2012 IL App (4th) 110482-U

NO. 4-11-0482

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 20, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KENNETH L. DALTON,	)	No. 10CF2153
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed as modified and remanded with directions where the trial court (1) properly convicted defendant of aggravated driving under the influence (DUI), (2) properly sentenced defendant to a 25-year prison term on aggravated DUI, but (3) erroneously sentenced defendant to an extended 6-year prison term for driving while license revoked (DWLR) because it was not in the class of the most serious offenses of which defendant was convicted.

¶ 2 In December 2010, the State charged defendant, Kenneth L. Dalton, with aggravated driving under the influence (DUI) and driving while license revoked (DWLR). In April 2011, defendant pleaded guilty to the DWLR charge, and, following a trial, a jury convicted defendant of DUI. In May 2011, the trial court entered judgment on the aggravated DUI charge, a Class 2 felony, and thereafter sentenced defendant as a Class X offender to a 25-year prison term based on defendant's prior Class 2 felony convictions. The court also sentenced defendant to a concurrent six-year prison term on the DWLR charge.

¶ 3 Defendant appeals, arguing (1) his felony conviction for aggravated DUI should be reduced to a misdemeanor because his prior convictions were not presented to the jury and the jury found defendant guilty only of DUI, and (2) the trial court lacked authority to impose an extended-term sentence for aggravated DUI. Defendant also asserts, in the alternative, if the trial court's aggravated DUI conviction and 25-year sentence were proper, the court erred by imposing an extended-term sentence on the DWLR conviction because DWLR was not the most serious class of offenses of which defendant was convicted.

¶ 4 We affirm defendant's aggravated DUI conviction and 25-year prison sentence but reduce defendant's 6-year DWLR sentence to 3 years and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In December 2010, the State charged defendant with (1) aggravated DUI, a Class 2 felony (625 ILCS 5/11-501(a)(2), (d)(2)(B) (West 2010)) (count I), based on defendant committing DUI with two prior DUI convictions; (2) aggravated driving with a drug, substance, or compound in his body, a Class 2 felony (625 ILCS 5/11-501(a)(6), (d)(2)(B) (West 2010)) (count II); and (3) DWLR, a Class 4 felony (625 ILCS 6-303(a), (a-5) (West 2010)) (count III).

¶ 7 In April 2011, defendant pleaded guilty to count III, and the State dismissed count II. Thereafter, defendant's trial on count I commenced, at which the parties presented the following evidence.

¶ 8 Champaign County sheriff's deputy Jonathon Reifsteck testified on December 24, 2010, at about 12:30 a.m., he stopped defendant in Champaign County, Illinois, for traveling 61 miles per hour in a 45-mile-per-hour zone. When Reifsteck made contact with defendant, he noticed defendant's eyes were bloodshot and glassy, and Reifsteck could detect a "strong odor of

an alcoholic beverage" on defendant's breath. Upon questioning defendant, Reifsteck noticed defendant's speech "was somewhat slurred." Reifsteck asked defendant to perform field sobriety tests, and defendant agreed. While he was performing the tests, defendant indicated to Reifsteck he needed to use the restroom. Reifsteck refused to allow defendant to do so until defendant completed the tests. During the tests, defendant urinated on himself. The trial court admitted into evidence a video recording of the traffic stop and allowed the State to play the recording for the jury. The State also showed the jury a photograph taken of defendant at the time of his arrest.

¶ 9 Following the field sobriety tests, Reifsteck concluded defendant was under the influence of alcohol. Reifsteck arrested defendant and transported him to jail, where defendant refused to submit to chemical testing. Reifsteck later inventoried defendant's pickup truck and found one 24-ounce Ice House beer can under the driver's seat and three 24-ounce cans in the bed. The cans were open and contained "the minimal amount of a liquid substance that smelled of beer."

¶ 10 Defendant testified he worked as a cook at Montana Mike's restaurant. On December 23, 2012, he worked until 4 p.m. and then helped a friend move furniture. When he returned home later that evening, he watched television with his fiancée. According to defendant, he consumed a lot of water because he felt dehydrated from working in the hot kitchen earlier that day. He denied drinking any alcohol. Around 11:20 p.m., defendant decided to drive to a convenience store to buy a can of beer. As defendant was leaving his house, a friend stopped him and asked for a ride to the store to buy some cigarettes. Defendant agreed.

¶ 11 After buying one can of Ice House beer, defendant "took like a little cruise." During the ride, he drank part of the can of beer and realized he had to urinate so he "tried to

hurry up and get to where [he] could get a place to use the restroom." Defendant saw the flashing lights of a police car in his rearview mirror, so he pulled into a Schnuck's parking lot. When defendant got out of his car, he felt he "had to urinate really bad" and asked Reifsteck if he could use the restroom. Reifsteck did not allow him to do so. Defendant testified he had difficulty completing the field sobriety tests because he "had to urinate really bad." He explained he has "weak kidneys." The urge to urinate intensified during the field tests, and defendant was forced to urinate on himself.

¶ 12 Defendant acknowledged he had previously been convicted twice for burglary.

¶ 13 On this evidence, the jury found defendant guilty of DUI.

¶ 14 In May 2011, defendant filed a motion for judgment of acquittal and new trial. At a hearing later that month, the trial court denied defendant's motion and proceeded to sentencing. Defendant's presentence report indicated defendant had previously been convicted of DUI twice. The report also showed defendant had multiple convictions for burglary, a Class 2 felony. The court sentenced defendant as a Class X felon to a 25-year prison term for aggravated DUI and a concurrent 6-year prison term for DWLR.

¶ 15 In June 2011, defendant filed a motion to reconsider sentence, which the trial court denied following a July 2011 hearing.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends (1) his felony conviction for aggravated DUI should be reduced to a misdemeanor because his prior convictions were not presented to the jury and the jury found defendant guilty only of DUI, and (2) the trial court lacked authority to impose

an extended-term sentence for aggravated DUI. Defendant also asserts, in the alternative, if the trial court's aggravated DUI conviction and 25-year sentence were proper, the court erred by imposing an extended-term sentence on the DWLR conviction because DWLR was not the most serious class of offense of which defendant was convicted.

¶ 19 We address defendant's contentions in turn.

¶ 20 A. Defendant Was Properly Convicted of a Class 2 Felony

¶ 21 Defendant first posits the trial court erred by imposing judgment on a felony conviction for aggravated DUI where the State did not present evidence of defendant's prior convictions to the jury, and the jury found defendant guilty only of DUI, a misdemeanor. As part of his argument, defendant contends his prior convictions were an element that the State needed to prove beyond a reasonable doubt. The State responds defendant was properly convicted of aggravated DUI because his prior DUI convictions were not an element that the prosecution needed to present at trial.

¶ 22 The interpretation of an Illinois statute is a question of law, which we review *de novo*. *People v. Lucas*, 231 Ill. 2d 169, 174, 897 N.E.2d 778, 781 (2008).

¶ 23 A person commits DUI, a misdemeanor, when he drives under the influence of alcohol. 625 ILCS 5/11-501(a)(2), (c)(1) (West 2010). A person commits aggravated DUI, a Class 2 felony, when he drives under the influence of alcohol after having been twice convicted of DUI. 625 ILCS 5/11-501(d)(2)(B) (West 2010). Section 111-3(c) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/111-3(c) (West 2010)) sets forth the procedure to be used when the State seeks an enhanced sentence based on a defendant's prior conviction. Section 111-3(c) specifically states "the fact of such prior conviction and the State's

intention to seek an enhanced sentence *are not elements of the offense* and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial." (Emphasis added.) 725 ILCS 5/111-3(c) (West 2010). An "enhanced sentence" is defined as "a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections[.]" 725 ILCS 5/111-3(c) (West 2010).

¶ 24 In *People v. Laskowski*, 287 Ill. App. 3d 539, 541, 678 N.E.2d 1241, 1243 (1997), this court stated pursuant to section 111-3(c) of the Criminal Procedure Code, evidence of the prior commission of two or more DUIs was not an element of the offense of aggravated DUI. Our statement in *Laskowski* is supported by our recent decision in *People v. Brooks*, 2012 IL App (4th) 100929, 966 N.E.2d 590. In *Brooks*, this court considered section 111-3(c) in the context of determining whether the State was required to prove to a jury a defendant's prior unlawful restraint conviction. In *Brooks*, the State charged the defendant with "violation of an order of protection—subsequent offense felony." (Internal quotation marks omitted.) *Brooks*, 2012 IL App (4th) 100929, ¶ 3, 966 N.E.2d at 591. Based on the defendant's prior conviction for unlawful restraint, the charge was a Class 4 felony. *Brooks*, 2012 IL App (4th) 100929, ¶ 3, 966 N.E.2d at 591. The State did not present evidence of the defendant's prior conviction to the jury; rather, the trial court took judicial notice of the defendant's conviction outside the jury's presence. *Brooks*, 2012 IL App (4th) 100929, ¶ 7, 966 N.E.2d at 591. The jury found the defendant guilty of violating an order of protection. *Brooks*, 2012 IL App (4th) 100929, ¶ 8, 966 N.E.2d at 591. On appeal, the defendant argued the State failed to convict him of "violation of an order of protection—subsequent offense felony" because the State was required to prove to the jury, as an

element of the crime, that this was a "subsequent-offense felony." (Internal quotation marks omitted.) *Brooks*, 2012 IL App (4th) 100929, ¶ 25, 966 N.E.2d at 594. In rejecting the defendant's argument, this court noted that section 111-3(c) of the Criminal Procedure Code (1) specifically prohibited the State from introducing proof of the prior conviction to the jury, and (2) stated that the fact of a prior conviction is not an element of the crime charged. *Brooks*, 2012 IL App (4th) 100929, ¶ 26, 966 N.E.2d at 594.

¶ 25 Based on the reasoning set forth in *Brooks*, as well as the plain language of the statute and this court's decision in *Laskowski*, we conclude the State was not required to prove defendant's prior DUI convictions to convict defendant of aggravated DUI. Section 111-3(c) of the Criminal Procedure Code expressly states a prior conviction is not an element of the crime charged. 725 ILCS 5/111-3(c) (West 2010). Moreover, as the State points out, in *People v. Van Schoyck*, 232 Ill. 2d 330, 337, 904 N.E.2d 29, 32 (2009), the Illinois Supreme Court explained pursuant to the plain language of section 11-501 of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501(c) (West 2010)), "only one offense of driving under the influence" exists, the elements of which are set forth in subsection (a) of Illinois' DUI statute (625 ILCS 5/11-501(a) (West 2010)). Meanwhile, subsection (c) (625 ILCS 5/11-501(c) (West 2010)) outlines the "enhancing factors" used to prove sentencing classifications based on other factors. *Van Schoyck*, 232 Ill. 2d at 337, 904 N.E.2d at 33.

¶ 26 Defendant contends *Van Schoyck* supports his contention that although defendant's DUI conviction was *punishable* as a felony due to his prior convictions, defendant could not be *convicted* of aggravated DUI where a jury did not find his prior convictions. We find this argument unconvincing. If defendant's contention were correct, then a defendant could

never be convicted of aggravated DUI based on his prior convictions due to section 111-3(c)'s prohibition against introducing prior convictions to the jury. This cannot have been the legislature's intent.

¶ 27 Defendant's reliance on the Illinois Supreme Court's decision in *Lucas*, 231 Ill. 2d at 180, 897 N.E.2d at 785, is also unpersuasive. In *Lucas*, the State charged defendant with armed violence (720 ILCS 5/33A-2(a) (West 2004)), alleging he, while armed with a dangerous weapon, committed driving while license revoked, subsequent offense, a Class 4 felony (625 ILCS 5/6-303(d) (West 2004)). *Lucas*, 231 Ill. 2d at 170-71, 897 N.E.2d at 779. To prove the defendant guilty of armed violence, the State needed to prove beyond a reasonable doubt the defendant committed a *felony*; thus, in the defendant's case, the State was required to prove the defendant committed the offense of driving while license revoked at a time when his driver's license had previously been revoked due to a conviction for driving under the influence. *Lucas*, 231 Ill. 2d at 178-79, 897 N.E.2d at 784. The supreme court recognized the State was unable to do so based on section 111-3(c)'s prohibition against disclosing the existence of a prior conviction to the jury. *Lucas*, 231 Ill. 2d at 181, 897 N.E.2d at 785. Accordingly, the supreme court concluded section 111-3(c) of the Criminal Procedure Code conflicted with section 6-303(d) of the Vehicle Code and driving while license revoked, subsequent offense, could not serve as a predicate felony under the armed violence statute. *Lucas*, 231 Ill. 2d at 181-83, 897 N.E.2d at 785-86.

¶ 28 Unlike the defendant's felony in *Lucas*, here, defendant's prior convictions were not elements of the crime of aggravated DUI. See *Laskowski*, 287 Ill. App. 3d at 541, 678 N.E.2d at 1243. Accordingly, *Lucas* does not offer support for defendant's contention

defendant's felony conviction was improper.

¶ 29 Based on the foregoing, we conclude defendant was properly convicted of a Class 2 felony.

¶ 30 B. Defendant Was Properly Sentenced as a Class X Offender

¶ 31 Defendant next claims the trial court improperly sentenced him as a Class X offender because defendant was not "convicted" of a felony; rather, his aggravated DUI conviction was a misdemeanor enhanced to a felony for sentencing purposes.

¶ 32 The trial court sentenced defendant to 25 years as a Class X offender pursuant to section 5-4.5-95(b) of the Unified Code of Corrections (Unified Code), although the form sentencing judgment still cited its predecessor, section 5-5-3(c)(8) (730 ILCS 5/5-5-3(c)(8) (West 2008)), now 730 ILCS 5/5-4.5-95(b) (West 2010), as amended by Pub. Act 95-1052 §§ 5, 90 (eff. July 1, 2009) (2008 Ill. Laws 4204, 4222, 4247) (moving language of section 5-5-3(c)(8) to section 5-4.5-95(b)). Section 5-4.5-95(b) provides when a defendant is convicted of a Class 2 felony, after having twice been convicted of an offense that contains the same elements as an offense now classified as a Class 2 or greater felony, the defendant shall be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 33 Defendant argues he was not "convicted" of a Class 2 felony, but rather, he was "sentenced" for a Class 2 felony. We disagree. Section 5-1-5 of the Unified Code (730 ILCS 5/5-1-5 (West 2010)) defines a "[c]onviction" as "a judgment of conviction or sentence." Moreover, the Vehicle Code specifically states aggravated DUI is a Class 2 felony. 625 ILCS 5/11-501(d)(2)(B) (West 2010). As previously detailed, defendant was properly convicted of aggravated DUI. Accordingly, he was convicted of a Class 2 felony, and his 25-year sentence

was proper.

¶ 34 C. Defendant's Extended-Term Sentence For DWLR is Void

¶ 35 Defendant claims if his Class 2 aggravated DUI felony conviction and 25-year sentence were proper, then his extended-term sentence for DWLR is void. The State concedes this issue, and we accept the State's concession.

¶ 36 Pursuant to section 5-8-2(a) of the Unified Code (730 ILCS 5/5-8-2(a) (West 2010)), "[a] judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized *** for an offense or offenses within the class of the most serious offense of which the offender was convicted." When a defendant is convicted of multiple offenses of differing classes, the trial court may impose an extended-term sentence only for the conviction within the most serious class of offense. *People v. Jordan*, 103 Ill. 2d 192, 206-07, 469 N.E.2d 569, 576 (1984). An exception to this rule applies only where the differing classes of offenses are charged separately and arise from unrelated courses of conduct. *People v. Coleman*, 166 Ill. 2d 247, 257, 652 N.E.2d 322, 327 (1995).

¶ 37 Here, defendant's aggravated DUI and DWLR charges arose from the same course of conduct. DWLR is a Class 4 felony, while aggravated DUI is a Class 2 felony. Accordingly, defendant's DWLR sentence must be reduced to three years.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm defendant's aggravated DUI conviction and 25-year prison sentence, but reduce defendant's 6-year DWLR sentence to 3 years, and remand for issuance of an amended sentencing judgment so reflecting. As part of our judgment, we award the State is $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-

2002(a) (West 2010).

¶ 40 Affirmed as modified; cause remanded with directions.