2017 IL App (1st) 161476-U
Order filed: May 12, 2017

SIXTH DIVISION

No. 1-16-1476

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. 16 C 330002
	)	
JEFFREY KROCKO,	)	Honorable
	)	James N. Karahalios,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Defendant's conviction and sentence for aggravated driving under the influence affirmed over his contentions that: the trial court shifted the burden to defendant; the trial court improperly classified defendant's conviction as a Class 2 felony; and defendant's sentence is excessive.

¶ 2 Following a bench trial, defendant Jeffrey Krocko was convicted of the Class 2 felony of aggravated driving under the influence (DUI) of alcohol in violation of 625 ILCS 5/11-501(a) (West 2014) (DUI statute), and sentenced to three years' imprisonment and two years of mandatory supervised release (MSR). On appeal, defendant contends that: (1) the trial court improperly shifted the burden of proof to him; (2) the trial court incorrectly classified defendant's conviction as a Class 2, rather than a Class 4 felony; and (3) his three-year sentence

is excessive because the trial court failed to consider his rehabilitative potential. For the following reasons, we affirm.

¶ 3 Defendant was charged with aggravated DUI. The indictment notified defendant that the State would seek a Class 2 felony sentence in that he had committed two previous violations of the DUI statute.

¶ 4 At trial, Village of Bartlett police officer Kevin Gost testified that he was on patrol with his partner, Officer Seickman, on October 4, 2015. At around 12:05 a.m., Officer Gost observed a vehicle speeding and, using his radar gun, determined that the vehicle was driving 33 miles over the 40 mile per hour speed limit. Officer Gost stopped the vehicle and identified defendant as the driver. Defendant told Officer Gost that he was speeding to get around another vehicle. However, according to the officer, there were no other vehicles on the road at that time. Defendant smelled strongly of alcohol and Officer Gost believed that defendant was slightly slurring his speech.

¶ 5 When defendant gave Officer Gost his license and insurance information, Officer Gost learned that defendant was not the owner of the vehicle. Officer Gost asked defendant who was the owner, and defendant responded that the vehicle belonged to his friend. When Officer Gost inquired about the friend's identity, defendant had to read her name from the insurance card.

¶ 6 Because defendant was speeding and smelled of alcohol, Officer Gost asked defendant to exit the vehicle and had to repeat his request multiple times. Only when the officers yelled at defendant to exit the vehicle, did he comply. Additionally, Officer Gost repeatedly requested that defendant remove the keys from the vehicle's ignition, but defendant did not comply. Eventually, Officer Seickman removed the keys by reaching through the passenger window.

¶ 7 Officer Gost sought to conduct field sobriety tests because defendant's actions "were not consistent" with a sober person's behavior. Defendant exited his vehicle and walked toward the rear of it. Although Officer Gost explained the field sobriety tests to defendant, defendant refused to perform them, stating that he was aware of what the tests were and that "[w]e, the [p]eople, are not to take tests." After defendant refused to perform the field sobriety tests, he was placed into custody.

¶ 8 Officer Seickman then searched defendant's vehicle and recovered two flasks: one bearing defendant's initials; the other bearing defendant's last name. One flask was empty but the second flask contained a liquid that, in Officer Gost's opinion, smelled like whiskey.

¶ 9 The officers transported defendant to the Village of Bartlett police station, and Officer Gost read defendant the "Warning to Motorist" admonition. Defendant requested a copy of the warning to read himself. After listening to and reading the admonition, defendant refused to submit to chemical tests. After a mandatory 20-minute waiting period, Officer Gost requested that defendant submit to a Breathalyzer test. Defendant refused to submit to a Breathalyzer test and also refused to sign an I-bond, which was required for his release. Because he refused to sign the I-bond, Officer Gost informed defendant he would be placed in a holding cell. Defendant responded: "Put me in the cell." Officer Gost asked defendant to remove his shoes and tie before being placed in the holding cell, and defendant proceeded to "disrobe completely." Officer Gost informed him that the full removal of his clothing was unnecessary, and defendant responded that he would remove them if he wanted to.

¶ 10 Eventually, defendant stopped removing his clothes and was placed into the holding cell where he remained until his ride arrived. Defendant continued to refuse to sign the I-bond, and

Officer Gost informed him that he would be transported to the county jail if he did not provide his signature. After 15 minutes, defendant signed the I-bond.

¶ 11 Officer Gost testified that he had been a police officer for 24 years and that he had a substantial amount of professional experience with people under the influence of alcohol. Based upon Officer Gost's professional experience, he believed that defendant was under the influence of alcohol on October 4, 2015. The officer's opinion was based on: the high rate of speed that defendant had been driving; the odor of alcohol emanating from defendant's person; defendant's contention that he was passing another vehicle when no other vehicles were on the road; and defendant's general demeanor. Officer Gost also believed that defendant's driving capabilities were impaired on the night in question.

¶ 12 On cross-examination, Officer Gost acknowledged that defendant's vehicle was not swerving or weaving. He did not observe any traffic violations, other than defendant's disregard for the posted speed limit. As part of his report in this matter, Officer Gost had prepared a three-page narrative. Officer Gost did not note in the narrative that defendant's speech was slurred, but marked the report to show slurred speech. Further, Officer Gost acknowledged that defendant did not fumble for his driver's license, nor did he have difficulty walking to the rear of his vehicle. Defendant told Officer Gost that he was a wrestler, and that the sobriety tests were easy, but that he refused to perform them. Officer Gost found it "ridiculous" and "irrelevant" that defendant mentioned being a wrestler, and that the statement contributed to Officer Gost's determination that defendant was under the influence of alcohol.

¶ 13 The court viewed portions of the traffic stop video from Officer Gost's vehicle, which is not contained in the record on appeal.[1]

[1] See *People v. Smith*, 406 Ill. App. 3d 879, 886 (2010) (noting that it is the defendant's

¶ 14 At the close of the State's evidence, defendant moved for a directed finding. In denying defendant's motion, the court stated that, in the video, defendant "did not exhibit physical movements which would indicate impairment," which would normally be sufficient for directing a finding. However, the court explained that it could not ignore the "combination of totally obnoxious behavior, defiance, and most telling, incoherent or nonresponsive remarks." Following the court's ruling on the motion, defendant rested without presenting evidence.

¶ 15 During closing arguments, defense counsel argued that no evidence had been presented that defendant was under the influence of alcohol. Counsel pointed out that there were no physical manifestations, such as swaying or stumbling, that indicated defendant was impaired. Further, counsel noted that defendant was not swerving or weaving while driving his vehicle. Without these physical manifestations of impairment, defense counsel argued that the State failed to prove, beyond a reasonable doubt, that defendant was driving under the influence of alcohol.

¶ 16 Following arguments, the court found defendant guilty of aggravated DUI. In finding defendant guilty, the court stated the following.

> "But for the charitably put unusual behavior, I agree with you, [defense counsel], but I don't have any explanation in the record as to why the Defendant responded both orally and physically in the manner that he did. I mean, he starts to strip down naked in -- in the police station. Just the totality of all of his actions, and conduct, and statements as testified to by the officer and as documented in the -- in the video leads me to believe there was mental impairment, at this time. There's just too many of these, again, charitably put, oddities to explain away without having some counterevidence.

---

burden to provide a complete record on appeal).

I mean, from the moment the officer approached he had a difficult time obtaining the Defendant's information regarding the ownership of the car, regarding him asking the Defendant to get out of the car, regarding asking him to turn off the car, regarding telling him not to go back into the car, he was insisting on the video that he wanted to retrieve his keys, just so many things about that, and then his responses to what the field sobriety tests were. I mean, I'm not -- I'm not discussing now an individual's right to refuse those things, I -- that's not anything that -- that I would take to mean any kind of a mental impairment, but his -- his total interactions with the police officer, separate and apart from him being completely obnoxious, demonstrate that he really did not have a constant awareness of what was being discussed with him, what was being asked of him, what his responses were, and, apparently, that -- that just continued on into the police station where he may be sitting there still but for his wife that -- that showed up and then he signed to get out of jail.

I mean, it's all so unusual that the totality of those circumstances convinces me that he had some mental impairment, at the time, and whether or not he knew he was even driving at 73 miles an hour is questionable. So, I do think that it [affected] his driving. Maybe he wasn't weaving, maybe he wasn't drifting out of his lane, but he was passing cars on the road that didn't exist and -- and going 73 miles per hour, you know, in a 40 mile an hour zone.

And the totality of those circumstances convince me beyond a reasonable doubt that the State has met its burden of proof both as to the case in chief, the underlying charge, and then there's no contest to the fact that he has two prior convictions which will

> enhance this felony. I don't have any choice under the -- under the totality of the circumstances but to find him guilty."

¶ 17 Defendant filed a motion for reconsideration, a new trial, and to reopen proofs to present evidence pertaining to defendant's mental health and argued that the State failed to prove him guilty beyond a reasonable doubt and the court improperly shifted the burden to him. Defense counsel further argued that a mental health assessment outside of the record indicated that defendant possibly suffers from attention deficit disorder and various other mental health issues. Defendant did not submit his medical records to counsel prior to trial.

¶ 18 The court denied defendant's posttrial motions, reasoning that the State proved defendant guilty beyond a reasonable doubt, and that the evidence defense counsel endeavored to present regarding defendant's mental health was speculative rather than factual because defendant had never been diagnosed with a mental illness. With regard to defendant's burden-shifting argument, the court stated:

> "Now I just want to mention one other thing. I do think that it is unfair to try to characterize my observations of the evidence as shifting the burden of proof which I was not doing. I do have every right to comment on evidence which is un-rebutted. Therefore, the State's evidence in this case was totally un-rebutted, un-refuted. Based upon the totality of that evidence, I found and do find that it proves the defendant guilty beyond a reasonable doubt. And without any disrespect to counsel, I'm going to deny the defendant's post trial motions."

¶ 19 Defendant's case proceeded to a sentencing hearing. In aggravation, the State presented evidence that the current offense was defendant's third DUI conviction. Defendant's two prior DUI convictions were from 2002 and 2007, respectively. The State additionally noted

defendant's criminal history, including a juvenile charge of armed robbery without a firearm that was reduced to theft and resulted in defendant being adjudicated delinquent. The State noted that defendant was placed on probation in his juvenile case, which was terminated unsatisfactorily.

¶ 20 In mitigation, defense counsel explained that defendant's juvenile theft offense occurred when he was 16 years old and that defendant had been sitting in a vehicle when another individual in the vehicle exited and robbed a gas station. Counsel further argued in mitigation that defendant has mental health issues, but that he is a hard worker with a strong work ethic. Counsel also presented 10 letters of character from various family members and defendant himself.

¶ 21 Before imposing defendant's sentence, the court noted that this was defendant's third DUI, and he had not previously been successful in completing his probation. The court, thus, concluded that probation was not appropriate for defendant and sentenced him to three years' imprisonment with two years of MSR.

¶ 22 Defendant subsequently filed a motion to reconsider his sentence, arguing that probation was a more appropriate sentence than incarceration due to his mental illness. The court denied defendant's motion to reconsider, reiterating that this was defendant's third DUI conviction, and that the three year sentence was appropriate because a lesser sentence would deprecate the seriousness of the offense. The court further reiterated that probation was not an option for defendant because he was previously unsuccessful in completing probation. This appeal followed.

¶ 23 On appeal, defendant first contends that the trial court shifted the burden of proof to defendant when it stated that the record contained no explanation for defendant's defiant behavior. The State argues that the court's statements, when read as a whole, reveal that it did

not shift the burden of proof to defendant, and that the court found defendant guilty based on a totality of the circumstances.

¶ 24 Due process requires that the State bear the burden of proving all of the elements of a charged offense beyond a reasonable doubt. *People v. Howery,* 178 Ill. 2d 1, 32 (1997). The burden of proof remains on the State throughout the entire trial and never shifts to the defendant. *Id.* The defendant is presumed innocent throughout the course of the trial and does not have to testify or present any evidence. *People v. Cameron,* 2012 IL App (3d) 110020, ¶ 27.

¶ 25 A presumption exists that the trial court knows the law regarding the burden of proof and will apply it properly. *Id.* ¶ 28. This presumption is rebutted only where the record contains "strong affirmative evidence" that the trial court incorrectly allocated the burden of proof to the defendant. *Howery,* 178 Ill. 2d at 32-33. A trial court's efforts to test, support, or sustain a theory of defense cannot be viewed as improperly diluting the State's burden of proof, or as improperly shifting the burden of proof to the defendant. *Cameron,* 2012 IL App (3d) 110020, ¶ 28. Moreover, the trial court may comment on the implausibility of the defense's theories, as long as it is clear from the record that the court applied the proper burden of proof in finding the defendant guilty. *Id.* Whether the trial court applied the proper legal standard is a question of law we review *de novo*. *People v. Fitzpatrick,* 2013 IL 113449, ¶ 12; *Cameron,* 2012 IL App (3d) 110020, ¶ 26.

¶ 26 In the instant case, we find that the record does not contain strong affirmative proof that the trial court erroneously diluted the State's burden of proof or shifted the burden of proof to defendant. The court noted that although defendant did not display physical indications of being under the influence, the totality of the circumstances indicated that he was impaired and there was no explanation for defendant's unusual and defiant behavior. We believe this comment was

a response to defense counsel's repeated assertion in closing arguments that there was no evidence that defendant was under the influence of alcohol. The trial court's remark indicates that it considered and attempted to sustain the defense theory that the State failed to prove defendant guilty beyond a reasonable doubt because there was no evidence of impairment, but found that theory inadequate. The record reflects that the State presented evidence that the officers recovered a flask containing suspected whiskey from the vehicle and defendant smelled of alcohol, indicating that defendant consumed alcohol. Further, the testimonial evidence of defendant's behavior indicated that he was impaired from the consumption of alcohol. Thus, when the court's comment is viewed in the context of its statements on the circumstantial evidence of defendant's guilt, we cannot find that the court improperly shifted the burden of proof to defendant. Although the trial court described defendant's behavior as unexplained, it is clear from the context that the trial court meant unexplained by anything other than alcohol consumption. Additionally, the court specifically stated that the State proved its case beyond a reasonable doubt, indicating that the court knew and applied the correct legal standard. *Cameron*, 2012 IL App (3d) 110020, ¶ 28. Accordingly, we reject defendant's contention that the trial court erroneously shifted the burden of proof to him.

¶ 27 Next, defendant asserts that the trial court improperly classified his conviction for aggravated DUI as a Class 2 felony. Defendant contends that the DUI statute is ambiguous, at best, as to whether an offender's prior two DUI convictions need to be aggravated in order to elevate a third or subsequent DUI to a Class 2 felony. Defendant acknowledges that he did not preserve this issue but asks that we review it under the first prong of the plain-error doctrine.

¶ 28 Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Powell*,

2012 IL App (1st) 102363, ¶ 7 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Nevertheless, forfeited sentencing issues may be reviewed for plain error. *Id*. ¶ 7 (citing *Hillier*, 237 Ill. 2d at 545). To obtain relief under the plain error doctrine in the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. Before we consider application of the plain error doctrine, we must determine whether any error occurred. *Id.*

¶ 29 Subsection (a) of section 11-501 of the Illinois Vehicle Code defines the offense of DUI. 625 ILCS 5/11-501(a)(1)-(6) (West 2014). With various exceptions not relevant in the instant case, both a first and second violation are, generally, Class A misdemeanors, and a second violation also subjects the offender to a mandatory term of either 5 days' imprisonment or 240 hours of community service. 625 ILCS 5/11-501(c)(1), (c)(2) (West 2014). Third and subsequent violations of section 11-501 are considered aggravated DUIs and carry with them harsher penalties. 625 ILCS 5/11-501(d)(1)(A) (West 2014).

¶ 30 Subsection (d)(2) of section 11-501 establishes parameters for aggravated DUIs and provides the "baseline" felony class for aggravated DUI: "Except as provided otherwise, a person convicted of aggravated driving under the influence of alcohol *** is guilty of a Class 4 felony." 625 ILCS 5/11-501(d)(2)(A) (West 2014); *People ex rel. Glasgow v. Carlson*, 2016 IL 120544, ¶ 20. Subsections (d)(2)(B) to (d)(2)(J) outline factors that elevate aggravated DUIs to higher class felonies. Subsection (d)(2)(B) provides that a "third violation of this Section or a similar provision is a Class 2 felony." 625 ILCS 5/11-501(d)(2)(B) (West 2014).

¶ 31 Defendant asserts that, because subsection (d)(2)(B) intentionally lists nonaggravated and aggravated DUIs as separate offenses, when read as a whole, the subsection mandates that an

offender have two prior *aggravated* DUIs before a third DUI becomes a Class 2 offense. Defendant argues that "a third violation of *this Section*" from subsection (d)(2)(B) refers *only* to aggravated DUIs. Thus, defendant contends that, because his first two DUI convictions were nonaggravated, the instant conviction is not an aggravated DUI subject to Class 2 felony classification. Moreover, defendant contends that reading the statute to include nonaggravated DUI violations for a high felony classification produces an absurd result because the punishment for a second offense DUI is Class A misdemeanor and a third offense DUI "jump[s]" to a Class 2 felony. Alternatively, defendant contends that section 11-501(d) is ambiguous because it is unclear whether an offender's prior DUI violations must have been aggravated in order to elevate the third or subsequent violation to a Class 2 felony. Defendant argues that the rule of lenity mandates that this ambiguity be resolved in his favor, and that we should interpret the statute as requiring two prior aggravated DUI convictions to trigger Class 2 felony classification for a third or subsequent violation. The State counters that contrary to defendant's assertion, the statute is not ambiguous, and Illinois courts have repeatedly concluded that the statute includes both aggravated and nonaggravated prior DUIs for enhancing third and subsequent violations to Class 2 felonies.

¶ 32 We review matters of statutory interpretation *de novo. People v. Beachem,* 229 Ill. 2d 237, 243 (2008). Our supreme court recently interpreted subsection (d)(2)(B) of section 11-501 in *People ex rel. Glasgow v. Carlson,* 2016 IL 120544. In *Carlson,* the defendant was convicted of aggravated DUI, his third DUI violation. *Id.* ¶¶ 3-4. The trial court, finding subsections (d)(2)(A) and (B) ambiguous, sentenced defendant as a Class 4 offender, despite his two previous DUI convictions. *Id.* ¶ 10. The State sought mandamus and requested, among other things, that our supreme court compel the trial court to classify the defendant's DUI conviction

as a Class 2 felony. *Id.* ¶ 14. Our supreme court, in interpreting the DUI statute, found that the defendant's third DUI constituted aggravated DUI and was a Class 2 felony, rather than a Class 4 felony. *Id.* ¶ 24. The court reasoned that subsection (d)(2)(A), which categorizes aggravated DUIs as Class 4 felonies, was a statutory baseline for aggravated DUIs and a third DUI is one of several ways in which a DUI could be elevated to aggravated DUI. *Id.* ¶ 23. The court concluded, "[w]ithout question, subsection (d)(2)(B) demonstrates unambiguous legislative intent to classify a third DUI conviction as a Class 2 felony." *Id.* ¶ 24. While the court did not address specifically whether an offender's prior DUI violations must have been aggravated to enhance a third violation to a Class 2 felony, it cited, with approval, *People v. Mischke*, 2014 IL App (2d) 130318, which held that subsection (d)(2)(B) " 'require[s] that a person with two prior *nonaggravated* DUI offenses be sentenced, upon his third DUI offense, as a Class 2 offender.' " (Emphasis added) *Carlson*, 2016 IL 120544, ¶ 27 (quoting *Mischke*, 2014 IL App (2d) 130318, ¶ 22).

¶ 33 Here, it is undisputed that the instant conviction is defendant's third DUI violation. Accordingly, subsection (d)(2)(B) of section 11-501 applies, and the plain language provides that a third DUI conviction is a Class 2 felony, regardless of whether his prior DUI convictions were aggravated. See *Carlson*, 2016 IL 120544, ¶ 26-27; see also *Mischke*, 2014 IL App (2d) 130318, ¶ 22. Furthermore, our supreme court expressly rejected the contention that classifying a third DUI violation to a higher felony classification produces an absurd result when read in the context of the statute as a whole. *Carlson*, 2016 IL 120544, ¶ 28. It noted that "the escalating penalties and felony classifications for successive DUI convictions in section 11-501 demonstrate 'the General Assembly's intention to penalize repeat [DUI] offenders more severely.' " *Id.* (quoting *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 35). In light of these cases and the plain

language of the statute, we find that the trial court properly classified defendant's conviction as a Class 2 felony. Without error, there is no plain error. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007).

¶ 34 Finally, defendant argues that his three-year sentence is excessive because the trial court failed to consider his rehabilitative potential and articulate its reasons for not giving defendant probation. The State responds that his sentence was appropriate based on the seriousness of the offense, defendant's criminal history, and the need to deter others. Further, the State argues that the court does not have to articulate its consideration of mitigating factors.

¶ 35 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30 (citing *People v. Stacey*, 193 Ill. 2d 203, 209-210 (2000)). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). In determining an appropriate sentence, the trial court considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment." *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). Absent some affirmative indication to the contrary, other than the sentence itself, we presume the trial court considered all mitigating evidence before it. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the trial court, having observed the proceedings, is in the best position to weigh the relevant sentencing factors, (*People v. Arze*, 2016 IL App (1st) 131959, ¶ 121) we do not substitute our judgment for that of the trial court simply because we would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214 (2010).

¶ 36 Here, defendant was sentenced to three years' imprisonment, the minimum sentence allowable within the statutory range. See 730 ILCS 5/5-4.5-35(a) (West 2012) (for Class 2 felonies, "[t]he sentence of imprisonment shall be a determinate sentence of not less than 3 years and not more than 7 years"). While defendant contends that mitigation evidence revealed that he has psychological issues which explained his defiant behavior on the night in question, and probation would have been more appropriate for restoring him to useful citizenship, the trial court is in the best position to weigh the relevant sentencing factors. *Arze*, 2016 IL App (1st) 131959, ¶ 121. The trial court stated on the record that probation was not appropriate because defendant was unsuccessful at completing probation in the past and the current offense was his third DUI. Further, the court noted that anything less than three years' imprisonment would deprecate the seriousness of the offense. All of these considerations were relevant to the trial court's sentencing determination. See *Hernandez*, 319 Ill. App. 3d at 529. Moreover, contrary to defendant's contention, nothing in the record indicates that the trial court did not consider defendant's rehabilitative potential. *Jones*, 2014 IL App (1st) 120927, ¶ 55. Thus, even if we would have weighed the relevant factors differently, we cannot say that the court abused its discretion by rejecting probation and sentencing defendant to three years' imprisonment. See *Alexander*, 239 Ill. 2d at 214.

¶ 37 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 38 Affirmed.