2018 IL App (2d) 151234-U
No. 2-15-1234
Order filed April 24, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRYAN J. SEIBEL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No.14-DT-866 Honorable Robert J. Morrow, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant could not show plain error in the State's closing argument, as the comments at issue pertained to a charge that he strategically chose not to contest and, in any event, the evidence on that charge was not closely balanced.

¶ 2 After a jury trial, defendant, Bryan J. Seibel, was convicted of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2014)) and driving while his license was suspended (DWLS) (625 ILCS 5/6-303(a) (West 2014)). He was acquitted of improper lane usage (625 ILCS 5/11-709(a) (West 2014)). The trial court sentenced defendant to 24 months' conditional discharge and imposed various fines and fees on both convictions. On appeal, defendant

challenges only his conviction of DWLS, arguing that the prosecutor erred when, in closing argument, she defined terms appearing in defendant's driving abstract and mischaracterized certain testimony. We affirm.

¶ 3 We summarize the trial evidence pertinent to the issue on appeal. Geneva police officer Lance Pahle testified on direct examination as follows. At about 2 a.m. on August 15, 2014, he was on routine patrol, driving east on State Street approaching Route 31. He saw a silver Audi followed by a black Chevrolet driving west in his direction. Both cars entered the left turn lane to go south on Route 31. They appeared to be speeding. A Law Enforcement Agencies Data System (LEADS) check revealed that the Audi's registration had been suspended. (The trial court admitted this testimony solely to explain Pahle's actions, and it gave the jury an appropriate limiting instruction.)

¶ 4 Pahle testified that he circled his squad car and pursued the cars. He was driving behind the Chevrolet when he saw the Audi move out of its lane, then return to its lane. Pahle activated his squad car's overhead lights. The Chevrolet pulled over, but the Audi did not slow down, so Pahle followed it for several blocks until it stopped. Pahle exited his squad car, approached the Audi, and asked the driver, defendant, for his license and proof of insurance. He explained that he was stopping him for improper lane usage and for driving with a suspended registration. Defendant said that he did not realize that his registration had been " 'expended.' "

¶ 5 Pahle noticed several indicia of intoxication, so he had defendant step out and perform several field sobriety tests, after which he arrested defendant for DUI. Defendant was taken to the police station, where he refused a breath-alcohol test and called his girlfriend, Kara Foley, who had been driving the Chevrolet. She drove defendant home.

¶ 6 The prosecutor showed Pahle People's exhibit No. 1, which he identified as a "toll certification" from the Secretary of State's office. He also called the document a "certified abstract." The prosecutor asked, "[D]oes this certified abstract indicate that the Defendant's registration was suspended on the day in question?" Pahle responded, "Yes, it does." Defendant did not object to any of the foregoing questions and answers. The State moved to admit the exhibit. Defendant stated that he had no objection, and the court admitted the exhibit.

¶ 7 We note that the exhibit is titled, "TOLL AUTH COM 04/20/15" and, immediately thereunder, lists defendant's name and address and the Vehicle Identification Number and related information about the Audi. Farther down is a short table reading, as pertinent:

"

YR	TA	DESCRIPTION	VAL-DATE	MA	SERL	FEE	CLSS	ACT-DATE
15	09	RENEWAL	04/21/15	AR	989	121.00	6750	04/21/15
14	841	TOLL AUTH COMP	05/06/14	DE	0814	120.00	7129	04/20/15"

The document is dated September 1, 2015.

¶ 8 On cross-examination, defendant's attorney questioned Pahle at length about the circumstances leading to the DUI and improper-lane-usage charges. He did not ask Pahle about the allegedly suspended registration or People's exhibit No. 1.

¶ 9 The State rested. Defendant testified. He described the circumstances preceding the stop and testified that, after Pahle activated his overhead lights, he kept driving only until he found a safe place to stop; that he drank little and had not been under the influence of alcohol; and that he signaled properly before he changed lanes. Defendant testified that Pahle asked him whether he knew his registration had been suspended and that he replied that he had had no idea. He did not recall saying "expended" instead of "suspended." No other mention of the DWLS charge was made during his testimony. Neither his counsel nor the State asked him directly about the status of his registration on August 15, 2014.

¶ 10 Foley testified briefly about the circumstances leading up to the stop and opined that defendant had not been intoxicated at the time.

¶ 11 In closing argument, the prosecutor began by addressing the registration charge. After reciting the elements that the State needed to prove, she continued:

> "Officer Pahle testified that he ran it through LEADS and that it came back suspended, the registration, and the Judge gave you an Instruction as to that's not the actual weight of the evidence, it's just the officer's actions. Well, that's why we admitted [People's exhibit No. 1] *** you can review when you step back into the jury room. Unfortunately, it's from the Secretary of State's Office, so it's a little convoluted, but what it does indicate to you on the certified registration is that the Defendant's registration of the vehicle was suspended for toll violations, 'Toll Authority Comp'., [*sic*] is what it says as of May 6th of 2014, that he then validated his registration on April 21st of 2015, so based on the fact that you have uncontested evidence that the Defendant was driving a motor vehicle, and uncontested evidence that his registration was suspended, *** he even testified that he did not know that his registration was suspended, but you don't even need his testimony because you have this, based on this, we've proven that element beyond a reasonable doubt."

Defendant did not object to any of the foregoing.

¶ 12 In his closing argument, defendant's attorney told the jury that, for various reasons, the State had not met its burden of proof on either DUI or improper lane usage. However, defendant's attorney did not mention the DWLS charge at all.

¶ 13 The jury found defendant guilty of DUI and DWLS and not guilty of improper lane usage. He filed a posttrial motion that did not claim any error related to the DWLS conviction. The trial court denied the motion and sentenced defendant as noted. He timely appealed.

¶ 14 On appeal, defendant raises two claims of error. He contends that in closing argument the prosecutor improperly defined key terms in defendant's certified abstract, even though there had been no evidence that defined them. Defendant argues that, as a result, the prosecutor improperly relied on facts not in evidence and that defendant's conviction of DWLS must be reversed and the cause remanded for a new trial on that charge. Defendant also contends that the prosecutor misstated the evidence by telling the jury that his statement to Pahle that he did not know that his license was suspended was affirmative evidence of the existence of the suspension.

¶ 15 Defendant concedes that he forfeited his claims of error, because he failed either to object contemporaneously or to raise the issues in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186-88 (1988). He asks us to review his claims for plain error (see *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)). He reasons that the evidence of his guilt of DWLS was not strong, given that the certified abstract required interpretation that the jury would not likely have attempted on its own. For the following reasons, we find defendant's arguments unpersuasive.

¶ 16 First, the record strongly suggests, if it does not conclusively prove, that defendant's acquiescence in the prosecutor's argument was not an oversight but a deliberate decision by his attorney as part of his larger trial strategy. Defendant's attorney did not merely decline to object to the prosecutor's closing argument on the DWLS charge; he did not contest that charge at all. He did not object to Pahle's testimony that the certified abstract stated that defendant's license was suspended on August 15, 2014. He did not cross-examine Pahle on this testimony or any other matter relating to DWLS. He did not ask defendant any questions about the status of his

license on August 15, 2014. He did not object to the prosecutor's remarks that defendant now challenges. He did not mention DWLS at all in his closing argument. And his posttrial motion did not raise any claim of error in relation to the DWLS conviction.

¶ 17 Under the circumstances, we must conclude that, in the trial court, defendant did not merely forfeit the claims that he now raises. Instead, his counsel's omission was not inadvertent, but part of a conscious trial strategy. Counsel decided to avoid contesting the DWLS charge in any way.

¶ 18 Defendant does not now claim that counsel was ineffective for choosing this strategy. Even if defendant had raised such a claim, we would recognize that counsel's decision was not unreasonable: he might well have believed that it was wise to concentrate on DUI and improper lane usage and implicitly concede DWLS. The first charge was far more serious than the third, and we know from the record that defendant could produce evidence to contradict Pahle on the first two charges. Apparently, counsel saw no realistic chance of obtaining an acquittal of DWLS and reasoned that it would be more promising to keep the jury focused on the two charges on which he had a chance of prevailing.

¶ 19 There is no basis to invoke the plain-error doctrine, because the forfeiture that defendant now seeks to overcome was part of the trial strategy that he adopted, through counsel, to seek the best result that was realistically possible under the circumstances. Defendant's conviction did not result from the sort of " 'miscarriage of justice' " that is the reason for overlooking forfeiture in a case where the evidence is closely balanced (*Herron*, 215 Ill. 2d at 178 (quoting *People v. Baynes*, 88 Ill. 2d 225, 231 (1981))). Rather, having tested one strategic approach to the case in the trial court, defendant now seeks to use the alternative approach that he rejected earlier. We see no reason to let him have it both ways.

¶ 20 In any event, however, we do not agree with defendant that the evidence was closely balanced, such that the prosecutor's allegedly improper remarks in closing argument might have affected the result. Pahle was shown the abstract and testified plainly that it meant that defendant was driving with a suspended license on August 15, 2014. No evidence contradicted his statement. Although the abstract might well have been a challenge for the jurors to interpret, that is all the more reason to conclude that they would not have doubted the interpretation supplied by a law enforcement officer, with experience in the investigation of traffic offenses. Even were customary plain-error analysis appropriate here, it would not aid defendant. Thus, whatever the possible impact of the prosecutor's closing argument, the evidence of DWLS was not closely balanced.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 22 Affirmed.