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IN THE
COURT OF APPEALS OF INDIANA

PATRICK W. SCHOLL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1012-CR-663
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
The Honorable William Albright, Senior Judge
Cause No. 71D02-1003-FC-48

July 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Patrick Scholl was convicted of Class C felony Operating a Motor Vehicle after a Lifetime Suspension of Driving Privileges,[1] for which he received a sentence of six years in the Department of Correction and a lifetime license suspension. Upon appeal, Scholl claims that the trial court abused its discretion in denying his motion to dismiss and that certain evidence was erroneously admitted at trial. Scholl additionally claims that there was insufficient evidence to support his conviction and that the trial court was not authorized to enter a lifetime license suspension. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 6, 2010, Officer Timothy Wiley of the South Bend Police Department stopped Scholl as he was driving a vehicle on North Notre Dame Avenue in St. Joseph County. Scholl admitted at the time that his license was suspended and that he was a habitual traffic violator. Scholl's passenger at the time was a certain Ms. Rhinesmith, who did not exhibit signs of distress during the stop. Officer Wiley arrested Scholl and confirmed that he was a habitual traffic violator.

On March 13, 2010, the State charged Scholl with Class C felony operating a motor vehicle after having had his driving privileges suspended for life in November of 2005 in Cause Number 20D04-0501-FC-1. On June 7, 2010, the State amended its charging information, alleging that Scholl's driving privileges had been suspended for life on December 4, 1995, in Cause Number 20D03-9509-CF-159 ("Cause No. 159").

[1] Ind. Code § 9-30-10-17 (2009).

According to the State's evidence later introduced at trial, Scholl's lifetime license suspension in Cause No. 159 was based upon Scholl's Class C felony violation of Indiana Code section 9-30-10-17 (1995).

At the beginning of the November 3-4, 2010 jury trial, defense counsel moved to dismiss the charges on the grounds that the charging information did not allege a criminal offense. According to defense counsel, Indiana Code section 9-30-10-17 does not provide for a lifetime license suspension. The trial court denied the motion. Defense counsel additionally moved to exclude evidence of Scholl's conviction in Cause No. 159 on Indiana Evidence Rule 403 and 404(b) grounds, an objection he later renewed at trial. The trial court also denied this motion.

At trial, Scholl asserted as a defense that he was driving only because Rhinesmith, who was the original driver, had had what he believed to be a medical emergency requiring that he take over driving. The jury found Scholl guilty as charged. On December 9, 2010, the trial court sentenced Scholl to six years in the Department of Correction and ordered that his license be suspended for life. This appeal follows.

DISCUSSION AND DECISION

I. Motion to Dismiss

Upon appeal, Scholl first challenges the trial court's denial of his motion to dismiss. Scholl contends that Cause No. 159, which involved a violation of Indiana Code section 9-30-10-17, could not have resulted in a lifetime license suspension because section 9-30-10-17 does not provide for such a suspension. Section 9-30-10-17 merely provides that driving with a lifetime license suspension is a Class C felony; it is

section 9-30-10-16 (2009) which provides for the lifetime license suspension itself, as a civil penalty for Class D felony driving with a license suspension. Accordingly, in Scholl's view, the current charging information, which alleged he had violated this purported lifetime license suspension, did not constitute an offense. The State responds by arguing that Scholl's motion was untimely and properly denied on untimeliness grounds. The State also argues on the merits that the motion was properly denied.

We agree with the State that the trial court was within its discretion to deny Scholl's motion on untimeliness grounds. Indiana Code section 35-34-1-4(a)(5) (2009) permits a trial court to dismiss an information if the facts stated do not constitute an offense. Indiana Code section 35-34-1-4(b)(1) provides that motions to dismiss on this ground must be made twenty days prior to the omnibus date. If the motion is filed anytime thereafter, the trial court may summarily deny it. *See id.* Here, Scholl's motion to dismiss occurred the day of trial. It was therefore untimely and properly denied.

Scholl's claim also fails on the merits. According to Scholl's amended charging information, Scholl operated a motor vehicle "after having forfeited his privilege to operate a motor vehicle for life having been convicted … of Operating a Motor Vehicle After Being Adjudged a Habitual Traffic Offender … in Cause No. [159]." Appellant's App. p. 13.

Technically, the lifetime forfeiture of Scholl's license was not attributable to Cause No. 159, which was a Class C felony conviction under section 9-30-10-17. Even so, the State's reliance upon Cause No. 159 does not fail to establish an offense. In *Stanek v. State*, 587 N.E.2d 736, 740 (Ind. Ct. App. 1992), *trans. granted and affirmed*

in relevant part, 603 N.E.2d 152, 153 (Ind. 1992), this court concluded that, in cases where a defendant is charged with Class C felony operating a motor vehicle with a lifetime license suspension, the State is not required to list in the charging information the original Class D felony charge leading to the lifetime license suspension. The State may instead rely upon a Class C felony conviction under section 9-30-10-17, the mere existence of which supports the State's allegation that the defendant's license has been suspended for life. *See Stanek*, 587 N.E.2d at 740. As the *Stanek* court observed, a valid Class C felony conviction is "relevant and probative evidence of the existence of the material fact, *i.e.*, life forfeiture of driving privileges." *Id.* at 740. Accordingly, we reject Scholl's argument that the State failed to allege an offense when relying upon his Class C felony conviction to establish his lifetime license suspension. We find no abuse of discretion by the trial court in denying Scholl's motion to dismiss.

II. Admissibility of State's Exhibit 1

Scholl further challenges the trial court's admitting into evidence, as State's Exhibit 1, a certified document[2] evidencing his prior Class C felony conviction in Cause No. 159. Scholl contends that the admission of this evidence violated Indiana Evidence Rules 401, 403 and 404(b).

The decision to admit evidence is within the sound discretion of the trial court and is afforded a great deal of deference upon appeal. *Hauk v. State*, 729 N.E.2d 994, 1001

[2] Exhibit 1 is an Indiana Abstract of Court Record. Properly certified BMV records, including abstracts of court record, have been held to be admissible under Indiana Evidence Rule 803(8) for purposes of establishing a defendant's driving status. *See Fennell v. State*, 698 N.E.2d 823, 824-25 (Ind. Ct. App. 1998).

(Ind. 2000). We review evidentiary determinations for abuse of discretion and will not reverse such determinations unless the decision is "'clearly against the logic and effect of the facts and circumstances' before the court." *Id.* (quoting *Taylor v. State*, 697 N.E.2d 51, 52 (Ind. 1998) (internal quotations omitted)).

Under Indiana Evidence Rule 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In addition, Indiana Evidence Rule 404(b) provides, in relevant part, as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.…

This rule prevents the State from punishing people for their character. *Bassett v. State*, 795 N.E.2d 1050, 1053 (Ind. Ct. App. 2003). To decide whether character evidence is admissible under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. *Id.*

In support of his claim, Scholl points to *Sams v. State*, 688 N.E.2d 1323, 1325-26 (Ind. Ct. App. 1997), *trans. denied*, in which this court held that the trial court had abused its discretion in permitting the State to introduce the defendant's entire driving record—which included multiple serious offenses—to establish the fact of his lifetime driver's

license suspension. In *Sams*, the defendant had offered to stipulate to the fact of his lifetime license suspension, but the State had rejected this offer. *Id.* at 1325.

Scholl's case is distinguishable. Perhaps most significantly, the State in the instant case introduced a single prior conviction, not an entire driving record. While the fact of Scholl's prior Class C felony conviction may have placed him in an unfavorable light, it was particularly relevant to establish the element of his crime that he had a lifetime license suspension. *See Stanek*, 587 N.E.2d at 740. We are therefore unpersuaded that the State's purpose in introducing this evidence was that it be used as impermissible Rule 404(b) propensity evidence rather than merely to establish the elements of the crime.

As for Rule 403, given that the elements of the instant crime required a showing that Scholl had a lifetime license suspension, State's Exhibit 1 would have had high probative value, which, in light of Officer Wiley's testimony that Scholl admitted to having a suspended license, would not have been overly inflammatory. While Scholl argues that the State could have used less prejudicial means, including a stipulation by the parties, to establish his lifetime license suspension, he points to no place in the record in which he proposed, and the State rejected, such a stipulation. The State is not required, on its own initiative, to find the least prejudicial evidence available; the rules of evidence simply require that the State's evidence be more probative than prejudicial. The trial court was within its discretion to conclude that Scholl's prior Class C felony conviction passed this test. We find no abuse of discretion.

III. Sufficiency of the Evidence

Scholl next challenges the sufficiency of the evidence to support his conviction. In evaluating the sufficiency of the evidence to support Scholl's conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id*. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id*. It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

Scholl claims that there was insufficient evidence that his license had been forfeited for life. Yet State's Exhibit 1 demonstrated that Scholl had had a past conviction for Class C felony driving with a lifetime license suspension. As the *Stanek* court concluded, such a Class C felony conviction is probative evidence of a lifetime license forfeiture. 587 N.E.2d at 740. Also, Scholl admitted at trial that he was under a lifetime license suspension at the time he was stopped in this case. Scholl's challenge to the sufficiency of the evidence lacks merit.

IV. Sentence

Scholl contends that the trial court erred by entering a lifetime license suspension at Scholl's sentencing hearing because Indiana Code section 9-30-10-17, the statute under

which Scholl was charged, does not provide for such a suspension. Trial courts have broad discretion in sentencing, but they must act within statutorily prescribed limits. *Laux v. State*, 821 N.E.2d 816, 818 (Ind. 2005). It is true that section 9-30-10-17 does not provide for a lifetime license suspension. But section 9-30-10-17 is defined by the fact that the defendant already has a lifetime license suspension, which by definition cannot terminate. Accordingly, we view the trial court's "entry" of a lifetime license suspension as more of an observation of its ongoing existence. The trial court did not exceed its authority by including this observation in its sentencing order.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.