

2014 IL App (1st) 120762-U

FIFTH DIVISION
February 28, 2014

No. 1-12-0762

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. TT-034-064
	)	
MICHEL DRAPE,	)	The Honorable
	)	Kevin W. Horan,
	)	Judge Presiding.
Defendant-Appellant.	)	

JUSTICE TAYLOR delivered the judgment of the court.
Justices Presiding Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court properly vacated plea agreement and void order of supervision for DUI defendant who previously had entered a plea agreement to reckless driving.

¶ 2 Following a negotiated guilty plea, defendant Michel Drape was found guilty of driving while under the influence of alcohol (DUI), failure to keep within lanes, and speeding, and was placed on supervision for DUI for 24 months with various conditions and fines, fees, and costs. Pursuant to the State's section 2-1203 motion (735 ILCS 5/2-1203 (West 2012), concerning post-judgment motions in non-jury cases), the circuit court vacated the guilty plea, vacated the disposition of supervision as void, and found that there was no just reason for delaying either enforcement or appeal or both pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). On appeal, defendant contends that the disposition of supervision should be reinstated and that the State should have proceeded by way of *mandamus* against the circuit court instead of a section 2-1203 motion. Defendant maintains that jurisdiction exists pursuant to Illinois Supreme Court Rule 304(a) or, alternatively, 304(b)(3). The State responds that defendant was ineligible for supervision because he had a prior supervision for reckless driving that resulted from a plea agreement. The State further maintains that the supervision in this case was void and that section 2-1203 motions can be brought in either civil or criminal cases.

¶ 3 On January 16, 2009, defendant was arrested and issued six citations for traffic offenses, including DUI (citation number TT-034-064). On November 29, 2011, defendant pleaded guilty to DUI, failure to keep within lanes, and speeding, and the circuit court placed him on supervision for 24 months, with a scheduled termination date of November 27, 2013.

¶ 4 On December 5, 2011, the State filed a motion to vacate the order of supervision pursuant to section 2-1203 of the Code of Civil Procedure. 735 ILCS 5/2-1203 (West 2012). In

the motion to vacate, the State alleged that the matter was before Judge Malone on March 25, 2010, and that at that time, defense counsel "addressed the court regarding Defendant receiving an order of supervision if Defendant plead [*sic*] guilty, despite Defendant's previous guilty plea to reckless driving where supervision was imposed." The State further alleged that the matter was continued to May 10, 2010, when the State cited *People v. Kinzer*, 232 Ill. 2d 179 (2009), and informed Judge Malone that in 2006, defendant was charged with DUI, and the charge was reduced to reckless driving pursuant to a plea agreement. On October 6, 2010, Judge Moreland conducted a conference and concluded that defendant was not eligible for supervision because he previously had received supervision for pleading guilty to a reduced charge of reckless driving. Over one year later, on November 29, 2011, defense counsel asked another assistant State's Attorney if defendant could have supervision if he pleaded guilty to the DUI charge. The assistant State's Attorney agreed without having properly reviewed the court file, and the court then entered an order placing defendant on supervision for 24 months.

¶ 5 Defendant filed a combined motion to strike, and response, to the State's motion to vacate, in which he alleged that he always had maintained, and continued to maintain, that the State had dismissed the prior DUI because of the State's inability to prove the case, rather than pursuant to any plea agreement. Defendant alleged that the State believed that it would be able to prove the reckless driving charge, and therefore defendant pleaded guilty to that charge and avoided an alcohol evaluation and counseling. On November 29, 2011, a negotiated guilty plea was reached in which defendant would plead guilty and receive supervision. The attorneys

discussed the prior reckless driving case, and the assistant State's Attorney agreed that a "dry" reckless driving did not render defendant ineligible for supervision. As to the procedural posture of the State's motion, defendant asserted that section 2-1203 of the Code of Civil Procedure was not applicable because this case involved a negotiated guilty plea, and section 2-1203 applies to bench trials, not guilty pleas. Defendant argued that the State had no authority to file a post plea motion because this case involved a negotiated guilty plea, and section 2-1203 does not apply to negotiated guilty pleas. Defendant asserted that the State should have pursued a supervisory order through a writ of *mandamus*.

¶ 6 On February 15, 2012, the circuit court entered a written order vacating the guilty plea agreement entered into on November 29, 2011, stating that the order of supervision was void as an illegal order, finding that there was no just reason for delaying either enforcement or appeal or both (see Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)), and continuing the matter to April 9, 2012. Defendant alleges that jurisdiction alternatively exists pursuant to Rule 304(a) or Rule 304(b)(3) (eff. Feb. 26, 2010), as an appeal entered from an order granting or denying relief requested in a section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)). However, during the February 15, 2012, hearing, defense counsel told the circuit court that it was not a section 2-1401 petition and that, to be appealable, the order should comply with Rule 304(a). The State makes no jurisdictional argument.

¶ 7 Defendant claims that jurisdiction exists under rules that do not apply. Rule 304(a) applies to final judgments, but there is no final judgment when a defendant is placed on

supervision until the defendant fails to complete supervision successfully and sentencing takes place. *People v. Saleh*, 2013 IL App (1st), 121195, ¶ 11. Because there was no final judgment, Rule 604(d) does not apply and defendant is not required to file a motion to withdraw and vacate the guilty plea and sentence. *People v. Johnson*, 174 Ill. App. 3d 812, 814 (1988). The effect of the order vacating supervision was to revoke it, and we therefore find that jurisdiction exists pursuant to Illinois Supreme Court Rule 604(b) (eff. Feb. 6, 2013)), which authorizes a defendant to appeal from an order revoking an order of supervision. See *People v. Larimer*, 409 Ill. App. 3d 827, 830 (2011); *In re Shatavia S.*, 403 Ill. App. 3d 414, 417 (2010) .

¶ 8 On appeal, defendant contends that the circuit court erred in vacating the disposition of supervision for DUI because there was insufficient evidence that his prior disposition of supervision for reckless driving resulted from a plea agreement. Defendant maintains that the record, namely, the abstract of his driving history, does not disclose the prior reckless driving charge much less a prior plea agreement. He asks this court to reverse the order vacating the supervision, and to reinstate the disposition of supervision. He also argues that the State should have sought an order of *mandamus* against the circuit court.

¶ 9 The State responds that the disposition of supervision was properly vacated because a prior disposition of supervision that resulted from a plea agreement to reckless driving in 2006 rendered defendant ineligible for supervision in this case. The State argues that it properly proceeded with a motion to vacate under section 2-1203 because that section applies to both civil and criminal cases, and because the order of supervision was void and subject to challenge.

¶ 10 Initially, we note that the record before us does not contain transcripts of the 2006 proceedings at which the first supervision was imposed. Therefore, defendant has failed to meet his burden of providing this court with an adequate record to support his claim of error and it is presumed that the circuit court's decision conformed to the law and was supported by a sufficient factual basis. See *People v. Deleon*, 227 Ill. 2d 322, 342 (2008); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). If the details of the 2006 reckless driving are not clear from the record, as to whether the reckless driving resulted from the reduction of a DUI charge pursuant to a plea agreement as the State suggests, or the State's recognition that it could not prove a DUI charge as defendant suggests, the ambiguity is the consequence of defendant's failure to fulfill his burden as the appellant to provide this court with a record of the 2006 proceedings. Accordingly, we must presume that the 2006 reckless driving guilty plea resulted from a plea agreement, which rendered defendant ineligible for supervision in the current case. See 730 ILCS 5/5-6-1(d)(3) (West 2012).

¶ 11 Furthermore, the portion of the record that defendant has provided gives us no reason to disturb the circuit court's order vacating the supervision in the current case. Section 5-6-1(c) of the Unified Code of Corrections provides for the imposition of supervision after a guilty plea in various circumstances. 730 ILCS 5/5-6-1(c) (West 2012). However, section 5-6-1(d)(3) provides exceptions, one of which is that supervision is not available if a defendant who is charged with DUI previously pleaded guilty to reckless driving, and the previous guilty plea was the result of a plea agreement. 730 ILCS 5/5-6-1(d)(3) (West 2012).

¶ 12 In *People ex rel. Madigan v. Kinzer*, 232 Ill. 2d 179 (2009), the trial court was prohibited from placing the defendant on supervision for DUI after the defendant had previously pleaded guilty to reckless driving pursuant to a plea agreement. There, the state attorney general filed a *mandamus* action before the Illinois Supreme Court to direct the circuit court to vacate the defendant's supervision and impose a sentence that would comport with the Unified Code of Corrections. The Illinois Supreme Court awarded the order of *mandamus*. The court observed that the reckless driving in the previous plea agreement need not have been reduced from a DUI for the defendant to be disqualified from receiving supervision. *Kinzer*, 232 Ill. 2d at 185, 189. Thus, pursuant to *Kinzer*, whether the prior reckless driving resulted from the reduction of a DUI charge, or the State's recognition that it could not prove a DUI charge, is not legally significant. The legally significant point is that the prior reckless driving resulted from a plea agreement.

¶ 13 Here, although defendant's driving abstract does not reflect plea negotiations or a prior reckless driving conviction, defendant made a judicial admission that he had a prior reckless driving conviction. See *People v. Wright*, 2012 IL App (1st), 073106, ¶ 92. Furthermore, defendant was charged in the present case with DUI, and the record reflects that he previously pleaded guilty to reckless driving in 2006. It reasonably can be inferred from those circumstances that the 2006 guilty plea was the result of a plea agreement. The circuit court would not have abused its discretion in so concluding because, on the record that was submitted to this court, nothing shows that the circuit court's decision was arbitrary, unreasonable, or fanciful. Finally, given that the circuit court lacked statutory authority to impose supervision, its

1-12-0762

order imposing supervision is void and the circuit court properly vacated it. See *In re Danielle J.*, 2013 IL 110810, ¶ 29. Although a *mandamus* action may have been preferable in accordance with *Kinzer*, the end result is that the State obtained the same result directly from the circuit court, vacatur of a void order, that it would have obtained through a more circuitous action for *mandamus*.

¶ 14 The judgment of the circuit court is affirmed.

¶ 15 Affirmed.