2018 IL App (3d) 170568-U

Order filed July 11, 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. 3-17-0568 Circuit No. 16-CF-392
BENJAMIN THRUSH,	)	Honorable Lisa Y. Wilson, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for failure to report a motor vehicle accident resulting in death was upheld because there was sufficient evidence for a trier of fact to find that the defendant was involved in a motor vehicle accident involving death and that the defendant knew he was involved in the accident. The defendant's 4-year prison sentence was reduced to a sentence of probation because it was an abuse of discretion to find that the facts of the case overcame the presumption of probation.

¶ 2 The defendant appeals from his convictions and prison sentence arising from leaving the scene of a motor vehicle accident that resulted in death.

¶ 3 FACTS

¶ 4 On or about April 30, 2016, an automobile accident occurred in the vicinity of northbound Illinois Route 6 that resulted in the death of Jacob Fishel. The defendant was indicted on three counts: (1) failure to report a motor vehicle accident resulting in death (625 ILCS 5/11-401(b) (West 2016); (2) leaving the scene of a personal injury accident (625 ILCS 5/11-401(a) (West 2016); and (3) aggravated reckless driving (625 ILCS 5/11-503(c) (West 2016). The defendant waived his right to a jury, and the case proceeded to a bench trial.

¶ 5 The defendant testified that around 6 p.m. on April 30, 2016, he drove his black truck to the Game Stop to buy a video game controller. He bought the game controller, went through the Burger King drive thru, and then proceeded to head home. He got on the on-ramp to head north on Route 6. Just before merging on to the highway, he noticed a vehicle already heading north on Route 6 at a high rate of speed. The defendant merged onto the highway behind that car, which the defendant described as a silver Impala. The defendant then went into the left lane to pass the same car, and the driver of the silver car flipped him off as he passed. After passing the silver car again, the defendant went back into the right lane. The silver car then passed the defendant on the left, returned to the right lane, and abruptly applied his brakes. The defendant applied his brakes and swung out in the left-hand lane. The defendant again passed the silver car and another car, and then decided to take the next off-ramp.

¶ 6 The defendant testified that the silver car came around on his left side, through the center median, while the defendant was on the off-ramp. The defendant was going about 60 miles per hour. The defendant testified that he was afraid, and he darted back onto Route 6. He then

noticed the silver car was back just behind his truck. The defendant denied making contact with the silver car or making any aggressive move toward it. The defendant's car hit a dip in the road, and when the defendant looked back, the silver car was sliding sideways and going into the ditch. He did not see it go airborne or roll. The defendant proceeded home. He testified that when he stopped at the gas station on his way to work two days later, the defendant heard the clerks talking about a crash on Route 6 and the fact that police were looking for a black truck. The defendant did an internet search and found that someone had died in an accident in a white car. He believed that the car he had trouble with was a silver car. The defendant testified that they were not drag racing.

¶ 7 Cory Hart testified that he was driving his Excursion on Route 6 at approximately 7:30 p.m. on April 30, 2016. Hart testified that two vehicles passed him on the left at a high rate of speed, traveling about 85 miles per hour. The white car was chasing the black truck. He thought the black truck was trying to get away from the white car. They both veered in front of him to take the exit, but returned to Route 6. Hart saw the black truck veer into the lane of the white car, and then he saw the white car go into the median and flip five or six times. Hart called 911.

¶ 8 Officer Scott Hulse testified that the air bag module of Fishel's car indicated that he was travelling at 95 miles per hour five seconds before it stopped completely. The paint samples from the defendant's car and Fishel's car were inconclusive; they did not show paint transfer between the vehicles. Hulse testified that he saw markings on the defendant's truck that could have been from rubbing up against another car while traveling at 90 miles per hour.

¶ 9 The defendant was found guilty of all three charges. The trial court acknowledged that it was unclear who was the aggressor in the case, but that the State proved all of the elements of each charge. The trial court declined to order probation, finding that it would deprecate the

seriousness of the offense under the circumstances. The defendant was sentenced to four years in prison on the offense of leaving the scene of an accident resulting in death, with concurrent one-year sentences on each of the other two convictions. The defendant's post-judgment motions were denied, and he appealed.

¶ 10 ANALYSIS

¶ 11 The defendant argues that the evidence failed to establish beyond a reasonable doubt that the defendant was involved in a motor vehicle accident as set forth in section 11-401 of the Illinois Vehicle Code (Code) (625 ILCS 5/11-401 (West 2016)). Although the defendant acknowledges that contact between the vehicles was not a requirement to qualify as a motor vehicle accident, the defendant argues that he was not involved in an accident and that Fishel was in a one-car accident. If the court finds that the defendant was in a motor vehicle accident, the defendant argues that the State failed to prove that the defendant knew he was involved. The State argues that the evidence was sufficient for any rational trier of fact to find that the defendant was involved in a motor vehicle accident and that he knew he was.

¶ 12 The defendant was charged with both failure to report a motor vehicle accident resulting in death (625 ILCS 5/11-401(b) (West 2016) and leaving the scene of a personal injury accident (625 ILCS 5/11-401(a) (West 2016). Inherent in each of those offenses is the requirement that the driver was "involved in a motor vehicle accident." 625 ILCS 5/11-401(a) (West 2016). The trial court found that the State had proved beyond a reasonable doubt that the defendant was driving the black truck, that the defendant had been involved in a motor vehicle accident, the accident resulted in death or personal injury, and the defendant knew that an accident had occurred. The trial court also found that the defendant failed to stop and failed to report the accident. We review a challenge to the sufficiency of the evidence by, viewing the evidence in

the light most favorable to the prosecution, determining whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997).

¶ 13 Physical contact with a defendant's vehicle is not required for a defendant to be deemed to have been "involved in a motor vehicle accident" within the meaning of section 11-401 of the Code. *People v. Kerger*, 191 Ill. App. 3d 405, 409-10 (1989). "Involved in a motor vehicle accident" has been defined as a substantial implication or connection with the accident in a substantial manner. *People v. Brady*, 369 Ill. App. 3d 836, 845 (2007). In *Kerger*, where the defendant swerved to miss a pedestrian, and the pedestrian fell and was fatally hit by the car following the defendant, the defendant was found to be involved in a motor vehicle accident. *Kerger*, 191 Ill. App. 3d at 410. In *Brady*, the defendant was found to have been involved in a motor vehicle accident when he was drag racing the victim, even though there was no contact between the defendant's vehicle and the victim's vehicle. *Brady*, 369 Ill. App. 3d at 846.

¶ 14 Under this authority, there was sufficient evidence to find that the defendant had a substantial connection to the accident that killed Fishel, so that the defendant was "involved in a motor vehicle accident" within the meaning of section 11-401 of the Code. The defendant was traveling at a high rate of speed and acting recklessly by swerving and making last-minute lane changes. As the trial court pointed out, it was unclear who was the instigator of this behavior, but it might well have been Fishel. However, for purposes of deciding whether a defendant was involved in a motor vehicle accident, it was not necessary to determine whether the defendant caused the accident or was at fault. *Brady*, 369 Ill. App. 3d at 852. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the defendant was involved in a motor vehicle accident.

¶ 15 The defendant also contends that the State did not prove that he knew he was involved in a motor vehicle accident. However, the defendant's own testimony was that he observed Fishel's vehicle going into the ditch in his mirror, and he knew how fast the vehicles were travelling at that moment. Whether or not the defendant knew that Fishel's car rolled over, there was sufficient evidence that the defendant knew there had been an accident. See *People v. Janik*, 127 Ill. 2d 390, 399 (1989) (prosecution was required to prove that the accused had knowledge that the vehicle he was driving was involved in an accident or collision and that he left the scene of that accident, though not necessarily that defendant was aware he caused an injury or death). We affirm the defendant's conviction for violating section 11-401(b) of the Code (failure to report a motor vehicle accident resulting in death). Since leaving the scene of a personal injury accident is a lesser-included offense of failure to report a motor vehicle accident resulting in death, the defendant's conviction for violating section 11-401(a) of the Code cannot stand. See *People v. Patrick*, 406 Ill. App. 3d 548, 558 (2010).

¶ 16 The defendant also argues that the State failed to prove beyond a reasonable doubt that he had committed the offense of aggravated reckless driving. Again, the defendant argues that Fishel was in a one-car accident and that the evidence was insufficient to establish that the defendant's actions resulted in great bodily harm or permanent disability to Fishel. Also, the defendant argues that the trial court only referred to the elements of misdemeanor reckless driving and did not make a finding that the defendant's actions caused great bodily harm, permanent disability or disfigurement to Fishel. The State argues that it proved the defendant guilty of aggravated reckless driving beyond a reasonable doubt.

¶ 17 The defendant was charged with aggravated reckless driving under section 11-503(c) of the Code (625 ILCS 5/11-503(c) (West 2016)). That section first requires that the charged

individual commit reckless driving under subsection 503(a) of the Code, which states a person commits reckless driving when they drive any vehicle with a willful or wanton disregard for the safety of persons or property. 625 ILCS 5/11-503(a) (West 2016). Subsection (c) adds that such reckless driving is aggravated when that violation results in great bodily harm, permanent disfigurement, or disability. 625 ILCS 5/11-503(c). The indictment alleged that the defendant committed aggravated reckless driving by driving with a willful and wanton disregard for others' safety by driving in excess of the posted speed limit and by making erratic lane changes that resulted in great bodily harm to Fishel.

¶ 18 As we already found, the evidence was sufficient to prove that the defendant was travelling at a high rate of speed and swerving on the road and was involved in the motor vehicle accident that caused Fishel's death. Again, contact with Fishel's vehicle was not required. Thus, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of aggravated reckless driving**.**

¶ 19 Lastly, the defendant argues that his sentence was an abuse of discretion. The defendant contends that the trial court abused its discretion by disregarding the presumption in favor of probation and further abused its discretion by considering Fishel's death as an aggravating factor at sentencing. The State argues that the defendant's four-year sentence was not an abuse of discretion.

¶ 20 A trial judge's sentencing determination is entitled to great deference and weight. *People v. Latona,* 184 Ill.2d 260, 272 (1998). The trial judge is responsible for balancing the relevant factors and providing a reasoned punishment according to the facts of a particular case. *Id*. A trial judge abuses his discretion when his ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by him. *People v. Sutherland*, 223 Ill.2d 187,

272-273 (2006). We review a trial court's sentencing determination for an abuse of discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991). A reviewing court may disturb a sentence that falls within the statutory limits if the trial court abused its discretion in imposing that sentence. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26.

¶ 21 The offense of leaving the scene of a motor vehicle accident resulting in death is a Class 1 felony (625 ILCS 5/11-401(b) (West 2016)) punishable by a sentence of between 4 and 15 years' imprisonment (730 ILCS 5/5-4.5-30(a)(West 2016)). However, it is a probationable offense, as are the defendant's other two convictions. See 730 ILCS 5/5-4.5-30(d)(West 2016); 730 ILCS 5/5-4.5-45 (West 2016); 730 ILCS 5/5-5-3(c)(2) (West 2016); 730 ILCS 5/5-6-1(a) (West 2016). Generally, the Unified Code of Corrections (Unified Code) creates a presumption in favor of probation. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 28. Section 5-6-1(a) of the Unified Code requires a sentence of probation unless the court finds a prison sentence is necessary for the protection of the public or if probation would deprecate the seriousness of the offender's conduct. 730 ILCS 5/5-6-1(a) (West 2016). When making this determination, the trial court must consider the nature and circumstance of the offense and the history, character, and condition of the offender. *Id.*

¶ 22 The defendant cites to the case of *People v. Daly*, wherein the defendant was convicted of reckless homicide and sentenced to 3½ years in prison after her cousin was fatally injured in an ATV accident where the defendant was driving and had been drinking earlier in the day. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 25. The defendant's prison sentence in that case, rather than probation, was found to be an abuse of discretion because the trial court failed to consider the nature and circumstance of the offense and the history, character and condition of the

offender. *Id.* ¶ 29. The trial court seemed to be sentencing the defendant for aggravated driving under the influence, not the crime she pled guilty to, reckless homicide. *Id.*

¶ 23 In this case, the trial court acknowledged that the defendant was eligible for probation, but found that probation would deprecate the seriousness of the defendant's offense. The trial court also stated that it considered the defendant's criminal history and noted that the defendant did not have a large criminal history, and that history consisted of mostly traffic violations. A review of the record indicates that the defendant had a number of seatbelt violations, but other than a moving violation in 2014, his last moving violation prior to that date was in 2002. The trial court stated that its reason for not imposing probation was that it did not want to depreciate the seriousness of the offense because Fishel died. However, Fishel's death was implicit in the offense, so it could not be considered a factor in aggravation. *Daly*, 2014 IL App (4th) 140624, ¶ 39. Also, the defendant made a statement to the family and expressed his remorse for the Fishel family's loss. While the trial court's four-year sentence, and concurrent one-year sentences, were within the statutorily allowed sentencing ranges, we find that a prison sentence, rather than probation, was an abuse of discretion.

¶ 24 We exercise our power under Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967) to reduce the defendant's sentence to probation. We remand the matter to the trial court with directions to impose appropriate conditions of probation, to vacate the defendant's conviction on the lesser-included offense of leaving the scene, and to withdraw and amend the sentencing judgment accordingly.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Peoria County is affirmed in part, the sentence reduced, and the cause remanded with directions.

¶ 27 Affirmed in part; sentence reduced; cause remanded with directions.