

2012 IL App (2d) 111050-U  
No. 2-11-1050  
Order filed June 26, 2012

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-DT-4671
	)	
ANDREW P. WEST,	)	Honorable
	)	Cary B. Pierce,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Bowman and Hudson concurred in the judgment.

**ORDER**

*Held:* There was sufficient evidence to support the defendant's conviction for DUI.

¶ 1 The defendant, Andrew West, appeals from his conviction for driving while under the influence pursuant to section 11-501(a)(6) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(6) (West 2006)) on the basis that there was insufficient evidence to prove beyond a reasonable doubt that he had cannabis in his breath, blood or urine at the time of his arrest. We affirm.

¶2 On October 14, 2007, the defendant was stopped for speeding on I-290. Illinois State Police Trooper Frank Scanio testified that he clocked the defendant's vehicle traveling at 85 miles per hour in a zone where the speed limit was 55 miles per hour. Scanio stated that, while he was speaking to the defendant after pulling him over, he smelled a strong odor of burnt cannabis coming from inside the car. Scanio asked the defendant to step out of the car. According to Scanio, after the defendant got out of the car he told Scanio that he had smoked cannabis one hour earlier, and Scanio noticed that the defendant's eyes were bloodshot and his pupils were dilated. Scanio searched the defendant's car and found one burnt, cannabis-style cigarette in the glove box and a few more in the ashtray. He field-tested one of the cigarettes and it tested positive for cannabis. He also found a set of metal knuckles in the center console. Scanio placed the suspected cannabis and the metal knuckles in separate evidence bags and sealed them, and then placed them in an evidence locker at the Elgin police station.

¶3 Scanio testified that he had been trained at the Illinois State Police academy to detect the odor of raw and burnt cannabis. The training included the effects of cannabis on a person, and those effects included lethargy, bloodshot eyes, and dilated pupils. Scanio's instructors told him that cannabis stays in a person's system for 20 to 45 days. Scanio gave the opinion that the defendant had smoked cannabis and was under the influence of cannabis. This opinion was based on the odor in the defendant's car, the presence of cannabis in the defendant's car (including in the ashtray), the defendant's admission that he had smoked cannabis an hour earlier, and the defendant's bloodshot eyes and dilated pupils.

¶4 On cross-examination, Scanio ¶ conceded that he had not observed that the defendant had any difficulty with balance, walking, turning, or speech. Moreover, the defendant was not lethargic.

Pursuant to his training, Scanio did not conduct field sobriety tests on persons suspected to be under the influence of cannabis. After the defendant was arrested, Scanio interviewed the defendant at the police station and the defendant denied being under the influence of alcohol or drugs. When Scanio asked the defendant what he had been doing during the three hours before his arrest, the defendant did not say that he had smoked marijuana. Scanio identified a DVD (later admitted into evidence) as containing a recording of the traffic stop of the defendant, taken by the videocamera inside Scanio's squad car.

¶ 5 Scanio issued traffic complaints to the defendant charging him with speeding (625 ILCS 5/11-601(b) (West 2006)) and driving while under the influence of drugs (DUI) (625 ILCS 5/11-501(a)(6) (West 2006)), and arrested him. Two days later, the defendant was charged by criminal complaint with unlawful use of a weapon (720 ILCS 5/24-1(a)(1) (West 2006)) based on his possession of the metal knuckles, and possession of less than 2.5 grams of cannabis (720 ILCS 550/4(a) (West 2006)).

¶ 6 A bench trial on the charges commenced on January 13, 2009. Trooper Scanio testified as described above. On February 5, 2009, the second day of trial, the State presented the testimony of Kelly Smitley, a forensic scientist employed by the Illinois State Police who tested a "cigar" contained in the evidence bag sealed by Scanio and found that it contained cannabis. The trial court subsequently refused to admit the evidence bag as an exhibit because the State had not proved the chain of custody, and there were some discrepancies in Scanio's and Smitley's identification of the contents.

¶ 7 The defense did not present any witnesses, and simply played a portion of the recording of the traffic stop and arrest. Although the recording contained audio at the beginning, a few minutes

into the recording the audio portion ceased, although the video portion continued. During the brief audio portion recorded during Scanio's conversation at the driver's side window, Scanio could be heard saying:

“You guys been smoking anything? No? I feel — I'm smelling something burnt. You guys smoke weed at all? What's that smell? All right, don't lie to me now, 'cause I'm gonna ask everybody to get out, and I'm going to find whatever's in there, okay? So don't be trying to hide it or throw it out the window at this point.”

Although there were muffled responses from inside the car to these questions, the responses could not be heard on the recording. Scanio then confirmed addresses and other information and returned to his squad car to call in the traffic stop. A few minutes later, for unknown reasons the audio portion ceased. There was no audio recording during the portion of the stop when the defendant got out of the car and Scanio questioned him at greater length. In closing argument, the defense argued that the audio recording suggested that the defendant initially denied that he had been smoking marijuana; it was uncontested that during his interview at the police station the defendant did not admit smoking marijuana in the hours before his arrest; and the recording did not corroborate Scanio's contention that the defendant admitted smoking marijuana during the traffic stop.

¶ 8 The trial court acquitted the defendant of the possession of marijuana due to the State's lack of chain-of-custody evidence for the evidence bag containing the marijuana cigarettes. However, it found Scanio's field-testing of one of the cigarettes (which indicated that they contained cannabis), combined with the defendant's admission that he had smoked cannabis an hour earlier, proved beyond a reasonable doubt that the defendant was guilty of “driving under the influence of cannabis.”

The trial court also found the defendant guilty of speeding and unlawful use of a weapon based on his constructive possession of the metal knuckles.

¶9 The defendant did not file any motion attacking the guilty findings within 30 days. On March 12, 2009, the trial court sentenced the defendant to 24 months of supervision and various fines and fees. The trial court's admonishments to the defendant regarding his appeal rights included the following comments:

“Okay. You have a right to an appeal. Prior to the appeal, there's a 30-day period beginning now where you have to file in writing motions asking for specific relief. This relief could be for a new trial, could be to vacate findings of judgment, could be a motion to reconsider, change or modify your sentences. \*\*\*”

¶10 On March 23, 2009, the defendant filed a motion seeking a new trial. The trial court denied that motion on April 16, 2009. On April 23, 2009, the trial court appointed counsel for the defendant and ordered the court clerk to prepare and file a notice of appeal. However, no notice of appeal was filed at that time. A notice of appeal was filed on behalf of the defendant on October 24, 2011. On November 29, 2011, this court granted the defendant's motion to treat his notice of appeal as if it had been filed on April 23, 2009.

¶11 Before we consider the merits of the defendant's appeal, we must address our jurisdiction to hear the appeal. The State filed, with its brief, a motion to dismiss the appeal for lack of jurisdiction, and we ordered the motion taken with the case. We now deny that motion for the following reasons.

¶12 The State argues, correctly, that the defendant's motion for a new trial was not timely filed as it was not filed within 30 days of February 5, 2009, the date on which the guilty findings were entered. See 725 ILCS 5/116-1(b) (West 2008); *People v. Patrick*, 2011 IL 111666, ¶33 (2011)

(“The plain language of section 116-1(b) \*\*\* requires a motion for a new trial to be \*\*\* filed within 30 days after entry of a guilty finding or verdict.”). Moreover, a notice of appeal in a criminal case must be filed within 30 days of “the entry of the final judgment appealed from” unless there is a timely posttrial motion directed against the judgment. Sup. Ct. R. 606(b) (eff. Mar. 20, 2009). In this case, no timely posttrial motion was filed—the defendant’s motion for a new trial was untimely—and so the notice of appeal should have been filed no later than April 11, 2009, 30 days after the defendant was sentenced. Treating the defendant’s notice of appeal as having been filed on April 23, 2009, as the defendant requested, we must still find that it is untimely.

¶ 13 The defendant did not file a motion pursuant to Supreme Court Rule 606(c) (eff. Mar. 20, 2009) for leave to file a late notice of appeal. However, the defendant’s notice of appeal is being treated as if it were filed on April 23, 2009, a date that is within the six-month period during which the defendant could have filed such a motion. See *id.* We also note that in this case the trial court’s comments to the defendant regarding his appeal rights were not particularly clear. The trial court advised the defendant that he had the right to appeal, but did not advise the defendant of the 30-day limit on that right. Moreover, the trial court advised the defendant that he had another 30 days after the sentencing in which to file a motion for a new trial, despite the fact that the 30-day period under section 116-1 had already expired. Under similar circumstances, the supreme court has held that we may treat a late notice of appeal as if it contained an implicit motion for leave to file it. See *People v. Williams*, 59 Ill. 2d 243, 246 (1973) (citing *People v. Brown*, 54 Ill. 2d 25, 26 (1973), in which the court held that to dismiss such an appeal merely because the defendant failed to petition for leave to file a late notice of appeal “unduly emphasizes formality at the expense of substance.”). We grant

that implicit motion in this case. Having done so, we have jurisdiction over the appeal and may address its substance.

¶ 14 The defendant argues that he was not proved guilty of DUI under section 11-501(a)(6) of the Code because the State did not prove beyond a reasonable doubt that he had cannabis in his breath, blood or urine. In evaluating the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Mills*, 356 Ill. App. 3d 438, 444 (2005). The determination of the weight to be given to the witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Collins*, 106 Ill. 2d at 261. This standard applies whether the evidence is direct or circumstantial and whether the verdict is the result of a jury trial or a bench trial. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 15 The statute that the defendant was convicted of violating provides as follows:

(a) A person shall not drive or be in actual physical control of any vehicle within this State while:

\* \* \*

(6) there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis\*\*\*." 625 ILCS 5/11-501(a)(6) (West 2006).

The defendant argues that there is insufficient evidence to support his conviction because there was no medical or scientific evidence that he had any compound or substance resulting from the use of

cannabis in his breath, blood or urine. Rather, the only evidence to support this element of the offense came from Scanio's testimony that the defendant admitted smoking cannabis an hour earlier and that Scanio had been told during training that cannabis stays in a person's system approximately 20 to 45 days. The defendant argues that Scanio was not qualified to offer the latter opinion and that, even if his testimony regarding the defendant's admission is taken as true, the State did not establish that he had any compound or substance resulting from the use of cannabis in his breath, blood or urine at the time of the traffic stop.

¶ 16 This court has previously held that circumstantial evidence regarding the presence of cannabis in a defendant's breath, blood, or urine is admissible in a proceeding under section 11-501(a)(6). *People v. McPeak*, 399 Ill. App. 3d 799, 802 (2010) ("We believe that evidence of the odor of cannabis on the breath of a defendant could provide circumstantial evidence that the defendant has cannabis in his breath."). Our holding in *McPeak* relied on *People v. Allen*, 375 Ill. App. 3d 810, 815 (2007), in which the reviewing court found that the trial court did not abuse its discretion in admitting a police officer's testimony that the defendant's breath smelled of burnt cannabis. In both *McPeak* and *Allen*, the reviewing courts ultimately reversed the convictions for DUI under section 11-501(a)(6) on the ground that, even if the evidence showed that the defendants had recently ingested cannabis, the State offered no evidence that would tend to show that there was any cannabis in the defendants' systems at the time of the arrest. Here, however, Scanio testified that cannabis stays in a person's system for 20 to 45 days. Drawing all reasonable inferences from the evidence in favor of the State, as we must (*Collins*, 106 Ill. 2d at 261), this evidence distinguishes our case from *McPeak* and *Allen*, and is sufficient to show that the defendant had some amount of cannabis in his breath, blood, or urine at the time of the arrest.

¶ 17 Citing *People v. Hunley*, 313 Ill. App. 3d 16 (2000), the defendant argues that Scanio was not qualified to offer an opinion that the cannabis ingested by the defendant would stay in the defendant's system for 20 to 45 days. In *Hunley*, the reviewing court held that the trial court had abused its discretion in admitting expert-level testimony regarding whether fingerprints could be lifted from plastic given by a police officer whose training in fingerprinting consisted of police academy classes, the substance and rigor of which were not disclosed. *Id.* at 30. The court noted that fingerprint analysis required specialized study, and the State had not offered the officer as an expert witness or attempted to qualify him as such. *Id.* at 29-30.

¶ 18 Here, by contrast, there was detailed testimony about Scanio's training and the basis for Scanio's knowledge about the effects of cannabis on the human body, including the length of time that it stays in a person's system. A trial court's decision to allow a witness to testify as an expert will not be reversed absent an abuse of discretion. *Id.* at 28 (citing *People v. Free*, 94 Ill. 2d 378, 410 (1983)). "A witness may qualify as an expert by providing evidence of the knowledge, skill, experience, or education of the witness." *Id.* at 30. Here, Scanio testified as to knowledge gained through education, a valid source of expertise. Moreover, "[t]he degree of knowledge or experience necessary to qualify the witness as an expert depends on the complexity of the subject matter and the likelihood of error if the witness is not properly qualified." *Id.* (citing *People v. Park*, 72 Ill. 2d 203, 209-10 (1978)). Although the overall field of toxicology and the metabolization of drugs is complex, only a basic understanding is necessary to appreciate that cannabis stays in a person's system for over two weeks. The trial court did not abuse its discretion in accepting Scanio's testimony on this issue. We also note that the elasticity of the range given by Scanio (20 to 45 days) is of only minor importance here, given the virtual certainty that ingesting cannabis would place at least some amount

of cannabis in the defendant's system, and the short period of time (one hour) between the defendant's admitted smoking of cannabis and his arrest.

¶ 19 For all of these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 20 Affirmed.