2018 IL App (1st) 170482-U

No. 1-17-0482

Order filed September 20, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 14124
	)	
JOHN COSTA,	)	Honorable
	)	James N. Karahalios,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: One of defendant's two convictions for aggravated DUI vacated pursuant to the one-act, one-crime doctrine where both convictions are based on the same physical act of driving under the influence of alcohol.

¶ 2 Following a bench trial, defendant John Costa was convicted of two counts of aggravated driving while under the influence of alcohol (DUI). The trial court sentenced defendant to concurrent terms of 4 months in the Cook County Department of Corrections, 30 months of

probation with intensive probation for the first year, and 25 days of community service, satisfied by time served. The court also assessed defendant fines, fees and court costs totaling $26,854.

¶ 3 On appeal, defendant contends in a very well-written brief, and the State agrees, that one of his convictions must be vacated under the one-act, one-crime doctrine because both convictions were based on the same physical act of driving while under the influence of alcohol. We agree.

¶ 4 Defendant was charged with two counts of aggravated DUI for driving under the influence of alcohol. Both counts indicated that the State sought to sentence defendant as a Class 2 offender because he had two prior DUI convictions. The only difference between the two counts is that count I included an additional aggravating factor alleging that at the time of the offense, defendant was transporting a person under the age of 16.[1]

¶ 5 The evidence at trial established that about 6:45 p.m. on August 13, 2016, paramedics and police responded to a call of a man slumped over the steering wheel of a vehicle stopped in traffic on Algonquin Road. Defendant, the driver of that vehicle, told paramedics that he was merely tired, but appeared confused and disoriented. Three young children, all under the age of 10, were seated in the back seat of the vehicle. Defendant smelled of alcohol and his speech was slurred. He had an unsteady gait as he walked to an ambulance, and crawled up the steps to enter. At the hospital, defendant admitted that he consumed two beers that afternoon. He refused to submit to a Breathalyzer, blood or urine test. Palatine police officer Christian Mennel opined that, based on his experience, observations of defendant, and defendant's admission to drinking

[1] We note that in his opening brief, appellate counsel states that he will move to supplement the record on appeal with the indictment. He has not yet done so. However, because the parties agree to the content of the charges and the State concedes the issue, we render judgment based on the existing record.

that afternoon, defendant was under the influence of alcohol. The trial court found defendant guilty of both counts of aggravated DUI.

¶ 6 The parties on appeal agree, and we concur, that one of defendant's convictions must be vacated under the one-act, one-crime doctrine because both convictions were based on the same physical act of driving while under the influence of alcohol. In support of his argument, defendant relies on this court's recent ruling in *People v. Hamerlinck*, 2018 IL App (1st) 152759. In *Hamerlinck*, we vacated the aggravated DUI conviction and sentence for the offense that we determined was the less serious. *Hamerlinck*, 2018 IL App (1st) 152759, ¶ 55. We found no need to remand the case for resentencing, noting that neither party had asked us to do so. *Hamerlinck*, 2018 IL App (1st) 152759, ¶ 55. Here, while defendant relies on our reasoning in *Hamerlinck*, he also asserts that unlike *Hamerlinck*, his case should be remanded to allow the trial court to exercise its discretion in vacating one of his convictions. He suggests that the trial court may modify the fines and fees order after the conviction has been vacated.

¶ 7 The State responds that this court should vacate defendant's conviction and sentence under count II. The State argues that there is no need for remand in this case because defendant received concurrent sentences.

¶ 8 Although defendant did not preserve this issue for appeal, it is well settled that one-act, one-crime violations are reviewable under the second prong of the plain error doctrine as they affect the integrity of the judicial process. *People v. Coats*, 2018 IL 121926, ¶¶ 9-10. Whether a violation has occurred is a question of law that we review *de novo*. *Coats*, 2018 IL 121926, ¶ 12.

¶ 9 Under the one-act, one-crime rule, a defendant cannot be convicted of multiple offenses that are based on precisely the same single physical act. *Coats*, 2018 IL 121926, ¶ 11 (citing

People v. King, 66 Ill. 2d 551, 566 (1977)). Where a defendant is convicted of two such offenses, the conviction for the less serious offense must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 10 To determine which offense is more serious, a reviewing court compares the punishments for each offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). In doing so, we examine the plain language of the statute, as common sense dictates that the legislature would provide a greater punishment for the offense deemed more serious. *Artis*, 232 Ill. 2d at 170; *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009). If the punishments are identical, the court should consider which offense has the more culpable mental state. *Artis*, 232 Ill. 2d at 170-71; *Samantha V.*, 234 Ill. 2d at 379. Where it is not possible to determine which offense is more serious based on these considerations, then the reviewing court should remand the case to the trial court to make that determination. *Artis*, 232 Ill. 2d at 170-72 (citing *People v. Garcia*, 179 Ill. 2d 55, 71-72 (1997)); *Samantha V.*, 234 Ill. 2d at 379-80.

¶ 11 Here, defendant was convicted of two counts of aggravated DUI under section 11-501(a)(2) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(2) (West 2016)). For both counts, because defendant had two prior DUI convictions, he was charged and sentenced as a Class 2 offender pursuant to sections 11-501(d)(1)(A) and (2)(B) of the Code (625 ILCS 5/11-501(d)(1)(A), (2)(B) (West 2016)).

¶ 12 Count I, however, included an additional aggravating factor which charged that at the time of the instant third violation, defendant was transporting a person under the age of 16. The evidence showed that defendant's three young children, all under the age of 10, were seated in the back seat of his vehicle at the time of the offense. Section 11-501(d)(2)(B) further provides:

"If at the time of the third violation, the defendant was transporting a person under the age of 16, a mandatory fine of $25,000 and 25 days of community service in a program benefitting children shall be imposed in addition to any other criminal or administrative sanction." 625 ILCS 5/11-501(d)(2)(B) (West 2016). The punishment for count I is therefore greater than the punishment for count II, rendering the conviction under count I as the more serious offense in this case. Accordingly, we vacate defendant's conviction and sentence for count II.

¶ 13 We decline defendant's request to remand this case to the trial court as we find that remand is not necessary. Because this court was able to determine which offense was more serious in this case, remand is not required. *Artis*, 232 Ill. 2d at 170-72; *Samantha V.*, 234 Ill. 2d at 379-80. Moreover, defendant's suggestion that the trial court may modify the sentence or the fines and fees order is not persuasive. The record shows that the trial court imposed concurrent sentences for the two convictions. Furthermore, the $25,000 fine for count I is mandatory and cannot be modified. The record reflects that the trial court was very concerned about the substantial fine and asked the prosecutor if there was "any way around that." However, after reviewing the language in the statute, the court acknowledged that it was required to impose the fine, stating "I don't want to do it, but I don't have a choice." The record shows that the improper conviction under count II did not affect the severity or duration of defendant's sentence, and therefore remand is not necessary. See *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 49. Also, the defense could not show us any way that the fines could be lowered.

¶ 14 For these reasons, we vacate defendant's conviction and sentence under count II, and affirm the trial court's judgment in all other respects.

¶ 15 Affirmed in part; vacated in part.