2014 IL App (3d) 120925-U

Order filed November 18, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-12-0925 |
| v. | ) | Circuit No. 07-CF-1052 |
| | ) | |
| CHRISTOPHER J. BRIGHT, | ) | The Honorable Carla Policandriotes, |
| Defendant-Appellant. | ) | Judge, presiding. |

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JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held*: In a case in which the defendant pled guilty to aggravated driving under the influence of alcohol, was sentenced to probation, violated that probation, and was resentenced on the original conviction to a five-year term of imprisonment, the appellate court held that: (1) the defendant was properly sentenced as a Class 2 felon; (2) his sentence was not excessive; and (3) it lacked jurisdiction to consider the defendant's argument that the imposition of a public defender fee was improper.

¶ 2 The defendant, Christopher J. Bright, pled guilty to aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2), (c-1)(2) (West 2008)) in 2007 and was

sentenced to probation. In 2009, the State filed a petition to revoke the defendant's probation, and the defendant admitted that he committed the acts alleged in the petition. After a hearing, the circuit court resentenced the defendant on his aggravated DUI conviction to five years of imprisonment and two years of mandatory supervised release (MSR). On appeal, the defendant argues that: (1) his sentence violated the constitutional prohibition against *ex post facto* laws; (2) his sentence was excessive; and (3) the circuit court improperly assessed a public defender fee.[1] We affirm.

¶ 3 FACTS

¶ 4 In June 2007, the defendant was charged by indictment with aggravated DUI (625 ILCS 5/11-501(a)(2), (c-1)(2) (West 2008)). The indictment alleged that this incident, which occurred on May 17, 2007, was the "third or subsequent time" that the defendant had violated the DUI statute and therefore constituted a Class 2 felony.

¶ 5 On November 5, 2007, the defendant pled guilty to the aggravated DUI charge. After admonitions and the State's recitation of the factual basis, the circuit court found a sufficient factual basis for the charge and accepted the defendant's guilty plea. On January 9, 2008, the defendant was sentenced to 36 months of probation. As part of the terms of his probation, the circuit court ordered the defendant to "complete 75 hours of alcohol counseling and after-care including 3 [Alcoholics Anonymous] meeting [*sic*] per week as part of after-care." In addition, the defendant was assessed court costs and fines, which included a public defender fee of $1,134. The defendant did not file a direct appeal from his conviction and sentence.

[1] In his brief, the defendant also argued that defense counsel was ineffective for failing to object to the class of the offense and the factual basis at the original sentencing hearing, but appellate counsel withdrew that argument in its entirety at oral argument.

¶ 6 On December 29, 2009, the State filed a petition to revoke the defendant's probation. The petition alleged that the defendant failed three drug tests in August and September 2009 and that he failed to comply with treatment. On February 8, 2010, he was released on a personal recognizance bond and admonished that he had to follow all recommendations for treatment through his after-care program and, *inter alia*, that he had to document a job search of 15 applications per week. On February 16, 2010, the circuit court revoked the defendant's bond because he failed to comply with the job search requirement, but the court reinstated the bond three days later. However, the defendant failed to appear in court on May 21, 2010, when he was also supposed to submit to a drug test, and the court issued a no-bond warrant for his arrest. The defendant was not arrested on that warrant until March 6, 2012. On March 19, 2012, the defendant admitted that he committed the acts alleged in the petition.

¶ 7 On July 11, 2012, the circuit court held a hearing to resentence the defendant. The court first clarified that the defendant was being resentenced on his aggravated DUI conviction, which was a Class 2 felony that had the possibility of probation but otherwise had an incarceration range of three to seven years. Next, the court heard arguments. In recommending a five-year sentence, the State noted that the defendant had a criminal history that included two prior DUI convictions, a 1987 conviction for Class 2 burglary, various driving suspensions, and a 2000 conviction for possession of a controlled substance. The State also noted that after the defendant failed to appear on the petition to revoke in December 2009, he was not apprehended until almost two years later. In recommending probation, defense counsel noted that: (1) there were 12 years in between the defendant's burglary and possession convictions; (2) he had completed probation for both of those offenses; (3) he admitted responsibility for the aggravated DUI; (4) the aggravated DUI was not a violent crime; (5) while in custody in this matter, he completed up

to session five of drug abuse classes and attended alcohol abuse counseling until he was relocated in jail such that he was no longer able to attend that counseling; (6) the defendant's character-reference letters spoke to his rehabilitation potential; and (7) he was employed at the time of his arrest. The defendant gave the court some details on the counseling and rehabilitation services he had attended, and he also told the court that he had been "clean and sober" since May 22, 2010.

¶ 8 In rendering its sentencing decision, the circuit court noted the defendant's criminal history and that it had "allowed and enabled [the defendant] to have inpatient treatment, also allowed him on prior occasions to remain in a sober living environment to attempt to have him maintain his sobriety." Further, the court noted that it did not believe the defendant had been "clean and sober" since May 2010, given his failure to appear in court on the petition to revoke and thereby submit to drug testing. The court found that probation was an inappropriate disposition because it did not believe the defendant would comply with the terms of probation. After stating that it had considered all factors in aggravation and mitigation, the presentence investigation report, and the character-reference letters, the court imposed a five-year prison sentence and two years of mandatory supervised release.

¶ 9 The defendant filed a motion to reconsider his sentence, which he alleged was excessive. After he retained private counsel, the defendant filed an amended motion to reconsider sentence in which he highlighted what he believed were mitigating circumstances. After the court denied the defendant's motion, he appealed.

¶ 10 ANALYSIS

¶ 11 The defendant's first argument on appeal is that his sentence violated the constitutional prohibition against *ex post facto* laws. Specifically, the defendant contends that at the time he

committed aggravated DUI, the penalty for the offense was a Class 3 felony rather than a Class 2 felony.

¶ 12 The *ex post facto* clauses of the United States and Illinois Constitutions forbid the retroactive application of a law that inflicts greater punishment than the law in effect at the time of the offense. U.S. Const., art. I, § 10, cl. 1; Ill. Const. 1970, art. I, § 16. "A law is considered *ex post facto* if it is both retroactive and disadvantageous to the defendant." *People v. Cornelius*, 213 Ill. 2d 178, 207 (2004). One way in which a law can be disadvantageous to a defendant is if it "increases the punishment for a previously committed offense." *Id.* Whether the defendant in this case was punished in violation of the *ex post facto* clauses presents a constitutional question, which we review under the *de novo* standard. See *People v. Davis*, 408 Ill. App. 3d 747, 751 (2011).

¶ 13 In 2005, the legislature amended the DUI statute seven times. The amendment of particular importance to this case appeared in Public Act 94-116 (Pub. Act 94-116 (eff. Jan. 1, 2006)). Prior to Public Act 94-116, a violation of subsection (c-1)(2) of the DUI statute constituted a Class 3 felony. 625 ILCS 5/11-501(c-1)(2) (West 2006); see also Pub. Act 93-1093 (eff. Mar. 29, 2005). Public Act 94-116 amended section 11-501(c-1)(2) by changing the requirements for all[2] third-time offenders and increasing the punishment for the offense:

> "A person who violates subsection (a) a third time, if the third violation occurs during a period in which his or her driving privileges are revoked or suspended where the revocation or suspension was for a violation of subsection (a), Section 11-501.1,

[2] Prior to Public Act 94-116, an individual who committed a third violation of the DUI statute was guilty of a Class 4 felony (625 ILCS 5/11-501(d)(2) (West 2006)), but if the violation occurred while the individual's license was suspended or revoked, the penalty increased to a Class 3 felony (625 ILCS 5/11-501(c-1)(2) (West 2006)).

paragraph (b) of Section 11-401, or for reckless homicide as defined in Section 9-3 of the Criminal Code of 1961, is guilty of a Class 2 ~~Class 3~~ felony." Pub. Act 94-116 (eff. Jan. 1, 2006).

The bill containing this amendment passed both houses on May 16, 2005, was approved by the governor on July 5, 2005, and became Public Act 94-116, which took effect on January 1, 2006. Http://www.ilga.gov/legislation/billstatus.asp?DocNum=3816&GAID=8&GA=94&DocTypeID=HB&LegID=20610&SessionID=50&SpecSess= (last visited Oct. 2014).

¶ 14 At the same time that the legislature was working on what became Public Act 94-116, they were also working on several other bills that amended various portions of section 11-501. In various ways, these bills—which became Public Acts 94-110 (eff. Jan. 1, 2006), 94-113 (eff. Jan. 1, 2006), 94-114 (eff. Jan. 1, 2006), 94-329 (eff. Jan. 1, 2006), and 94-609 (eff. Jan. 1, 2006)—were inconsistent with each other, given that subsequent Acts did not use the previous Acts' text. The legislature also passed a bill on April 25, 2006, which was approved by the governor on June 28, 2006, and which became Public Act 94-963 (eff. June 28, 2006). Public Act 94-963 amended sections 11-501(j) and (k) of the DUI statute, but did so by publishing the full text of Public Act 93-1093 (eff. Mar. 29, 2005)—which was the version of the DUI statute in effect prior to the 2005 amendments—and the full text of Public Acts 94-110, 94-113, 94-114, 94-116, 94-329, and 94-609, and incorporating the changes to sections (j) and (k) into the text of all seven of those Public Acts. See *People v. Maldonado*, 402 Ill. App. 3d 1068, 1073 (2010). Public Act 94-963 contained the version of the DUI statute in effect at the time of the instant defendant's offense.

¶ 15 Given that Public Acts 94-329 and 94-609 did not include the increased punishment for section 11-501(c-1)(2) made by Public Act 94-116, the question for this appeal is whether the defendant's May 17, 2007, offense was a Class 2 felony or a Class 3 felony.

¶ 16 In relevant part, section 6 of the Statute on Statutes provides:

> "Two or more Acts which relate to the same subject matter and which are enacted by the same General Assembly shall be construed together in such manner as to give full effect to each Act except in case of an irreconcilable conflict. In case of an irreconcilable conflict the Act last acted upon by the General Assembly is controlling to the extent of such conflict. * * *
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> An irreconcilable conflict between 2 or more Acts which amend the same section of an Act exists only if the amendatory Acts make inconsistent changes in the section as it theretofore existed." 5 ILCS 70/6 (West 2012).

¶ 17 In deciding this issue, the Second District's decision in *People v. Prouty*, 385 Ill. App. 3d 149 (2008) is instructive. In *Prouty*, the defendant was charged with aggravated DUI under section 11-501(d)(1)(a) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(1)(a) (West 2006)), which the circuit court treated as a Class 2 felony. *Prouty*, 385 Ill. App. 3d at 150. The defendant argued that section 11-501(d)(1)(a) was a Class 4 felony at the time of his offense on April 28, 2006. *Id.*

¶ 18 The *Prouty* court examined the relevant amendments made by the legislature to the DUI statute in 2005 and determined that while Public Acts 94-116 and 94-609 conflicted, the conflict was not irreconcilable. *Id.* at 154. The *Prouty* court noted that Public Act 94-609 did not explicitly repeal the amendments made to the statute by Public Act 94-116 and that Public Act 94-609 made a change to the statute separate from the changes made by Public Act 94-116. *Id.*

at 150. Further, the *Prouty* court stated that if the legislature intended a reversion, it likely would have done so explicitly by striking out the language added by Public Act 94-116 and restoring the old language via underline. *Id.* at 154. The *Prouty* court added:

> "We note that the two acts were passed only four days apart, suggesting that the drafters of Public Act 94-609 simply overlooked what had just been added by Public Act 94-116. Such an inference is more plausible than positing that the legislators had a sudden change of heart but chose to express it by passive indirection." *Id.* at 154.

¶ 19 We find the *Prouty* court's analysis persuasive and hold in this case that no irreconcilable conflict exists between Public Acts 94-116, 94-329, and 94-609. We hold that Public Acts 94-329 and 94-609 did not revert section 11-501(c-1)(2) back to a Class 3 felony, as those Public Acts made separate and distinct amendments to the DUI statute from Public Act 94-116. Compare Pub. Act 94-116 (eff. Jan. 1, 2006) with Pub. Act 94-329 (eff. Jan. 1, 2006) and Pub. Act 94-609 (eff. Jan. 1, 2006). See *Prouty*, 385 Ill. App. 3d at 154; see also *People v. Gonzalez*, 388 Ill. App. 3d 1003, 1007 (2009) (holding that Public Act 94-609 did not nullify the amendments made by Public Act 94-329 because those Public Acts made separate and distinct amendments to the DUI statute).[3] Accordingly, we hold that the defendant's sentence for aggravated DUI did not violate the constitutional prohibition against *ex post facto* laws.

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[3] Further, even assuming we agreed with the defendant that an irreconcilable conflict existed, we would reject the defendant's notion that Public Act 94-609 was "the Act last acted upon" for purposes of section 6 of the Statute on Statutes (5 ILCS 70/6 (West 2012)). Public Act 94-609 was not the last Act passed on this matter—Public Act 94-963 was. Because Public Act 94-963 published the text of seven different versions of the DUI statute, the defendant's argument regarding Public Act 94-609 does not eliminate the need to reconcile the different versions of the DUI statute created by the aforementioned 2005 legislation.

¶ 20 The defendant's second argument on appeal is that his sentence was excessive. The defendant contends that mitigating factors warranted a sentence of less than five years. He also contends that his sentence was excessive because other offenders have received lesser sentences despite their offenses having more tragic consequences, such as death to pedestrians struck by those intoxicated offenders.

¶ 21 The circuit court has broad discretion in imposing a sentence. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The court's sentencing decision is entitled to great deference, as "[t]he trial judge has the opportunity to weight such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* We will not disturb the circuit court's sentencing decision unless it constituted an abuse of discretion. *Id.* at 209-10. Examples of abuses of discretion include when a sentence greatly varies from the spirit and purpose of the law, or when it is manifestly disproportionate to the nature of the offense. *Id.* at 210.

¶ 22 Our review of the record in this case reveals no error in the circuit court's sentencing decision. The defendant in this case received a five-year sentence when the available sentencing range for a Class 2 felony was three to seven years. 730 ILCS 5/5-8-1(a)(5) (West 2008). The court indicated that it considered all factors in aggravation and mitigation, and the defendant has not pointed to any deficiency in the court's decision in that regard. Rather, the defendant's argument in appeal essentially posits that the relevant factors should have been weighed differently. In that regard, we note that is not the function of a reviewing court to reweigh the factors or substitute its judgment for that of the circuit court (*Stacey*, 193 Ill. 2d at 209), and we therefore decline the defendant's invitation to do so.

¶ 23 Furthermore, with regard to the defendant's argument that other offenders have received lesser sentences in situations that have had more tragic consequences, our supreme court has emphasized that "[t]he fact that a lesser sentence was imposed in another case has no bearing on whether the sentence in the case at hand is excessive *on the facts of that case*." (Emphasis in original.) *People v. Fern*, 189 Ill. 2d 48, 56 (1999). Thus, the sentences received by other offenders cannot serve as a basis for finding this defendant's sentence excessive. *Id.* For these reasons, under the circumstances of this case, we hold that the defendant's sentence was not excessive.

¶ 24 The defendant's third argument on appeal is that the circuit court erred when it imposed a $1,134 public defender fee.

¶ 25 Under section 113-3.1(a) of the Code of Criminal Procedure of 1961, a circuit court can order a defendant to reimburse the circuit court clerk for the cost of appointed counsel. 725 ILCS 5/113-3.1(a) (West 2008). Prior to ordering that reimbursement, however, the court must conduct a hearing on the defendant's ability to pay. *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 26.

¶ 26 Illinois Supreme Court Rule 606(a) (eff. Sept. 1, 2006) requires a timely filed notice of appeal for jurisdiction to be conferred regarding any issues with the propriety of a judgment of the circuit court. Absent that notice of appeal, a reviewing court lacks jurisdiction to hear any arguments against the circuit court's judgment unless the judgment was void. *People v. Morrison*, 298 Ill. App. 3d 241, 244 (1998). "An appeal from a sentence entered upon revocation of probation does not revive voidable errors in guilty plea proceedings." *Id.*

¶ 27 If a circuit court fails to hold the statutorily mandated hearing on a defendant's ability to pay a reimbursement fee for appointed counsel, such an error is related to an erroneous exercise

of power and is not a jurisdictional matter. *Id.* Accordingly, even if the circuit court fails to hold that hearing before ordering the defendant to pay the reimbursement, such an order is voidable, not void. *Id.*

¶ 28 In this case, as was the situation in *Morrison*, the defendant did not file a timely notice of appeal from his guilty plea and original sentence, which imposed the $1,134 public defender fee. See *id.* Accordingly, we lack jurisdiction to consider the propriety of the imposition of the $1,134 public defender fee. See *id.*; *Wynn*, 2013 IL App (2d) 120575, ¶ 30.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Will County is affirmed.

¶ 31 Affirmed.