SIXTH DIVISION
September 29, 2017

Nos. 1-16-0804 & 1-16-0807
2017 IL App (1st) 160804-U

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.	)	Nos. TW 475-008 & 009
	)	
DANIELLE GALLAGHER,	)	Honorable
	)	Daniel Gallagher,
Defendant-Appellant.	)	Patrick Coughlin, and
	)	John Lyke,
	)	Judges Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty of driving under the influence and failure to keep in the proper lane of traffic beyond a reasonable doubt; the admission of defendant's blood test results was proper as it was sufficiently attenuated from the taint of the unlawful arrest; and the admission of the blood test results did not violate the confrontation clause.

¶ 2 Following a bench trial, defendant Danielle Gallagher was found guilty of driving while the alcohol concentration in her blood was 0.08 or more, and failure to stay in her lane of traffic. Defendant was sentenced to 24 months' conditional discharge, one victim impact panel, 240 hours of independent community service, 12 random urine drops, and ordered to pay fines and fees in the amount of $2,889. Defendant now appeals, arguing that: (1) the State failed to prove

her guilty beyond a reasonable doubt of driving under the influence of alcohol and failure to stay in her proper lane of traffic; (2) the trial court erroneously found that the results of defendant's blood test were attenuated from her illegal arrest; and (3) the admission of defendant's blood test results violated the confrontation clause. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with: (1) driving while the alcohol concentration in her blood, other bodily substance, or breath is 0.08 or more (625 ILCS 5/11-501(a)(1) (West 2012)); (2) driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2012)); and (3) a municipal violation for failure to keep in lanes.

¶ 5 Prior to trial, defendant filed a motion to quash arrest and to suppress evidence of the medical records obtained when defendant was in the emergency room following her arrest. The sole witness at the hearing on this motion was Officer Susan Higham. She testified that on March 17, 2013, she was on duty at approximately 7:38 a.m., when she observed an automobile that had been in an accident with several parked cars. Officer Higham testified that she observed defendant getting in and out of her car, and that she was not very stable on her feet. She testified that the left side of defendant's face was swollen and that the airbag had gone off which indicated to Officer Higham that defendant had suffered some sort of injury during the accident. Officer Higham acknowledged that her arrest report showed the time of arrest as 7:40 a.m.

¶ 6 A video was shown that depicted defendant in the backseat of her vehicle as Officer Higham pulled up, with the back door of the car open. Defendant then pulled the door closed. After Officer Higham approached the vehicle, defendant got out of the car, attempted to open the driver's side door, and then again got into the backseat of the vehicle. The end of the video

showed Officer Higham holding defendant's arm and guiding her off camera, presumably into the police car.

¶ 7 Officer Higham testified that defendant went in and out of the vehicle several times, attempting to get the keys out of the ignition, but that she believed the driver's side door was jammed. Officer Higham further testified that defendant had trouble speaking, had glassy eyes, and did not take direction well. She called an ambulance because defendant's cheek was swollen, indicating an injury. Officer Higham testified that an ambulance arrived and transported defendant to Illinois Masonic Hospital. Defendant was not handcuffed, and had not been given her *Miranda* warnings at that time.

¶ 8 Officer Higham testified that she followed the ambulance to the hospital. While at the hospital, Officer Higham learned from a nurse that defendant's blood alcohol content was .329, and thereafter gave defendant her *Miranda* warnings. Officer Higham testified that she believed defendant to be under the influence of alcohol based on defendant's demeanor at the scene and the blood alcohol content in her blood test.

¶ 9 At the close of the hearing, and after viewing the video, the court stated it "saw when there was a seizure. *** [T]he court finds that the defendant was seized when the officer grabbed her by the arm and took her back to the squad car in order to detain her ***." The court found that at that time, the officer had not witnessed any unsteadiness, and therefore the arrest occurred at 7:40 a.m. with no probable cause, "and the motion to quash arrest and suppress evidence, despite the abomination of a .329 BAC *** is granted."

¶ 10 The State then filed a motion for an attenuation hearing. At the hearing, Kimberly Cisneros, a nurse in the Illinois Masonic emergency room (ER), testified that she was working on the date in question. Cisneros testified that defendant was brought into the ER at

approximately 8 a.m. on a backboard with a collar. Cisneros testified that she did not see any police nearby when defendant was brought in, and that defendant was not handcuffed. Cisneros testified that defendant was trying to get off the board and out of the collar. Cisneros stated that "there was obviously some altered mental status so you either assume it's from substance or a head injury *** but most likely the odor of alcohol was there and the way you have to keep redirecting and the repetitive questioning and not following direction." Cisneros testified that based on her observations, her opinion was that defendant was intoxicated.

¶ 11 Cisneros testified that as a trauma nurse, the first thing she does is "cut all the clothes off, hook them up to the monitor, keep them stabilized on the board, draw their blood, start IVs, give fluids." She testified that the blood draw and urine sample are both done on every patient to check things like electrolytes, acid base balance, and substances in the blood, amongst other things. Cisneros further testified that it is hospital procedure to do a blood draw on every trauma patient, and that at no time was she ordered to do one by a police officer.

¶ 12 Lawrence Kaczmarek, a paramedic with the Chicago Fire Department, testified next. He testified that on the morning in question, he arrived at the scene and saw defendant sitting in the back of a police car, with the door open. She was not handcuffed. Kaczmarek testified that defendant told him she was wearing a seatbelt, "she was driving the vehicle, she hit her head and the left side of her face hurt." Kaczmarek testified that defendant appeared confused, and was not answering all of his questions appropriately. He testified that she was unaware of what time of day it was, or where she was. Kaczmarek testified that he explained to defendant that he wanted to check her out in the ambulance, at which point she became "uncooperative." After the paramedics got her in the ambulance, she "started swinging" at them and would not answer any questions.

¶ 13 Kaczmarek testified that he believed defendant was under the influence of alcohol based on her mannerisms, and that she had "admitted to us that she had gotten off work and had a couple beers with some friends." He testified that because defendant's mental state was altered, and she was not competent and unable to refuse medical care, he decided to transport her to the hospital. He stated that the police officers did not accompany them to the hospital, and did not direct him to take defendant to the hospital. Kaczmarek testified that he called the hospital and stated that there was a trauma victim because defendant was involved in a motor vehicle accident, had hit her head, and was "altered." Additionally, there was moderate damage to the vehicle and the airbags had deployed.

¶ 14 The trial court granted the State's motion for attenuation, finding that the blood test result evidence was sufficiently attenuated from the illegal arrest. It based its decision on the following: "Once the EMT is called and he talks to her, it's his assessment, she needs to go to the hospital because she['s] not fully aware; she can't refuse medical treatment; she is not competent." On October 7, 2014, the trial court denied defendant's motion to reconsider attenuation.

¶ 15 Defendant also moved the trial court to exclude from evidence the results of the blood test administered at the hospital based on the sixth amendment to the Constitution of the United States. Defendant argued that the admission of the report alone, absent live testimony by the individual that prepared the report, would deprive her of the right to meaningfully test the evidence by cross-examining the technician who performed the test. The trial court denied the motion.

¶ 16 A bench trial commenced on August 17, 2015. Officer Arsenio Cruz testified first, stating that he arrived on the scene of the crash at approximately 7:30 a.m., and observed an automobile that had collided with the rear of a parked car. Defendant was with the paramedics and another

officer when he arrived. Officer Cruz testified that the keys were "jammed" in the ignition and would not come out. He obtained the VIN number on the car.

¶ 17 Kaczmarek then testified to substantially the same facts as those he testified to in the hearing on defendant's motion to suppress. He stated that when he approached the scene, defendant was in the back of a police car, and was not aware of her location or how the accident occurred. Kaczmarek testified that she "knew her name and she remembered she was driving – actually, she didn't know where she was."

¶ 18 Kimbery Cisneros testified consistently with her previous testimony as well, with the exception of a few additional facts. Cisneros testified that it is standard procedure to draw blood from trauma patients, and that the blood is then placed in a specimen bag and sent to a lab that is routinely used by the hospital to perform blood work for trauma patients. Cisneros testified that she received a call from the lab informing her of defendant's alcohol serum level of .329. The State introduced into evidence a copy of one page of defendant's medical records that stated her lab results. Cisneros also testified that in order to obtain defendant's whole blood alcohol concentration, she would divide the serum level by 1.18, which would be a whole blood concentration of .278.

¶ 19 The State then introduced into evidence a certified title to the vehicle in question, which was in defendant's name.

¶ 20 At the close of evidence, defendant was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(1) (West 2012)), and failure to keep in her proper lane of traffic. The trial court noted that Officer Cruz testified that he did not recall seeing the defendant actually inside of the vehicle. The trial court stated that while there was no direct evidence that defendant was driving, "one occupied car caused the accident and that was a Nissan. It was

registered [to] the defendant. The defendant [was] observed on scene, following the accident. The driver's side airbag was deployed." The trial court also stated that "defendant may have admitted driving to the paramedic. So I think the defendant was driving and that she was also in actual physical control of the vehicle in that early morning hour[s]." The trial court further stated that the defendant was not giving appropriate answers to the paramedics and had admitted to hitting her head, so the paramedics properly transported her to the hospital. The trial court stated that the hospital followed standard procedures in treating a trauma patient.

¶ 21 Defendant was sentenced to 24 months' conditional discharge, one victim impact panel, 240 hours of independent community service, 12 random urine drops, and ordered to pay fines and fees in the amount of $2,899. Defendant now appeals.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant contends that: (1) the State failed to prove her guilty of driving while under the influence of alcohol and failing to keep in her proper lane of traffic where none of the evidence proved she was driving the vehicle in question, (2) the trial court erred in admitting the results of defendant's blood test into evidence based on the finding that it was sufficiently attenuated from the taint of her illegal arrest, and (3) the trial court violated the confrontation clause in admitting the blood test results into evidence in the absence of testimony of a live witness.

¶ 24 Sufficiency of the Evidence

¶ 25 Defendant's first argument is that the State failed to prove her guilty beyond a reasonable doubt of either offense because there was no evidence that she drove the vehicle or had control over the vehicle involved in the accident. "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's

guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id*. Rather, " '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.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 26 A criminal conviction may be based on circumstantial evidence, as long as it satisfies proof beyond a reasonable doubt of the charged offense. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). In a case based on circumstantial evidence, the trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances if all the evidence considered collectively satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *Id*.

¶ 27 Looking at the facts of this case in a light most favorable to the prosecution, we find that the evidence established beyond a reasonable doubt that defendant was in physical control over the vehicle involved in the accident. The evidence established that Officer Cruz arrived on the scene and defendant was the only civilian in the vicinity. He obtained the vehicle's VIN number and found that it was registered to defendant. Paramedics arrived and treated defendant for injuries on the left side of her face that she had allegedly sustained from the collision. The airbags were deployed. Defendant's car keys were in the ignition, and defendant stated that she was coming home after being out with friends. This circumstantial evidence, when considered collectively, allows the conclusion that defendant drove her vehicle into the parked cars. Where,

as here, the owner is near the vehicle after an accident, the trier of fact reasonably may infer that the owner of the vehicle was its driver. *People v. Rhoden*, 253 Ill. App. 3d 805, 812 (1993).

¶ 28 In *People v. Davis*, 205 Ill. App. 3d 431, 435 (1990), the court noted four factors that could be considered in deciding whether a defendant exercised actual physical control over a vehicle: (1) whether the defendant was positioned in the driver's seat; (2) whether the defendant possessed the ignition key; (3) whether the defendant was alone in the vehicle; and (4) whether the vehicle's doors were locked. Although these factors provide a guideline in determining whether a defendant exercised physical control over a vehicle, that list is not exhaustive. *People v. Slinkard*, 362 Ill. App. 3d 855, 859 (2006). Rather, the issue of whether defendant exercised physical control over a vehicle must be decided on a case-by-case basis. See *Davis*, 205 Ill. App. 3d at 436 (noting that the State need not prove that the defendant was positioned in the driver's seat in order to establish that the defendant exercised control over the vehicle, because to so hold would contradict the admonishment that actual physical control is a question of fact that must be decided on a case-by-case basis). Accordingly, we find that in this case, a rational trier of fact could find that the State proved defendant guilty of driving under the influence beyond a reasonable doubt.

¶ 29 Blood Test Results – Attenuation

¶ 30 Defendant's next argument on appeal is that the trial court erred in admitting the results of defendant's blood test into evidence based on its finding that the test was sufficiently attenuated from the taint of her illegal arrest. Specifically, defendant contends that the blood test was obtained as a direct result of her illegal arrest, and therefore was obtained in violation of the fourth amendment to the Constitution of the United States. It is well-settled that searches by private individuals do not come within the scope of the fourth amendment. *People v. Carlile*, 234

Ill. App. 3d 1063, 1065 (1992). "A 'search' as contemplated by the fourth amendment to the United States Constitution occurs when an expectation of privacy considered reasonable by society is infringed." *People v. Mannozzi*, 60 Ill. App. 3d 199, 203 (1994). Here, there is no indication from the record that the blood draw was a subterfuge procured by the police or any form of state action. See *People v. Yant*, 210 Ill. App. 3d 961, 965 (1991). The officer called paramedics after arriving on the scene and observing defendant's injuries and the condition of the vehicles involved in the crash. Kaczmarek, one of the paramedics who testified, stated that he did an independent assessment of defendant's condition, and did not take any direction from the police officers on the scene. He observed injuries to defendant's face, could see that the airbag had been deployed, and noticed that defendant seemed disoriented and did not know where she was. The paramedic made a decision to transport her to the hospital, as well as to call her in as a trauma patient. Once at the hospital, it was the medical personnel's decision to do the blood draw, as part of the procedure for a trauma patient admitted to the ER. There was simply no evidence presented that the police officer directed the paramedics to bring defendant to the hospital, or that the police officer directed hospital personnel to do a blood draw.

¶ 31 Defendant's reliance on *Birchfield v. North Dakota*, 579 U.S. __ (2016), does not convince us otherwise. In *Birchfield*, police officers were subjecting defendants to breath-testing and blood testing based on state laws if suspected of driving under the influence. The Supreme Court found that breath tests did not implicate significant privacy concerns, but that blood tests were found to be intrusive because of the information that could be revealed to law enforcement. *Id*. The case at bar is inapposite to *Birchfield*. There is no state law requirement in Illinois that motorists suspected of driving under the influence be subjected to blood testing. Rather, the

blood test performed in this case was at the direction of a hospital providing medical treatment, not a police officer.

¶ 32 Even if we were to find that the paramedics and hospital staff were state actors in this case, the conclusion that an arrest was illegal under the fourth amendment does not automatically mean that any subsequent evidence obtained is suppressed. *People v. Jackson*, 374 Ill. App. 3d 93, 101 (2007). The question becomes whether the evidence was obtained by means sufficiently distinguishable from the illegal arrest such that we can say that the evidence is purged of, or attenuated from, the taint of the original fourth-amendment illegality. *Id*. at 93.

¶ 33 In reviewing a trial court's ruling on a motion to suppress evidence, we apply the two-part standard of review adopted by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Under this standard, we give deference to the factual findings of the trial court, and we will reject those findings only if they are against the manifest weight of the evidence. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). However, we review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Id*. at 271. A factual finding is against the manifest weight of the evidence only if the finding appears to be unreasonable, arbitrary, or not based on the evidence, or if the opposite conclusion is readily apparent. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 23.

¶ 34 To determine whether a statement or piece of evidence is sufficiently attenuated from an illegal arrest, courts generally consider the following factors: (1) the proximity in time between the arrest and the statement; (2) the presence of intervening circumstances; (3) the provision of *Miranda* warnings; and (4) the flagrancy of the police misconduct. *People v. Johnson*, 237 Ill. 2d. 81, 93 (2010). "Of these four factors, the presence of intervening circumstances and the flagrancy of the police conduct are the most important." *Hernandez*, 2017 IL App (1st) 150575, ¶

95. Our supreme court has stated that these four factors are to be " 'include[d]' " in an attenuation analysis, "suggesting that a court may consider other facts in an appropriate case." *Id*. ¶ 96 (quoting *Johnson*, 237 Ill. 2d at 93).

¶ 35 Here, defendant's blood test occurred at the hospital, about 20 minutes after her arrest. While it is somewhat close in time to the arrest, there were several intervening factors that occurred prior to the blood draw. See *People v. Vega*, 250 Ill. App. 3d 106, 117 (1993) ("the key to whether the passage of time constitutes sufficient attenuation depends considerably on whether any intervening event occurred during that time, and the nature of those events.") After defendant's arrest, paramedics arrived and independently assessed defendant's condition. They found that defendant had sustained injuries to her face and appeared disoriented. Based on defendant's condition, the force of impact observed in the car, and that the driver's side airbag had deployed, the paramedics made a decision to transport her to the hospital as a trauma patient. Upon arrival at the hospital, defendant received a blood draw as part of the standard procedure performed on all trauma patients. Accordingly, the intervening circumstances show that the blood draw was sufficiently attenuated from the arrest.

¶ 36 There is no evidence to suggest that Officer Higham's conduct rose to the level of flagrancy in this case. "Police action is flagrant where the investigation is carried out in such a manner as to cause surprise, fear, and confusion, or where it otherwise has a 'quality of purposefulness,' *i.e.*, where the police embark upon a course of illegal conduct in the hope that some incriminating evidence (such as the very statement obtained) might be found." *People v. Jennings*, 296 Ill. App. 3d 761, 765 (1998) (quoting *People v. Foskey*, 136 Ill. 2d 66, 86 (1990)). Here, the officer placed her hand on defendant's arm and guided her into the police car, leaving the door open. She did not handcuff defendant, perform field sobriety tests on her, give her a

breathalyzer, or question her extensively. Rather, the officer saw the state of the vehicle involved in the crash, observed defendant and her injuries, and made the decision to call an ambulance. Although guiding defendant to the police car was done without probable cause, and therefore was found to be an illegal arrest, there is simply no evidence that the officer's conduct demonstrated a quality of purposefulness or was done to cause surprise, fear, or confusion on the part of the defendant.

¶ 37 *Miranda* warnings are not sufficient to dissipate the taint of an illegal arrest. However, such warnings provide a factor to be considered in determining whether the defendant's statement was attenuated. *Foskey*, 136 Ill. 2d at 86. In the instant case, the police officer gave defendant her *Miranda* warnings at the hospital, after learning the results of the blood draw. However, before that occurred, defendant did not give any incriminating statements to the police. Accordingly, this issue is not relevant to our attenuation analysis.

¶ 38 Looking at these four factors, with emphasis on the intervening factors and lack of flagrancy on the part of the police officer, we agree with the trial court's assessment that the blood draw was sufficiently attenuated from the illegal arrest.

¶ 39 Blood Test Results – Confrontation Clause

¶ 40 Defendant's final contention on appeal is that it was a violation of her right to confront the witnesses against her when the trial court allowed the State to admit evidence of her blood test results absent the testimony of a live witness. Section 11-501.4 of the Vehicle Code (625 ILCS 5/11-501.4 (West 2012)) allows written blood-alcohol test results to be admitted under certain circumstances in DUI cases as a form of the business-records exception to the rule against hearsay. Section 11-501.4 provides in pertinent part:

> "[T]he results of blood, other bodily substance, or urine tests performed for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, of an individual's blood, other bodily substance, or urine conducted upon persons receiving medical treatment in a hospital emergency room are admissible in evidence as a business record exception to the hearsay rule." 625 ILCS 5/11-501.4 (West 2012).

¶ 41 Defendant contends that this statute is unconstitutional because it deprives her of the right to confront the witnesses against her. This same issue was discussed in *People v. Lendabarker*, 215 Ill. App. 3d 540, 558 (1991), in which the defendant contended that the failure to allow him to confront and cross-examine the personnel who actually tested his blood violated his sixth amendment right to confront witnesses against him. U.S. Const., amend. VI.

¶ 42 In *Lendabarker*, the court recognized that a two-step process is utilized when determining whether hearsay may be admitted in a criminal prosecution without offending the confrontation clause:

> "First, in the usual case the prosecution must either produce or demonstrate the unavailability of the declarant whose statement is to be used against the defendant. Second, once a witness is shown to be unavailable, his statement is admissible only if it bears adequate indicia of reliability. Reliability can be inferred without more if the evidence falls within a firmly rooted exception to the rule against hearsay." *Lendabarker*, 215 Ill. App. 3d at 558-59 (citing *Idaho v. Wright*, 497 U.S. 805, __ (1990)).

¶ 43 The court found that "in the context of the particular dimension of the business-records exception manifested in section 1-501.4 of the Vehicle Code, reliability would not be materially

enhanced by requiring the State to demonstrate the unavailability of the persons who compiled the medical record," and that "the business-records exception to the rule against hearsay is firmly rooted in the law." *Lendabarker*, 215 Ill. App. 3d at 559. The court concluded that "section 11-501.4 does not unconstitutionally deny defendants their sixth amendment right to confront their accusers," and thus we find the same here. See also *People v. Cortez*, 361 Ill. App. 3d 456, 468 (2005).

¶ 44 Finally, we find defendant's reliance on *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), to be misplaced. In *Bullcoming*, the State admitted the results of a blood-alcohol test through a scientist that did not perform the test. The report was created solely for evidentiary purposes and used to aid police officers in their investigation of a criminal offense. *Id.* at 664. The Supreme Court concluded that the report was testimonial in nature and the failure to produce the analyst who performed the test constituted a confrontation clause violation. *Id*. at 665. Justice Sotomayor, in her partial concurrence, stated that *Bullcoming* was "not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the BAC report. For example, the State has not claimed the report was necessary to provide Bullcoming with medical treatment." *Id*. at 672.

¶ 45 Unlike in *Bullcoming*, the result of defendant's blood test in this case was not procured for the sole purpose of aiding police officers in their investigation, and was not testimonial in nature. Rather, it was obtained as part of defendant's medical treatment as a trauma patient in the ER, and thus the admission of this evidence did not violate defendant's right to confront the witnesses against her.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.