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IN THE
COURT OF APPEALS OF INDIANA

JULIO AZPEITIA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A05-1012-CR-796
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Rick Maughmer, Judge
Cause No. 09D02-1006-CM-516
Cause No. 09D02-1008-CM-694

May 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

In this consolidated appeal, Julio Azpeitia challenges his conviction of Driving While Suspended (DWS),[1] a class A misdemeanor, and Public Intoxication,[2] a class B misdemeanor, as well as the sentences imposed thereon. Azpeitia presents the following restated issues for review:

1. Was the evidence sufficient to prove Azpeitia committed DWS?

2. Was the evidence sufficient to prove Azpeitia committed public intoxication?

3. Did the trial court abuse its discretion in refusing to grant Azpeitia's request for a continuance?

4. Did the trial court err in imposing consecutive sentences without explanation?

We affirm.

The facts favorable to the convictions are that Officer Travis Yike of the Logansport Police Department knew Azpeitia from previous encounters. On June 20, 2010, Officer Yike saw Azpeitia driving a car in an alley. The officer called dispatch to check on the status of Azpeitia's driver's license. While he was waiting for a response, the officer was dispatched to a 911 hang-up call. On his way to the 911 call, Officer Yike again saw Azpeitia operating his vehicle in an alley. On his way to the call, the officer was informed by dispatch that Azpeitia's license was suspended. After Officer Yike completed his response to the 911 call, he returned to the area approximately ten minutes later to look for Azpeitia. He found

[1] Ind. Code Ann. § 9-24-19-3 (West, Westlaw through 2011 Pub. Laws approved & effective through 4/6/2011).
[2] Ind. Code Ann. § 7.1-5-1-3 (West, Westlaw through 2011 Pub. Laws approved & effective through 4/6/2011).

Azpeitia mowing a lawn. The officer approached and told Azpeitia he had seen Azpeitia driving earlier. Azpeitia asked "if it was a problem that he was driving." *Transcript, Vol. 4* at 10. Officer Yike informed him that his license was "suspended misdemeanor." *Id.* The officer placed Azpeitia under arrest.

Early in the morning of August 28, 2010 and after he had been released on bond on the foregoing charge, Azpeitia was involved in a fight at the Sinaloa Bar in Logansport. Officer Flaud Dillon of the Logansport Police Department happened to be nearby when Azpeitia fled from the building with a friend, Ron Supo. Officer Dillon gave chase, catching the two in an alley and ordering them to stop. Azpeitia complied, but Supo did not. At about that time, Officer Brandon Bonnell arrived on the scene to provide backup. While Officer Dillon continued after Supo, Officer Bonnell approached Azpeitia and asked why he was running. Azpeitia responded that he had been in a fight. The officer observed that Azpeitia's lip was cut and red. He also noted that Azpeitia's eyes were red and glassy, that his speech was slurred, he was unsteady on his feet, and that he smelled of alcohol. At that point, Officer Dillon returned. He concluded that Azpeitia was intoxicated and placed him under arrest. He offered Azpeitia the opportunity to take a portable breath test, but Azpeitia refused to provide a breath sample. Azpeitia was charged with public intoxication as a class B misdemeanor.

On October 26, 2010, bench trials were conducted on both charges and Azpeitia was convicted of both offenses. The trial court sentenced Azpeitia to one year for the DWS offense and one hundred and eighty days for the public intoxication offense, with those sentences to run consecutively.

Before considering the issues presented by Azpeitia, we address two deficiencies in his appellate materials. First, we note that he included in his appendix two separate copies of the presentence investigation report on white paper. We remind Azpeitia that Ind. Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1), which includes presentence investigation reports, must be filed in accordance with Ind. Trial Rule 5(G). This rule provides that such documents must be tendered on light green paper or have a light green coversheet and be marked "Not for Public Access" or "Confidential". T.R. 5(G)(1).

Second, Indiana Appellate Rule 50(C) provides: "A table of contents shall be prepared for every Appendix. The table of contents shall specifically identify *each item* contained in the Appendix, including the item's date." (Emphasis supplied.) The single-volume appendix filed by Azpeitia contains motions, orders, notices—and more. Yet, the table of contents appears as follows:

Chronological Case Summary for Cause No. 09D02-1006-CM-00516 ……. 1
Chronological Case Summary for Cause No. 09D02-1006-CM-00694……..… 4
Guilty Finding and Sentencing Order in Cause No. 09D02-1006-CM-00516 …… 7
Guilty Finding and Sentencing Order in Cause No. 09D02-1006-CM-00694 …… 10
Clerk's Record in Cause No. 09D02-1006-CM-00516 …….. 13
Clerk's Record in Cause No. 09D02-1006-CM-00694 …….. 69
Verification ……. 111

Appellant's Appendix at i. This does not comply with the requirements of App. R. 50(C), either in letter or spirit. In future appellate endeavors, when creating a table of contents for appendices, counsel is instructed to provide the appropriate specific references to each item included in each volume of the appendix. This means that the numerous individual items that comprise the clerk's records for each cause number should be listed separately in the table of

contents, complete with date.

1.

Azpeitia contends the evidence was insufficient to sustain his DWS conviction because (a) the State's evidence did not prove that he was notified of his license suspension by mail and (b) "he was not observed driving on a highway under the plain meaning of the driving while suspended statute. He was merely observed driving in an alley." *Appellant's Brief* at 9.

Our standard of review for challenges to the sufficiency of the evidence is well settled.

> When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id*. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id*.

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

In order to convict Azpeitia of DWS, the State was required to prove beyond a reasonable doubt that he operated a motor vehicle on a highway when he knew his driving privileges had been suspended. *See* I.C. § 9-24-19-3. Azpeitia claims upon appeal that the State's evidence did not establish that he knew his license was suspended.

I.C. § 9-24-19-8 (West, Westlaw through 2011 Pub. Laws approved & effective through 4/6/2011) establishes a rebuttable presumption that a defendant knew of his license suspension upon proof that the Indiana Bureau of Motor Vehicles (BMV) sent notice by first-class mail to the defendant's last known address. *See Spivey v. State*, 922 N.E.2d 91 (Ind. Ct. App. 2010). In this case, the State introduced a BMV record indicating that on December 29,

2009, the BMV mailed notice to Azpeitia at 114 10th Street in Logansport that his license had been suspended. In fact, the record reveals that three such notices were sent on that day for three separate suspensions for three different reasons and set to expire at three separate times. One of those suspensions would have expired on June 10, 2010, ten days before Azpeitia's arrest on the DWS charge. The other two, however, appear to still be in force at the present time; they certainly were in force at the time of Azpeitia's arrest. Azpeitia contends, however, that he rebutted the presumption set out in I.C. § 9-24-19-8 by proving that he was in jail at the time those notices were sent.

Even assuming this is the case, Azpeitia acknowledged that the 10th Street address was the home of his parents at the time, and still is. He also acknowledged that he returned to live in the house when he was released from jail and that he was living there six months later, at the time this incident occurred. We can find no requirement that the State prove that a defendant was actually present when the notice arrived in the mail. It is enough that the notice was mailed to Azpeitia's then-current address and that he was living at that address, which was the home of his parents, after the notice was received and sometime before he was arrested on this instant charge.

As set forth above, Azpeitia challenges the sufficiency of the evidence relative to this charge on a second ground. Pursuant to I.C. § 9-24-19-3, in order to convict Azpeitia of DWS, the State was required to prove, in relevant part, that he operated a vehicle "upon a highway". Azpeitia contends an alley is not a highway within the meaning of I.C. § 9-24-19-3.

According to Ind. Code Ann. § 9-13-2-73 (West, Westlaw through 2011 Pub. Laws

approved & effective through 4/6/2011), "'Highway' or 'street' means the entire width between the boundary lines of every publicly maintained way when any part of the way is open to the use of the public for purposes of vehicular travel. *The term includes an alley in a city or town*." (Emphasis supplied.) *See also* Ind. Code Ann. § 9-25-2-4 (West, Westlaw through 2011 Pub. Laws approved & effective through 4/6/2011) ("[p]ublic highway" means a street, an *alley*, a road, a highway, or a thoroughfare in Indiana, including a privately owned business parking lot and drive, that is used by the public or open to use by the public") (emphasis supplied)). Thus, we conclude that an alley is a "highway" within the meaning of I.C. § 9-24-19-3.

Office Yike testified that he observed Azpeitia operating a vehicle in an alley on two separate occasions on the day in question, once when Azpeitia's vehicle crossed Ninth Street and again when it crossed Sixth Street. This testimony was sufficient to prove that Azpeitia operated a vehicle on a highway within the meaning of I.C. § 9-24-19-3. The evidence was sufficient to support the conviction for DWS.

2.

Azpeitia contends the evidence was insufficient to sustain his conviction of public intoxication. Specifically, he contends that he "should not be convicted of public intoxication because he was not bothering or threatening the safety of others." *Appellant's Brief* at 10. In support of this argument, Azpeitia cites a recent opinion of this court that, according to Azpeitia, "questioned the rationale" of a 1966 decision of our Supreme Court that ostensibly approved of public intoxication offenses where the defendant posed no threat

to the public. *Appellant's Brief* at 11. In making this argument, Azpeitia mischaracterizes our recent decision.

Miles v. State, 247 Ind. 423, 216 N.E.2d 847 (1966) is the Supreme Court case to which Azpeitia alludes. In that case, the Supreme Court determined that police officers had a right and duty to investigate a situation in which a truck was parked, with the engine running, "very near the traveled portion of a heavily traveled highway." *Id*. at 849. When officers came upon the truck, they asked the driver to step out of the vehicle. When the driver complied, they discovered that he was intoxicated. The driver was charged with public intoxication and later submitted a motion to suppress evidence of his intoxication on grounds that it was the fruit of an illegal search, i.e., the officers did not have grounds to ask him to step out of his vehicle. The trial court denied that request and the Supreme Court affirmed, holding, among other things, that a person located in the cab of a truck parked three or four feet from the traveled portion of a busy highway is in a "public place" within the meaning of the public intoxication statute. *Id*.

Azpeitia contends this court questioned *Miles* in *Jones v. State*, 881 N.E.2d 1095 (Ind. Ct. App. 2008). In *Jones*, the intoxicated defendant was found sitting in a vehicle parked on private property and thereafter convicted of public intoxication. The *Miles* panel noted that "[t]he spirit of the public intoxication statute is to prevent people from becoming inebriated and then bothering and/or threatening the safety of other people in public places." *Id*. at 1098 (quoting *Wright v. State*, 772 N.E.2d 449, 456 (Ind. Ct. App. 2002)). The court reversed the defendant's conviction upon the conclusion that "[p]rosecuting and convicting Jones for being intoxicated in a vehicle parked in a private driveway, not disturbing or offending

anyone, does nothing to serve this purpose." *Jones v. State*, 881 N.E.2d at 1098. We can find no criticism of any aspect of *Miles* in *Jones*. In any event, "Supreme [C]ourt precedent is binding upon us until it is changed either by that court or by legislative enactment." *State v. Jackson*, 857 N.E.2d 378, 381 (Ind. Ct. App. 2006) (quoting *Dragon v. State*, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002), *trans. denied*).

We therefore reject Azpeitia's invitation to create a defense to a charge of public intoxication to the effect that the defendant was not bothering or threatening the safety of others. This being his only challenge to the sufficiency of the evidence on this offense, the challenge fails.

3.

As the parties were about to commence trial on the DWS charge, Azpeitia asked the court for a continuance so he could secure the attendance of his father, whom he wished to call as a witness. Azpeitia contends the trial court abused its discretion in refusing to grant his request.

When, as here, a motion for a continuance is made on non-statutory grounds, the decision to grant or deny the motion is committed to the trial court's discretion. *Tolliver v. State*, 922 N.E.2d 1272 (Ind. Ct. App. 2010). We will not disturb the trial court's decision unless the defendant clearly demonstrates that the trial court abused its discretion. *Id.* In order to gain reversal on this basis, a defendant must demonstrate that he or she was prejudiced by the denial. *Vaughn v. State*, 590 N.E.2d 134 (Ind. 1992).

We note first that Azpeitia has not directed us to the place in the appendix or trial transcript where the motion for continuance was made. The trial transcript begins with the

trial court noting that Azpeitia had made such a request. When asked about it, Azpeitia's counsel replied "Well, I … the problem is Julio did not get his witnesses here today." *Transcript, Volume 4* at 3. When asked, "What is his excuse for not getting his witnesses here?", counsel replied, "I don't know." *Id*. at 3-4. After ascertaining that the State objected to a continuance, the trial court denied the request. Later, during his trial testimony, Azpeitia explained why his father had not appeared to testify: "Because. I don't know. I guess I got a call from [defense counsel] but I haven't had my phone and he couldn't be here because I couldn't notify him to be here." *Id*. at 23. Neither Azpeitia nor his attorney stated any facts relating to the alleged offense about which Azpeitia's father would testify. At best, we are left to *infer* that Azpeitia's father would have corroborated Azpeitia's testimony that it was the father, not Azpeitia, who was driving when Officer Yike saw them in the alley. At most, this would have been merely cumulative of Azpeitia's testimony to the same effect. Such does not carry Azpeitia's burden of demonstrating an abuse of discretion in denial of his motion for continuance. *See Dillon v. State*, 448 N.E.2d 21 (Ind. 1983). The trial court did not err in denying Azpeitia's motion for a continuance.

4.

After finding Azpeitia guilty of public intoxication and DWS, the court imposed sentences of one hundred and eighty days and one year, respectively, and ordered that they be served consecutively. Azpeitia contends the trial court erred in imposing consecutive sentences without explaining its reasons for doing so.

"The decision to impose consecutive or concurrent sentences is within the trial court's sound discretion and is reviewed only for an abuse of discretion." *Lavoie v. State*, 903

N.E.2d 135, 140 (Ind. Ct. App. 2009). Moreover, as Azpeitia argues, a trial court is required to state its reasons for imposing consecutive sentences. *Lavoie v. State*, 903 N.E.2d 135. The trial court failed to do that here. In the circumstances of this case, however, reversal or remand is not warranted.

Azpeitia was released to probation from Cass County Jail on June 17, 2010. He was arrested on the DWS charge three days later. He was released on bond from that charge when he committed the public intoxication offense on August 28, 2010. Pursuant to Ind. Code Ann. § 35-50-1-2(d)(2)(B), "If, after being arrested for one (1) crime, a person commits another crime …while the person is released … on bond … the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed." Our Supreme Court has stated that when a trial court "imposes consecutive sentences *where not required to do so by statute*," our appellate courts "will examine the record to insure that the court explained its reasons for selecting the sentence it imposed[.]" *Harris v. State*, 716 N.E.2d 406, 412-13 (Ind. 1999) (emphasis supplied). As set out above, the trial court in the instant case was required to impose Azpeitia's sentences consecutively. Therefore, the failure to explain the decision does not warrant corrective measures by this court.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.