2013 IL App (3d) 120149-U

Order filed May 14, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	Grundy County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0149
v.	)	Circuit Nos. 09-CF-189 and 09-DT-108
	)	
JASON E. SMITH,	)	Honorable
	)	Lance R. Peterson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The evidence at trial was sufficient to convict defendant of aggravated driving under the influence of drugs. (2) Counsel was not ineffective where the record did not show that counsel failed to challenge the sufficiency of the State's evidence. (3) Defendant's three-year sentence was not an abuse of discretion.

¶ 2 Following a jury trial, defendant, Jason E. Smith, was found guilty of two counts of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(4), (a)(5), (d)(1)(C) (West 2008)) and one count of misdemeanor DUI (625 ILCS 5/11-501(a)(6) (West 2008)). The trial

court sentenced defendant to three years' imprisonment on one count of aggravated DUI and merged the remaining counts. 625 ILCS 5/11-501(a)(4), (d)(1)(C) (West 2008). Defendant appeals, arguing that: (1) he was not proven guilty beyond a reasonable doubt; (2) counsel was ineffective for failing to argue at trial that the State's evidence was insufficient; and (3) his sentence was excessive. We affirm.

¶ 3 FACTS

¶ 4 On December 2, 2009, defendant was charged by indictment with multiple counts of aggravated DUI based on his committing DUI while involved in a motor vehicle accident with Christine Suroski on July 19, 2009. See 625 ILCS 5/11-501(d)(1)(C) (West 2008). The cause proceeded to a jury trial on a total of four counts. Count I alleged that defendant drove while under the influence of any drug or combination of drugs to a degree that rendered him incapable of driving safely, and was involved in a motor vehicle accident. 625 ILCS 5/11-501(a)(4), (d)(1)(C) (West 2008). Count II alleged that defendant drove while under the combined influence of alcohol, drugs, or intoxicating compounds to a degree that rendered him incapable of driving safely, and was involved in a motor vehicle accident. 625 ILCS 5/11-501(a)(5), (d)(1)(C) (West 2008). Count III alleged that defendant drove while there was any amount of a drug, substance, or compound in his breath, blood, or urine resulting from unlawful use or consumption, and was involved in a motor vehicle accident. 625 ILCS 5/11-501(a)(6), (d)(1)(C) (West 2008). Count IV was charged by uniform traffic citation and alleged the same conduct as in count III, except that it did not enhance the offense for defendant's involvement in a motor vehicle accident. 625 ILCS 5/11-501(a)(6) (West 2008).

¶ 5 At trial, David Weiss, an occurrence witness to the accident, testified that at 5:30 a.m. on

the day of the accident, he was driving on Interstate 80. Weiss was in the right-hand lane going 65 miles per hour when he noticed a black SUV in his rearview mirror driving entirely on the shoulder of the road for approximately 30 seconds. As the SUV approached Weiss's vehicle, it traveled directly from the shoulder into the left-hand lane and passed him at a high rate of speed. Soon after the SUV passed Weiss, he lost sight of the vehicle. Less than one minute later, Weiss saw a car accident with two vehicles on the side of the road. Weiss saw the SUV that had passed him earlier rolled over in the ditch.

¶ 6 Suroski testified that on the morning of the accident, she was driving her company pickup truck to work on Interstate 80. The truck was equipped with reflectors across the bumper and rear of the vehicle. Suroski was driving approximately 63 miles per hour in the right-hand lane when she noticed a black SUV swerve around another vehicle and approach her truck at about 90 miles per hour. When the SUV was approximately 15 car lengths behind her, she witnessed it swerve from the right-hand lane onto the shoulder of the road. The SUV drove on the shoulder for approximately four car lengths. The SUV swerved back from the shoulder to the right-hand lane while traveling at a high rate of speed. The SUV continued to approach the rear of Suroski's vehicle and was angled toward the left-hand lane when it hit the rear of her truck. The accident caused Suroski's truck to veer into the ditch off the side of the road.

¶ 7 Dr. Sean Atchison testified that he was the emergency room physician who treated defendant at the hospital following the accident. Defendant was in serious condition when he arrived at the hospital. Due to the nature of defendant's injuries, Atchison was unable to observe defendant's ability to walk or balance. Atchison ordered the collection and testing of defendant's blood and urine for purposes of medical treatment. Defendant's blood sample was collected at

6:43 a.m. that morning, and his urine was collected at 7:40 a.m. The blood test revealed defendant had a blood alcohol content of 0.067. The urine test revealed a positive result for cannabis and amphetamines. Atchison testified that alcohol, cannabis, and amphetamines can be mind or body altering substances. These substances may cause an alteration in one's normal judgment. Defendant's medical records indicated that defendant was prescribed Adderall, which was a form of amphetamine that could show up as such on a drug screen.

¶ 8 Illinois State Police Trooper John Baudino testified he was dispatched to the scene of a two-car accident. Baudino observed a black SUV on its side in the ditch, and defendant was lodged in the driver's side. Baudino detected an odor of alcohol on defendant, and he had some confused speech. When defendant was pulled out of the SUV, he told Baudino that he was not driving. Defendant was immediately taken to the hospital. At approximately 9:30 a.m. on the morning of the accident, additional blood and urine samples were collected from defendant to be analyzed by the Illinois State Police laboratory.

¶ 9 Jennifer Bash, a forensic toxicologist with the Illinois State Police, testified that she analyzed defendant's blood and urine for the presence of alcohol and other drugs. The results revealed that defendant had cannabis and amphetamines in his system, and had a blood alcohol content of 0.017. Specifically, the urine specimen showed the presence of a tetrahydrocannabinol (THC) metabolite, amphetamines, and phenylpropanol. Bash noted that Adderall is an amphetamine. With regard to the THC found in defendant's urine, Bash testified that a person could test positive for THC after quitting, but this usually only occurs if the person was a chronic user. The testing Bash used in the urine analysis ruled out the likelihood of a false positive, including passive inhalation of marijuana. Bash further testified that there is an active

ingredient in Prozac which causes it to have an additive effect when consumed with alcohol. The combination of the drugs could have a synergistic effect, in that a person would feel the effects of the alcohol more rapidly.

¶ 10 The State rested, and defendant moved for a directed verdict, arguing that the State had not met its burden of proof. The trial court denied defendant's motion.

¶ 11 Defendant testified that he was first prescribed Prozac and Adderall in March 2009. Defendant admitted to taking these medications as prescribed on the date of the offense. Defendant did not have a recollection of the accident, but did remember turning the wheel sharply, hitting the brakes, and waking up in the hospital. Defendant testified that he had not smoked marijuana in five or six years, noting that he could get fired from his job if he tested positive. Defendant admitted he had three drinks over the course of five or six hours that night.

¶ 12 During closing arguments, defense counsel acknowledged that defendant was driving on the day of the offense and was involved in an accident. Counsel, however, argued that the State failed to prove the remaining elements beyond a reasonable doubt, including that there was insufficient evidence to prove that defendant was driving under the influence. Specifically, counsel argued that driving fast does not prove that defendant was impaired.

¶ 13 The jury found defendant guilty of two counts of aggravated DUI (count I and II) (625 ILCS 5/11-501(a)(4), (a)(5), (d)(1)(C) (West 2008)) and one count of misdemeanor DUI (count IV) (625 ILCS 5/11-501(a)(6) (West 2008)). Defendant filed a motion for new trial, alleging, in part, that the State failed to prove every material allegation in the indictment beyond a reasonable doubt. The trial court denied defendant's motion.

¶ 14 At sentencing, the State called Suroski, who testified that she suffered from severe

injuries due to the accident, including a broken arm, broken ribs, a concussion, and a gash on her forehead. Suroski had undergone multiple surgeries as a result of her injuries and anticipated that more would be needed. She had not yet returned to work at AT&T because her job duties could not accommodate her restrictions. She was permanently restricted from lifting more than five pounds and doing repetitive movements with her right arm. She also could not bend, lift, or twist due to her back surgeries. Suroski suffered from a lot of pain and needed to walk with a cane. Suroski's pain prevented her from engaging in recreational activities and maintaining her rental properties. Since the accident, she was taking medication for depression and found it difficult to sleep.

¶ 15 Next, defendant called Paul Ankin, defendant's attorney for a car accident defendant was involved in since the instant offense. Ankin described defendant as honest and responsible. Defendant's pipefitter apprenticeship required drug and alcohol testing, which he had never failed in the four years he had been in the program. If defendant were unable to finish the last year of his apprenticeship, he would be thrown out and unable to return.

¶ 16 Anthony Szambelan, defendant's foreman, testified that defendant was a responsible and respectful employee and a very good apprentice. Donald Boyer, defendant's stepfather, and Katherine Boyer, defendant's mother, testified that defendant had helped out with their recoveries following surgery and with fundraising for veterans. Defendant also helped take care of his young niece and nephew.

¶ 17 Defendant testified and made a statement in allocution. Defendant stated that on the day of the offense, he was the designated driver and was driving his intoxicated brother home. Defendant only had a small amount to drink that night. He did not remember much about the

accident, but admitted that it was his fault and was sorry for what had happened. Defendant submitted numerous letters from friends and family on his behalf.

¶ 18 Defendant's presentence investigation report (PSI) indicated that defendant had felony convictions for delivery of cannabis and theft. Defendant was sentenced to probation for both of these offenses, but defendant was resentenced on the delivery of cannabis charge following the revocation of his probation. Defendant had misdemeanor convictions for theft and possession of cannabis, in addition to dispositions for petty offenses and traffic violations. Defendant also had delinquency adjudications for theft and two counts of possession of drug paraphernalia, and had been found in indirect criminal contempt.

¶ 19 In sentencing defendant, the trial court considered the evidence at trial, the PSI, the factors in aggravation and mitigation, and defendant's statement in allocution. The court found the letters from defendant's friends and family weighed against a finding that defendant's conduct was likely to recur. The court, however, found this mitigating evidence counterbalanced by defendant's criminal history throughout his life and his probation violation. The court also found that defendant caused serious harm to Suroski and a sentence was necessary to deter others, noting that defendant had just finished his probation a few months before the instant offense. The trial court merged all three convictions into a single conviction for aggravated DUI of drugs (count I) (625 ILCS 5/11-501(a)(4), (d)(1)(C) (West 2008)) and sentenced defendant to three years' imprisonment on this count. Defendant's motion to reconsider sentence was denied by the trial court. Defendant appeals.

¶ 20 ANALYSIS

¶ 21 I. Sufficiency of the Evidence

¶ 22 Defendant first argues on appeal that the State failed to prove beyond a reasonable doubt that he was guilty of aggravated DUI of drugs, aggravated DUI of alcohol and drugs, and misdemeanor DUI.

¶ 23 When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011); *People v. Collins*, 106 Ill. 2d 237 (1985). The reviewing court must construe all reasonable inferences in favor of the State. *People v. Bush*, 214 Ill. 2d 318 (2005). It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Ross*, 229 Ill. 2d 255 (2008). The trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *Id.* We will not set aside a defendant's conviction unless the evidence was so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d 1.

¶ 24 Initially, we note that defendant was found guilty of three counts of DUI, but was only sentenced on the DUI of drugs count. 625 ILCS 5/11-501(a)(4) (West 2008). We will review the sufficiency of this judgment, and only if we reverse for insufficient evidence will we address the merged counts of DUI. See *People v. Dixon*, 91 Ill. 2d 346 (1982) (allowing reinstatement of unsentenced conviction for a lesser charge when the greater conviction was vacated).

¶ 25 To sustain a charge of aggravated driving under the influence of a drug, the State must prove that defendant: (1) drove a vehicle; (2) while under the influence of a drug or combination of drugs; (3) to a degree which rendered him incapable of safely driving; and (4) was involved in

a motor vehicle accident, where his driving under the influence was the proximate cause of great bodily harm to another. See 625 ILCS 5/11-501(a)(4), (d)(1)(C) (West 2008).

¶ 26 It is undisputed that defendant was driving on the day of the offense, took Adderall, and was involved in a motor vehicle accident which caused great bodily harm to Suroski. Furthermore, although defendant testified that he did not use cannabis, his urine screen revealed the presence of cannabis, in addition to amphetamines. Thus, the only issue before us on appeal is whether the State sufficiently proved that defendant's ingestion of a drug or combination of drugs impaired his ability to drive safely. See *People v. Martin*, 2011 IL 109102.

¶ 27 After viewing the evidence regarding impairment in the light most favorable to the State, we hold that a rational trier of fact could have found beyond a reasonable doubt that defendant was under the influence of amphetamines or amphetamines combined with cannabis, which rendered him incapable of driving safely. Suroski and Weiss saw defendant operating his vehicle in an erratic and dangerous manner just before the accident. Suroski and Weiss witnessed defendant drive on the shoulder of the road and swerve between the lanes of traffic. Suroski estimated defendant's speed at approximately 90 miles per hour. In addition, Dr. Atchison testified that cannabis and amphetamines can be mind or body altering substances. He also stated that these substances may cause an alteration in one's normal judgment. The expert testimony from Bash established that amphetamines included drugs such as Adderall, which defendant admitted taking.[1]

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[1] There was also evidence that defendant took Prozac; however, since there was no evidence regarding the nature and effect of Prozac independent of alcohol, we did not consider it to support defendant's conviction. See *People v. Vente*, 2012 IL App (3d) 100600 (holding that it

¶ 28 Defendant's erratic driving, when viewed in combination with the test results showing the presence of amphetamines and cannabis and Dr. Atchison's testimony that amphetamines and cannabis have a mind-altering effect, was sufficient to support a finding that defendant was under the influence of drugs which impaired his ability to drive safely. *Cf. People v. Workman*, 312 Ill. App. 3d 305 (2000) (reversing a DUI of a drug where there was no evidence that defendant drove erratically, that the drug had physiological effects, or that defendant in fact ingested the drug). We acknowledge that there was arguably stronger evidence to support defendant's impairment from the combined effect of alcohol and Prozac. Nevertheless, given our highly deferential standard of review, there was sufficient proof that defendant's driving impairment was from his use of Adderall alone or in combination with his use of cannabis. Therefore, we conclude that the evidence at trial was not so improbable or unsatisfactory that it raised a reasonable doubt of defendant's guilt. See *Beauchamp*, 241 Ill. 2d 1.

¶ 29 II. Ineffective Counsel

¶ 30 Next, defendant argues that trial counsel was ineffective for failing to argue there was insufficient evidence to prove that: (1) the drugs, alcohol, or combination of both rendered defendant unsafe to drive; and (2) the drugs detected in defendant's system were from unlawful use.

¶ 31 To prevail on a claim of ineffective assistance of trial counsel, defendant must establish

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is not illegal for a person to drive a vehicle while lawfully using prescription medications, so long as such use does not render the driver incapable of driving safely); *People v. Vanzandt*, 287 Ill. App. 3d 836 (1997) (noting that if use of a drug would not independently render defendant incapable of driving safely, it will not sustain a charge for DUI of a drug).

that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Manning*, 241 Ill. 2d 319 (2011). Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003).

¶ 32 Our review of the record in this case reveals trial counsel did not render ineffective assistance because counsel's performance did not fall below an objective standard of reasonableness. Defendant argues that counsel failed to argue that the State's evidence was insufficient regarding impairment. The record, however, shows that counsel did challenge the State's evidence when counsel moved for a directed verdict and argued in closing arguments and in a motion for new trial that the State's evidence was insufficient to prove defendant was driving under the influence. Thus, the record directly contradicts defendant's claim that counsel's performance was deficient.

¶ 33 Additionally, the claim concerning counsel's failure to argue that the State did not prove that the drugs in defendant's system, relating to the misdemeanor DUI charge, resulted from unlawful use is without merit. The misdemeanor DUI defendant was found guilty of required proof that defendant drove a motor vehicle while there was any amount of a drug, substance, or compound in defendant's breath, blood, or urine resulting from unlawful use or consumption. See 625 ILCS 5/11-501(a)(6) (West 2008). Here, defendant's drug screen revealed cannabis in his urine. Possession of cannabis is unlawful *per se*; thus, unlawfulness is not a separate element of the offense. See 720 ILCS 550/4 (West 2008); *cf. People v. Rodriguez*, 398 Ill. App. 3d 436 (2009) (holding that the State only has to prove that defendant drove after using or consuming a

controlled substance). As a result, there was no need for counsel to argue that the State failed to prove defendant's use of cannabis was unlawful because defendant violated section 11-501(a)(6) simply by driving with cannabis in his system. See *Martin*, 2011 IL 109102. Accordingly, defendant failed to meet the first prong of *Strickland* for both of his claims; therefore, he cannot show he received ineffective assistance from his trial counsel. See *Graham*, 206 Ill. 2d 465.

¶ 34 III. Excessive Sentence

¶ 35 Finally, defendant argues that his three-year sentence was excessive in light of his rehabilitative potential and the fact that this was his first DUI.

¶ 36 The Illinois Constitution mandates that all penalties be determined according to both the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. However, the determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205 (2010). A trial court is in a far better position than an appellate court to fashion an appropriate sentence, based upon firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id.* Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Id.*

¶ 37 Aggravated DUI is a Class 4 felony punishable by a sentence of 1 to 12 years' imprisonment. 625 ILCS 5/11-501(a)(4), (d)(1)(C), (d)(2)(A), (d)(2)(F) (West 2008). A sentence that falls within the statutory range does not amount to an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796

(2007). Here, we do not find defendant's three-year sentence, which fell in the low end of the sentencing range, to be an abuse of discretion.

¶ 38 The record reveals that the trial court explicitly considered all mitigating and aggravating factors before pronouncing its sentence. Although defendant contends that his sentence was excessive in light of his rehabilitative potential, we find no error in this regard because he seriously injured Suroski during the accident, causing permanent injuries. See *Alexander*, 239 Ill. 2d 205; *People v. Shaw*, 351 Ill. App. 3d 1087 (2004) (trial court was not required to give greater weight to defendant's rehabilitative potential and other mitigating factors than to the circumstances of the offense). Moreover, even though this was defendant's first DUI, the court expressed concern regarding defendant's violation of probation and his multiple felony and misdemeanor convictions. In addition, the court found defendant's sentence necessary to deter others. Defendant is merely asking us to substitute our judgment for that of the trial court in weighing the factors, which we cannot do. See *Alexander*, 239 Ill. 2d 205.

¶ 39 Therefore, in light of these aggravating factors presented at sentencing and the nature of the offense, we cannot say that the court abused its discretion when it weighed the factors and found a sentence of three years' imprisonment appropriate. *Id.*

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Grundy County is affirmed.

¶ 42 Affirmed.