the defendant was ultimately found guilty) alleged the defendant committed the offense while under the influence of alcohol. *Id.* § 11-501(a)(2). The new charge alleged substantively different conduct (alcohol rather than drugs). Like the defendant in *Hernandez*, the defendant in this case did not knowingly and voluntarily relinquish his right to a jury trial on entirely different charges filed after his jury waiver.

¶ 23 Because the defendant was found guilty of driving under the influence of alcohol without properly waiving his right to a jury trial, the finding of guilt must be reversed. See, *e.g.*, *Bracey*, 213 Ill. 2d at 270 (holding that the right to a jury is fundamental and the deprivation of that right in the absence of a proper waiver is reversible plain error). The final question is the appropriate remedy. In his opening brief, the defendant requested remand for a new trial. In response, the

State notes that because the defendant successfully completed court supervision, "[t]he defendant has been, as a matter of law acquitted on all four counts. If his appeal is successful, a new trial on Count I, DUI of alcohol could result in a conviction and any sentence previously available. As such, it is difficult to understand the defendant's position." In reply, the defendant now asks this court to reverse the finding of guilt without remanding because a new trial would be neither equitable nor productive. *People v. Campbell*, 224 Ill. 2d 80, 87 (2006). We express no opinion on whether a new trial would be equitable or productive. Instead, we remand for the parties to decide how to proceed.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Will County is reversed and remanded for further proceedings.

¶ 26 Reversed and remanded for further proceedings.