2012 IL App (4th) 100818-U

Filed 1/10/12

NO. 4-10-0818

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DOUGLAS SLEIGHT,	)	No. 09CF1829
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The court (1) affirmed defendant's conviction for aggravated DUI, finding the trial court did not err in (a) allowing expert testimony on the length of time cocaine stays in the body where the expert was qualified to offer such testimony, and (b) sentencing defendant where the factors considered in aggravation were proper; and (2) vacated defendant's $200-DNA-analysis fee because he previously submitted a DNA sample.

¶ 2 In June 2010, a jury convicted defendant, Douglas Sleight, of driving with a drug, substance, or compound in his breath, blood, or urine (625 ILCS 5/11-501(d)(2)(E) (West Supp. 2009)). Because of defendant's five prior DUI violations, the offense was aggravated DUI, a Class X felony. In August 2010, the trial court sentenced defendant to 20 years' imprisonment, ordered him to submit a deoxyribonucleic acid (DNA) sample, and imposed a $200 DNA-analysis fee. Defendant appeals, arguing (1) the court erred in (a) admitting expert testimony by an unqualified witness, and (b) considering an element inherent in the crime in aggravation

during sentencing; and (2) his DNA-analysis fee should be vacated because he previously submitted a DNA sample. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In October 2009, the State charged defendant by information with one count of aggravated driving with a drug, substance, or compound in his breath, blood, or urine (625 ILCS 5/11-501(d)(2)(D) (West Supp. 2009))(count I), a Class 1 felony. In June 2010, the State amended defendant's charges by dismissing count I and filing counts II and III. Count II charged defendant with aggravated driving under the combined influence of alcohol and drugs (625 ILCS 5/11-501(d)(2)(E) (West Supp. 2009)), a Class X felony, and count III charged defendant with aggravated driving with a drug, substance, or compound in his breath, blood, or urine (625 ILCS 5/11-501(d)(2)(E) (West Supp. 2009)), a Class X felony. Defendant pleaded not guilty and requested a jury trial. The evidence introduced at defendant's trial showed the following.

¶ 5 Rantoul police officer Kyle Donovan stopped defendant's vehicle a little after midnight, after defendant twice failed to signal when turning. While speaking with defendant, Donovan detected an odor of an alcoholic beverage coming from the vehicle. Donovan asked defendant if he had been drinking, and defendant told Donovan he had consumed three or four beers. Because he suspected defendant might be under the influence of alcohol, Donovan asked defendant to step out of the vehicle and participate in field sobriety tests. Defendant told Donovan one of his legs was shorter than the other, and he had taken an antidepressant medication earlier. Defendant admitted he probably should not have been drinking alcohol while taking the antidepressant.

¶ 6 The first test Donovan administered was the one-legged-stand test, which

defendant failed. Donovan then administered the walk-and-turn test, which defendant also failed. Based on defendant's performance on the field sobriety tests, Donovan placed defendant under arrest for driving under the influence (DUI), and he was transported to the police station.

¶ 7 At the police station, defendant submitted to a Breathalyzer test to determine his blood alcohol content (BAC). The results of defendant's Breathalyzer test showed a 0.017 BAC, well below the 0.08 legal limit. Though the results of defendant's Breathalyzer test surprised Donovan, he believed defendant might be under the influence of drugs. Donovan testified defendant's pupils were very constricted, and he found a piece of Brillo pad under the driver's seat in defendant's car, which is "commonly used as a filter system for a crack pipe." Donovan did not take the Brillo pad into evidence.

¶ 8 Donovan asked defendant to submit a urine sample to determine whether he had any drugs in his system. Defendant refused to give a urine sample because he ingested cocaine the day before and knew the test would come back positive for cocaine. Donovan then released defendant from custody.

¶ 9 On cross-examination, Donovan stated the fact one of defendant's legs was shorter than the other could have affected his performance on the field sobriety tests. Donovan also testified he did not make any attempt to regain access to defendant's car and recover the Brillo pad for drug testing after defendant passed the Breathalyzer test. Finally, Donovan testified Brillo pads were commonly used for legal purposes.

¶ 10 Rantoul police officer Greg Willard testified he responded to the area where Donovan stopped defendant. Willard provided backup for Donovan but did not participate in or observe Donovan's investigation. After Donovan arrested defendant, Willard transported him to

the police station. At the police station, Willard initiated the Breathalyzer process by reading defendant the warning to motorist, but Donovan arrived shortly thereafter and took over.

¶ 11 Michael Carey testified he currently was in charge of drug testing for Champaign County and had been a probation officer for over 20 years. Carey had conducted tests on urine samples collected all over the county since 1992 and was the head of the drug testing lab. Carey received extensive training from various laboratories over the years and eventually became a police instructor on toxicology, pharmacology, drug testing, adulterations, and how people attempt to beat drug tests. Carey also stated he had significant training on the effects of drugs on people who use them and how drugs persist in the human body after ingestion. The State tendered Carey as an expert witness in the fields of pharmacology and toxicology, and defense counsel conducted *voir dire* regarding Carey's qualifications.

¶ 12 During *voir dire*, Carey testified he received a bachelor's degree in physical education, and he did not have a degree in any other subject. All the training Carey completed regarding pharmacology and toxicology had been in connection with his job as a probation officer. In addition, Carey testified he had no training in the testing of blood. The State then conducted redirect examination of Carey regarding his qualifications as an expert.

¶ 13 During redirect examination, Carey testified he participated in extensive ongoing education courses. Carey further testified he was certified by the Illinois Association of Drug Court Professionals, the Illinois Probation and Court Services Association, Siemens Laboratory, and Roesch Laboratories, and Abbott Laboratories. The trial court then admitted Carey as an expert witness over defense counsel's objection, and the State began its direct examination.

¶ 14 On direct examination, Carey stated he had some expertise on how cocaine works

inside the body once it is ingested. Carey also corroborated Donovan's testimony regarding Brillo pads commonly being used to smoke cocaine. Carey testified the effects of cocaine are typically felt within five minutes of ingestion and last anywhere from 20 minutes to 1 hour. Once cocaine enters the body, it makes its way to the brain and then the kidneys before it is flushed out of the individual's system. Typically cocaine can be detected in a urine sample for two to four days. Carey stated a person who ingested cocaine the day before would test positive for cocaine if they submitted a urine sample for testing. Carey testified this time frame was based on studies conducted by both government and private entities. Carey went on to testify a positive test result is "assured" within 48 hours of ingestion, but a positive test result becomes less sure when the sample is taken more than 48 hours after ingestion.

¶ 15 On cross-examination, Carey stated he did not conduct any tests on a urine sample from defendant in the present case. Carey also testified cocaine could move through an individual's body a little faster or slower based on factors such as metabolism and the amount of fluids the person ingested, but he stated the purity and amount of cocaine ingested would not affect its passage through the body. Finally, Carey testified an individual could be under the influence for up to four hours after ingesting cocaine but not after 12 to 24 hours. After Carey's testimony, both parties rested.

¶ 16 The jury found defendant not guilty on count II and guilty on count III. The trial court set the matter for sentencing on August 4, 2010. Defense counsel filed a motion for acquittal or new trial, arguing, *inter alia*, the court erred in certifying Carey as an expert witness because he was not qualified based on his education and experience. Prior to sentencing, defendant was diagnosed with stage-four lung cancer, and on July 26, 2010, he underwent brain

surgery for a metastatic brain mass. On July 27, 2010, the court continued defendant's sentencing to August 25, 2010. On August 25, 2010, the court denied defendant's motion for acquittal or new trial.

¶ 17 During the sentencing phase of the August 25, 2010 hearing, the State requested an 8- to 10-year sentence based on the harm defendant posed to the public by driving under the influence. Defense counsel argued defendant's medical condition was a mitigating factor and requested a six-year sentence. Defendant's presentence report showed five previous DUI convictions and one felony conviction for unlawful possession of a controlled substance. While discussing defendant's sentence, the trial court stated:

> "I have reviewed the presentence report in this matter. It is a lengthy presentence report which demonstrates a lengthy battle with alcohol and substances, which has repeatedly put the People of the State of Illinois in danger through driving.
>
> I have considered the medical evidence that has been presented to the court and agree with the State that that is a mitigating factor. *** I disagree with the State to the extent of its suggestion of how mitigating it is based upon this record and based upon what the court perceives as a very real danger to the public from this defendant."

The court then rejected both parties' sentencing recommendations, sentenced defendant to 20 years' imprisonment, and assessed a $200 DNA-analysis fee.

¶ 18 In September 2010, defendant filed a motion to reconsider his sentence, arguing

the trial court gave too much weight in aggravation to defendant's criminal history and too little in mitigation to his medical condition. In the same month, defendant also filed a motion to vacate his sentence, arguing the sentence the court imposed was unlawful. In October 2010, the court denied both motions.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues (1) the trial court erred in (a) certifying Carey as an expert witness because he was not qualified and (b) considering an element inherent in the offense as an aggravating factor during sentencing; and (2) the $200 DNA-analysis fee should be vacated because defendant previously submitted a DNA sample. The State concedes defendant's DNA-analysis fee should be vacated but contends the court did not err in certifying Carey as an expert witness and did not consider an element inherent in the offense during sentencing.

¶ 22 A. Expert Witness Testimony

¶ 23 "A trial court should allow expert testimony only if (1) the proffered expert has knowledge and qualifications uncommon to laypersons that distinguish him as an expert; (2) the expert's testimony would help the jury understand an aspect of the evidence that it otherwise might not understand, without invading the province of the jury to determine credibility and assess the facts; and (3) the expert's testimony would reflect generally accepted scientific or technical principles." *People v. Simpkins*, 297 Ill. App. 3d 668, 681, 697 N.E.2d 302, 310 (1998). "Expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education." *Snelson v. Kamm*, 204 Ill. 2d 1, 24, 787 N.E.2d 796, 809 (2003). "The decision of whether to admit expert testimony is within the sound discretion of the

trial court [citation], and a ruling will not be reversed absent an abuse of that discretion [citation]." *Id*. The burden of establishing a witness's expertise rests on the party offering the testimony. *People v. Kane*, 223 Ill. App. 3d 377, 384, 584 N.E.2d 1044, 1048 (1991).

¶ 24 Here, the State presented testimony by Carey as an expert on detecting drugs in urine samples and how the body metabolizes cocaine after ingestion. Carey's qualification testimony showed he (1) had almost 20 years of experience in analyzing urine samples for the presence of drugs, (2) received extensive training regarding the effects of drugs on the individuals who use them, and (3) had expertise on how the human body processes cocaine once it is ingested. Carey's direct testimony (1) showed he had knowledge of how the human body metabolizes cocaine beyond the knowledge of a layperson, (2) was helpful on the issue of whether defendant was under the influence of cocaine or had cocaine in his system when he drove, and (3) was based on commonly accepted scientific data. We conclude the trial court did not abuse its discretion in certifying Carey as an expert witness on the amount of time cocaine remains in the system after ingestion.

¶ 25 B. Factors Considered at Defendant's Sentencing

¶ 26 The imposition of a sentence is a matter of judicial discretion for the trial court, and this court may not disturb the trial court’s sentencing determination absent an abuse of its discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). A proper sentence balances the seriousness of the offense with the defendant’s rehabilitative potential. Ill. Const. 1970, art. I, § 11. "The trial court may consider the nature of the offense, including the circumstances and extent of each element as committed, as a factor when imposing a sentence." *People v. Csaszar*, 375 Ill. App. 3d 929, 951, 874 N.E.2d 255, 273-74 (2007).

¶ 27 Though the trial court has wide discretion in fashioning an appropriate sentence, it is well settled the court may not consider elements inherent in a given offense as aggravating factors at sentencing. *People v. Thomas*, 171 Ill. 2d 207, 226, 664 N.E.2d 76, 86 (1996). The General Assembly has already considered factors inherent to an offense in setting the range of penalties provided by statute. *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004).

¶ 28 Defendant argues the trial court erred in considering his previous DUI convictions in determining defendant posed a threat to the public. Specifically, defendant contends threat to the public is a factor inherent to aggravated DUI because the aggravation is based on previous DUI convictions. However, this court has stated "prior DUI convictions do not constitute an element of an aggravated DUI charge." *People v. Lush*, 372 Ill. App. 3d 629, 634, 867 N.E.2d 1199, 1203 (2007). Further, the risk of serious harm from defendant's conduct and the fact he had an extensive criminal history are both statutory factors in aggravation. See 730 ILCS 5/5-5-3.2(a)(1), (a)(3)((West 2008). Finally, the court's comments regarding the threat defendant poses to society indicate the court was concerned about the future threat of defendant driving under the influence, should he be released from prison. We conclude the court did not abuse its discretion by considering defendant's criminal history and the danger he posed to society in determining an appropriate sentence.

¶ 29 C. Defendant's DNA-Analysis Fee

¶ 30 Defendant argues, and the State concedes, his $200 DNA-analysis fee should be vacated because he previously submitted a DNA sample and paid the analysis fee as ordered in DuPage County case No. 05-CF-584.

¶ 31 Section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)) authorizes a $200 analysis fee when an individual is required to submit a DNA sample. However, once an individual has submitted a DNA sample, requiring another sample serves no purpose. *People v. Marshall*, 242 Ill. 2d 285, 296, 950 N.E.2d 668, 676 (2011). "[S]ince the analysis fee is intended to cover the costs of the DNA analysis, and only one analysis is necessary per qualifying offender, then by extension only one analysis fee is necessary as well." (Internal quotation marks omitted.) *Marshall*, 242 Ill. 2d at 296-97, 950 N.E.2d at 676. Because defendant already submitted a DNA sample, requiring him to submit another sample serves no purpose, and by extension the DNA-analysis fee must be vacated.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the trial court's judgment in part, vacate in part, and remand with directions to issue an amended sentencing judgment to reflect the vacatur of his $200 DNA-analysis fee. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed in part, vacated in part, and cause remanded with directions.