2016 IL App (1st) 153137-U

FOURTH DIVISION
December 8, 2016

No. 1-15-3137

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 18367
	)	
AARON MCBRIDE,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

Held: We affirm defendant's conviction of vehicular hijacking. The prosecution had the authority to strike the aggravated form of the charge on remand and the trial court acted in conformance with the appellate court's mandate in entering a conviction on vehicular hijacking and sentencing defendant accordingly.

¶ 1 In 2009, defendant Aaron McBride was convicted of aggravated vehicular hijacking following a jury trial. In his first direct appeal, this court affirmed in part, reversed in part, and

remanded. *People v. McBride,* 2012 IL App (1st) 100375, ¶ 2.[1] Upon remand, the State struck the aggravated portion of the vehicular hijacking charge, and the trial court sentenced defendant for simple vehicular hijacking. Defendant again appeals, arguing that the trial court disregarded this court's mandate in not ordering a new trial and instead reducing his conviction to simple vehicular hijacking and sentencing him for that offense. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 This court previously set forth a detailed recitation of the facts of defendant's case in its prior opinion. *McBride,* 2012 IL App (1st) 100375, ¶¶ 4-13. Defendant was charged with aggravated vehicular hijacking stemming from an incident on May 19, 2007. The victim Kenneth Criswell was parking his car when defendant approached him, ordered him to exit the car, and defendant then drove away in the car. Criswell believed that defendant was holding a gun; Criswell got a "slight glance" at the barrel and defendant hit him in the forehead with the barrel of the gun. The officer who responded to the scene did not recall seeing any injuries on Criswell, but he did check the box indicating injury on his police report. *McBride,* 2012 IL App (1st) 100375, ¶¶ 2, 6-10. The jury found defendant guilty of aggravated vehicular hijacking and he was sentenced to nine and a half years' imprisonment. *Id.* ¶ 2.

¶ 4 The indictment charged that defendant committed aggravated vehicular hijacking in that he "knowingly took a motor vehicle *** from the person or immediate presence of Kenneth Criswell by the use of force or by threatening the imminent use of force, and he carried on or about his person, or was otherwise armed with a dangerous weapon, to wit: a handgun," in violation of section 18-4(a)(3) of the vehicular hijacking statute (720 ILCS 5/18-4(a)(3) (West 1998)). *McBride,* 2012 IL App (1st) 100375, ¶ 4. This court held in defendant's first direct appeal

[1] Justice Joseph Gordon authored the opinion in defendant's first appeal.

that he was necessarily charged under the preamended version of section 18-4(a)(3), which did not make a distinction between firearm-related and non-firearm-related offenses: "A person commits aggravated vehicular hijacking when he or she violates Section 18-3 [vehicular hijacking]; and *** (3) he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon." 720 ILCS 5/18-4(a)(3) (West 1998). The statute was amended in 2000 to provide that aggravated vehicular hijacking occurs when a person "(3) *** carries on or about his or her person, or is otherwise armed with a dangerous weapon, other than a firearm; or (4) he or she carries on or about his or her person or is otherwise armed with a firearm ***." 720 ILCS 5/18-4(a) (West 2006). The appellate court determined that, because the amended version of the statute had been found unconstitutional at the time of the offense, the statute in effect at the time of the offense was the preamended version of section 18-4(a)(3). *McBride,* 2012 IL App (1st) 100375, ¶¶ 4, 27-37.

¶ 5 In his first direct appeal, defendant raised four claims of error. The first two challenged the sufficiency of the evidence supporting his conviction. Defendant argued that the State failed to prove that he was armed with a dangerous weapon "other than a firearm" or that the gun was loaded or dangerous. As such, defendant asserted that his aggravated vehicular hijacking conviction should be vacated or reduced to vehicular hijacking. In his third and fourth claims of error, defendant contended that the trial court's response to the jury's request for a definition of "dangerous weapon" misstated the law and his trial counsel was ineffective for proposing a definition that failed to exclude firearms. Defendant argued that the court should reverse his conviction and remand for a new trial. *McBride,* 2012 IL App (1st) 100375, ¶¶ 15-16.

¶ 6 With regard to defendant's challenge to the sufficiency of the evidence, the appellate court held that because defendant was charged under the pre-amended version of the statute, the

State was not required to prove that he was armed with a weapon "other than a firearm." *McBride,* 2012 IL App (1st) 100375, ¶ 37. The court also found that the State presented sufficient evidence to support his aggravated vehicular hijacking conviction given the evidence that the gun was actually used in a dangerous manner during the crime. *Id.* ¶¶ 46-49.

¶ 7 With regard to defendant's challenge to the instructions, the appellate court concluded that the trial court's instruction defining "dangerous weapon" misstated the law and could have misled the jury into believing that a handgun was *per se* dangerous, without requiring any showing that the handgun was loaded, operable, or dangerous based on other factors. *Id.* ¶ 53. The State argued that even if the instruction was erroneous, it was not prejudicial because the evidence against defendant was overwhelming. *Id.* ¶ 58. The appellate court disagreed, noting

> "at the outset that nobody in this appeal is contesting the jury's finding of guilt as to the lesser included offense of simple vehicular hijacking under section 18-3 (720 ILCS 5/18-3 (West 2006)). Rather, the only question at issue is whether defendant was properly convicted of aggravated vehicular hijacking due to the fact that he was 'armed with a dangerous weapon' under preamended subsection (a)(3). In this regard, we find that, although there was sufficient evidence for the jury to find that defendant's weapon was dangerous, there was no evidence presented at trial that would compel such a finding." *Id.*

¶ 8 The appellate court reasoned that the jury was faced with two disputed factual issues: (1) whether the victim actually suffered any injury, and (2) "whether the injury was of a nature that would indicate that the weapon used by the defendant was capable of producing death or serious

bodily harm." *Id.* As a result, the trial court's definition allowed the jury to sidestep these factual issues if it concluded that the weapon was a handgun. *Id.* ¶ 59. The court went on to hold:

> "Nevertheless, as previously discussed, it is not disputed that there was sufficient evidence to convict defendant of the lesser included offense of simple vehicular hijacking, nor would the incorrect definition of "dangerous weapon" given to the jury have had any impact upon the jury's determination of whether defendant committed that lesser included offense. Thus, there is no question that, at the very least, a judgment of conviction for simple vehicular hijacking should be entered against defendant. [Citation.] However, we reverse and remand for a new trial on the limited issue of whether defendant is guilty of aggravated vehicular hijacking under the preamended version of subsection (a)(3)." *Id.* ¶ 60.

¶ 9 In addition, the appellate court granted defendant's request to correct his mittimus to reflect 883 days of credit instead of 872 days of credit for time spent in presentencing custody. *Id.* ¶ 62. The court denied the State's request to require defendant to pay costs and a fee associated with the State's defense of the appeal. *Id.* ¶ 63. The court directed that the case was "[a]ffirmed in part and reversed in part and case remanded, with instructions; mittimus modified." *Id.* ¶ 63.

¶ 10 On remand, however, there was some confusion in the trial court as to how to effectuate the appellate court's mandate. Initially, the case went before the trial court judge on September 14, 2012, but it was continued numerous times for various reasons. At a court date on August 5, 2014, the trial court indicated that it was a simple case and "[w]e are either going to set it for trial or figure out a disposition." The parties reconvened on September 8, 2014, and defendant's

attorney informed the trial court that defendant was considering whether to "accept state offer of time considered served or whether to request another trial in this matter." Defendant asked the trial court if he could be sentenced to more time if he had a second trial, and the trial court informed him that he could not. Defendant affirmed that he wanted a new trial.

¶ 11 At the next court date on April 13, 2015, the State made a motion to *nolle prosequi* the aggravated vehicular hijacking charge. The Assistant State's Attorney (ASA) informed the trial court that "[t]his is a mandate issued by the Appellate Court to enter a verdict or a judgment on vehicular hijacking and remand for agg vehicular hijacking. As far as the State is concerned, it is motion State *nolle* as to the agg vehicular hijacking." Defense counsel stated that she knew "the Appellate Court affirmed the conviction on vehicle hijacking, however remanded on the aggravated vehicular hijacking based on the definition of dangerous weapon that was sent back to the jury." The ASA again stated that the State was "nolling the agg vehicular hijacking" and explained that the appellate court "remanded it for the possibility of agg vehicular hijacking, but it also has affirmed in part a sentence on and conviction on the lesser-included offense of vehicular hijacking." Defense counsel agreed that defendant should be sentenced for vehicular hijacking and indicated that they waived the presentence investigation, but defendant then refused to sign the waiver. The trial court held, "[l]et the record reflect given what I have read in the mandate, the conviction for vehicular hijacking stands" and it set the matter for sentencing.

¶ 12 The parties reconvened for sentencing on May 14, 2015. The trial court stated that according to the appellate court mandate, the aggravated vehicular hijacking conviction was vacated and the case was remanded "for the limited issue of whether this is aggravated, not vehicular hijacking. The State has stricken that part of the charging document. So is it everyone's agreement that he stands convicted of vehicular hijacking?" Defense counsel responded, "That is

my interpretation of the Appellate Court's ruling, yes." The State agreed. The trial court indicated that it "can't frankly tell from what the Appellate Court said" whether the appellate court vacated his sentence. Defense counsel stated that her understanding was that "the conviction for the vehicular hijacking already stands." The court and parties discussed what to do about defendant's sentence and parole, as defendant had been released from prison on May 19, 2012, and was on parole for three months before his bracelet was removed in August 2012. The trial court proposed that the "proper thing to do is do an order indicating that the conviction for vehicular hijacking, a Class 1 offense, stands. That his sentence stands and that his sentence has been satisfied by operation of law and is time considered served and that his is done. *** Anybody have an objection to that?" Both the ASA and defense counsel responded, "No, Judge." However, defendant stated that he "was under the impression I was supposed to receive a new trial, and if possible, I would like that trial." Defense counsel explained to the court:

> *[DEFENSE COUNSEL]:* "I have known and I have made clear that my client wanted a new trial on the aggravated vehicular hijacking. I would have prepared for trial and gone to trial on that count had the State not nolle'd it taking away my opportunity to ask for a new trial on the aggravated vehicular hijacking. I have explained that to Mr. McBride.
>
> *[THE COURT]:* What do you want a trial on, the aggravated or the vehicular hijacking?
>
> *[DEFENSE COUNSEL]:* I believe he wanted a whole new trial.
>
> *[DEFENDANT]:* I was under the impression that I was supposed to have a whole new trial."

¶ 13 The trial court continued the case in order to again review the appellate court decision.

¶ 14 When the case reconvened on June 20, 2015, the trial court recited that the appellate court's mandate was "affirmed in part and reversed in part case remanded with instructions." The trial court reasoned that this "can't be written any other way to interpret their ruling in the manner that I'm about to interpret it." Referring to its notes from prior court dates, the trial court stated that "what I wrote was that the State didn't dismiss the count. They dismissed the aggravated part, the vehicular hijacking. That's what I have written." The ASA stated, "I did state the State was nolle'g that count, I think it was clear in the subsequent conversations *** that I was getting rid of the aggravated portion probably the more upper [*sic*, proper] language would be to amend it from aggravated vehicular hijacking to vehicular hijacking as mandated by the Appellate Court." Defense counsel objected to the amendment because defendant had not been charged with a lesser included offense and the jury had not been instructed on a lesser included offense. Counsel asserted that defendant was entitled to a new trial on aggravated vehicular hijacking.

¶ 15 The trial court found that "if, in fact, it was nolle'd, which I don't believe it was. It's reinstated, and the State's request to strike that portion, the aggravated portion in the charging title and the document itself, the body was granted over the defense's objection." The trial court explained that it "would be nonsensical to find nothing that [the appellate court] affirm[ed]. The only thing they could have affirmed is what they affirmed as the conviction for vehicular hijacking to give them an opportunity to contest the aggravated. The State has withdrawn by amending and striking their language aggravated." The trial court held that defendant "stands to be resentenced on the lesser included offense of vehicular hijacking."

¶ 16 At the subsequent sentencing hearing, the trial court sentenced defendant to nine years' imprisonment for vehicular hijacking. He was given 1727 days credit for time served and 105

days credit towards parole. The trial court denied his subsequent motion to reconsider sentence. Defendant timely appealed.

¶ 17 ANALYSIS

¶ 18 "The mandate of an appellate court is its judgment which, upon transmittal to the trial court, vests the trial court with authority only to take action that conforms with the mandate." *In re Marriage of Ludwinski*, 329 Ill. App. 3d 1149, 1152 (2002). "[A] trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court. [Citations.] *** Any other order issued by the trial court is outside the scope of its authority and void for lack of jurisdiction." *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276-77 (1982). "Precise and unambiguous directions in a mandate must be obeyed." (Internal quotation marks omitted). *Id.* at 276. If the remand contains general instructions, "the trial court is required to examine the appellate court's opinion and exercise its discretion in determining what further proceedings would be consistent with the opinion on remand." *Ludwinski*, 329 Ill. App. at 1152-53. "[I]f the mandate directs the trial court to proceed in conformity with the opinion issued, the appellate court's opinion must be consulted in determining the appropriate course of action." *Id.* at 1153. Whether a trial court has complied with an appellate court's mandate is a question of law that is reviewed *de novo* on appeal. *Clemons v. Mechanical Devices Co.*, 202 Ill.2d 344, 351–52 (2002).

¶ 19 Defendant contends that the trial court disregarded the appellate court's mandate when it refused defendant a new trial and instead sentenced him for vehicular hijacking. Defendant argues that the appellate court's opinion ordered that defendant receive a new trial due to the erroneous jury instruction regarding the meaning of a "dangerous weapon."

¶ 20 Having reviewed the appellate court opinion, we find that the trial court's actions did not fall outside the bounds of the appellate court's mandate. In his argument, defendant glosses over

portions of the court's opinion which hold that, at the least, a conviction on the lesser included offense of vehicular hijacking was entered. In its analysis of the instruction issue, the appellate court observed that "nobody in this appeal is contesting the jury's finding of guilt as to the lesser included offense of simple vehicular hijacking under section 18-3 (720 ILCS 5/18-3 (West 2006))." *McBride*, 2012 IL App (1st) 100375, ¶ 58. The appellate court further held:

> "it is not disputed that there was sufficient evidence to convict defendant of the lesser included offense of simple vehicular hijacking, nor would the incorrect definition of "dangerous weapon" given to the jury have had any impact upon the jury's determination of whether defendant committed that lesser included offense. Thus, there is no question that, at the very least, a judgment of conviction for simple vehicular hijacking should be entered against defendant. [Citation.] However, we reverse and remand for a new trial on the limited issue of whether defendant is guilty of aggravated vehicular hijacking under the preamended version of subsection (a)(3)." *Id.* ¶ 60.

¶ 21 The clear language of the appellate court opinion provided for two courses of action. First, it indicates that a judgment on the lesser included offense of simple vehicular hijacking should be entered against defendant. Second, the opinion remanded on the limited issue of whether defendant was guilty of the aggravated form of the offense using an instruction which correctly reflected the elements of that offense under the preamended version of section 18-4(a)(3). In accordance with these two holdings, the appellate court ordered that the judgment was affirmed in part, reversed in part, and remanded, with instructions. *McBride,* 2012 IL App (1st) 100375, ¶ 64. Had the appellate court not meant to enter a conviction on the lesser included offense of vehicular hijacking, there would have been no reason for it to affirm the judgment in

part. There would have been nothing left to affirm, considering it reversed defendant's aggravated vehicular hijacking conviction based on instructional error. Rather, it would have instead reversed the judgment in its entirety.

¶ 22 Our interpretation of the appellate court's mandate also accords with the fact that it granted defendant's request to correct his mittimus to reflect 883 days of credit instead of 872 days of credit for time spent in presentencing custody. *Id.* ¶ 62. Considering that the appellate court reversed his aggravated vehicular hijacking conviction, there would have been no conviction or sentence against which to apply this credit without the simple vehicular hijacking conviction in its place. It would have had no need to address the mittimus issue. See, *e.g.*, *People v. Whitelow*, 162 Ill. App. 3d 626, 631 (1987) (nothing that, since the court was reversing the defendant's convictions, it need not address his argument on appeal that he was entitled to credit for time served).

¶ 23 Similarly, our interpretation of the opinion comports with the appellate court's denial of the State's request to require defendant to pay costs and a fee associated with the State's defense of the appeal. *McBride,* 2012 IL App (1st) 100375, ¶ 63. Defendant argues that the appellate court's refusal to award the State any costs or fees for defending the prior appeal is evidence that it meant for defendant to receive a new trial. We disagree with this assertion. The appellate court qualified its statement that defendant was "not an unsuccessful criminal appellant," by adding that he was successful only "[i]nsofar as we find defendant to be entitled to a new trial." *Id.* As noted, the appellate court specifically stated that he was entitled to a new trial "on the limited issue of whether defendant is guilty of aggravated vehicular hijacking ***." *Id.* ¶ 60.

¶ 24 Additionally, the appellate court had the authority to reduce the degree of defendant's conviction from aggravated vehicular hijacking to simple vehicular hijacking, even though it was

not listed in the indictment and the jury was not instructed on the lesser-included offense. "Illinois Supreme Court 'Rule 615(b)(3) provides the appellate court with broad authority to reduce the degree of a defendant's conviction, even when the lesser offense is not charged ***.' " *People v. Clark*, 2014 IL App (1st) 123494, ¶ 43 (quoting *People v. Kennebrew*, 2013 IL 113998, ¶ 25). "A defendant may be convicted of an uncharged offense *** if it is a lesser-included offense of a crime with which the defendant is expressly charged." *Id.* ¶ 25 (citing *People v. Kolton*, 219 Ill. 2d 353, 360 (2006)). Further, "vehicular hijacking is a lesser-included offense of aggravated vehicular hijacking ***." *Id.* (citing *People v. Andrews*, 364 Ill. App. 3d 253 282 (2006)). Accordingly, the trial court correctly followed this court's mandate in sentencing defendant on the lesser offense.

¶ 25 We further note that the State has broad discretion regarding whether to *nolle prosequi* a charge. "The prosecution's power to nol-pros continues throughout the proceedings, until the imposition of a sentence. [Citation.] The trial court is required to enter the *nolle prosequi* absent a clear abuse of the prosecutor's discretion. [Citation.] Only where the entry of the *nolle prosequi* is capricious or vexatiously repetitious will the court limit the prosecution's power." *People v. Bradley*, 128 Ill. App. 3d 372, 382 (1984).

¶ 26 The State also has the power to amend an indictment at any time for formal defects. 725 ILCS 5/111–5 (West 2012); *People v. Knaff*, 196 Ill. 2d 460, 473-74 (2001). This is particularly true where the amendment results in no surprise or prejudice to the defendant. *People v. Ross*, 395 Ill. App. 3d 660, 667 (2009). Generally, substantive amendments which alter an essential element of the offense charged or broaden the scope of the indictment require the State to either return to the grand jury or file an information and re-verify it. *People v. Terry*, 2012 IL App (4th) 100205, ¶ 50; *Knaff*, 196 Ill. 2d at 474. Here, the State effectively removed an element of the

offense which reduced the charge to simple vehicular hijacking. Although this altered the essential elements of the offense, it did not broaden the scope of the indictment. Moreover, in *Knaff*, our supreme court explained:

> "a defendant may be convicted of an offense not expressly included in the charging instrument if that offense is a lesser-included offense of the crime expressly charged. [Citations.] It is elementary that it is unnecessary to allege a lesser-included offense in an indictment charging an offense of a greater degree when, in order to convict on the greater charge, the prosecution must prove every element necessary for a conviction on the lesser charge. [Citation.] In such a case, if the charging instrument specifically charges the greater offense, while also sufficiently alleging the conduct and mental states required for the lesser offense, the defendant is considered to be charged by implication with the lesser crime." *Knaff*, 196 Ill. 2d at 472-73.

¶ 27 In *Knaff*, our supreme court found that the indictment provided the parties "with a closed set of facts, and both parties had notice of all possible lesser-included offenses and could plan their trial strategies accordingly." *Id.* at 473.

¶ 28 The State, therefore, acted within the bounds of its authority when it struck the aggravated portion of the charge on remand. As noted, vehicular hijacking is a lesser-included offense of aggravated vehicular hijacking. *Clark*, 2014 IL App (1st) 123494, ¶ 43; *Andrews*, 364 Ill. App. 3d at 282. Although defendant argues that he was entitled to a new trial on the aggravated vehicular hijacking charge, our supreme court has explained that "the State's Attorney is vested with exclusive discretion in the initiation and management of a criminal prosecution. That discretion includes the choice of which charges shall be brought. A criminal defendant does

not have the right to choose his or her prosecution or punishment." *People v. Ceja*, 204 Ill. 2d 332, 362 (2003).

¶ 29 Accordingly, the trial court acted within the bounds of this court's mandate, and the prosecution acted in conformity with its legal authority. As the aggravated portion of the hijacking charge was eliminated and defendant stood convicted of simple vehicular hijacking, the trial court appropriately proceeded to sentencing for that conviction.

¶ 30 CONCLUSION

¶ 31 For the above reasons, we affirm defendant’s conviction of vehicular hijacking.

¶ 32 Affirmed.