2019 IL App (1st) 160997-U

FIFTH DIVISION
Order filed: March 1, 2019

No. 1-16-0997

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. 14 C2 20405
	)	
	)	
DANIEL SMITH,	)	Honorable
	)	Jeffrey L. Warnick,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for driving under the influence of alcohol (DUI) is affirmed where: (1) he forfeited his challenge on the admissibility of his blood test results based on a chain of custody; (2) the trial court did not plainly err by admitting the blood test results into evidence because the State established an adequate foundation for admission without proof of a chain of custody; and (3) trial counsel's failure to challenge the admissibility of the blood test results did not amount to ineffective assistance of counsel as such an objection would have been futile. The cause is remanded to the trial court with instructions to determine

> which DUI conviction is less serious under the one-act, one-crime rule, to vacate that conviction, and to resentence the defendant on the remaining DUI count.

¶ 2 Following a bench trial, the defendant, Daniel Smith, was convicted of two counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), 11-501(a)(2) (West 2014)). He was sentenced to two years' probation, with the following conditions: "the alcohol treatment that's recommended *** Victim Impact Panel," mandatory fines and costs, and attending Alcoholics Anonymous meetings twice a week. On appeal, the defendant contends that the State failed to establish a sufficient chain of custody over the blood test results introduced as evidence against him and that, because of a lack of foundation for this evidence, he is entitled to a new trial. Alternatively, he maintains that one of his convictions for aggravated DUI must be vacated as it violates the one-act, one-crime rule. For the reasons that follow, we affirm the defendant's conviction for aggravated DUI and remand the cause with instructions.

¶ 3 The defendant was charged by information with two counts of aggravated DUI, in connection with an incident that occurred on August 2, 2014. Count one alleged that the defendant drove a motor vehicle with a blood alcohol concentration of .08 or more and count two alleged that he drove a motor vehicle "while under the influence of alcohol." The following evidence was adduced at trial.

¶ 4 Letetra Wideman testified that, while driving home on the evening of August 2, 2014, with her cousin, Rebecca Hall, she stopped at the "1700 block of Grey [Street]" in Evanston, Illinois. Around 8:30 p.m., she drove down Grey Street and turned left onto Emerson Street, heading west on Emerson Street. Wideman stated that as she approached the intersection of Emerson Street and Hartrey Avenue, she saw the defendant drive his motorcycle through a stop sign on Hartrey Avenue, and turn westbound onto Emerson Street. In order to avoid hitting the

defendant, Wideman stopped her car. However, Wideman's brother, Travis Johnson, who was driving his motorcycle behind her, passed her vehicle on the right side and crashed into the rear, right side of the defendant's motorcycle. While Hall called 911, Wideman checked on the defendant, who was unconscious but still breathing, and then sat on the ground next to Johnson, waiting for the emergency personnel to arrive.

¶ 5 Evanston firefighter and paramedic, Jeffrey Gonzalez, testified that at about 8:45 p.m. on August 2, 2014, he was called to respond to a motorcycle accident at the intersection of Hartrey Avenue and Emerson Street. Gonzalez arrived at the scene of the accident with two other firefighters. He began to treat the defendant, while the other two firefighters began to treat Johnson. Gonzalez stated that he put a cervical collar on the defendant, and while doing so, was close enough to smell alcohol on the defendant's breath. While in the ambulance, Gonzalez started an IV in the "inner elbow *** antecubital area" on the defendant's right arm in accordance with his training and experience. On cross-examination, Gonzalez testified that, before he started the IV, he cleaned the defendant's arm with a packaged isopropyl alcohol wipe, provided by the hospital, but was unaware of the alcohol content of the wipe. On redirect examination, Gonzalez testified that the alcohol wipe was approximately one inch by one inch, very thin, did not contain much alcohol, and was issued by the hospital to use when inserting IVs.

¶ 6 Sergeant Scott Sophier testified that at 8:30 p.m. on August 2, 2014, he responded to a motorcycle accident at the intersection of Hartrey Avenue and Emerson Street in Evanston, Illinois. When he arrived at the scene of the accident, he observed fire department personnel treating both the defendant and Johnson, and he spoke with Hall and Wideman regarding what they witnessed. Sergeant Sophier stated that, in the hospital emergency room, he noticed that the

defendant's eyes were "glassy" and he could smell alcohol on his breath. According to Sergeant Sophier, the defendant was calm, and they had a conversation in which the defendant stated that, when he reached the intersection of Emerson Street and Hartrey Avenue, he felt an impact at the rear end of his motorcycle and was thrown from it. The defendant admitted that he had one glass of wine with dinner prior to driving his motorcycle. Sergeant Sophier testified that he placed the defendant "in custody" for DUI after this conversation, and read to him the Illinois "warning to motorists." He also asked the defendant to submit to a "DUI kit," consisting of a blood and urine sample, which the defendant refused. On cross-examination, Sergeant Sophier testified that Dr. Laskaris informed him that, for medical purposes unrelated to Sergeant Sophier's offer to administer a DUI kit on the defendant, the hospital took a blood sample which showed that the defendant's blood alcohol concentration was above the legal limit. Sergeant Sophier stated that, based on the smell of alcohol on the defendant's breath, his glassy eyes, and his blood alcohol concentration being above the legal limit, he arrested the defendant.

¶ 7 Dr. Evan Laskaris, an emergency medicine physician with North Shore University Health Systems, testified that he was the "attending physician" in the hospital emergency room on August 2, 2014. He stated that he has treated thousands of motor vehicle accident trauma patients and thousands of trauma patients who have been under the influence of alcohol. According to Dr. Laskaris, the defendant received a unique medical record number (MRN), which is generated immediately after the patient arrives and is associated with the patient's full name, date of birth, social security number, or any other identifying information. The MRN is then used for all future encounters to establish the patient's medical history. Each patient also receives a wristband that includes their name, MRN, and a unique barcode. Any lab work that is sent to the lab, or any medication given, is scanned through the barcode. A patient's documentation includes the name

of the patient, date of birth, and the MRN. Any formal results are updated in the patient's chart (in the hospital's computer charting system), including any order generated and results obtained, which is linked to the patient's date of birth and MRN.

¶ 8 Dr. Laskaris testified that following hospital protocol, and not at the request of law enforcement, he ordered a blood draw for the defendant. Although Dr. Laskaris did not draw the defendant's blood, he was familiar with the procedures and described the standard protocol: (1) a nurse identifies a site from which to draw blood; (2) the nurse places a tourniquet on the patient; (3) the nurse disinfects the site with a pre-packaged "chlorhexidine prep," which does not contain alcohol and will not affect blood alcohol test results; and (4) the nurse places an IV into the patient and draws blood from the IV. Dr. Laskaris testified that nothing was administered through the IV that was placed in the defendant's right arm prior to his arrival at the hospital and that a standard alcohol wipe does not affect a patient's blood alcohol level. According to Dr. Laskaris, all information regarding the patient's medications or blood work is included on the patient's wristband, and the orders are sent to the hospital's lab once they are scanned and placed into the computer system. The lab is used for all inpatients and emergency room patients and was used for the defendant's blood test results on August 2, 2014. Dr. Laskaris stated that the results of the blood test are usually uploaded to the computer system in about 40 minutes to 1 hour after the samples are sent to the lab.

¶ 9 Dr. Laskaris identified People's Exhibit No. 1 as the defendant's MRN, which included a true and accurate representation of the defendant's medical records. The medical records included a blood test lab result, showing that, on August 2, 2014, the defendant's blood alcohol serum level was 207, or a whole blood alcohol content of 0.175. Dr. Laskaris opined that one glass of wine would not cause a blood alcohol serum level of 207 and that such a level indicated

that the defendant was under the influence of alcohol. The State entered the medical records contained in People's Exhibit No. 1 into evidence, without objection from defense counsel.

¶ 10 On cross-examination, Dr. Laskaris testified that the medical staff asked the defendant about his alcohol consumption for treatment purposes and not to assist the State in prosecuting DUI offenders. While Dr. Laskaris was not involved in the blood testing completed at the hospital's lab, he did testify to the procedures leading up to sending the blood samples to the lab. Dr. Laskaris stated that, after the blood is drawn, the vials are labeled and placed in a "specimen bag." The bag is then placed in a plastic container, called a vacutainer, which is transported from the emergency room, through the hospital's vacuum tube system, to the lab by entering a specific code. On re-direct examination, Dr. Laskaris testified, that while he was not present for the blood testing done at the lab, he relied on the results from the lab on a daily basis for almost every patient he has treated.

¶ 11 Joanne DaSilva, a trauma-certified registered nurse, testified that she was working at the hospital on August 2, 2014. When the defendant arrived in the emergency room, she drew his blood, and waited for the doctor's orders, which was her normal routine. DaSilva identified People's Exhibit No. 2 as the trauma flow sheet she used to document any treatment administered to the defendant. She completed all of the charting for the defendant. She identified People's Exhibit No. 1 as the defendant's medical records from his hospital stay on August 2, 2014. DaSilva testified that she drew the defendant's blood in accordance with routine procedure.

¶ 12 DaSilva stated that in order to draw the blood, she used a tourniquet; cleaned the injection site with chlorhexidine; drew the blood; and collected, sealed, and scanned the vials into the computer, while in the defendant's room. She labeled the vials with stickers containing a "bar

code that's specific to them," ensuring the defendant's MRN and date of birth (located on his wristband) was on the label. She checked the labels "multiple times" before placing the vials in a Ziploc bag. The bag was sealed and placed into a vacuum tubing system which is used for every adult patient in the hospital. DaSilva then pressed the button to send the vials to the lab in the hospital's basement. DaSilva explained that the Ziploc bags are patient-specific and never would more than one patient's blood be sealed inside the same bag. Once DaSilva withdrew the blood and placed the vials in the plastic bag, they remained in her exclusive care until she pressed the button on the tubing system to send the vials to the lab. DaSilva testified that the blood was drawn for medical purposes, in accordance with routine procedure, and not at the request of law enforcement.

¶ 13 On cross-examination, DaSilva testified that, before leaving the room, she remembered sealing and labeling the vials of the defendant's blood, ensuring that the MRN, name, and date of birth matched his wristband. However, when asked if she had "an independent memory" of the steps, she admitted that she did not, but was confident that she followed them because that is the protocol she follows with every patient. DaSilva admitted that she had never been to the "specimen lab," was not present during the analysis of the defendant's blood, and had no first-hand knowledge of what happened to the vials once they left the emergency room. She testified that the blood test results appear on a screen, and the doctor reads the blood alcohol concentration from the screen. The State entered the trauma flow sheet (People's Exhibit No. 2) into evidence, without objection from defense counsel.

¶ 14 The trial court took judicial notice of the conversion factor for the blood alcohol serum level of 207 to a whole blood alcohol concentration of .175. Defense counsel did not stipulate to "any degree of the accuracy of the blood test results." People's Exhibit Nos. 4 through 8 and 10

through 13 were admitted into evidence without objection from defense counsel. The State rested. The defendant then moved for a directed "finding of acquittal," which was denied. The defense rested with the defendant waiving his right to testify and without calling any further witnesses.

¶ 15 After closing arguments, the trial court found the defendant guilty on both counts of aggravated DUI. The trial court sentenced him to two years' probation, with the following conditions: "the alcohol treatment that's recommended *** Victim Impact Panel," mandatory fines and costs, and attending Alcoholics Anonymous meetings twice a week. The defendant filed a motion for a new trial, which was denied. The defendant now appeals.

¶ 16 The defendant first contends that the circuit court erred by admitting the medical records containing his blood test results into evidence because the State failed to establish a sufficient chain of custody for his blood sample as required by Illinois Rule of Evidence 901 (eff. Jan 1, 2011). He argues that, while section 11-501.4 of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501.4(a) (West 2014)) relieves the State of the hearsay bar, allowing admission of blood test results in DUI cases, it does not remove the foundation requirement that a proper chain of custody must be established.

¶ 17 At the outset, we note that the defendant did not preserve this issue for appeal. A challenge to the chain of custody is "considered an attack on the admissibility of the evidence" rather than the sufficiency of the evidence, and is, therefore, "subject to the ordinary rules of forfeiture." *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). In order to preserve a claim for review, generally a defendant must object at trial and raise the issue again in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Here, the defendant failed to object to the admission of the blood test results at trial and failed to raise the issue in a timely posttrial motion, thus, depriving

the State of "any reasonable opportunity to correct the alleged errors in the chain of custody evidence it presented at trial." *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 22. Consequently, the defendant has forfeited this argument on appeal.

¶ 18 The defendant concedes that this challenge was not preserved at trial and that his trial attorney failed to file a timely posttrial motion raising the issue, but argues that we may review his claim under the plain-error doctrine. We disagree.

¶ 19 "The plain-error doctrine allows a reviewing court to address defects affecting substantial rights if the evidence is closely balanced or if fundamental fairness requires." *People v. Echavarria*, 362 Ill. App. 3d 599, 607 (2005). The first step in the plain-error analysis is to determine whether any error occurred as there can be no plain error if there is no error. *Wilson*, 2017 IL App (1st) 143183, ¶ 25.

¶ 20 The defendant's medical records containing his blood test results were admitted under section 11-501.4 of the Code, which provides that the results of blood tests are admissible as a business record exception to the hearsay rule if the following criteria are met:

> "(1) the tests were ordered in the regular course of providing emergency medical treatment and not at the request of a law enforcement officer; (2) the tests were performed by the laboratory routinely used by the hospital; and (3) the results of the tests are admissible regardless of the time the records were prepared." *People v. Henderson*, 336 Ill. App. 3d 915, 919-20 (2003); 625 ILCS 5/11-501.4(a) (West 2014).

The defendant does not dispute that the State met the requirements of section 11-501.4 of the Code. Rather, he argues that although compliance with the requirements of section 11-501.4

relieves the State of the hearsay bar allowing admission of blood tests into evidence in DUI cases, it does not remove the foundation requirement that a proper chain of custody must be established.

¶ 21 This court has held that compliance with section 11-501.4 establishes the admissibility of blood test results "and additional chain of custody evidence is not required." *People v. Lach*, 302 Ill. App. 3d 587, 594 (1998). The purpose of section 11-501.4 is to ensure "the reliability and integrity of test results conducted on a person charged with driving under the influence." *Id*. Therefore, when the State complies with section 11-501.4, it "demonstrates that reasonably protective measures have been taken to ensure that the blood taken from [the] defendant and tested in the hospital lab was not changed or substituted." *Id*. We will not disturb a trial court's ruling on the admission of evidence absent an abuse of discretion. *Id*. at 593.

¶ 22 The defendant acknowledges that, in *Lach*, 302 Ill. App. 3d 587, and *Henderson*, 336 Ill. App. 3d 915, this court held that the State need not establish a chain of custody to admit blood test results into evidence under section 11-501.4; however, he asserts that these cases were incorrectly decided and misconstrued the statute.

¶ 23 The defendant relies on *People v. Ethridge*, 243 Ill. App. 3d 446, 464 (1993) to support his assertion that, while the statute does create a hearsay exception, it does not excuse the State from establishing foundation. He relies on *People v. Dabbs*, 239 Ill. 2d 277 (2010) and *Woolley v. Hafner's Wagon Wheel, Inc.*, 22 Ill. 2d 413, 418 (1961), to support his argument that the statutory hearsay exception in the statute should not be expanded beyond its plain language. Finally, he relies on *People v. Whitney*, 188 Ill. 2d 91, 97-98 (1999) to support his assertion that this court should look to legislative history when faced with an ambiguous statute to determine

legislative intent and maintains that the legislature never intended to eliminate the foundational chain of custody requirements of the statute.

¶ 24 The defendant's reliance on these cases is misplaced, and he does not cite to any authority holding that, contrary to *Lach* and *Henderson*, when a blood test is conducted in the ordinary course of providing emergency medical treatment and the blood sample is in the hospital's custody at all times, the State must establish a chain of custody under section 11-501.4 for the results of a blood test to be admitted into evidence.

¶ 25 In *Ethridge*, this court held that the State was not required to introduce the defendant's actual blood serum in order to establish foundation for the admission of the blood test results. However, in *dicta*, we stated that, if blood test results are to be used as evidence of a defendant's guilt, then the State must establish that it was the defendant's blood that was tested. We never mentioned chain of custody requirements for the admission of the blood test results. Moreover, as this court held in *Henderson*, "it would be logically absurd for us to require the State to prove chain of custody under section 11-501.4 for a blood sample that was continuously in a hospital's custody and never in the State's custody." *Henderson*, 336 Ill. App. 3d at 922.

¶ 26 Further, we are unpersuaded by the defendant's arguments that *Lach* expands the hearsay exception in the statute beyond the plain and unambiguous language of the statute. The purpose of introducing the evidence and establishing a chain of custody is to connect the object to the defendant and to the crime. *Lach*, 302 Ill. App. 3d at 593. The purpose of the chain of custody rule is to negate the possibility of tampering or substitution. *Id.* As previously discussed, the purpose of section 11-501.4 is to ensure the reliability and integrity of the test results conducted on a person charged with DUI. *Id.* at 594. The State's compliance with section 11-501.4 demonstrates that "reasonably protective measures have been taken to ensure that the blood

taken from [the] defendant and tested in the hospital lab was not changed or substituted," (*Id.*), which, again, is the purpose of establishing a chain of custody. Establishing a further chain of custody when the safeguards of preventing tampering and substitution are inherent in compliance with section 11-501.4 is unnecessary and not within the plain language of the statute. We find, therefore, consistent with *Lach*, that "compliance with section 11-501.4 is sufficient in and of itself" to establish the admissibility of blood test results, and additional chain of custody evidence is not required. *Id*. Consequently, we conclude that the trial court did not abuse its discretion by admitting the blood test results into evidence without the State establishing a chain of custody for the defendant's blood sample. See *Henderson*, 336 Ill. App. 3d at 922. Accordingly, we find that there was no error and will not invoke the plain-error doctrine to excuse the defendant's forfeiture of this issue.

¶ 27 Because the plain language of the statute is clear, we need not address the defendant's legislative history and legislative intent arguments for purposes of statutory construction. *Davis v. Toshiba Machine Co., America*, 186 Ill. 2d 181, 184-85 (1999).

¶ 28 The defendant alternatively argues that we may review this claim as ineffective assistance of counsel because his trial attorney failed to raise a foundational challenge to the blood test's admissibility at trial and failed to file a timely posttrial motion raising the issue of the blood test's admissibility. Given our determination that the State established a sufficient foundation for the blood test by complying with section 11-501.4 of the Code, an objection would have been futile. Therefore, the defendant's ineffective assistance of counsel claim is meritless. *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 34 (citing *People v. Holmes*, 397 Ill. App. 3d 737, 745 (2010) ("It is axiomatic that a defense counsel will not be deemed ineffective for failing to make a futile objection.").

¶ 29 Finally, the defendant argues, and the State concedes, that one of his convictions for aggravated DUI must be vacated pursuant to the one-act, one-crime rule as both convictions are predicated upon the single act of driving.

¶ 30 The one-act, one-crime rule prohibits convictions for multiple offenses that are based on the same physical act. *People v. Grant*, 2017 IL App (1st) 142956, ¶ 32 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). Pursuant to the one-act, one-crime rule, a court should impose a sentence on the more serious offense and vacate the less serious offense. *Grant*, 2017 IL App (1st) 142956, ¶ 32. We review, *de novo*, the question of whether there was a violation of the one-act, one-crime rule. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 17.

¶ 31 We agree with the parties that the defendant's convictions for aggravated DUI violate the one-act, one-crime rule as both arose out of the same physical act—driving. When multiple convictions, as here, violate the one-act, one-crime rule, the less serious of the two convictions must be vacated. *People v. Artis*, 232 Ill. 2d 156, 170. However, "when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Id*. at 177. In determining whether one offense is more serious than another, we look to the possible punishments for each offense as well as which offense has the more culpable mental state. *Id*. at 170-71. As the offense of aggravated DUI does not require proof of a culpable mental state (*Bohner v. Ace American Insurance Co*., 359 Ill. App. 3d 621, 625 (2005)), we look only to the possible punishments for each offense. In the present case, both charges alleged the same offense (aggravated DUI) and carried the same penalties. Because we cannot determine which of the two offenses is more serious, we remand this cause to the trial court to make that determination.

¶ 32 For the foregoing reasons, we affirm the defendant's conviction for aggravated DUI and remand the cause to the trial court with instructions to determine which DUI conviction is less serious and to vacate that conviction. We further instruct the trial court to resentence the defendant on the remaining DUI count.

¶ 33 Affirmed in part; and remanded with instructions.