2019 IL App (1st) 170248-U

THIRD DIVISION
September 4, 2019

No. 1-17-0248



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 15 CR 17721 |
| | ) | |
| SAMUEL BLANDON, | ) | Honorable |
| | ) | Arthur F. Hill, Jr., |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the State did not violate section 111-3 of the Illinois Code of Criminal Procedure when it failed to state the prior convictions it would rely on to convict defendant of felony driving while license revoked with more specificity because defendant suffered no prejudice from the way the information was written.

¶ 2 Defendant appeals his conviction for driving while license revoked as a Class 4 felony on the grounds the State failed to list the prior convictions that elevated the offense from a misdemeanor to a felony in the charging document. Defendant does not challenge the sufficiency of the evidence to

convict him of driving while license revoked and only seeks to have his conviction reduced from a felony to a misdemeanor based on the allegedly defective charging information. For the following reasons, we affirm defendant's conviction for Class 4 felony driving while license revoked.

¶ 3 BACKGROUND

¶ 4 The State charged defendant, Samuel Blandon, by information with three counts of driving while license revoked (DWLR) as a Class 4 felony offense. The information charged defendant with committing the offense of felony driving while driver's license revoked in that he drove or was in actual physical control of a motor vehicle at a time when his driver's license was revoked in violation of section 6-303(a) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/6-303 (West 2014)). Except in certain circumstances specified in the statute, a first-offense DWLR is a Class A misdemeanor. 625 ILCS 5/6-303(a) (West 2014). The class of the offense of DWLR is elevated based on a variety of circumstances. The information charging defendant with DWLR in this case stated as follows:

> "The State shall seek to sentence [defendant] as a Class 4 offender pursuant to section 6-303(d-3), in that the revocation was for a violation of section 11-501 of Chapter 625 Act 5 of the Illinois Compiled Statutes *** and he previously has been convicted of three violations[1] of section 6-303 ***, and the prior convictions occurred while his driver's license had been revoked or suspended for a violation of *** Section 111-501[2] ***."

"Section 11-501" is the driving under the influence (DUI) statute. 625 ILCS 5/11-501 (West 2014).

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[1] The information against defendant was in three counts. Count 1 of the information alleged defendant had previously been convicted of three violations of section 6-303 of the Code; Count 2 alleged defendant had previously been convicted of two violations of section 6-303 of the Code; and Count 3 alleged defendant had previously been convicted of one violation of section 6-303 of the Code. The three counts were identical in all other respects.

[2] Other qualifying prior convictions listed in the information include reckless homicide (720 ILCS 5/9-3(a) (West 2014)) and leaving the scene of an accident (625 ILCS 5/11-401 (West 2014)). Nothing in the record suggests defendant was ever convicted of either of those offenses.

¶ 5 The matter proceeded to a bench trial. The State called the police officer who arrested defendant to testify. The State also introduced defendant's driving abstract into evidence. After the State rested defendant called his brother, who had allegedly been with defendant at the time of his arrest, to testify, and defendant testified on his own behalf. After the parties rested the trial court found defendant guilty of all counts in the information. At defendant's sentencing hearing, the State presented defendant's certified driving abstract "for the priors." The prosecutor stated as follows:

> "For count one we are seeking to sentence him as a class four offender due to three previous violations of the 6[-]303 statute as well as a prior conviction for a DUI. The defendant has a 2009 conviction for DUI. A 2012 conviction for a 6[-]303. Another 2012 conviction for a 6[-]303. And a 2014 conviction for a 6[-]303, which would be the three priors."

The trial court accepted the driving abstract as an exhibit. Defendant did not object.

¶ 6 The court sentenced defendant to two years' probation and 180 days in jail.

¶ 7 This appeal followed.

¶ 8 ANALYSIS

¶ 9 Defendant argues his conviction for Class 4 felony DWLR should be reduced to a misdemeanor conviction for DWLR because the State failed to provide adequate notice that it was seeking to increase the class of the offense of DWLR from a misdemeanor to a felony as required by section 111-3(c) of the Code of Criminal Procedure (Code) (725 ILCS 5/111-3(c) (West 2014)). Section 11-3(c) of the Code reads as follows:

> "When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior

> conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2014).

Questions requiring an interpretation of section 111-3(c) of the Code are reviewed *de novo*. *People v. Lewis*, 2014 IL App (1st) 122126, ¶ 28, see also *People v. Wilkinson*, 285 Ill. App. 3d 727, 732 (1996) (reviewing determination on pretrial motion to dismiss charging instrument for failure to comply with section 111-3 of the Code *de novo*).

¶ 10 Defendant argues the information charging him with DWLR was inadequate to provide notice because it "listed no prior qualifying conviction or violation." According to defendant, to satisfy the notice requirement of section 111-3(c) the information had to list the prior qualifying convictions for DWLR and state the prior offenses or suspensions triggering the prior revocations. In this case, defendant argues, the information "cited statutes for offenses that *could* trigger a felony [DWLR] sentence" (emphasis added) but cited none of defendant's prior convictions or violations. Defendant argues he is not required to show that he was prejudiced by the inadequacy of the information because the prejudice that results from an inadequate charging instrument is prejudice to the defendant's ability to prepare a defense but here the question is notice of how the State will prove a higher offense class at sentencing, after the defendant has already been convicted, rather than notice of what offense the State will attempt to prove so that the defendant can prepare a defense and plead a resulting conviction as a

bar to future prosecution. Regardless, defendant argues he was prejudiced because "[i]t is difficult to tell from the charges how the State intended to show [defendant] committed felony DWLR."

¶ 11 Defendant concedes he failed to raise this issue at trial or in a posttrial motion but asks this court to review the issue as plain error. We note that

> "forfeited claims of sentencing error may be reviewed for plain error, and the defendant has the burden of demonstrating either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. [Citations.] Under plain-error review, we start by reviewing defendant's claim to determine whether any error occurred." (Internal quotation marks omitted.) *People v. Polk*, 2014 IL App (1st) 122017, ¶ 15.

Accordingly, we will proceed to determine whether any error occurred.

¶ 12 The State responds the information states that the State sought to convict defendant of felony DWLR based on prior convictions under section 6-303 of the Vehicle Code, which is titled "Driving while driver's license *** revoked;" "[t]hus, a simple reading of the title of the statute sufficiently provided defendant notice that the prior violations that the State was relying on were *** prior violations of driving while his license was revoked." Further, the State argues defendant is required to show he was prejudiced by the information, which he cannot do, because "Illinois courts do not distinguish between section 111-3(a) and 111-3(c)" of the Code and a challenge based on section 111-3(a) of the Code raised for the first time on appeal requires a showing of prejudice. Section 111-3 reads, in pertinent part, as follows:

> "(a) A charge shall be in writing and allege the commission of an offense by:
>
> (1) Stating the name of the offense;
>
> (2) Citing the statutory provision alleged to have been violated;

(3) Setting forth the nature and elements of the offense charged;

(4) Stating the date and county of the offense as definitely as can be done; and

(5) Stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

* * *

(c) When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(a), (c) (West 2014).

¶ 13 In *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 31, aff'd in part, vacated in part sub nom, *People v. Bingham*, 2018 IL 122008, ¶¶ 34-35, the defendant argued he should not have been sentenced as a Class 4 felon for theft and his conviction should be reduced to a Class A misdemeanor because the State failed to comply with section 111-3(c) of the Code. Regarding the defendant's challenge under section 111-3(c) this court wrote as follows:

> "The timing of the challenge to the indictment determines whether defendant must show he was prejudiced by the defect in the charging instrument. [Citation.] If an indictment or information is challenged in a pretrial motion, it must strictly comply with the pleading requirements of section 111-3. [Citation.] However, if the defendant challenges the sufficiency of the charging instrument for the first time on appeal, he must show he was prejudiced by the defect in the indictment. [Citation.]" (Internal quotation marks omitted.) *Id*. ¶ 34 (citing *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 18).

The court held that because the defendant challenged the sufficiency of the indictment under section 111-3(c) for the first time on appeal he must show he was prejudiced thereby. *Id*. ¶ 35. Prejudice in that context meant the defendant had to show the indictment "failed to notify him that he was being charged with a Class 4 felony theft." *Id*. In this case defendant argues *Bingham* wrongly applied a prejudice requirement to section 111-3(c) claims because it "failed to make a distinction between 111-3(a) and section 111-3(c)." Here, defendant argues that it is logical to apply a prejudice requirement to a challenge to the charging instrument raised for the first time on appeal where the sufficiency of the charging instrument may have affected the defendant's ability to prepare a defense but not when the issue is how the State will establish a higher offense class at sentencing.

¶ 14 Defendant has failed to demonstrate why the different aspects of the "form of charge" provided for in section 111-3(a) and 111-3(c) should be treated differently for purposes of challenges to the charging instrument either before appeal or on appeal. The purpose of section 111-3(a) "is to ensure that a defendant will be informed with reasonable certainty of the offense with which he is charged so that he can prepare his defense." *People v. Costello*, 224 Ill. App. 3d 500, 506 (1992). Our supreme court has held that the purpose of section 113-(c) is similarly "to ensure that a defendant received notice, before trial, of the offense with which he is charged." *People v. Jameson*, 162 Ill. 2d 282, 290 (1994) ("The

legislature enacted section 111-3(c) to ensure that a defendant received notice, before trial, of the offense with which he is charged."). Specifically, "[s]ection 111-3(c) ensures that a defendant receives pretrial notice that the State is charging the defendant with a higher classification of [the] offense because of a prior conviction." *Id*. at 291. Because the sections of the statute serve the same essential purpose we find no reason to treat one section differently when raised for the first time on appeal than the other. See generally *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 45 ("A statute should be construed in conjunction with other statutes touching on the same or related subjects considering the reason and necessity for the law, the evils to be remedied, and the objects and purposes to be obtained." (Internal quotation marks omitted.)).

¶ 15 Moreover, the only alternative left open by defendant's argument is a requirement for strict compliance with section 111-3(c). Defendant has cited no authority for such a rule. Additionally, defendant's argument misstates the reason a showing of prejudice is not required for section 111-3 challenges raised in the trial court. Our supreme court held, with regard to section 111-3(a), that

> "the sufficiency of an information or indictment attacked for the first time on appeal is *not* to be determined by whether its form follows precisely the provisions of the statute. When attacked for the first time on appeal an information or indictment is sufficient if it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." (Emphasis added.) *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976).

Our supreme court "reached this conclusion on the strength of section 114-1(b) of the Code of Criminal Procedure of 1963 *** and the absence of any provision for nonwaiver at the appellate level comparable to section 116-2." *People v. Smith*, 99 Ill. 2d 467, 475 (1984). Section 114-1(b) states that

> "[t]he court shall require any motion to dismiss [the charge] to be filed within a reasonable time after the defendant has been arraigned. Any motion not filed within such time or an extension thereof shall not be considered by the court and the grounds therefor, except as to subsections (a)(6) [(the court in which the charge has been filed does not have jurisdiction)] and (a)(8) [(the charge does not state an offense)] of this Section, are waived." 725 ILCS 5/114-1(b) (West 2014).

Section 116-2 of the Code states:

> "(a) A written motion in arrest of judgment shall be filed by the defendant within 30 days following the entry of a verdict or finding of guilty. Reasonable notice of the motion shall be served upon the State.
>
> (b) The court *shall* grant the motion when:
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> (1) The indictment, information or complaint does not charge an offense, or
>
> (2) The court is without jurisdiction of the cause.
>
> (c) A motion in arrest of judgment attacking the indictment, information, or complaint on the ground that it does not charge an offense shall be denied if the indictment, information or complaint apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution out of the same conduct." (Emphasis added.) 725 ILCS 5/116-2 (West 2014).

¶ 16 After deciding *Gilmore*, "[t]wo years later in *Lutz* the court took the logical next step and gave section 116-2 the literal interpretation contemplated by its mandatory wording and foreshadowed by *Gilmore*." *Smith*, 99 Ill. 2d at 475 (citing *People v. Medreno*, 99 Ill. App. 3d 449, 455 (1981)). In

*People v. Lutz*, 73 Ill. 2d 204, 209 (1978), the State argued that under *People v. Pujoue*, 61 Ill. 2d 335 (1975), the defendant challenging an indictment in the trial court had to show prejudice. The *Pujoue* court had held that "the sufficiency of a complaint attacked for the first time on appeal must be determined by a different standard." *Pujoue*, 61 Ill. 2d at 339. The *Lutz* court noted that, "[a]s the court observed in *Gilmore*, 'No similar statutory provision was made for nonwaiver at the appellate level' [citation]" of a challenge to an indictment for failing to charge an offense, and on that basis the court "decline[d] the invitation of the People to extend the *Pujoue* rule to include defects in the indictment pointed out in a timely filed motion in arrest of judgment." *Lutz*, 73 Ill. 2d at 210.

¶ 17 Thus, sections 114-1 and 116-2 of the Code operate to save a strict compliance challenge to a charging instrument *in the trial court*; and absent such a "nonwaiver provision" for challenges at the appellate level our supreme court applies "the *Pujoue* rule" which requires the challenger to show prejudice from the allegedly defective charging instrument. Whether the challenge goes to notice of the offense or notice of the sentencing class of the offense is a distinction without a difference. The difference lies in the absence of a "provision *** for nonwaiver at the appellate level." Defendant has pointed to no such provision for a challenge based on section 111-3(c). Accordingly, since, as stated above, section 111-3(a) and 111-3(c) serve the same general purpose, we will treat them similarly and hold that defendant's challenge raised for the first time on appeal requires defendant to show prejudice from the allegedly defective information. *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991) (when an information is attacked for the first time on appeal "the appellate court should consider whether the defect in the information or indictment prejudiced the defendant in preparing his defense. If, however, the information or indictment is attacked before trial, as in this case, the information must strictly comply with the pleading requirements of the Code of Criminal Procedure of 1963."). In this context, this means defendant had to show he did not know that the prior offenses on which the State relied to

increase the class of the offense from a misdemeanor to a felony were defendant's prior convictions for DWLR.

¶ 18 Defendant's argument he was prejudiced by the information in this case is unpersuasive. The information did not leave the question of how felony DWLR might be proven "entirely open" as defendant suggests. The information informed defendant the State sought to convict him of felony DWLR rather than misdemeanor DWLR based on prior convictions for violations of section 6-303 of "Chapter 625 Act 5 of the Illinois Compiled Statutes," otherwise known as the Illinois Vehicle Code and, more specifically, the driving while license revoked statute. 625 ILCS 5/6-303 (West 2014). In regard to the State's argument that the information was sufficient because listing the statute for the prior conviction, the State would rely upon informed defendant that the State was relying upon his prior DWLR convictions defendant's only response is that the State's argument "ignores the requirements of section 111-3(c)" and to assert there was confusion "at trial over how the State would prove the prior convictions." We reject defendant's arguments.

¶ 19 First, we note defendant does not argue the State failed to prove those prior convictions or that the prior convictions do not satisfy the requirements of section (d-3) of the DWLR statute (625 ILCS 5/6-303(d-3) (West 2014)). As stated above, the question we must answer is whether defendant was prejudiced in that defendant did not know the prior offenses on which the State relied to increase the class of the offense from a misdemeanor to a felony were defendant's prior convictions for DWLR. A plain reading of the information informed defendant the State was relying on the fact defendant "previously has been convicted of three violations of [the DWLR statute.]" A defendant is on notice of information readily discernible from the charging instrument. See *Bingham*, 2017 IL App (1st), 143150, ¶ 36 ("Initially, we note that defendant makes no argument that he was not on notice before trial that he was being charged with a Class 4 felony theft [where the indictment did not expressly state the intention

to seek a sentence for Class 4 felony theft.] Nor could he make such an argument, as the indictment informed him that he was being charged with theft after having been previously convicted of retail theft. Only one offense level and sentencing range is allowed for a defendant charged with theft who has a prior conviction for retail theft: a Class 4 offense with a prison term of between one and three years. See 720 ILCS 5/16-1(b)(2) (West 2012); 730 ILCS 5/5-4.5-45(a) (West 2012). Accordingly, as defendant was on notice before trial that he was being charged with Class 4 felony theft subject to a potential three-year term of imprisonment, his challenge to the sufficiency of the indictment fails.").

¶ 20 We recognize that the information did list multiple offenses or violations that may have led to the prior revocations and DWLR convictions. However, defendant does not argue that he was prejudiced by confusion as to the prior offenses on which the current charge was based because of the existence of multiple charges in his record that could have satisfied the requirements of section 6-303. Further, as noted by the State, defendant does not argue and there is nothing in the record to suggest defendant was unaware of the nature of his prior DWLR convictions. See *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 36 (finding defendant could not establish prejudice from the omission of the words "proximately caused great bodily harm" from the indictment where "[the] defendant cannot credibly argue that he was not informed prior to trial of the facts concerning great bodily harm [the victim] sustained as a result of the shooting"). Based on this record we cannot say defendant was prejudiced by the way the information was written. Because we hold defendant was required to show prejudice from the allegedly defective information and defendant has failed to do so, we find no error occurred. Because there was no error, there can be no plain error.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 23 Affirmed.