2018 IL App (3d) 150256-U

Order filed February 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0256 Circuit No. 14-CF-168
SPENCER FLIER,	)	Honorable Kevin Lyons,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: A defendant was not entitled to a lesser-included jury instruction in his criminal trial for failing to report an accident involving death for the crime of leaving the scene of an accident because there was not any evidence in the record that the defendant reported the accident within a half hour. The defendant's 8-year sentence was not an abuse of discretion.

¶ 2 The defendant, Spencer Flier, appeals his conviction of failure to report an accident and his 8-year prison sentence.

¶ 3 FACTS

¶ 4 The defendant was indicted on two counts of failure to report an accident involving death in violation of section 11-401(b) of the Illinois Vehicle Code (625 ILCS 5/11-401(b) (West 2014)). At the jury trial, Billie Bellville testified that on August 10, 2013, at approximately 10 p.m., he was driving his motorcycle on Farmington Road and his two friends were following on another motorcycle about 100-200 feet behind him. Bellville testified that he passed a white car traveling in the opposite direction with its left turn signal on and then watched in his rearview mirror as the white car turned left in front of the following motorcycle. Bellville turned around and returned to help his two friends until police and ambulance services arrived. Bellville testified that the white car had completed its left turn and was not at the scene. Both of Bellville's friends died as a result of the accident.

¶ 5 The accident occurred at the intersection of Farmington Road and Wildwood Court. Linda Diaz testified that she lived at 910 Wildwood Court, which was the second house on the street. The defendant lived at 906 Wildwood Court, which was the house on the corner of Wildwood and Farmington. Diaz testified that she was in her kitchen around 10 p.m. on August 10, 2013, and she heard a noise like something hit something and then saw some headlights pull into her neighbor's driveway at 906 Wildwood Court. Shortly thereafter, she heard sirens, so she turned off her kitchen light to look outside. She saw a young man who looked like the defendant come out of 906 Wildwood and he appeared to be holding a cell phone.

¶ 6 The defendant's sister testified that she got a phone call from the defendant on the night of August 10, 2013. The defendant told his sister that he hit a bike, and then he hung up the phone.

¶ 7 Officer Jason Briggs of the Peoria County Sheriff's Office responded to the accident scene on August 10, 2013. He observed a motorcycle and two victims in the roadway. Briggs performed CPR on the female victim until the emergency personnel arrived. Briggs remained on the scene for a couple of hours. Briggs testified that the defendant never approached him and indicated any involvement in the accident.

¶ 8 Jim Smith was a detective with the Peoria County Sheriff's Office on August 12, 2013, when he was assigned as the lead investigator for the accident at Wildwood and Farmington. He was informed that the accident involved a white vehicle that had left the scene. Smith made informational fliers and went to the neighborhood located at Wildwood and Farmington, looking for neighbors who may have seen the accident. While handing out the informational fliers on August 13, Smith observed a white vehicle with damage in the driveway at 906 Wildwood Court. Up until that point, Smith had no information regarding the defendant and had not been contacted by the defendant. Smith called in a crime scene investigator to investigate the white vehicle. The testimony indicated that there was damage to the right rear quarter panel consistent with an accident, with some repair to the cover on the back bumper.

¶ 9 At the jury instruction conference, the State submitted the Illinois Pattern Jury Instructions applicable to section 11-401(b) of the Vehicle Code. 625 ILCS 5/11-401(b); Illinois Pattern Jury Instructions, Criminal, Nos. 23.07, 23.08 (4th ed. Supp. 2009) (hereinafter IPI Criminal 4th Nos. 23.07, 23.08 (Supp. 2009)). IPI Criminal 4th No. 23.08 instructed the jury that it had to find six propositions to be proven in order to find the defendant guilty, including the proposition that the defendant failed to report the accident within a half hour. The defendant submitted instructions applicable to section 11-401(a) of the Vehicle Code, arguing that the jury should be instructed on the lesser-included offense of leaving the scene of an accident because

the jury could find that the State did not prove that the defendant failed to report the accident within a half hour. 625 ILCS 5/11-401(a); Illinois Pattern Jury Instructions, Criminal, Nos. 23.05, 23.06 (4th ed. Supp. 2009) (hereinafter IPI Criminal 4th Nos. 23.05, 23.06 (Supp. 2009)). The trial court concluded that there may be occasions when the giving of IPI Criminal 4th Nos. 23.05 and 23.06 regarding a lesser-included offense might be warranted but that was not the fact pattern in this case and refused the defense instructions. The jury was only given two verdict forms: guilty and not guilty of failure to report an accident involving death. The jury found the defendant guilty.

¶ 10 The defendant filed a combined motion for judgment notwithstanding the verdict and motion for a new trial, arguing that leaving the scene of the accident involving death or personal injury was a lesser-included offense of failing to report an accident involving death or personal injury. The defendant argued that the jury was not properly instructed, that there was no evidence that the defendant failed to report the accident within a half hour, and that there was no evidence that the defendant left the scene. The trial court denied the defendant's posttrial motion.

¶ 11 The presentence investigation report indicated that the defendant was 24 years old at the time of the accident. The defendant had two prior misdemeanor convictions, two prior ordinance violations, and one prior traffic offense. He lived with his father, step-mother, and half-sister, and had lived there for 7 years. The defendant also had an older sister and an older brother, although the brother committed suicide in 2012. The report indicated that the defendant worked part-time for a construction company, making $500-$700 a month, and he had never held a full-time job. At the sentencing hearing, the defendant’s father testified that the defendant did not have a high school diploma and was not in the process of the trying to obtain his GED. The trial

court sentenced the defendant to 8 years in prison. The defendant's motion to reconsider was denied and he appealed.

¶ 12 ANALYSIS

¶ 13 The defendant contends that the trial court erred in denying his request for jury instructions on the lesser-included offense of leaving the scene of an accident. Also, the defendant argues that his sentence was excessive. The State contends that the trial court did not abuse its discretion in refusing the instruction and did not abuse its discretion in sentencing the defendant to 8 years in prison.

¶ 14 The defendant was charged with the class 1 felony of failing to report an accident involving a death, 625 ILCS 5/11-401(b), and the jury was instructed regarding the elements for that offense. During trial, however, the defendant requested that the jury be instructed on the class 4 felony of leaving the scene of an accident involving personal injury or death, 625 ILCS 5/11-401(a). The defendant argues that the offense of leaving the scene was a lesser-included offense of failure to report an accident, and the jury should have been instructed on the lesser offense because the State failed to prove the element that the defendant did not report the accident within a half hour.

¶ 15 Since a defendant has a due process right to notice of the charges brought against him, a defendant may not be convicted of an offense he has not been charged with committing. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). However, a defendant may be convicted of an uncharged offense if it is a lesser-included offense of the charge offense and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *Id.* An included offense is an offense that is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish

the commission of the offense charged. 720 ILCS 5/2-9(a) (West 2000); *People v. Kolton*, 219 Ill. 2d 353, 360 (2006).

¶ 16 Section 401(a) provides:

> "The driver of any vehicle involved in a motor vehicle accident resulting in personal injury to or death of any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until the requirements of Section 11-403 have been fulfilled. Every such stop shall be made without obstructing traffic more than is necessary." 625 ILCS 5/11-401(a) (West 2014).

¶ 17 A violation of this section is a Class 4 felony. 625 ILCS 5/11-401(c) (West 2014).

¶ 18 Section 401(b) provides:

> "Any person who has failed to stop or to comply with the requirements of paragraph (a) shall, as soon as possible but in no case later than one-half hour after such motor vehicle accident, or, if hospitalized and incapacitated from reporting at any time during such period, as soon as possible but in no case later than one-half hour after being discharged from the hospital, report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred. No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of paragraph (a)." 625 ILCS 5/11-401(b) (West 2014).

¶ 19 A violation of this section is a Class 2 felony, unless the accident results in a death, then the offense is enhanced to a Class 1 felony. 625 ILCS 5/11-401(d) (West 2014). Failing to report

the required information within one-half hour is a required element of the offense. *People v. Moreno*, 2015 IL App (2d) 130581, ¶ 23.

¶ 20 The State relies upon *People v. Gee*, 11 Ill. App. 3d 1058 (1974), for its argument that leaving the scene of an accident is not a lesser-included offense of failing to report an accident. The *Gee* court found that section 11-401(a) of the Vehicle Code was not a lesser-included offense of section 11-402(b) of the Vehicle Code. *People v. Gee*, 11 Ill. App. 3d at 1060. Without discussing the relative elements of each offense, the *Gee* court concluded that the offenses would be established by proof of different facts and an individual could violate (a) and not (b), and *vice versa*. *Id.* We disagree with that conclusion. A violation of section 11-402(b) of the Vehicle Code requires proof of all the elements of a violation of section 11-401(a) of the Vehicle Code, plus proof that the defendant failed to report the accident within a half hour. 625 ILCS 5/11-401(a), (b); IPI Criminal 4th Nos. 23.06, 23.08 (Supp. 2009). We find that section 401(a) of the Vehicle Code is a lesser-included offense of section 11-401(b) of the Vehicle Code. See *People v. Patrick*, 406 Ill. App. 3d 548, 558 (same conclusion); see also *People v. Eubanks*, 2017 IL App (1st) 142837, ¶ 49 (court reduced the defendant's section 11-401(b) conviction to a section 11-401(a) conviction when failure to report within a half hour was not established).

¶ 21 Since we have determined that leaving the scene was a lesser-included offense of failing to report, we must evaluate whether the trial court abused its discretion in refusing to give the defendant's requested instructions. The test for determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is some evidence in the record that, if believed by the jury, will reduce the crime charged to a lesser offense. *People v. McDonald*, 2016 IL 118882, ¶ 25. We review a trial court's decision that there is insufficient evidence to justify the giving of a jury instruction for an abuse of discretion. *Id.* ¶ 42.

¶ 22 In this case, the trial court found that the responding officer, who was at the scene for several hours, was not approached by or aware of the defendant. Also, the officer in charge testified that, as of three days after the accident, he had not received any information from or about the defendant. The defendant argues that he could have called another police department, and the State failed to prove he did not. We agree with the trial court that evidence that the officer in charge had no knowledge of the defendant's involvement in the accident three days after the accident was unrebutted evidence that the defendant failed to report the accident. The fact that the defendant could have hypothetically called another police department was not *some evidence* that he reported the accident within a half hour. See *id.* ¶ 25 ("there must be *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense" (Emphasis in original.)). Since there was evidence with respect to each element of the crime charged, and there was no evidence in the record that the defendant reported the accident within a half hour, the instruction on the lesser-included offense was not warranted. Thus, the denial of the instruction was not an abuse of discretion.

¶ 23 As for the defendant's sentence, the defendant argues that his sentence was excessive and that the trial court did not give sufficient weight to the mitigating factors and gave significant weight to the deterrent effect of the defendant's sentence. The defendant contends that this court should reduce his 8-year sentence to the minimum 4 years. The State contends that the trial court did not abuse its discretion.

¶ 24 A trial court has broad discretion in imposing a sentence, and a reviewing court affords those decisions great deference because the trial court observed the defendant and the proceedings. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). We review a trial court's sentence

for an abuse of discretion. *People v. Thomas*, 171 Ill. 2d 207 (1996). A sentence within the statutory range is presumed to be proper. *People v. Knox*, 2014 Ill App (1st) 120349, ¶ 46.

¶ 25 The defendant was convicted of a class 1 felony, making the applicable sentence 4 to 15 years. 730 ILCS 5/5-4.5-30(a) (West 2014). It was a probationable offense, subject to day-for-day sentenced credit. 730 ILCS 5/5-4.5-30(d), (j) (West 2014).

¶ 26 The defendant contends that the trial court did not adequately consider his rehabilitative potential in light of his minimal criminal background, his favorable history of employment, his future employment goals, his desire to further his education, and his family ties. The defendant points out that he was only 24 at the time of the accident, his parents had a difficult divorce, and his brother had committed suicide the year before the accident. He had two misdemeanor prior convictions. The defendant also contends that the trial court considered improper aggravating factors in sentencing him to 8 years in prison and not sentencing him to probation or the minimum sentence. The defendant contends that the trial court considered the death of the victims, that the defendant's actions caused or threatened serious harm, and speculated regarding the defendant's motives for not reporting as aggravating factors.

¶ 27 The trial court stated that it considered the statutory factors in aggravation and mitigation, and the history and character of the defendant. The trial court noted that the defendant quit high school and did not spend much time working. It found that the defendant’s conduct possibly caused or threatened serious harm in that people had to figure out what had happened at the accident scene, costing valuable time in responding to the victims, albeit probably only seconds. The trial court acknowledged the defendant’s limited prior criminal history, but also the need to deter others.

¶ 28 It is well established a trial court may not consider a factor inherent in an offense as an aggravating factor in sentencing. *People v. Martin*, 119 Ill. 2d 453, 459-60 (1988). In support of his argument that the sentence focused on the victims' deaths, the defendant cites to *People v. Daly*, 2014 IL App (4th) 140624, wherein the appellate court reduced the defendant's three and half year sentence for reckless homicide to probation. In *Daly*, the appellate court found that the trial court seemed to actually be sentencing the defendant for aggravated driving under the influence, rather than reckless homicide, and focused on the victim's death in sentencing the defendant. Here, the trial court did refer to the two people that were killed in the accident. However, the record indicates that the trial court did not consider their deaths as an aggravating factor, but rather referred to the deaths in terms of deterrence and the failure to report the accident.

¶ 29 The defendant also contends that the trial court erred in finding that the defendant's actions caused or threatened serious harm because "people had to figure out what happened here." The defendant argues that the serious harm alleged by the court was only that the police had to investigate. However, the trial court's comment does not appear to be referring to the investigation, but rather the "matter of seconds" that might have made a difference if the defendant had stopped and called the police or assisted the victims.

¶ 30 Finally, the defendant takes issue with the trial court's speculation regarding the defendant's motives for not reporting the accident. In context, defense counsel had argued that the defendant left the scene of the accident because he panicked and there was no indication that the defendant was intoxicated. The trial court was noting that, because the defendant left the scene, there was no way to know the defendant’s condition that night.

¶ 31 We find that the trial court considered all of the factors in aggravation and mitigation, and it did not consider any improper aggravating factors. Since the defendant's 8-year sentence was within the applicable sentencing range, and it was not "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense," there was no abuse of discretion. *Alexander*, 239 Ill. 2d at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 32 CONCLUSION

¶ 33 The judgment of the circuit court of Peoria County is affirmed.

¶ 34 Affirmed.