# ILLINOIS OFFICIAL REPORTS

## Appellate Court


***People v. Liekis*, 2012 IL App (2d) 100774**

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| Appellate Court Caption | THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JULIE E. LIEKIS, Defendant-Appellant. |
| District & No. | Second District<br>Docket No. 2-10-0774 |
| Filed | July 31, 2012 |
| Rehearing denied | September 6, 2012 |
| Held<br>(*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*) | Defendant's motion to modify a condition of her conditional discharge imposed for driving under the influence of alcohol did not implicitly dismiss her timely appeal or deprive the appellate court of jurisdiction, and for purposes of her appeal, she failed to establish a *prima facie* case that there was no reasonable suspicion to stop her and she did not shift the burden of proof to the State on her motion to quash her arrest and suppress evidence. |
| Decision Under Review | Appeal from the Circuit Court of Lake County, No. 09-DT-3383; the Hon. Joseph R. Waldeck, Judge, presiding. |
| Judgment | Affirmed. |

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| Counsel on Appeal | Thomas A. Lilien and Christopher McCoy, both of State Appellate Defender's Office, of Elgin, for appellant.<br><br>Michael J. Waller, State's Attorney, of Waukegan (Lawrence M. Bauer and Mary Beth Burns, both of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People. |
| Panel | JUSTICE McLAREN delivered the judgment of the court, with opinion.<br>Justices Burke and Birkett concurred in the judgment and opinion. |

## OPINION

¶ 1 The trial court found defendant, Julie E. Liekis, guilty of driving with a blood alcohol content of 0.08 or greater (625 ILCS 5/11-501(a)(1) (West 2008)) and driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2008)). It appears from the record that the trial court entered judgment only on the DUI count and sentenced defendant to one year of conditional discharge and various fines and fees. On appeal, defendant argues that: (1) the court erred by denying her motion to quash her arrest and suppress evidence; and (2) she is entitled to a new trial because the record does not reflect that she made an understanding waiver of her right to a jury trial in open court. We affirm.

¶ 2 I. BACKGROUND

¶ 3 We provide here only the facts necessary to an understanding of this appeal. On December 20, 2009, defendant was charged with violations of sections 11-501(a)(1) and 11-501(a)(2) of the Illinois Vehicle Code. 625 ILCS 5/11-501(a)(1) (West 2008) ("the alcohol concentration in the person's blood or breath is 0.08 or more"); 625 ILCS 5/11-501(a)(2) (West 2008) ("under the influence of alcohol"). Defendant filed a motion to quash her arrest and suppress the evidence that was the product of the arrest.

¶ 4 The hearing on the motion to quash and suppress began with defense counsel's direct examination of defendant, who testified as follows. On December 20, 2009, around 9:30 p.m., defendant was driving "by the Advertiser in Antioch" when she was "pulled over" by "the Antioch Police Department." There were no warrants out for defendant's arrest at that time. After she was pulled over, the officer had defendant get out of her car and asked her to "do a sobriety test." Subsequently, defendant was placed under arrest.

¶ 5 Defense counsel then stated: "[W]e would ask now that we established she was arrested in Lake County, Illinois, without a warrant, we ask to shift the burden for the State to prove the statutory warrant requirements." The prosecutor disagreed with defense counsel. The trial court agreed that there was insufficient testimony to shift the burden but asked the

prosecutor: "However, will you accept the burden or do you want more?" The prosecutor replied, "At this point I prefer more." Defense counsel stated that "case law says that [all] defense counsel needs to prove [is] that the defendant was arrested without a warrant" for the burden to shift to the State. The prosecutor disagreed with defense counsel's assertion and stated that he was not familiar with case law that shifted the burden to the State "after a mere allegation that there was no arrest warrant." Defense counsel then tendered *People v. Collins*, 53 Ill. App. 3d 253 (1977). The prosecutor stated that he was not familiar with defense counsel's "line of argument" or *Collins* and that he did not know if he could respond appropriately at that time, because he needed to do research. The prosecutor then stated: "I would defer to the Court in ruling on the matter. This is quite frankly a novel issue that I've never come across." The trial court stated:

> "[B]ased upon the fact that [defendant] testified there was no warrant, I will find that is sufficient enough to have the State assume the burden at this point."

¶ 6 The prosecutor cross-examined defendant, who testified that to arrive at the Advertiser she traveled through the intersection of Route 59 and Grass Lake Road. Defendant told the officer who stopped her that she had been drinking and had consumed six beers. Defendant performed field sobriety tests. She was unable to recite the alphabet on her first attempt because she was upset. Defendant took a "breath" test.

¶ 7 The prosecutor introduced a video recording of defendant's stop. The video recording showed only from when the field sobriety tests began until defendant was placed under arrest. Defendant testified that the video recording was a fair and accurate depiction of what occurred on the night in question. The trial court admitted the video recording into evidence.

¶ 8 The trial court denied the State's motion for a directed finding. The trial court again stated that the burden had shifted to the State.

¶ 9 The State presented its case, calling as its sole witness Deputy Felix Pena of the Lake County sheriff's office. Pena testified that, on the evening in question, he received a dispatch concerning a hit-and-run accident. The complainant gave her name, a description of the vehicle, the vehicle's license plate number, the direction the vehicle was traveling, and the location of the accident, the intersection of Route 59 and Grass Lake Road. Pena received updates from dispatch regarding the location of the vehicle; dispatch was receiving location updates from the complainant. Pena told dispatch to inform the Antioch police department dispatch to try to "get a unit toward that vehicle." Pena was dispatched to the Advertiser parking lot, where Officer Manders[1] and Deputy Yanacheck[2] were at the scene with defendant. Defendant's vehicle matched the description of the vehicle by the complainant. Defendant's eyes were bloodshot and "glossy" and there was an odor of alcohol "emanating from her breath and person." Defendant said that she had consumed several drinks; her speech was "slightly slurred and thick tongue[d]." Defendant performed field sobriety tests. Defendant failed the horizontal gaze nystagmus (HGN) test. Pena opined that defendant was

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[1]Manders' first name not was not provided.

[2]Yanacheck's first name was not provided.

under the influence of alcohol.

¶ 10 On May 19, 2010, the trial court found that there was probable cause and denied defendant's motion to quash and suppress.

¶ 11 On June 9, 2010, defendant filed a motion to reconsider the denial of her motion to quash and suppress. On July 14, 2010, the trial court denied defendant's motion to reconsider.

¶ 12 An "Agreed Statement of Facts" provided the following. Immediately following the trial court's denial of defendant's motion to reconsider, a stipulated bench trial was conducted. Both sides stipulated that, if called to testify, Pena would testify that on the night in question he was "dispatched to a report of a hit and run accident." When Pena reached defendant's vehicle, Manders had already stopped it. The parties also stipulated to the following facts. Defendant exhibited indicia of alcohol consumption; she admitted to consuming alcohol; she failed field sobriety tests; she was placed under arrest; and she "blew a .137 on the breathalyzer" at the Lake County jail. Defense counsel objected to the admission of all the evidence obtained after the initial stop by Manders. The trial court found defendant guilty.

¶ 13 On July 14, 2010, the trial court sentenced defendant to a one-year term of conditional discharge; among the conditions was the requirement that defendant perform 240 hours of community service. Defendant filed a notice of appeal on July 19 and an amended notice of appeal on August 9, 2010. On August 23, 2010, defendant filed a motion to modify her sentence, wherein she asked the court to change the 240 "public service hours" to 5 days' periodic imprisonment. On September 8, 2010, the trial court granted defendant's motion to modify her sentence. Defendant failed to file a subsequent notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 A. Jurisdiction

¶ 16 Initially, we address the State's argument that we lack jurisdiction to hear this appeal because, after defendant filed her notice of appeal, she filed an untimely motion in the trial court to modify her sentence. The State contends that this motion was litigated and that, therefore, the trial court was revested with jurisdiction. The State notes that, after the trial court modified defendant's sentence, she failed to file a subsequent notice of appeal. Thus, according to the State, this court lacks jurisdiction to hear this appeal and we must dismiss it. Defendant argues that her motion to modify her sentence was not untimely because a trial court retains jurisdiction to modify a sentence of conditional discharge for more than 30 days after the imposition of the sentence.

¶ 17 Initially, we note that defendant's motion to modify her sentence was not an untimely motion to reconsider the sentence; rather, it was a timely motion to modify her sentence. Pursuant to section 5-6-4(f) of the Unified Code of Corrections (730 ILCS 5/5-6-4(f) (West 2010)), a trial court retains jurisdiction to modify the conditions of a conditional discharge. In this case, defendant's motion did not challenge the trial court's decision to sentence defendant to conditional discharge; rather, defendant requested only a modification of one of the conditions of the conditional discharge. Therefore, defendant's motion did not "serve to implicitly dismiss his appeal or deprive this court of jurisdiction." *People v. Komes*, 319 Ill. App. 3d 830, 832 (2001). Thus, we will address the merits of defendant's appeal.

¶ 18 B. Motion to Quash Arrest and Suppress Evidence

¶ 19 Defendant argues that the trial court erred by denying her motion to quash and suppress, because the State failed to show that the traffic stop was justified by a reasonable suspicion. The State argues that defendant's argument cannot prevail, because she failed to present a *prima facie* case to support her motion to quash and suppress. We agree with the State.

¶ 20 On appeal from a trial court's ruling on a motion to quash and suppress, the reviewing court "will accord great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence." *People v. Close*, 238 Ill. 2d 497, 504 (2010). However, the trial court's ultimate decision to grant or deny the motion is subject to *de novo* review. *Id.* A defendant moving to quash and suppress bears the burden of establishing a *prima facie* case that she was doing nothing unusual to justify the intrusion of a warrantless search or seizure. *People v. Linley*, 388 Ill. App. 3d 747, 749 (2009). "If the defendant makes the required showing, the burden shifts to the State to present evidence to justify the search or seizure." *Id.*

¶ 21 In this case, defendant failed to establish a *prima facie* case that would have shifted the burden to the State. At the hearing on defendant's motion to quash and suppress, defense counsel called defendant to testify. Defendant testified only that she recalled being pulled over by the Antioch police on December 20, 2009, at about 9:30 p.m., "by the Advertiser in Antioch"; that there was no warrant for her arrest; and that she was arrested after she took field sobriety tests. After defendant provided this testimony, defense counsel asked the trial court to shift the burden to the State and, after argument, the trial court stated that the burden had shifted.

¶ 22 Ordinarily, a trial court should find that a defendant has made a *prima facie* case after the defendant has established that he or she was doing nothing unusual to justify the seizure. See *People v. Matous*, 381 Ill. App. 3d 918, 923 (2008). Because defendant failed to establish that she was doing nothing unusual to justify the stop, she failed to establish a *prima facie* case. Thus, the trial court's determination that the burden shifted to the State was erroneous.

¶ 23 Defendant argues that, under the invited error doctrine, the State cannot argue on appeal that defendant did not establish a *prima facie* case, because the prosecutor deferred to the trial court on this issue. The State argues that the invited error doctrine does not apply to this issue and that this court may affirm the trial court's judgment on any basis supported by the record, regardless of the trial court's reasoning. We agree with the State.

¶ 24 The doctrine of invited error or acquiescence is a form of procedural default or estoppel. *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 33. The doctrine provides that a party may not request the court to proceed in one manner and then argue on appeal that the requested action was error. *Id.* The rationale for the doctrine is that it would be unfair to grant a party relief based on error that she introduced into the proceedings. *Id.*

¶ 25 In this case, defendant, and not the State, introduced the trial court's error into the hearing. Defense counsel insisted that the burden was shifted because defendant had established that "defendant was arrested without a warrant." The prosecutor disagreed that defendant had shifted the burden to the State. The trial court asked the prosecutor, "will you

accept the burden or do you want more?" The prosecutor expressly declined the invitation, stating, "At this point I prefer more." Defense counsel then cited inapplicable case law, *Collins*, 53 Ill. App. 3d 253. In *Collins*, the appellate court held that a police officer did not have probable cause to search a defendant's car where the police officer saw the defendant bend down after his vehicle was stopped. *Id*. at 256. The case had nothing to do with the propriety of a warrantless seizure. It was undisputed that the stop was proper because the defendant failed to stop at a stop sign. *Id*. at 254. The prosecutor, being unfamiliar with *Collins*, deferred to the trial court. The trial court then improperly shifted the burden to the State. We cannot deem this course of events as the State's acquiescence in error that was introduced by defendant.

¶ 26 Defendant cites *In re Detention of Swope*, 213 Ill. 2d 210 (2004), to support her argument that the State acquiesced in the error. In *Swope*, the respondent filed a petition for conditional release following his commitment as a sexually violent person. *Id*. at 211-12. On appeal, the respondent argued that his due process rights were violated because his expert witnesses were not given the opportunity to interview his treatment providers. *Id*. at 214-15. The supreme court held that the respondent could not "attack a procedure to which he [had] agreed." *Id*. at 217. In this case, the prosecutor expressly disagreed that defendant had shifted the burden and the prosecutor did not agree to accept it. Thus, *Swope* is distinguishable from this case, and the trial court did not err in refusing to quash the arrest and suppress evidence.

¶ 27 C. Jury Waiver

¶ 28 Next, defendant argues that she is entitled to a new trial because the record does not reflect that she made an understanding waiver of her right to a jury trial in open court and there is no written jury waiver in the common-law record.

¶ 29 Defendant acknowledges that she did not raise this issue in a posttrial motion. Instead, she raises it for the first time on appeal and it, therefore, is forfeited. See *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). However, defendant asks us to review the issue under the plain-error doctrine. Plain-error review is permitted when either: (1) the evidence is closely balanced (regardless of the seriousness of the error); or (2) the error itself is so serious that the "integrity of the judicial process" is at stake (regardless of the closeness of the evidence). *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The question of whether there was a valid waiver of a jury trial is reviewed under the second prong, because of the fundamental nature of the right at stake. *People v. Rincon*, 387 Ill. App. 3d 708, 717 (2008). When the facts are not in dispute, our review is *de novo*. *Id*.

¶ 30 The right to a jury trial is protected by the United States Constitution (U.S. Const., amends. VI, XIV) and the Illinois Constitution (Ill. Const. 1970, art. I, § 8), and has been codified by the Illinois legislature (725 ILCS 5/103-6 (West 2008)). Under section 103-6 of the Code of Criminal Procedure of 1963 (Code), a bench trial may be held if the right to a trial by jury is "understandingly waived by defendant in open court." *Id.* In addition, section 115-1 of the Code provides: "All prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives a jury trial in writing." 725 ILCS 5/115-1 (West 2008). However, failure to file a written jury waiver does

not require reversal "so long as the defendant's waiver was made understandingly in accordance with section 103-6 of the Code of Criminal Procedure." *People v. Tooles*, 177 Ill. 2d 462, 468 (1997). Whether a jury waiver was made understandingly turns on the facts and circumstances of each particular case. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). An accused typically speaks and acts through his attorney, and a jury waiver is valid when made by defense counsel in the defendant's presence where the defendant gives no indication of any objection to the trial court hearing the case. *People v. Frey*, 103 Ill. 2d 327, 332 (1984).

¶ 31 A report of the proceeding in which the waiver is supposed to have occurred is essential to a review of whether a defendant made a valid waiver in open court. *People v. Smith*, 106 Ill. 2d 327, 334 (1985). Where a defendant claims that she did not waive the right to a jury trial in open court, the defendant must present a record that sufficiently covers all proceedings that could have involved the waiver. *Id.* at 335; *People v. Hart*, 371 Ill. App. 3d 470, 472 (2007). Without an adequate record, the reviewing court "must assume that the record indications of a jury waiver are indeed based on a valid waiver." *Smith*, 106 Ill. 2d at 336. The appellant bears the burden of preserving and presenting an adequate record of the asserted error. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). Any doubts arising from the inadequacy of the record must be resolved against the appellant. *Id.*

¶ 32 In this case, defendant has presented an incomplete record. The only facts in the record on appeal relating to the issue of jury waiver are that: (1) the agreed statement of facts states that, "[i]mmediately following the [trial court's] denial [of defendant motion to reconsider,] a stipulated bench trial was conducted"; (2) a minute order states that, on July 14, 2010, defense counsel moved for a stipulated bench trial; (3) the half-sheet states that, while defendant was present in court on July 14, 2010, "jury trial [was] waived"; and (4) defendant was present for the stipulated bench trial. No report of the proceedings on July 14 is included in the record. Thus, we have no way of determining whether a valid waiver was, or was not, made on that day. In the absence of the report of proceedings, or an acceptable substitute, we must assume that the record indications of a jury waiver are indeed based on a valid waiver. See *Smith*, 106 Ill. 2d at 336.

¶ 33 Further, though the record on appeal does not contain a written jury waiver, the half-sheet shows that defendant waived a jury. As in *Frey*, 103 Ill. 2d at 333, the record indicates that defendant was present when her attorney told the trial court that she waived her right to a jury. See also *People v. Brials*, 315 Ill. App. 3d 162, 177 (2000) (Although the record contained no written waiver, the record was sufficient to establish a valid jury waiver where the half-sheet indicated that the defendant waived his right to a jury trial). We note that defendant does not contend in her brief that she failed to understandingly waive her right to a jury trial; rather, she argues only that the record does not reflect that she did so. We disagree and determine that the record reflects that defendant understandingly waived her right to a jury trial.

¶ 34 Defendant cites *People v. Hernandez*, 409 Ill. App. 3d 294 (2011), *People v. Owens*, 336 Ill. App. 3d 807 (2002), and *People v. Coleman*, 59 Ill. App. 3d 1050 (1978), to support her argument. These cases are distinguishable from the case at bar because there was no evidence in *Hernandez*, *Owens*, and *Coleman* that the defendants, or their attorneys on their behalf, waived their right to a jury trial in open court. *Hernandez*, 409 Ill. App. 3d at 295; *Owens*,

336 Ill. App. 3d at 811; *Coleman*, 59 Ill. App. 3d at 1053. In this case, there is evidence that defendant waived her right to a jury trial in open court. The half-sheet states that, while defendant was present, defense counsel moved for a stipulated bench trial and "jury trial [was] waived." Thus, the cases cited by defendant are distinguishable from this case.

¶ 35 Accordingly, we hold that defendant failed to shift the burden to the State during the hearing on the motion to quash her arrest and suppress evidence. Thus, we affirm the trial court's judgment denying defendant's motion and her motion to reconsider. Further, we hold that the record provided on appeal reflects that defendant understandingly waived her right to a jury trial.

¶ 36 III. CONCLUSION

¶ 37 The judgment of the circuit court of Lake County is affirmed.

¶ 38 Affirmed.