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2017 IL App (3d) 150064-U

Order filed July 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0064 Circuit No. 14-CF-349
VINCENT D. MADRIAGA,	)	Honorable Susan Sumner Tungate,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: Admission of evidence of defendant's postarrest, pre-*Miranda* warning silence was error, but it is not reversible plain error and did not result in ineffective assistance of counsel. The court did not err when it mentioned at sentencing that defendant had five prior DUI convictions.

¶ 2 Defendant, Vincent D. Madriaga, appeals from his convictions for aggravated driving under the influence of alcohol (DUI) and driving while license revoked. Defendant argues: (1) the State committed prosecutorial misconduct when it elicited testimony regarding defendant's

postarrest silence, and (2) defendant's sentence was the result of a double enhancement. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of Class 1 felony aggravated DUI (625 ILCS 5/11-501(d)(1)(A) (West 2014)), two counts of Class 4 felony aggravated DUI (625 ILCS 5/11-501(d)(1)(G) (West 2014)), and one count of Class 3 felony driving while driver's license is revoked (625 ILCS 5/6-303(d-4) (West 2014)). The cause proceeded to a jury trial.

¶ 5 Police Lieutenant Michael Johnston testified that he saw defendant slumped over in the driver's seat of a running vehicle. At the time, defendant was holding a can of beer. Johnston recorded the scene with his cell phone while he attempted to rouse defendant. When defendant awoke, he told Johnston that he drove the vehicle from his residence to the parking lot and the beer belonged to him. Defendant said he was waiting for his wife. Defendant did not deny driving the vehicle. The State played Johnston's video recording for the jury.

¶ 6 During his interaction with defendant, Johnston discovered that defendant's driver's license was revoked. Defendant's driving abstract showed that defendant had four prior DUI convictions and his driver's license was revoked at the time of the instant offense. Defendant also agreed to submit to field sobriety tests, which were recorded by Officer Robert St. Louis's dash camera. During the walk-and-turn test, defendant swayed from side-to-side and could not walk in a straight line. Defendant also could not complete the one-leg stand test. The State played the recording of the field sobriety tests for the jury. Johnston opined that based on his experience and observations defendant was under the influence of alcohol and was not fit to operate a vehicle. The parties stipulated that a breathalyzer test showed that defendant's blood alcohol content was 0.14.

¶ 7 At the police station, Johnston read the *Miranda* warning to defendant. Defendant waived his rights and told Johnston that he drove from his residence to the parking lot where he met Johnston. Defendant had three or four beers, but he did not believe that he was under the influence of alcohol.

¶ 8 Johnston also spoke with defendant's wife, Phyllis Madriaga, in the insurance office that was located adjacent to the parking lot. Defendant's wife never told Johnston that she drove the vehicle to the parking lot. The State rested at the conclusion of Johnston's testimony.

¶ 9 The defense called Phyllis as its first witness. Phyllis testified that she drove defendant to the parking lot. Phyllis left defendant in the vehicle while she renewed her automotive insurance at a nearby office. While Phyllis was in the office, a police officer approached her and told her that defendant was being arrested for DUI. The officer told Phyllis that defendant had admitted that he drove the vehicle. Phyllis told the officer that she had driven the vehicle to the parking lot. Phyllis did not know if defendant had been drinking and was unaware that defendant had an open beer in the vehicle.

¶ 10 The State recalled Johnston to testify. Johnston said Phyllis never said that she drove the vehicle.

¶ 11 The State next called Officer St. Louis. St. Louis testified that he was present during the field sobriety testing, and he transported defendant to the police station. The State asked St. Louis:

> "Q. At any point during your time with the defendant did he tell you that he did not drive that car?
>
> A. No, he did not."

¶ 12 During its closing argument, the State argued "[n]ever at any point during any conversations of any police officers does the defendant say I didn't drive. Never when given field sobriety tests does he say, hey, wait a minute. How can you arrest me for DUI? I didn't drive today."

¶ 13 The jury found defendant guilty of each of the charged offenses.

¶ 14 During the sentencing hearing, the State argued that "[y]ou cannot have five DUI's and get the minimum sentence." The court ruled:

> "Regards to the, uh, nature and circumstances of this offense and to the history, character, and condition of the defendant—five DUI's, just to top it off—the Court is of the opinion that, uh, his imprisonment is necessary for the protection of the public.
>
> The State has asked for on, Count 1, twelve years in the Department of Corrections. Defendant asked for four.
>
> This Court has considered this and tried to figure out an appropriate thing. I'm going to sentence him to eight years in the Department of Corrections [for aggravated DUI]."

The court sentenced defendant to a concurrent term of five years' imprisonment for driving while driver's license is revoked.

¶ 15 ANALYSIS

¶ 16 I. Evidence of Defendant's Postarrest Silence

¶ 17 Defendant argues that the State violated his right against self-incrimination and his due process right to a fair trial when it elicited testimony that he never denied driving the vehicle and used this evidence of defendant's silence in its closing argument. Defendant forfeited this issue

but argues that it is reversible as either plain error or the result of ineffective assistance of counsel. We find that the elicitation of defendant's postarrest silence was error, but it is not plain error, and defendant received effective assistance of counsel.

¶ 18 A. Defendant's Postarrest Silence

¶ 19 The first step in either plain error or ineffective assistance of counsel review is to determine if there is error. See *People v. Sargent*, 239 Ill. 2d 166, 189 (2010) (first step of plain error analysis is to determine if error occurred); *People v. Mahaffey*, 194 Ill. 2d 154, 173 (2000) (ineffective assistance of counsel cannot be established where no error occurred) (*overruled on other grounds by People v. Wrice*, 2012 IL 111860, ¶ 75).

¶ 20 Generally, the use of a defendant's postarrest, post-*Miranda* warning silence violates a defendant's right to due process. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). Defendant argues that Illinois case law extends the *Doyle* due process protections to a defendant's pre-*Miranda* silence. Defendant's interpretation of the Illinois rule is overbroad. Under the Illinois rule, defendant's postarrest, pre-*Miranda* silence is inadmissible on evidentiary principles. *People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962). Evidence of a defendant's postarrest, pre-*Miranda* silence is neither relevant nor material to proving or disproving the charged offense. *People v. Clark*, 335 Ill. App. 3d 758, 763 (2002). Illinois law does not, however, create a constitutional prohibition to the use of a defendant's postarrest, pre-*Miranda* silence. *People v. Sanchez*, 392 Ill. App. 3d 1084, 1096 (2009). Ultimately, evidence of defendant's postarrest silence is inadmissible in Illinois whether it occurred before or after defendant received the *Miranda* warning, but it is only of a constitutional magnitude where defendant's silence occurred after the *Miranda* warning was issued. *Id.* Stated another way, evidence of a defendant's postarrest that

occurs before the *Miranda* warning is inadmissible evidence, but not a violation of defendant's constitutional rights.

¶ 21 Here, the State elicited testimony from St. Louis about defendant's silence. During defendant's interaction with St. Louis, he was either undergoing field sobriety testing or placed under arrest and being transported to the police station. Defendant received the *Miranda* warning after St. Louis transported him to the police station. Therefore, St. Louis's testimony about defendant silence violated the Illinois evidentiary rule against the use of a defendant's postarrest, pre-*Miranda* silence. See *id.*

¶ 22 B. Plain Error

¶ 23 Defendant acknowledges that this error has been forfeited, but he argues that it is reversible under either prong of the plain error doctrine. A reviewing court may consider a forfeited error when either (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant" or (2) "the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 24 The evidence in this case was not close. To prove defendant's guilt of aggravated DUI, the State was required to show that defendant was in physical control of a vehicle while the concentration of alcohol in defendant's breath was 0.08 or more, and defendant had three or more prior DUI convictions. 625 ILCS 5/11-501(a)(1), (d)(1)(A) (West 2014). The only disputed issue is whether defendant was in physical control of the vehicle. The evidence readily establishes this element. Johnston testified that he found defendant seated in the driver's seat with the engine running. A video recording corroborated Johnston's testimony. These facts allowed the jury to reasonably determine that defendant was in physical control of the vehicle.

See *City of Naperville v. Watson*, 175 Ill. 2d 399, 402 (1997) (a person need not drive to be in physical control of a vehicle as individuals discovered sleeping in vehicles have been found to be in actual physical control).

¶ 25 This error also does not require reversal under the second prong. Under the second prong, "automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). The error at issue is an evidentiary error and does not rise to the level of a violation of defendant's constitutional rights. *Sanchez*, 392 Ill. App. 3d at 1096. Therefore, this error was not so serious that it challenged the integrity of the judicial process or undermined the fairness of the trial.

¶ 26 C. Ineffective Assistance of Counsel

¶ 27 Defendant argues that counsel was ineffective for failing to object to the erroneous admission of defendant's silence and its subsequent use in the State's closing argument. To establish ineffective assistance, defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *People v. Bailey*, 232 Ill. 2d 285, 289 (2009). Ineffective assistance of counsel and the first prong of plain error review share the requirement that defendant show that he was prejudiced. *People v. White*, 2011 IL 109689, ¶ 133. Defendant does not satisfy this requirement. As we noted above, the evidence in this case was not close. See *supra* ¶ 24. In light of this evidence, defendant cannot show that the singular admission of his silence into evidence and its mention in the State's closing argument altered the outcome of the trial.

¶ 28 II. Sentence

¶ 29 Defendant argues that the court abused its discretion when it considered his prior DUI convictions in aggravation because defendant's prior convictions were an element of the Class 1 felony aggravated DUI charge. Defendant acknowledges that he has forfeited review of this issue, but argues that it is plain error. We find that the court did not abuse its discretion as it gave insignificant weight to defendant's history of multiple DUI convictions.

¶ 30 A fact that is an element of an offense cannot also be used as the basis for imposing a more severe sentence. *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). However, remand for resentencing is unnecessary where the court places insignificant weight on an otherwise improper aggravating factor. *People v. Beals*, 162 Ill. 2d 497, 509-10 (1994). We review defendant's sentence for an abuse of discretion. *Id.* at 512.

¶ 31 Defendant was charged with aggravated DUI in that he was in physical control of a vehicle while he was under the influence of alcohol, and he had three or more prior DUI convictions. 625 ILCS 5/11-501(a)(1), (d)(1)(A) (West 2014). The State enhanced the charge to a Class 1 felony because defendant was charged with his fifth DUI violation. 625 ILCS 5/11-501(d)(2)(D) (West 2014). This charge carried a sentencing range of 4 to 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2014).

¶ 32 Defendant's sentence of eight years' imprisonment is within the applicable sentencing range, and therefore, is presumptively valid. See *People v. McGuire*, 2016 IL App (1st) 133410, ¶ 12. The record establishes that the court gave insignificant weight to defendant's criminal history. The court's comment that defendant had five prior DUI convictions indicated both the reason that defendant was subject to the enhanced sentencing range and that the court had reviewed defendant's criminal history. Therefore, the court did not abuse its discretion when it

made a passing reference to defendant's prior DUI convictions. Having found no error, we need not address the two prongs of plain error analysis.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Kankakee County is affirmed.

¶ 35 Affirmed.

¶ 36 JUSTICE SCHMIDT, specially concurring.

¶ 37 I concur in the judgment, but write separately to point out that any error with respect to evidence regarding who drove the car to the parking lot, defendant or Phyllis, is harmless as a matter of law. As the majority points out above, the evidence was undisputed that defendant was in physical control of the vehicle at the time officers encountered him. *Supra* ¶ 24. Furthermore, who drove the car to the parking lot is legally irrelevant. The statute applies to drivers of any vehicle within the State and is not limited to public highways. *People v. Bailey*, 243 Ill. App. 3d 871 (1993); *People v. Foster*, 170 Ill. App. 3d 306 (1988); *People v. Clark*, 47 Ill. App. 3d 568 (1977).