2019 IL App (4th) 180435-U

NO. 4-18-0435

FILED
February 7, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Scott County
DAVID E. DUNMIRE,	)	No. 18DT1
Defendant-Appellant.	)	
	)	Honorable
	)	David R. Cherry,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, finding the trial court erred in conducting a hearing on defendant's petition to rescind the statutory summary suspension of his driving privileges beyond the 30-day period required by statute.

¶ 2 In February 2018, defendant, David E. Dunmire, was arrested for driving under the influence (DUI) of alcohol and, as a result, his driving privileges were suspended. In March 2018, defendant filed a petition to rescind the statutory summary suspension, and the State filed a motion to strike. The trial court granted the motion to strike and allowed defendant to replead. Defendant filed an amended petition to rescind, and the State moved to continue. In April 2018, defendant filed a motion for summary judgment, arguing he did not receive a hearing within 30 days of the filing of his initial petition. At the May 2018 hearing, the court denied defendant's motion for summary judgment and granted the State's motion for a directed finding at the close of defendant's evidence on his amended petition to rescind.

¶ 3 On appeal, defendant argues the trial court erred in (1) denying his motion for summary judgment and (2) granting the State's motion for a directed finding. We reverse.

¶ 4 I. BACKGROUND

¶ 5 On February 7, 2018, defendant was arrested for DUI (625 ILCS 5/11-501(a)(2) (West 2016)) and issued a citation and complaint. The law enforcement sworn report indicated chemical testing revealed defendant had an alcohol concentration of 0.107. The arresting officer noted defendant's vehicle was stopped for tinted windows, and defendant was found to have "red/glassy eyes," slurred speech, and a strong odor of alcoholic beverage. The report stated defendant was served with an immediate notice of summary suspension and/or revocation of his driving privileges.

¶ 6 On March 2, 2018, a confirmation of the statutory summary suspension of defendant's driving privileges from the Illinois Secretary of State was filed, indicating defendant was a first-time offender, the summary suspension would begin March 25, 2018, the minimum length of the suspension was six months, and his provisional reinstatement date was September 25, 2018.

¶ 7 On March 26, 2018, defendant, through his attorney, filed a petition to rescind the statutory summary suspension, which stated as follows:

> "I hereby petition the Court to rescind the statutory summary suspension issued in this case due to the following issue(s):
>
> (X) I was not properly placed under arrest for an offense as defined in Sect. 11-501 of the Illinois Vehicle Code (driving under the influence of alcohol/drugs) or a similar provision of a local

ordinance, as evidence[d] by the issuance of a Uniform Traffic Ticket or other form or charge;

(X) The arresting officer did not have reasonable grounds to believe that I was driving or in actual physical control of a motor vehicle while under the influence of alcohol and/or other drugs, or a combination thereof;

(X) I was not properly warned by the arresting officer as provided in Sect. 11-501.1 of the Illinois Vehicle Code;

( ) I did not refuse to submit to and/or complete the required chemical test or test, pursuant to Section 11-501.1 of the Illinois Vehicle Code, upon the request of the arresting officer;

(X) I submitted to the requested test or tests but the test sample of my blood alcohol concentration did not indicate a blood alcohol concentration of 0.08% or more."

That same day, defendant appeared with his attorney in court. The trial court set a hearing on the petition to rescind on April 19, 2018.

¶ 8 On April 19, 2018, the State filed a motion to strike pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). The State claimed defendant's petition to rescind failed to set forth any ultimate facts upon which the State could rely to enable preparation of an adequately prepared defense, but instead it made only conclusions of fact. The State argued the petition failed to state any ultimate facts demonstrating defendant was not properly placed under arrest, the arresting officer was mistaken in his observations and

statements contained in the sworn report, the warning to motorist was not proper, or defendant had a blood-alcohol concentration below 0.08% as claimed.

¶ 9 At the hearing on the State's motion to strike, the prosecutor argued he had "no idea" and did not understand what the petition to rescind was. He contended the petition consisted of conclusions without any facts alleged to support them and likened it to "a frivolous pleading." Defendant's counsel argued the petition was "a statutory pleading," with which prosecutors "all over the state are able to prepare for these hearings."

¶ 10 The trial court granted the State's motion to strike. However, the court allowed defendant to refile the petition "with the correct information to give notice to the State of what the issues are going to be." The court also told defense counsel "we are a fact-pleading state and you have got to tell us why his rights were violated."

¶ 11 Defense counsel noted he had filed the petition to rescind on March 26 and asked for a hearing within 30 days of that date. The trial court stated the hearing had started and it was continuing the hearing until another date. Defense counsel objected, arguing the court could not toll the statutory 30-day requirement by starting a hearing and then continuing it. The court stated it was "going to stick" with its ruling, grant the motion to strike, and allow counsel to reinstate the petition. The court stated the 30-day requirement had been followed by the hearing being set for that day. However, the "hearing was interrupted with a Motion to Strike" and then continued. The court continued the hearing until April 26, 2018.

¶ 12 On April 20, 2018, defendant filed an amended petition to rescind the statutory summary suspension and set forth numerous allegations of fact. Defendant argued the stop of his vehicle was unlawful at its inception, as the arresting officer did not observe defendant commit any traffic violations. Further, defendant alleged he was illegally seized and unconstitutionally

detained when the arresting officer exceeded the scope of the stop by stalling for more than 15 minutes while waiting for another officer to arrive. Following the officer's alleged stalling, defendant claimed he was subjected to a second round of field-sobriety tests. Defendant contended the officers did not have reasonable suspicion to believe he violated section 11-501 of the Vehicle Code and failed to preserve a videotape of the encounter.

¶ 13 Defendant also filed a motion for summary ruling or to bar testimony, alleging the arresting officer failed to record or failed to preserve the audio and video recordings of the horizontal gaze nystagmus (HGN) test and the walk-and-turn test. Defendant also alleged the arresting officer failed to record or failed to preserve the audio recording of the one-legged stand test but did record and preserve the video recording of the test. Relying on the Illinois Supreme Court's decision in *People v. Kladis*, 2011 IL 110920, 960 N.E.2d 1104, defendant argued the appropriate remedy for the officer's failure to perform his statutory duty to record the tests was a summary grant of the petition to rescind and the dismissal of the DUI citation.

¶ 14 The State acknowledged it received an electronic copy of the amended petition to rescind on April 20, 2018, six days prior to the scheduled hearing on April 26. On April 23, 2018, the State filed a motion to continue, arguing the six-day window was not enough time to prepare for the hearing on the amended petition to rescind.

¶ 15 On April 25, 2018, defendant filed an objection to the State's motion to continue, arguing a continuance would deprive him of his right to a hearing within 30 days as required by section 2-118.1(b) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/2-118.1(b) (West 2016)). On April 26, 2018, defendant and his counsel appeared for the hearing on the amended petition. Instead of commencing the rescission hearing, the trial court heard arguments on the

State's motion to continue. The court granted the motion to continue and set the hearing on the amended petition for May 8, 2018.

¶ 16 On April 30, 2018, defendant filed a motion for summary judgment, arguing more than 30 days had passed since the filing of the petition to rescind on March 26, 2018. As none of the delay in commencing the hearing could be attributable to defendant and due process required a hearing within 30 days, defendant asked the trial court to grant summary judgment in his favor on his petition to rescind.

¶ 17 In its response, the State contended the petition to rescind had been stricken in its entirety and nothing remained for the amended petition to rescind to relate back to. Instead, the State argued the filing of the amended petition to rescind started a new 30-day time period in which to conduct a hearing under the statute.

¶ 18 On May 8, 2018, the trial court held a hearing on the motion for summary judgment, the motion to bar testimony, and the amended petition to rescind. As to the motion to bar testimony, Illinois State Police Trooper Jeffrey Lacey testified he was called to Bluffs, Illinois, on February 7, 2018, to assist with a DUI stop initiated by Bluffs police officer Ryan Crowder, who had never processed a DUI case at that time. Lacey stated it took him approximately 20 minutes to arrive on the scene. Further testimony revealed Lacey received a call at 8:49 p.m. and arrived on the scene at 9:17 p.m.

¶ 19 Lacey testified he did not manually turn on the video camera in his squad car at the time he arrived on the scene. He also stated his takedown lights were not activated, which, had they been, would have automatically turned on the camera. He conducted the HGN test, the walk-and-turn test, and the one-legged-stand test on defendant, but he failed to record the tests.

He only realized he had failed to activate the camera when he walked back to his squad car. Lacey testified he did not notify anyone that he had failed to record portions of the stop.

¶ 20 The trial court took the matter under advisement and then proceeded to a hearing on the amended petition to rescind. The court noted the hearing would be limited to Officer Crowder's actions and would not involve Trooper Lacey and his actions.

¶ 21 Officer Crowder testified defendant was his first DUI arrest. He initially executed a traffic stop for illegal window tinting at approximately 8:31 p.m. Crowder called for a backup officer at 8:48 p.m., and Lacey arrived at 9:17 p.m. While he waited for Lacey to arrive, Crowder had defendant perform several field-sobriety tests. During the walk-and-turn test, defendant raised his arms from his side, but Crowder failed to include that detail in his report. Defendant also failed to touch heel-to-toe on all of his steps. Crowder stated his manual requires two mistakes to constitute a failure on the walk-and-turn test.

¶ 22 In regard to the one-legged-stand test, defendant told Crowder his ankles bothered him, but he would be able to perform the test. Crowder observed two clues when conducting the test. After completing the tests in approximately 15 minutes, Crowder placed defendant in his squad car. While waiting for Lacey to arrive, Crowder searched defendant's car as a search incident to arrest.

¶ 23 On cross-examination, Crowder stated he stopped defendant's vehicle because the window tinting "appeared to be illegal." Crowder asked defendant for his driver's license, and defendant proceeded to hand over "his whole wallet." Crowder told him he only needed the driver's license. Defendant eventually was able to retrieve his license, but he was "slow, fumbling, [and] digging" in doing so. Crowder stated he smelled "the odor of alcoholic beverage" and saw an opened box of beer in the car. Defendant's eyes "appeared bloodshot

[and] glassy." During the HGN test, Crowder said defendant "lacked smooth pursuit" and "had maximum deviance." Based on the field-sobriety tests, Crowder was of the opinion that defendant was impaired.

¶ 24 After Crowder testified and defendant offered no other witnesses, the State made a motion for a directed finding and argued defendant failed to produce sufficient evidence to shift the burden to the State. The trial court first denied defendant's motion for summary judgment, holding the hearing had been conducted within 30 days. The court then denied the amended petition to rescind, holding defendant failed to shift "the burden sufficiently to present a *prima facie* case." The court noted Officer Crowder had a reasonable suspicion that he could stop defendant's vehicle due to the window tinting and believed defendant was impaired after the field-sobriety tests. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. Motion for Summary Judgment

¶ 27 Defendant argues the trial court erred in denying his motion for summary judgment, claiming there was no issue of fact that the hearing on the petition to rescind was not held until 43 days after it was filed and none of the delay was attributable to defendant. The State concedes the error, asserting defendant is entitled to rescission of the summary suspension of his driver's license because the rescission hearing was not held within 30 days after he properly filed his written request. We accept the State's concession and agree the court erred in failing to conduct the hearing within 30 days of the filing of defendant's petition to rescind.

¶ 28 Under section 11-501.1(e) of the Vehicle Code (625 ILCS 5/11-501.1(e) (West 2016)), the Secretary of State is required to summarily suspend the driver's license of any motorist arrested for DUI who refuses testing or tests above the legal alcohol-concentration limit.

"[T]he purpose of the summary suspension procedure is twofold: to quickly remove impaired drivers from our highways [citation]; and to balance the due process rights of a driver to a prompt hearing [citation]." *People v. Janas*, 389 Ill. App. 3d 426, 428, 906 N.E.2d 686, 688 (2009). To that end, the Vehicle Code allows a motorist to challenge the statutory summary suspension and receive a hearing pursuant to section 2-118.1(b) (625 ILCS 5/2-118.1(b) (West 2016)), which provides as follows:

> "Within 90 days after the notice of statutory summary suspension or revocation served under Section 11-501.1, the person may make a written request for a judicial hearing in the circuit court of venue. The request to the circuit court shall state the grounds upon which the person seeks to have the statutory summary suspension or revocation rescinded. *Within 30 days after receipt of the written request or the first appearance date on the Uniform Traffic Ticket issued pursuant to a violation of Section 11-501, or a similar provision of a local ordinance, the hearing shall be conducted by the circuit court having jurisdiction.* This judicial hearing, request, or process shall not stay or delay the statutory summary suspension or revocation. The hearings shall proceed in the court in the same manner as in other civil proceedings." (Emphasis added.)

See also *People v. Bywater*, 223 Ill. 2d 477, 482, 861 N.E.2d 989, 992-93 (2006).

¶ 29 Our supreme court has noted "the plain language of section 2-118.1(b) establishes a 30-day period within which a hearing on a petition to rescind summary suspension must be held ***." *Bywater*, 223 Ill. 2d at 486, 861 N.E.2d at 995; see also *People v. Moreland*, 2011 IL

App (2d) 100699, ¶ 8, 955 N.E.2d 1218 (stating the 30-day hearing requirement in the statute is a mandatory obligation).

> "When a defendant files a petition to rescind his summary suspension with the clerk of the circuit court and sends a copy to the State's Attorney's office, he has fulfilled his obligations under section 2-118.1(b). [Citations.] The burden then shifts to the State to ensure that a hearing is held within the time constraints set forth in section 2-118.1(b) because the State is in the 'best position to know court schedules, court dates for police officers, and the other matters incident to an orderly administration of this legislation.' [Citation.]" *People v. Miklos*, 393 Ill. App. 3d 205, 209, 914 N.E.2d 506, 510 (2009).

¶ 30 In *Miklos*, 393 Ill. App. 3d at 210, 914 N.E.2d at 510, the defendant filed his petition to rescind his summary suspension on June 11, 2008, and the State scheduled a hearing for 22 days after the filing of the petition. On the date of the hearing, the prosecutor initially stated she was ready to proceed but then changed her mind because the arresting officer was unavailable. *Miklos*, 393 Ill. App. 3d at 210, 914 N.E.2d at 510. The State chose to reschedule the hearing for 15 days later, which amounted to 36 days after the defendant filed his petition to rescind. *Miklos*, 393 Ill. App. 3d at 210, 914 N.E.2d at 510. The trial court granted the defendant's motion to dismiss based on the lack of a timely hearing. *Miklos*, 393 Ill. App. 3d at 207, 914 N.E.2d at 508. The Third District found the State violated the defendant's due-process rights by depriving him of a hearing on his petition to rescind within 30 days of its filing. *Miklos*, 393 Ill. App. 3d at 210, 914 N.E.2d at 510.

¶ 31 Our supreme court has noted a hearing on a defendant's petition to rescind must be held within 30 days "unless the delay is occasioned by the defendant." *People v. Schaefer*, 154 Ill. 2d 250, 253, 609 N.E.2d 329, 330 (1993); see also *People v. Guillermo*, 2016 IL App (1st) 151799, ¶ 24, 54 N.E.3d 974 (noting "if the defendant occasions any delay beyond the 30-day deadline he is not entitled to rescission based on an untimely hearing so long as the hearing is held within 30 days of the filing of the petition to rescind exclusive of any period of delay occasioned by the defendant"); *Moreland*, 2011 IL App (2d) 100699, ¶ 10, 955 N.E.2d 1218 (stating "a defendant is not entitled to a rescission if the defendant caused the hearing to be delayed"). Moreover, the supreme court has stated section 2-118.1(b) does not require a hearing to be completed within 30 days. *People v. Cosenza*, 215 Ill. 2d 308, 314, 830 N.E.2d 522, 525 (2005). Instead, if the hearing has been timely commenced, the trial court has "the authority to continue the matter if the circumstances so dictate." *Cosenza*, 215 Ill. 2d at 315, 830 N.E.2d at 525 (finding the hearing began within the 30-day period and was continued by agreement of the parties).

¶ 32 In the case *sub judice*, defendant was arrested for DUI and given notice of the summary suspension of his driver's license on February 7, 2018. The Secretary of State confirmed his suspension on March 2, 2018. On March 26, 2018, defendant filed his initial petition to rescind and properly served a copy on the State. See *Schaefer*, 154 Ill. 2d at 268, 609 N.E.2d at 337 (noting the requirement that the defendant serve his petition on the State). From the date of the filing of the petition to rescind, the court had 30 days to conduct a hearing, which would have been April 26, 2018. See *Bywater*, 223 Ill. 2d at 486, 861 N.E.2d at 994; see also *People v. Riffice*, 392 Ill. App. 3d 961, 964, 911 N.E.2d 1244, 1247 (2009) (stating that, in

counting the 30 days, the day the petition is filed is not counted). The court set the hearing for April 19, 2018.

¶ 33 The State filed a motion to strike on April 19, 2018, arguing defendant failed to plead sufficient allegations of fact in support of his grounds for rescission. The trial court granted the motion to strike. We find the court erred in doing so.

¶ 34 This court has stated "the legislature intended to severely restrict the focus of rescission hearings" to expedite them. *People v. Buerkett*, 201 Ill. App. 3d 140, 146, 559 N.E.2d 271, 275 (1990). Thus, the statute only requires the petition to rescind to "state the grounds upon which the person seeks to have the statutory summary suspension or revocation rescinded." 625 ILCS 5/2-118.1(b) (West 2016). As noted by defendant's counsel and the appellate prosecutor, the form used by defendant in this case is utilized throughout the state and is drawn from the language set forth in the statute. See 625 ILCS 5/2-118.1(b) (West 2016) (stating the scope of the hearing is limited to the issues enumerated in the statute). Moreover, the Secretary of State advised defendant that in any written request for a hearing, he "must state which issue(s) listed below you are using as grounds upon which to have the Summary Suspension rescinded." To require fact-pleading, as the trial court did here, is inconsistent with the legislative goal of expedited proceedings. As defendant stated the issues he would be relying on and thereby fulfilled his obligations under section 2-118.1(b), the court abused its discretion in striking his initial petition to rescind and requiring him to file an amended petition.

¶ 35 On April 20, 2018, defendant filed his amended petition. Three days later, the State filed a motion to continue, arguing it could not prepare in time for the April 26, 2018, hearing. On April 25, 2018, defendant objected to the State's motion to continue, arguing a continuance would deprive him of his right to hearing within 30 days. On April 26, 2018 (the

30th day from the filing of the initial petition), defendant and his counsel appeared for a hearing on the amended petition, but the trial court granted the State's motion to continue and set the hearing on the amended petition for May 8, 2018. This was beyond the 30-day period mandated by statute.

¶ 36 As the State concedes on appeal, the delay in the hearing was not occasioned by defendant. Instead, it was occasioned by the trial court's granting of the State's motion to continue. As the court erred in granting the State's motion to strike defendant's original petition to rescind and requiring him to file an amended request, the 30-day period for holding a hearing did not restart upon the filing of the amended petition to rescind. See *Moreland*, 2011 IL App (2d) 100699, ¶ 11, 955 N.E.2d 1218 (stating the "30-day period in which defendant was entitled to a hearing on his petition to rescind was not tolled when the trial court struck the petition"). Because the delay in conducting the rescission hearing was not attributable to defendant, his statutory and due-process rights to a timely hearing were violated. Thus, defendant is entitled to rescission of the statutory summary suspension of his driving privileges.

¶ 37 B. Motion for a Directed Finding

¶ 38 Defendant also argues the trial court erred in granting the State's motion for a directed finding on defendant's amended petition to rescind at the close of his case, claiming he presented ample evidence that both the stop and/or his arrest were not justified. The State contends we need only address this issue if we were to reject its concession and find the rescission hearing was timely. In his reply brief, defendant asks this court to rule on the issue. We decline to do so.

¶ 39 "Generally, courts of review do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues

are decided." *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 11, 25 N.E.3d 678. Initially, we note the six-month suspension of defendant's driving privileges expired on September 25, 2018. Thus, our reversal of the trial court's judgment offers little solace to him now, other than the fact that the statutory summary suspension will be removed from his driving record. Accordingly, the first issue regarding the timeliness of the hearing on the petition to rescind was not moot. The same cannot be said of the second issue—whether the arresting officer unlawfully stopped and detained defendant. Any decision on our part would constitute an advisory opinion and would have no bearing on the outcome of this case, *i.e.*, the rescission of the statutory summary suspension. Thus, we find the issue moot and decline to address it.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the trial court's judgment.

¶ 42 Reversed.