2013 IL App (1st) 112212-U

FOURTH DIVISION
APRIL 11, 2013

No. 1-11-2212

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. 11 CR 2002
	)	
PABLO MORALES,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant should have been convicted of committing the Class A misdemeanor offense of driving while under the influence of alcohol, and not a Class 4 felony. Defendant's felony conviction is reduced to a Class A misdemeanor, his one-year prison term is vacated, and the cause is remanded for a new sentencing hearing.

¶ 2 In a bench trial, defendant Pablo Morales was convicted of eight counts of aggravated driving under the influence of alcohol and sentenced to one year in prison for one of those counts, with the other counts merged into that one. On appeal he contends that his conviction should be reduced to a misdemeanor and the cause remanded for a new sentencing hearing

because the State failed to prove any of the aggravating elements which would enhance his conviction to a felony. The State only contends that it proved the aggravating element for counts five and six, and that aggravating element was that defendant did not have a driver's license when he committed a DUI. The State also contends that the cause should be remanded for the assessment of mandatory costs and fees, which the trial court failed to impose.

¶ 3 Defendant was charged with eight counts of aggravated driving while under the influence of alcohol (DUI), all based upon the same incident. 625 ILCS 5/11-501(d)(1) (West 2010). The elements which enhanced these offenses from a Class A misdemeanor to a Class 4 felony were that defendant had committed the DUI: while his driving privileges were either revoked (counts one and two) (625 ILCS 5/11-501(d)(1)(G) (West 2010)) or suspended (counts three and four) (625 ILCS 5/11-501(d)(1)(G) (West 2010)); while he did not have a driver's license[1] (counts 5 and 6) (625 ILCS 5/11-501(d)(1)(H) (West 2010)); or while he knew or should have known that the vehicle he was driving was not covered by a liability insurance policy (counts 7 and 8) (625 ILCS 5/11-501(d)(1)(I) (West 2010)). Defendant was convicted on all eight counts, but the court merged counts two through eight into count one and sentenced defendant to one year in prison.

¶ 4 At trial, the State presented the following evidence. Chicago police officer Jeff Muehlfelder testified that at about 12:15 a.m. on January 12, 2011, he was on patrol in his squad car with his partner in the vicinity of 4175 West Fullerton in Chicago. Another motorist alerted Officer Muehlfelder that a person in a car driving behind him was "driving drunk." In his rear view mirror, Officer Muehlfelder saw that a car with one headlight out was approaching him. The car passed the officers and then went through a red light. They followed the vehicle for two blocks and saw that it was swerving in and out of its lane. The officers stopped the other car,

[1] Under the statute the defendant may also possess a driver's permit, a restricted driving permit, a judicial driving permit, or a monitoring device driving permit. We will refer to these collectively as a driver's license.

which was driven by defendant. Officer Muehlfelder knocked on the driver's side window to get defendant to open the window, but defendant did not do so. He then opened defendant's door and instructed him to get out. He noticed that defendant's eyes were bloodshot and he had a strong odor of alcohol. Officer Muehlfelder testified that when he asked defendant for "ID and insurance," defendant did not produce any, but he also testified that he could not understand much of what defendant was saying, which was apparently in Spanish, because he did not speak Spanish. Another squad car pulled up with Officer Ortiz, who did speak Spanish and who translated for him. Officer Muehlfelder testified that defendant said he did not have an "ID" or "insurance," but this testimony was stricken on the defense's motion.

¶ 5 Officer Muehlfelder then transported defendant to the police station. There, using Officer Ortiz as a translator, defendant was asked to perform three field sobriety tests, the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. Defendant failed all three tests and it was Officer Muehlfelder's opinion that defendant was under the influence of alcohol. Defendant was subsequently given a breathalyzer exam by Officer Ortiz. The officer determined that, at 1:23 a.m., defendant's blood alcohol concentration was .185. He also observed that defendant's breath had the strong odor of alcohol. Defendant told Officer Ortiz that he had three drinks earlier that evening. Officer Ortiz used the breathalyzer to print a "breath ticket," which was introduced into evidence. The ticket has the names of defendant and Officer Ortiz, the time, date, and the results of the breathalyzer test. It also has a space for "License No," in which is printed "IL-NONE." At the close of all the evidence, the court convicted defendant of all eight counts of DUI, and merged counts two through eight into count one. Defendant has appealed.

¶ 6 On appeal, defendant contends that his convictions should be reduced to misdemeanors, and the cause remanded for a new sentencing hearing, because the State failed to prove the elements which enhanced those misdemeanors to Class 4 felonies. Defendant does not challenge

the sufficiency of the evidence to establish that he committed the eight counts of misdemeanor DUI. The State contends only that it proved the aggravating element for counts five and six, that at the time the offenses were committed defendant did not possess a driver's license. The State does not contend that it proved the aggravating elements for the other counts. Because defendant concedes that he was proven guilty of eight counts of misdemeanor DUI and the State does not contest that it failed to prove the aggravating elements for counts one through four and counts seven and eight, we address only the sufficiency of the evidence to establish that defendant was guilty of aggravated DUI under counts five and six.

¶ 7 Count five charges defendant with driving while having a blood alcohol concentration of 0.08 or more. 625 ILCS 5/11-501(a)(1) (West 2010). Count six charges defendant with driving under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2010). Both counts would be misdemeanors unless the State proved that defendant committed aggravated DUI because he did not possess a driver's license at the time he committed the DUIs. 625 ILCS 5/11-501(d)(1)(H) (West 2010). In assessing on appeal whether the State has met its burden of proof of an offense beyond a reasonable doubt, we review the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Defendant concedes that he was proven guilty of DUI beyond a reasonable doubt under both of these counts, and we concur when we review the evidence in the light most favorable to the State. For count five, the State introduced unrebutted evidence that the result of the breathalyzer exam given to defendant was that he had a blood alcohol concentration of .185, more than twice the legal limit of .08. For count six, the State introduced evidence that defendant swerved from lane to lane when he drove, smelled strongly of alcohol, had bloodshot eyes, failed three field sobriety tests, admitted that he had three drinks, and had a blood alcohol concentration of .185. Based upon all of these factors,

any rational trier of fact would find defendant guilty of driving while under the influence of alcohol. *People v. Sturgess*, 364 Ill. App. 3d 107, 115-16 (2006) (evidence of intoxication included involvement in a car accident, failing two field sobriety tests, bloodshot eyes, police officer's opinion that defendant was intoxicated, and the odor of alcohol).

¶ 8 Defendant's contention is that the State failed to prove the element that would enhance these two DUIs to a felony, that when he committed these DUIs he did not possess a driver's license. Viewing the evidence in the light most favorable to the State, we do not find that the State proved this element beyond a reasonable doubt. There was no testimony that defendant did not have a driver's license that day. Officer Muehlfelder first testified that defendant "could not produce any ID" and that when he asked defendant to provide "ID and insurance," defendant could not do so. But the officer then added that he spoke very little Spanish and that when he asked defendant if he had a license, he could not understand defendant's response. According to Officer Muehlfelder, Officer Ortiz arrived and translated. Officer Muehlfelder testified "I asked him, he said he does not have that ID, and he does not have insurance." This testimony was stricken on defendant's motion and therefore was not considered by the trial court. The State notes that the "breath ticket" from the breathalyzer had a space for "License No," in which "IL-NONE" was printed. The evidence suggests that Officer Ortiz had entered this information into the breathalyzer, along with his name, defendant's name, and the time and date. But Officer Ortiz was never asked about the "IL-NONE" on the ticket. There was no admitted testimony by Officer Ortiz or Officer Muehlfelder that defendant told them that he had no driver's license. The State could have also presented a driver's abstract from the Illinois Secretary of State's office to establish whether or not defendant had a valid driver's license. See *People v. Smith*, 345 Ill. App. 3d 179, 182 (2004). It did not do so. The State was required to prove every fact necessary to establish the commission of these offenses beyond a reasonable doubt. *People v. Cunningham*,

212 Ill. 2d 274, 278 (2004). Because the State failed to prove this element beyond a reasonable doubt, we reduce defendant's convictions on counts four and five to Class A misdemeanors.

¶ 9 As we have noted, the State does not contest defendant's contention that the State failed to prove the offense-enhancing elements for counts one through four or counts seven and eight. Accordingly, we reduce also reduce defendant's convictions on all of those counts to class A misdemeanors. Defendant's convictions on counts two through eight are merged into his conviction on count one. We also vacate defendant's one-year prison term and remand this cause for a new sentencing hearing.

¶ 10 The State contends that the trial court erred in failing to impose mandated fees and costs on defendant. The record establishes that defendant was granted a credit for his time spent in custody against his "costs." But pre-sentence confinement credit is only permitted to offset fines assessed against a defendant, not fees and costs. 725 ILCS 5/110-14 (West 2010); *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). The record does not disclose what fines, fees, and costs were assessed against defendant. Accordingly, on remand the trial court is directed to set out those fines, fees, and costs.

¶ 11 Affirmed as modified; sentence vacated and cause remanded for a new sentencing hearing.