2017 IL App (2d) 160494-U
No. 2-16-0494
Order filed August 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JESSICA M. HOGAN, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Kane County. No. 16-DT-131 Honorable Robert J. Morrow, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Jorgensen concurred in the judgment.
Justice McLaren specially concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's petition to rescind her summary suspension: after denying the State's motion for a directed finding, the court granted defendant's petition without allowing the State to present a case-in-chief; thus, we vacated the court's ruling and remanded the cause for further proceedings.

¶ 2 Defendant, Jessica M. Hogan, rear-ended another vehicle on a February evening in 2016. At the hospital, before she had been arrested or had been read the warning to motorists, defendant refused to take a blood test. Later, defendant was arrested for driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2016)). She was handcuffed and

transported to the police station, where she was read the warning to motorists. Defendant refused to submit to a breath test, and on February 5, 2016, her driving privileges were summarily suspended (see 625 ILCS 5/11-501.1(e) (West 2016)). She petitioned to rescind that suspension, arguing, among other things, that she was not properly warned (see 625 ILCS 5/2-118.1(b)(3) (West 2016)). At the hearing on the petition, the trial court granted the State's motion for a directed finding. Defendant moved the court to reconsider that ruling, the court granted that motion, and the court rescinded the suspension. The State moved to be allowed to present its case. The court denied the State's motion, and this timely appeal followed. The pertinent issue raised is whether the State should be allowed to present its case. We determine that it should. Thus, we vacate and remand.

¶ 3 At the hearing on her petition, on March 18, 2016, defendant claimed that the arresting officer, Sean McCoy, lacked probable cause to arrest her for DUI and that he failed to properly warn her about the consequences of failing to submit to chemical testing or submitting to testing that revealed a blood-alcohol level of 0.08 or more. See 625 ILCS 5/2-118.1(b)(2), (b)(3) (West 2016). Evidence presented by defendant at the hearing revealed that McCoy arrived at the scene of an accident and observed substantial damage to both vehicles. In talking to defendant, McCoy learned that defendant had consumed two regular-size martinis between 6:30 and 8 p.m. McCoy asked defendant for her driver's license and proof of insurance, and she gave him her health insurance card. McCoy noticed while talking to defendant that she spoke slowly, her speech was slurred, and her eyes were bloodshot and glassy.

¶ 4 Although defendant did not have any obvious injuries, emergency responders transported her to the hospital. These responders told McCoy that they could smell alcohol on defendant's breath.

¶ 5 At the hospital, a nurse asked defendant to give a urine sample. She failed to do so. McCoy told defendant that, if she did not submit to a urine test, he could ask her to take a blood test pursuant to Illinois State Police rules and regulations. McCoy then asked the nurse to retrieve a blood-test kit. Defendant, who was not under arrest at this point, refused to take a blood test.

¶ 6 McCoy subsequently arrested defendant for DUI, handcuffed her, and transported her to the police station. At the station, McCoy asked defendant to complete some field sobriety tests, and defendant refused to do so. McCoy then read verbatim to defendant the warning to motorists; he asked defendant to take a breath test; and defendant refused to complete a breath test.

¶ 7 After defendant presented all of her evidence, the State moved for a directed finding, and defendant moved for "summary judgment." The trial court denied defendant's motion for summary judgment and granted the State's motion for a directed finding. On April 3, 2016, defendant moved the court to reconsider, and on May 27, 2016, the court granted the motion, immediately granting defendant's petition to rescind the statutory summary suspension of her driving privileges. On June 23, 2016, the State filed a "Motion for Hearing Following Motion to Reconsider," claiming that, because the court determined that defendant established a *prima facie* case for rescission, the burden shifted to the State to present evidence in support of denying the petition. Because the State had not had the opportunity to present such evidence, it claimed that it should be allowed to do so. On June 24, 2016, the court denied the State's motion.

¶ 8 At issue in this appeal is whether this case must be remanded to allow the State to put on its case. Because resolution of this issue does not require us to defer to any factual findings or

credibility determinations the trial court made, our review is *de novo*. See *People v. Chapman*, 194 Ill. 2d 186, 217 (2000) ("*De novo* review is appropriate *** when there are no factual or credibility disputes, and the appeal therefore involves a pure question of law.").

¶ 9 In resolving the issue raised, we find instructive *People v. Elliott*, 162 Ill. App. 3d 542 (1987). There, at a hearing on a motion to suppress evidence, the defendant called the arresting officer. *Id.* at 543. During the State's cross-examination of that officer, the trial court interrupted the State and asserted that it was going to grant the motion to suppress. *Id.* When the State asked to continue with its cross-examination, the court refused to allow it to do so or to present its own case. *Id.* at 544. In reversing the trial court, this court held:

> "Fundamental to the concept of an adversary proceeding is that each side have the opportunity to cross-examine the other side's witnesses and present witnesses of its own. At a hearing on a motion to suppress evidence, the State has the right to present evidence. [Citation.] The right to present evidence is a substantial right. [Citation.] Were a trial court similarly to prevent a defendant from presenting his defense at trial, the resulting violation of due process would require reversal of a conviction." *Id.* at 544-45.

We concluded that "the trial judge's premature remarks and ruling denied the State a fair and impartial hearing. The heavy case load placed upon each judge requires expeditious handling of all matters, but the State does have a right to present evidence, and that right cannot be abridged no matter how well motivated." *Id.* at 545.

¶ 10 We observe that here, unlike in *Elliott*, the State made an offer of proof as to what it would present in its case-in-chief. Specifically, the State asserted that it would present the warning to motorists that defendant signed at the police station and a recording of what transpired there. The trial court persisted in refusing to allow the State to present its case,

reasoning that the State's evidence would not affect its decision. However, these facts do not support a distinction of *Elliott*.

¶ 11 When a trial court excludes evidence, an offer of proof enables the reviewing court to determine whether the exclusion was proper (or, if improper, harmless). See *People v. Way*, 2017 IL 120023, ¶ 33. In that circumstance, if a party fails to make an offer of proof, that party forfeits any challenge to the exclusion. See *People v. Peeples*, 155 Ill. 2d 422, 458 (1993). In *Elliott* and in this case, however, the trial court did not merely exclude evidence; it foreclosed the State's entire case-in-chief. In *Elliott*, the State made no offer of proof as to what it would present in its case-in-chief, yet we did not hold that the State had forfeited the issue by failing to specify what it would have presented. Instead we held that, having been denied its "right to present evidence"—*regardless* of what it would have presented—the State was denied "a fair and impartial hearing." *Elliott*, 162 Ill. App. 3d at 545.

¶ 12 Although here the State made an offer of proof, the same result obtains. Even if the State's evidence indeed would not have affected the outcome—and we emphasize here that we are expressing no opinion on that point—the trial court's denial of the State's right to present it denied the State a fair and impartial hearing. No matter what the State would have presented, we cannot deem this error harmless. In *Elliott* we confirmed this by drawing an analogy to the denial of a defendant's right to present evidence at a criminal trial. Definitively, that denial cannot be harmless. See *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury."); *id.* at 579 (instructional error there could be deemed harmless because, among other things, the defendant "received a full opportunity to put on evidence"). Thus, here, in accordance with *Elliott*, the trial court committed reversible error,

regardless of the strength of the State's offer of proof and, indeed, regardless of whether the State even made one.

¶ 13 Because the State was denied its right to present its case, and thus was denied a fair and impartial hearing, we vacate the order granting defendant's petition to rescind and we remand this cause for further proceedings. See *Elliott*, 162 Ill. App. 3d at 545. Upon remand, the State must be permitted to present its own evidence. *Id.* Once the State has done so, and defendant has had the opportunity to cross-examine any witnesses and to offer any rebuttal, the court then must rule on the petition to rescind. *Id.* Again we emphasize that we offer no opinion on the strength of the State's evidence or on the ultimate merits of defendant's petition.

¶ 14 For the reasons stated, we vacate the judgment of the circuit court of Kane County and remand this cause for further proceedings.

¶ 15 Vacated and remanded.

¶ 16 Justice McLaren, specially concurring.

¶ 17 I specially concur because I believe the procedural character of this case is distinguishable from *Elliott*. In *Elliott* the trial court exhibited a refusal to allow cross examination and cut the State off. In this case, the hearing was completed, a motion to reconsider was granted, and the case would have had to be scheduled for a continuation of the proceedings to allow the State to present its evidence. The trial court refused to reset the matter, and an offer of proof was made. I believe the offer of proof raises sufficient issues of fact that could reasonably alter the outcome of the case.

¶ 18 I believe it was an abuse of discretion not to allow the State to present its evidence. In *Elliott* prejudice was palpable. Rather than presume prejudicial error, as did *Elliott*, I conclude the State has established prejudicial error.[1]

[1] Any manifestation of the term prejudice is absent in *Elliot*.