2017 IL App (4th) 140711-U

NO. 4-14-0711

FILED
April 11, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
MICHAEL P. FOGARTY,	)	No. 13CF91
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's stipulated bench trial was not tantamount to a guilty plea and the trial court committed no error in failing to admonish defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012).

(2) Evidence which defendant sought to have suppressed prior to trial was merely cumulative or duplicative of other unchallenged evidence and, therefore, any error in the admission of that challenged evidence was harmless.

¶ 2 Following a stipulated bench trial, defendant, Michael P. Fogarty, was found guilty of two counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(F) (West 2012)) and sentenced to 12 years in prison. He appeals, arguing his stipulated bench trial was tantamount to a guilty plea and, as a result, the trial court erred in failing to admonish him in accordance with Illinois Supreme Court Rule 402 (eff. July 1, 2012). Alternatively, defendant contends the court erred in denying his motion to suppress the results of a war-

rantless blood draw performed at the request of law enforcement in violation of his fourth amendment rights. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On the evening of March 2, 2013, defendant was involved in a multiple-vehicle accident in Mattoon, Illinois. As a result of the accident, several people, including defendant, were injured and one person, Amy Thomas, was killed. The record reflects defendant was driving at a high rate of speed, in excess of 100 miles per hour, and ran into the back of a line of cars that were stopped at red light. Defendant was found unconscious at the scene of the accident and required emergency medical care.

¶ 5 On March 6, 2013, the State charged defendant with one count of aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2012)), alleging he drove a motor vehicle on a public highway at a time when his blood alcohol concentration (BAC) was greater than 0.08, and he was involved in a motor vehicle accident that resulted in Thomas' death. On May 2, 2013, the State charged defendant with a second count of aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2012)), asserting he drove while under the influence of alcohol and was involved in a motor vehicle accident that resulted in Thomas' death.

¶ 6 On August 23, 2013, defendant filed a motion to suppress evidence of a blood test performed on him after the accident. Specifically, he alleged "the Mattoon Police obtained a [BAC] from the Defendant at his hospital stay from Carle Foundation Hospital [(Carle)] at 12:44 [a.m.] on the date of the accident that resulted in the Defendant's hospitalization." Defendant maintained no exigency existed which relieved the police from obtaining a search warrant, and he asked the court to suppress both the blood seized from him and the subsequent testing results.

¶ 7 Defendant filed a memorandum of law in support of his motion to suppress. He cited *Missouri v. McNeely*, ___U.S. ___, ___, 133 S. Ct. 1552, 1556 (2013), in which the Supreme Court stated that the natural metabolization of alcohol in the blood stream did not present "a *per se* exigency that justifie[d] an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, it held exigency "must be determined case by case based on the totality of the circumstances." *Id*. Defendant asserted the trial court had "no choice" but to follow *McNeely* and "rule the BAC inadmissible."

¶ 8 On August 30, 2013, the State filed a response to defendant's motion, arguing exceptions to the warrant requirement applied. It first asserted "the blood draw at issue" was consensual, noting the Illinois Vehicle Code provides that individuals who drive on "public highways of this State" are deemed to have given consent to blood and other tests for the purpose of determining alcohol content (625 ILCS 5/11-501.1(a) (West 2012)) and that any person who is unconscious "shall be deemed not to have withdrawn the consent" to such testing (625 ILCS 5/11-501.1(b) (West 2012)). Second, the State maintained that even without consent, the blood draw was valid because Illinois law requires a person to submit to such testing, "[n]otwithstanding any ability to refuse *** to submit to these tests or any ability to revoke the implied consent to these tests," if a law enforcement officer has probable cause to believe the person drove while under the influence of alcohol and caused death or personal injury to another. 625 ILCS 5/11-501.2(c)(2), (c)(3) (West 2012). Third, the State argued that ample exigent circumstances existed to permit a warrantless blood draw.

¶ 9 On September 4, 2013, the trial court conducted a hearing on defendant's motion to suppress. Brandon Saunders testified he was a police officer for the City of Mattoon, Illinois,

and, at approximately 8:30 p.m. on March 2, 2013, he responded to the motor vehicle accident at issue. He stated, due to the nature of the accident, multiple units of the Mattoon police department responded to the scene, as well as the City of Mattoon's ambulance service, the Charleston fire department, and units of the Illinois State Police. Initially, Saunders spent time redirecting traffic. He was also approached by witnesses to the accident, whom he directed to park and wait on the shoulder of the roadway. Saunders testified the scene was secured by around 9 p.m.

¶ 10 After directing traffic, Saunders noticed the odor of alcohol coming from defendant, who was then being attended to by paramedics and emergency medical technicians. Saunders also observed open alcohol in defendant's vehicle. He testified his commander, Lieutenant Rich Heuerman, advised him to get a DUI packet and go to Sarah Bush Lincoln Health Center, where defendant was being transported and which was within a couple of miles of the crash site. Saunders stated he drove to the police department to get a DUI packet and then headed to the hospital; however, his squad car broke down on the way. When he ultimately arrived at the hospital, defendant was being transported to a helicopter for a transfer to Carle in Urbana, Illinois. Saunders did not ask for a sample of defendant's blood at that time because he believed defendant needed to be transported to Carle. Saunders estimated Carle was approximately 45 to 50 miles from the crash site.

¶ 11 While at Sarah Bush Lincoln Health Center, Saunders "grabbed quick statements" from accident victims who were being treated at the hospital. Another police officer then arrived at the hospital and informed Saunders that Heuerman was "commanding" him back to the crash scene to take measurements and photographs. When Saunders arrived back at the accident scene, Heuerman was still directing traffic. According to Saunders, before going to Carle to see de-

fendant, he had to be taken back to the Mattoon police department to get another vehicle because "command and administration" would not let him ride with another officer. Once at the police department, the first vehicle he attempted to use had a dead battery. Saunders then obtained a second vehicle and drove to Carle. He stated the drive took 45 to 50 minutes and he arrived at Carle between 12 a.m. and 12:15 a.m.

¶ 12 At Carle, Saunders first spoke with a nurse about Thomas, who had also been transferred to that hospital for treatment. At that time, Saunders learned Thomas had suffered a brain injury from which she would not survive. He stated he was also aware that other individuals had been injured in the crash and were transported from the scene by ambulance. The parties agreed defendant was unconscious when Saunders finally made contact with him. Saunders testified he read a "Warning to Motorists" to defendant and laid a copy on defendant's chest. He also issued defendant traffic citations. The nurse then took blood and urine samples from defendant and provided them to Saunders.

¶ 13 Saunders testified he previously received assistance from the Cole's County State's Attorney's office in obtaining search warrants and was aware that judges were available "pretty much 24/seven, seven days a week." He stated the process for preparing a search warrant included preparing an initial complaint or affidavit, setting forth probable cause for the search warrant, and the search warrant itself. Saunders estimated it generally took about two hours to get a search warrant to a judge. Further, he testified that to get a search warrant in the instant case he "would have had to have gone through [his] commander, who was directing traffic like crazy" and get permission to contact "administration or a detective" to meet him at the police department. He then would have had to prepare the necessary documents and contact a prosecu-

tor or judge. Saunders stated the police department had "a search warrant file to generate [a search warrant] on the detective's computers." However, the detectives' offices were locked when the detectives were not in and he did not have access to the form. Saunders testified that no detectives were on duty at the time of the crash.

¶ 14 At the conclusion of the evidence, the trial court denied defendant's motion, finding he failed to show any constitutional deprivation. The court first found defendant had given consent for a search under Illinois's implied consent law. It also found exigent circumstances existed, which would excuse the search warrant requirement.

¶ 15 On January 21, 2014, defendant waived his right to a jury trial and, on February 4, 2014, the matter proceeded to a bench trial. The parties presented a signed stipulation of facts to the trial court, and no other evidence was presented. Relevant to this appeal, the parties stipulated as follows:

> "12. Once at Carle ***, doctors examined the Defendant and conducted a blood test pursuant to his medical treatment. Examination of the Defendant's blood serum revealed a BAC of .208 g/dL approximately two hours after the crash.
>
> 13. The blood serum BAC of .208 g/dL converts to a whole blood BAC of .176 g/dL.
>
> 14. A state DUI kit was also conducted at Carle *** with a blood draw done at 12:40 a.m. on March 3, 2013, approximately four hours after the crash. The Illinois State Police Department then tested the Defendant's whole blood for alcohol and deter-

mined his BAC at 12:40 a.m. was .152 g/dL."

¶ 16 The trial court found defendant guilty of both aggravated DUI counts. On April 9, 2014, the court conducted defendant's sentencing hearing. At the outset, the following colloquy occurred between the court and the parties:

> "THE COURT: And just for clarification for the record[,] this matter did proceed to a bench trial, and I want to make it clear my recollection is that we handled it simply as a bench trial, and a finding was made after that trial. There was a stipulation as to certain facts. I recall admonishing the Defendant as to the waiver of certain rights he has with respect to stipulations, but it's clear this isn't or wasn't a stipulated bench trial. It was actually a finding of guilty following a bench trial. Is that—is that the State's understanding?
>
> MR. SCALES [(assistant State's Attorney)]: That is correct, Your Honor. There was no stipulation as to the sufficiency of the evidence.
>
> THE COURT: Mr. Zopf [(defense attorney)], do you agree with that?
>
> MR. ZOPF: Yes, Judge. That was our intention.
>
> THE COURT: And for purposes of those in the courtroom who perhaps aren't lawyers the significance of that is only as it relates to admonitions to be given to a defendant, so I believe we're

on good ground here."

At the conclusion of the hearing, the court sentenced defendant to 12 years in prison.

¶ 17 On April 30, 2014, defendant filed a motion to reconsider his sentence. On August 6, 2014, the court denied his motion.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Rule 402 Admonishments

¶ 21 On appeal, defendant first argues the trial court erred by failing to admonish him pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012) at the time of his stipulated bench trial. He maintains his stipulated bench trial was tantamount to a guilty plea and, as a result, Rule 402 admonishments were required.

¶ 22 Rule 402(a) concerns admonishments the trial court must provide to a defendant who pleads guilty or stipulates "that the evidence is sufficient to convict." It requires that the court inform the defendant, and determine his understanding, of matters including the nature of the charges against him; possible sentences; and the rights he waives by pleading guilty or stipulating to the sufficiency of the evidence. Ill. S. Ct. R. 402(a) (eff. July 1, 2012).

¶ 23 Generally, a stipulated bench trial provides a defendant with the benefits and convenience of a guilty plea while preserving any pretrial objections, like a motion to suppress, for appellate review. *People v. Harris*, 2015 IL App (4th) 140696, ¶ 32, 32 N.E.3d 211; see *People v. Horton*, 143 Ill. 2d 11, 22, 570 N.E.2d 320, 325 (1991) ("A guilty plea waives all nonjurisdictional defenses or defects."). When a defendant's stipulated bench trial is tantamount to a guilty plea, the trial court must admonish him pursuant to Rule 402. *People v. Chapman*,

379 Ill. App. 3d 317, 326, 883 N.E.2d 510, 517 (2007). "[A] stipulation is tantamount to a guilty plea" when "(1) the State's entire case is to be presented by stipulation *and* the defendant does not present or preserve a defense; *or* (2) the stipulation includes a statement that the evidence is sufficient to convict the defendant." (Emphases in original.) *People v. Clendenin*, 238 Ill. 2d 302, 322, 939 N.E.2d 310, 322 (2010).

¶ 24 Defendant claims his case falls within this subset of stipulated bench trials to which Rule 402(a) admonitions are required. Whether Rule 402 admonishments are required in connection with a stipulated bench trial is a question of law and subject to *de novo* review. *Chapman*, 379 Ill. App. 3d at 326, 883 N.E.2d at 517.

¶ 25 Initially, we note defendant acknowledges he failed to preserve this issue for appellate review. We agree, in that the record shows defendant neither raised the issue at trial or in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (stating that "the presence of both a trial objection and a written post-trial motion raising the issue are necessary to preserve an issue for review"). Nevertheless, defendant asks us to review his claim under the plain-error doctrine.

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process,

> regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11, (2007).

The failure to provide Rule 402 admonishments can amount to plain error. *People v. Fuller*, 205 Ill. 2d 308, 322, 793 N.E.2d 526, 537 (2002).

¶ 26 On appeal, defendant argues his stipulated bench trial was tantamount to a guilty plea because the State presented its entire case by stipulation and he did not preserve any defenses for review. Defendant points out that he did not file a posttrial motion following his stipulated bench trial, which he maintains was necessary for the preservation of any pretrial issues on appeal.

¶ 27 Generally, "[t]o preserve an issue for review, a party *** must raise it at trial and in a written posttrial motion." *People v. Cregan*, 2014 IL 113600, ¶ 15, 10 N.E.3d 1196 (citing *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1130). However, the supreme court has recognized a "constitutional-issue exception" to this general forfeiture rule. *Id*. ¶¶ 16-18. Under this exception, "constitutional issues that were properly raised at trial and may be raised later in a postconviction petition" are not subject to forfeiture based on the failure to file a posttrial motion. *Id*. ¶ 16. In addressing the exception, the supreme court reasoned as follows:

> "If a defendant were precluded from raising a constitutional issue previously raised at trial on direct appeal, merely because he failed to raise it in a posttrial motion, the defendant could simply allege the issue in a later postconviction petition. Accordingly, the interests in judicial economy favor addressing the issue on direct appeal rather than requiring defendant to raise it in a separate

postconviction petition." *Id.* ¶ 18.

¶ 28 In this instance, the record shows defendant filed a motion to suppress evidence of a warrantless blood draw, arguing the blood draw violated his fourth amendment rights. Although he did not file a posttrial motion raising this issue, we find it was preserved based upon the constitutional-issue exception to the forfeiture rule. See *Id.* ¶¶ 15-20 (finding the constitutional-issue exception applied to permit review of the trial court's denial of the defendant's motion to suppress asserting a violation of constitutional rights despite the defendant's failure to raise the issue in a posttrial motion); see also *People v. Almond*, 2015 IL 113817, ¶ 54, 32 N.E.3d 535 (electing to review the defendant's fourth amendment challenge to a motion to suppress evidence despite his failure to raise the issue in a posttrial motion).

¶ 29 Here, issues related to defendant's motion to suppress evidence were properly preserved for review. Moreover, seeking the suppression of evidence with the trial court is sufficient to constitute the presentation and preservation of a defense for purposes of a stipulated bench trial. *Horton*, 143 Ill. 2d at 20, 570 N.E.2d at 324. Thus, we reject defendant's claim that his stipulated bench trial was tantamount to a guilty plea.

¶ 30 Finally, we note that in responding to the State's arguments on appeal, defendant asserts an additional basis for finding his stipulated bench trial was tantamount to a guilty plea. Specifically, he acknowledges that the parties' stipulations included references to two separate blood draws—one performed approximately two hours after the crash and pursuant to defendant's medical treatment, resulting in a BAC of 0.176; and one performed approximately four hours after the crash at the request of the police, resulting in a BAC of 0.152. Defendant asserts that because he stipulated to the evidence of the blood draw that was performed during the

course of his medical treatment, any appeal based solely on a challenge to the blood draw requested by law enforcement "would have been futile." He contends that even if a challenge to a warrantless law enforcement blood draw was successful, the remaining stipulations "were dispositive of his guilt," rendering his stipulated bench trial tantamount to a guilty plea.

¶ 31 We disagree and decline to find that whether a stipulated bench trial is tantamount to a guilty plea is dependent upon the defendant's likelihood of success on appeal. See *People v. Foote*, 389 Ill. App. 3d 888, 895, 906 N.E.2d 1214, 1220 (2009) (stating that although the defendant's preserved defense lacked specificity, it did not make his challenge any less meaningful and signified his continued intent not to plead guilty). To hold as defendant suggests would require that trial courts evaluate the merits of potential preserved defenses prior to proceeding with a stipulated bench trial. Defendant cites no authority for his contention on appeal, nor does our research reveal any authority which would support his position.

¶ 32 Under the circumstances presented, defendant's stipulated bench trial was not tantamount to a guilty plea. Thus, the trial court was not required to provide Rule 402 admonishments to defendant and committed no error. In so holding, we note the State was held to its burden of proof at the stipulated bench trial. Neither defendant nor his attorney stipulated to the sufficiency of the evidence to establish defendant's guilt. Further, comments made by the court and the parties prior to defendant's sentencing clearly reflect that pleading guilty or stipulating to the sufficiency of the evidence was not defendant's intention when electing to proceed with a stipulated bench trial.

¶ 33 B. Motion To Suppress

¶ 34 On appeal, defendant alternatively argues the trial court erred in denying his mo-

tion to suppress evidence of the blood draw performed at the request of Officer Saunders approximately four hours after the motor vehicle accident at issue. He argues the blood draw was performed without a warrant in violation of his fourth amendment rights and no recognized exception to the warrant requirement applied. In connection with this issue, defendant also maintains sections 501.1(b) and 501.2(c)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501.1(b), 501.2(c)(2) (West 2012)) are unconstitutional both on their face and as applied to him.

¶ 35 As alluded to, the State responds to defendant's assertions by pointing out that the parties stipulated that a blood test was performed on defendant approximately two hours after the crash and in the course of his medical treatment. According to the stipulations, that test showed defendant had a BAC of 0.176. Thus, the State maintains that even if the blood draw requested by Officer Saunders was inadmissible, defendant's convictions may be affirmed based on the blood draw that was performed pursuant to medical treatment.

¶ 36 We agree with the State. The Illinois Vehicle Code provides that, in a DUI prosecution, the results of blood tests to determine alcohol content are admissible in evidence as a business record exception to the hearsay rule when they are "conducted upon persons receiving medical treatment in a hospital emergency room." 625 ILCS 5/11-501.4(a) (West 2012). Further, we note "[t]he admission of illegally obtained evidence in a criminal trial following the erroneous denial of a motion to suppress is subject to the harmless error rule." *People v. Hobson*, 169 Ill. App. 3d 485, 493, 525 N.E.2d 895, 900 (1988); see also *People v. Mitchell*, 152 Ill. 2d 274, 327-28, 604 N.E.2d 877, 904 (1992) (stating that fourth amendment violations are subject to the harmless error analysis). Additionally, on review, we may find an error is harmless when "the improperly admitted evidence is merely cumulative or duplicates properly admitted evi-

dence." *People v. Becker*, 239 Ill. 2d 215, 240, 940 N.E.2d 1131, 1145 (2010).

¶ 37 Here, even assuming evidence obtained as a result of the warrantless blood draw requested by law enforcement should have been suppressed, alternative and unchallenged blood draw results remained in evidence. The blood draw performed during the course of defendant's medical treatment yielded a BAC result that was sufficient to establish defendant's guilt and sustain his convictions. As a result, any error that might have occurred due to an improper denial of defendant's motion to suppress was harmless error.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $75 against defendant as costs of this appeal.

¶ 40 Affirmed.