2012 IL App (1st) 101345-U

FIRST DIVISION
June 25, 2012

No. 1-10-1345

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. YP 319-592
	)	
ALBERT GOLDSTEIN,	)	Honorable
	)	Kay Hanlon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court did not improperly admit evidence of the horizontal gaze nystagmus test in defendant's driving under the influence trial. The State did not fail to prove defendant guilty beyond a reasonable doubt. The trial court did not abuse its discretion when it refused to sentence defendant to court supervision.

¶ 2 Following a jury trial, defendant Albert Goldstein was found guilty of driving under the influence of alcohol and sentenced to one year of misdemeanor probation including fines and fees totaling $2,330, and a requirement that he attend a "significant" intervention program. On appeal, defendant contends that: 1) the trial court erroneously admitted evidence of a horizontal

gaze nystagmus (HGN) test without a proper foundation; 2) the State failed to prove him guilty beyond a reasonable doubt; and 3) the trial court abused its discretion when it refused to place defendant on court supervision. We affirm.

¶ 3 At trial, Hanover Park police officer Matt McDonald testified that, on October 23, 2009 at 2:55 a.m., he was on patrol and observing traffic from a parked police car. He observed a black Cadillac driving westbound on Irving Park road with no lights on. He followed the car and observed the Cadillac pull into the left turn lane at the intersection with Bryer Lane, without activating its turn signals. The Cadillac then crossed Bryer Lane without turning and continued westbound in the eastbound lanes of Irving Park road against the normal flow of traffic. At that point McDonald activated his emergency lights. The Cadillac crossed the median, returned to the westbound lanes of traffic, and pulled to side of the road, striking the curb as it did so. After the Cadillac stopped, McDonald observed defendant sitting in the driver's seat.

¶ 4 McDonald approached the car and asked for defendant's license and proof of insurance, which defendant produced. McDonald told defendant what he had observed and defendant responded that he was unaware that he was driving without lights and that he was unaware that he had crossed into the wrong lane of traffic. Defendant stated that he was coming from a restaurant in Chicago where he worked. Defendant had glassy, bloodshot eyes and smelled of alcohol.

¶ 5 McDonald returned to his own vehicle, verified that defendant's license was valid and approached defendant once again. McDonald asked whether defendant had been drinking and he replied that he had not. McDonald then asked defendant to step out of his vehicle to perform field sobriety tests.

¶ 6 McDonald testified that the first test he administered with was the HGN test. The State then questiond McDonald as follows "Now, Officer, without going into the results of this test,

would you please describe the performance of defendant." Defense counsel objected arguing that the State had failed to lay an adequate foundation for the McDonald's qualifications to give the test. The trial court overruled the objection. The State asked whether defendant was able to follow instructions and defense counsel objected again arguing that the State had failed to lay an adequate foundation. The trial court sustained the objection.

¶ 7 The State then asked McDonald whether he administered another test after the HGN test. McDonald responded that he administered the one leg stand test. McDonald explained the test to defendant and asked if he had any injuries that would prevent him from performing the test. Defendant indicated that he had a "bad knee," but did not indicate that he could not perform the test. Defendant raised his leg, but bent his knee contrary to instruction, raised his arms to prevent himself from falling, and placed his foot back on the ground after only counting to two or three instead of the requested 30 seconds. Defendant asked whether he could repeat the test with the other leg, and McDonald agreed, but defendant achieved the same results using the other leg.

¶ 8 McDonald then asked defendant to perform the walk and turn test. Defendant started the test before instructed to do so, walked 12 steps instead of the requested 9, and failed to touch his feet heel to toe.

¶ 9 McDonald opined that based on the odor of alcohol, bloodshot and glassy eyes, defendant's initial denial of drinking followed by an admission of having "a few drinks" after failing the field sobriety tests, and defendant's failure on the field sobriety tests, that defendant was under the influence of alcohol. McDonald placed defendant under arrest and transported him to the police station. At the station, McDonald read defendant the "Warnings to Motorists" and observed him. Defendant refused to submit to breath alcohol testing.

¶ 10 After eliciting McDonald's opinion, the State returned to the issue of the HGN test, inquiring whether defendant was able to follow the instructions for the test. Defense counsel

objected and moved for a mistrial, arguing that no foundation had been laid for the admission of the HGN test results. The State responded that it was not seeking to elicit testimony regarding the results of the HGN test, but was seeking only a description of defendant's ability to follow instructions. The trial court noted that it was familiar with *People v. McKown*, 236 Ill. 2d 278 (2010), and held that the State had not laid a proper foundation for admission of the HGN test results. The court further held, however, that the State could elicit testimony regarding McDonald's "general observations."

¶ 11 McDonald further testified that when he administered the HGN test he was standing approximately one foot from defendant. Defendant's eyes were bloodshot and glassy, and defendant's breath smelled of alcohol. After McDonald administered the HGN test, defendant told him that there had been a party at the restaurant where defendant works and that he had consumed "two beers."

¶ 12 On cross-examination, McDonald admitted that he prepared a report memorializing his observations of defendant. McDonald admitted that the report identified nine ways in which a suspect could fail the walk and turn test, but that defendant only failed in three ways. McDonald admitted that he could not recall whether defendant admitted to having "two beers" or "two drinks" and that his report stated "a couple of drinks."

¶ 13 The State rested its case, and defendant rested without presenting any evidence. The trial court instructed the jury, and the jury found defendant guilty of driving under the influence of alcohol. At sentencing, defendant argued that a sentence of court supervision would be appropriate because it was his first driving violation "of significance." The court noted that defendant had received felony probation in a 1985 for burglary, and held that, although it was "quite an old matter," it did not agree that he was eligible for court supervision. The trial court

sentenced defendant to one year of misdemeanor probation with fines, fees, and a requirement for "significant risk classes." Defendant timely appeals.

¶ 14 Defendant first argues that the trial court improperly admitted the results of the HGN test without a proper foundation. In *McKown*, our supreme court held that HGN testing is accepted in the relevant scientific fields and evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol. *McKown*, 236 Ill. 2d at 303. The court went on to conclude:

> "A properly trained police officer who performed the HGN field test in accordance with proper procedures may give expert testimony regarding the results of the test. *** [A] testifying officer may use the HGN test results as a part of the basis for his opinion that the defendant was under the influence and impaired." McKown, 236 Ill. 2d at 306.

¶ 15 Defendant's contention that the trial court erred by admitting evidence of the HGN test without a proper foundation, however, finds no support in the record. We have carefully reviewed the record, and note that although that HGN test was mentioned repeatedly, the trial court was careful to limit testimony about HGN testing to nothing more than the observations McDonald made of defendant independent of the HGN test result. We find that because no test results were admitted into evidence, there was no need to lay a foundation for such results, and we need not consider whether the evidence which was admitted met the foundational requirements of *McKown*.

¶ 16 Defendant next contends that the State failed to prove him guilty beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence, the relevant questions is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. McBride*, 2012 IL App (1st) 100375, ¶ 19 quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "A conviction should only be set aside if the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Long*, 316 Ill. App. 3d 919, 926 (2000), citing *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 17 The essential elements of driving under the influence are: 1) that the defendant is driving a vehicle; and 2) the defendant is intoxicated while driving. *Long*, 316 Ill. App. 3d at 926. Here it is undisputed that defendant was driving. As to intoxication, the State presented ample evidence. McDonald testified that defendant's eyes were glassy and bloodshot and that he smelled of alcohol. Defendant failed the one leg stand test and the walk and turn test. He was operating his vehicle without headlights at night and on the wrong side of the road. Defendant also admitted to consuming alcohol. Finally, defendant refused to submit to breath testing for alcohol, and the jury could infer from that refusal a consciousness of guilt. See, *e.g.*, *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993).

¶ 18 Defendant argues that evidence of intoxication was lacking because although McDonald identified three signs of intoxication during the walk and turn test, he failed to note an additional six. Defendant further argues that defendant did not lose his balance while turning or stop walking to regain his balance. We find these arguments unavailing. The jury heard and rejected these same arguments, and the law does not require that a defendant be "falling down drunk" or that he be completely incapable of passing any aspect of the field sobriety testing. In short, there was ample evidence of intoxication and we cannot conclude that no rational trier of fact would have found defendant guilty beyond a reasonable doubt.

¶ 19 Finally, defendant contends that the trial court erroneously refused to place defendant on court supervision. The State responds that defendant has forfeited the error by failing to object during the sentencing hearing or in a posttrial motion. In his reply, defendant argues that the plain error doctrine should be applied to overlook his forfeiture. In the sentencing context, a defendant must demonstrate that: 1) the evidence at the sentencing hearing was closely balanced; or 2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step in a plain error analysis, however, is to determine whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30.

¶ 20 Here we find no error in the trial court's sentence, and accordingly no plain error. A trial court's sentencing decisions represent the exercise of discretion and a reviewing court will disturb a sentence only where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). Section 5-6-1(c) of the Unified Code of Corrections (730 ILCS 5/5-6-1(c) (West 2008)) allows a court to impose a sentence of court supervision for defendants found guilty of Class A misdemeanors following a jury trial. See *People v. Boykin*, 94 Ill. 2d 138 (1983) (holding that section 5-6-1(c) applied equally to defendants who pled guilty and those who demanded trial). A disposition of court supervision is appropriate when the court is of the opinion that:

> "(1) the offender is not likely to commit further crimes;
> (2) the defendant and the public would be best served if defendant were not to receive a criminal record; and
> (3) in the best interests of justice an order of supervision is more appropriate than a sentence otherwise permitted under this Code."
> 730 ILCS 5/5-6-1(c) (West 2008).

¶ 21 Defendant relies upon *People v. Jones*, 284 Ill. App. 3d 975 (1996) to argue that a disposition of court supervision was appropriate in his case. In *Jones*, the reviewing court found that the trial court had adopted a blanket policy of denying court supervision to defendants found guilty of driving under the influence based on a belief that such sentences were inconsistent with the public policy evidenced by the mandatory suspension provisions of section 6-205(a)(2) of the Illinois Vehicle Code (625 ILCS 5/6-205(a)(2) (West 1994)). *Jones*, 284 Ill. App. 3d at 981. The reviewing court found that this was a misapplication of the law and remanded for resentencing. *Id.*

¶ 22 We find defendant's reliance on *Jones* misplaced. Here, there is no indication on the record that the trial court's determination that defendant was not eligible for court supervision was based on a misapplication of the law. Instead it appears that the trial court properly reached its conclusion after considering the nature of the offense and defendant's background. To the extent defendant argues that his background matches that of the *Jones* defendant, we disagree on two grounds. First, sentencing decisions must be made on an individual basis. See *People v. Lavelle*, 396 Ill. App. 3d 372, 385 (2009). Second, there is little meaningful comparison to be made between defendant and Jones on a factual basis. Jones was young, 20 years old, but defendant is much more mature, 61. Jones had never had any significant contact with the judicial system, but defendant had a criminal history including a prior felony conviction. Accordingly, we cannot conclude that the trial court's imposition of a sentence of probation rather than court supervision constituted an abuse of discretion.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.