NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

PAUL THOMAS MOORE

Appellant,

v.

Appeal No. CRC 09-00027 APANO
UCN: 522008CT125211XXXXXX
UCN: 522008CT125014XXXXXX
UCN: 522008TR125009XXXXXX

STATE OF FLORIDA

Appellee.
_____/

Opinion filed _____.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Susan P. Bedinghaus

Thomas Matthew McLaughlin, Esquire
Attorney for Appellant

James E. Flynn, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Paul Thomas Moore's, appeal from a conviction, after a jury trial, of Driving Under the Influence, in violation of

Florida Statute § 316.193 and Driving with a Suspended or Revoked License, in violation of Florida Statute § 322.34(2). Appellant also appeals from a conviction, after a simultaneous non-jury trial, of Careless Driving, in violation of Florida Statute § 316.1925(1).

Issues

Appellant presents four issues in this appeal. First, whether the State failed to make a prima fascia showing the Defendant was guilty of DUI. Second, whether the Trial Court erroneously denied the Defendant's Motion for Judgment of Acquittal. Third, whether the Trial Court improperly assessed certain court costs and fines. Fourth, the written judgment is not consistent with the sentence orally imposed by the court.

Factual Background and Trial Court Proceedings

On July 4, 2008, the Appellant, Paul Thomas Moore, was charged by a Florida Uniformed Traffic Citations with three offenses; Driving While Under the Influence of Alcoholic Beverage or Controlled Substance, Driving While License Suspended or Revoked, and Careless Driving. The case proceeded to trial on April 22, 2009. The State presented three witnesses; an eyewitness to the accident, the responding police officer and a forensic toxicologist.

The eyewitness testified, in part, to several points; (1) that she observed the vehicle driven by Mr. Moore crash into a tree; (2) that she called 911, (3) that as she approached the car, there was a strong smell of alcohol, (4) that the driver was the only person in the vehicle and he was partially in and partially out of the car, (5) that the driver said "take the alcohol" and she responded "I can't do that," (6) that she did not know and had never before seen Mr. Moore, (7) that the driver did not run away, (8) that she stayed

at the scene the entire time, and (9) that she saw the responding police officer make contact with the driver, Mr. Moore.

The responding police officer testified, in part, to several points; (1) upon arrival he observed a heavily damaged white Ford Escort that appeared to have struck a tree, (2) the driver's door was the only open door on the crashed vehicle, (3) the Defendant, who appeared injured, was laying on the ground within ten feet of the car, in front of the car on the driver's side, (4) Mr. Moore was in and out of consciousness, (5) when Mr. Moore spoke he noticed a slight odor of alcohol on his breath, (6) he observed alcohol containers in the crashed vehicle, one that was open in the cup holder next to the driver's seat, and there was an ice chest in the rear with some sealed containers and ice in it, (7) Mr. Moore had on his person an Florida State identification card that contained his photograph and also a beer bottle cap, (8) that the Defendant did not have a valid driver's license, (9) the crashed vehicle was not registered to Mr. Moore, (10) that based upon his investigation, he concluded that Mr. Moore was the operator of the crashed vehicle and there was no one else involved in the crash, and (11) the officer identified Mr. Moore in the courtroom.

The forensic toxicologist testified, in part, to several points; (1) she identified cocaine, alprazolam, oxycodone and alcohol in Mr. Moore's blood, (2) the alcohol concentration was 0.023 grams per deciliter, (3) cocaine can cause agitation, increased energy, aggressive behavior and in combination with the other drugs would enhance impairment, (4) alprazolam is a central nervous system depressant that can cause drowsiness and has a tendency to cause confusion, (5) oxycodone is also a central nervous system depressant that causes nausea, drowsiness and confusion, (6) alcohol is another central nervous system depressant that in combination will enhance the effects of

the drugs, (7) each of these drugs has the potential of affecting somebody's ability to operate heavy machinery.

When the State rested their case, the Defense moved for a Judgment of Acquittal arguing the State failed to establish a prima facie case. Specifically the eye witness never identified Mr. Moore as the person she saw on the scene and the state never called the owner of the Ford Escort to establish property damage. The Motion for Judgment of Acquittal was denied. The jury found the Defendant guilty of DUI and of Driving While License Suspended or Revoked. The trial court found the Defendant guilty of careless driving.

At the conclusion of the trial the court sentenced the Appellant. On the conviction of Driving Under the Influence, the trial court, in relevant part, adjudicated Mr. Moore guilty, placed him on one year probation with a condition that he serve one hundred eighty (180) days in jail,[1] pay $350 as a Public Defender fee and pay a fine of $968 and court costs of $32. On the conviction of Driving While License Suspended or Revoked the trial court, in relevant part, adjudicated Mr. Moore guilty, sentenced him to 270 days in jail and imposed a consecutive $1,000 fine and court costs. On the Careless Driving conviction, the Court imposed $300 in fines and court costs consecutive to the other fines.

Thereafter the Clerk of Court prepared and the trial court signed a written Judgment of Guilt that did not detail each of the three sentences. That judgment only addressed the DUI conviction and misstated the length of the term of incarceration

[1] The trial court did not specifically announce the term of incarceration was a condition of probation. However this court assumes that was the trial court's intention because the combined terms of incarceration and probation must not exceed the statutory maximum for the offense. *See Manning v. State*, 961 So.2d 1135, 1136 (Fla. 2nd DCA 2007).

imposed in that conviction. The Appellant subsequently filed a Motion to Correct Sentencing error pursuant to 3.800(b)(2) alleging that the written sentence did not comport with the oral pronouncement and the Court improperly assessed certain costs. The Appellant's motion contained errors and omissions in its description of part of the sentence the court orally imposed. The Assistant State Attorney then filed a response to that motion that repeated the same errors or omissions and argued essentially that the trial court's sentence complied with Florida Statute § 775.083. The trial court thereafter entered an order suspending $32 of the outstanding fines.

Standard of Review

In reviewing either a motion for judgment of acquittal or the legality of a sentence, a de novo standard of review applies. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002), *cert. denied,* 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137 (2003); *Demps v. State,* 761 So.2d 302, 306 (Fla. 2000); *State v. Fagan,* 857 So2d 320 (Fla. 2nd DCA 2003); *Carswell v. State,* 947 So2d 692 (Fla. 4th DCA 2007).

The Trial

Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. *Fitzpatrick v. State*, 900 So.2d 495, 507 (Fla. 2005); *Morales v. State*, 952 So.2d 1266 (Fla. 2nd DCA 2007).

The Appellant first argues the State failed to make a prima fascia showing the Defendant was guilty of DUI because it presented no evidence showing that he was under the influence of alcohol or a controlled substance to the extent that his normal faculties were impaired. There are two problems with this argument. First it was not presented to the trial court; that specific legal argument or ground was not part of the presentation below and it was not preserved for review. *See Sunset Harbour Condominium Association v. Robbins,* 914 So2d 925 (Fla. 2005); *Tillman v. State,* 471 So2d 32 (Fla. 1985); *Moss v. Moss,* 939 So2d 159 (Fla. 2nd DCA 2006); § 924.051(1)(b) Fla. Stat. (2006). Second, the testimony and evidence presented provided competent, substantial evidence to sustain the DUI conviction. In addition to all the other evidence presented, the forensic toxicologist testified, that Mr. Moore's blood contained cocaine, alprazolam, oxycodone and alcohol and that those drugs and alcohol in combination can enhance impairment.

Second the Appellant argues the trial court erroneously denied the Defendant's Motion for Judgment of Acquittal based on the State's failure to establish that the Mr. Moore was the actual driver. The difficulty with this argument is that the testimony did establish that Appellant was the driver. The eyewitness testified that she observed the crash, the driver was the only person in the vehicle, he was partially in and partially out of the car, that the driver did not run away, that she stayed at the scene the entire time, and that she saw the responding police officer make contact with that driver. The responding police officer testified, the Defendant, who appeared injured, was laying on the ground within ten feet of the car, in front of the car on the driver's side, that he made contact with Mr. Moore who had a Florida State identification card that contained his

photograph, that based upon his investigation, he concluded that Mr. Moore was the operator of the crashed vehicle and there was no one else involved in the crash, and the officer identified Mr. Moore in the courtroom. When viewed in the light most favorable to the State, this evidence was sufficient overcome the Defendant's Motion for Judgment of Acquittal.

The Appellant's convictions were supported by competent, substantial evidence. There was no error by the trial court.

The Sentencing

The written Judgment of Guilt entered below was neither complete nor accurate. This case is remanded for the trial court, assisted by the Clerk of Court, to enter an amended judgment that accurately details each of the three sentences and cites, where required, the statutory authority for any financial imposition contained in the sentences.

The trial court imposed the Public Defender fees without advising Appellant of his right to a hearing to contest the amount of the Public Defender fees. Fla. R. Crim. P. 3.720 (d)(1); § 938.29 (5) Fla. Stat. (2008);[2] *Webster v. State,* 998 So2d 655, 656-657 (Fla. 2nd DCA 2008). We reverse and direct the trial court to strike the public defender fees. Mr. Moore shall have thirty days from our mandate to file a written objection to the amount assessed for the public defender fees. If he files an objection, the court must hold a hearing prior to again imposing the Public Defender fees. If Mr. Moore fails to timely

[2] This court notes that Florida Statute § 938.29 (1) requires trial courts to impose Public Defender attorney fees and costs "at no less than $50 per case when a misdemeanor or criminal traffic offense is charged and no less than $100 per case when a felony offense is charged." This court is aware of no appellate case authority that recognizes and addresses the futility of requiring a hearing in cases where only the mandatory minimum statutory fees of $50 or $100 are imposed. Those fees must be imposed, no matter what occurs at a hearing pursuant to Florida Statute § 938.29 (5). That issue is not present in this appeal.

object, the trial court may again impose the public defender fees without a hearing. *See Webster,* 998 So2d at 656-657.

Conclusions

1. This Court finds the Appellant's convictions were supported by competent, substantial evidence. There was no error by the trial court.

2. As stated above, this case is remanded for the trial court, assisted by the Clerk of Court, to enter an amended judgment that accurately details each of the three sentences and cites, where required, the statutory authority for any financial imposition contained in the sentences.

3. Subject to the procedural requirements set forth above, we direct the trial court to strike the present public defender fees.

IT IS THEREFORE ORDERED that the convictions of the Appellant are affirmed. The case is remanded to the trial court for the entry of an amended judgment that accurately details each of the three sentences that were imposed and cites, where required, the statutory authority for any financial imposition contained in the sentences. Subject to the procedural requirements set forth above, we direct the trial court to strike the present public defender fees.

ORDERED at Clearwater, Florida this 17th day of May, 2010.

Original order entered on May 17, 2010 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Susan P. Bedinghaus
Thomas Matthew McLaughlin, Esquire
Office of the State Attorney