Circuit Court for Wicomico County
Case No. 22-K-15-000525

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 420

September Term, 2016

---

JAIME LYNN DAILEY

v.

STATE OF MARYLAND

---

Berger,
Shaw Geter,
*Krauser,

JJ.

---

Opinion by Krauser, J.

---

Filed: January 23, 2018

*Krauser, Peter B., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and preparation of this opinion.

Jaime Lynn Dailey, appellant, was convicted by a jury, in the Circuit Court for Wicomico County, of multiple driving offenses.[1] Of particular relevance to this appeal are her convictions for driving on a suspended license and driving on a revoked license and the sentence the court subsequently imposed for each of these two offenses. Specifically, appellant received a sentence of two years of imprisonment for driving on a suspended license and one year of imprisonment for driving on a revoked license, to be served consecutively.[2]

On appeal, she presents the two questions for our review:

I. Did the trial court err in imposing separate sentences for driving on a revoked license and driving on a suspended license?

II. Did the trial court err in allowing the State to make improper and prejudicial statements at closing argument?

[1] In addition to being convicted of the two offenses—which are the subjects of this appeal—driving on a suspended license and driving on a revoked license, appellant was also convicted of the following offenses: driving a vehicle in violation of restricted license requirements, possessing a revoked license, possessing a suspended license, driving under the influence of alcohol, negligent driving, driving a vehicle without the required ignition interlock system, driving a vehicle in excess of reasonable and prudent speed, and failure to display registration card upon demand by a police officer.

[2] The court also sentenced appellant to one year of imprisonment for driving under the influence of alcohol, but suspended that sentence and ordered that it run consecutive to her driving on a revoked license sentence. It further sentenced her to one year of imprisonment for driving without the required ignition interlock system but, after suspending that sentence, ordered that it run consecutive to her driving under the influence of alcohol sentence. Finally, appellant was ordered to pay fines for driving a vehicle in violation of a restricted license requirement, possessing a revoked license, possessing a suspended license, negligent driving, driving a vehicle in excess of a reasonable and prudent speed, and failure to display registration card upon demand by a police officer.

For the reasons that follow, we vacate appellant's sentence for driving on a revoked license, but otherwise affirm the judgments of the circuit court.

## BACKGROUND

The testimony adduced at trial, when viewed in a light most favorable to the prevailing party—in this instance, the State—established that, on February 12, 2015, Trooper Blake Meurrens of the Maryland State Police, upon observing a white pickup truck traveling at a "high rate of speed" in Wicomico County, proceeded to follow that vehicle. While doing so, he "paced" it at sixty-two miles per hour in a posted thirty-five mile per hour zone and observed it "jerkingly" cross over two lanes of travel. Then, when the vehicle entered a parking lot of a gas station, Trooper Meurrens, after activating his emergency equipment, parked his marked patrol car directly behind it. But, before he was able to exit his patrol vehicle, the white truck began to backup, almost striking the Trooper's vehicle. It stopped, but only after Trooper Meurrens blew his patrol car's horn.

Trooper Meurrens then approached the truck, on foot, and asked the driver of the truck, appellant, for her driver's license and registration. Although she produced her driver's license, she was unable to produce her registration. In the meantime, Trooper Meurrens smelled a strong odor of an alcohol coming from her truck, which prompted the trooper to ask appellant if she had "consumed any alcohol" that "night." Appellant admitted to drinking two glasses of wine at dinner that evening. Then, when the trooper observed a nearly empty bottle of whiskey on the floor of the vehicle, he asked appellant to step out of her vehicle to perform field sobriety tests. Although she exited the truck, she refused to

perform the tests, at which point Trooper Meurrens noted that appellant's speech was slurred.

Next, upon running appellant's license information through the National Crime Information Center's database and the Department of Motor Vehicles' system, Trooper Meurrens learned that appellant's license had been revoked and suspended and that there was a license restriction that, not only prohibited her from consuming alcohol and driving, but also required her to have an ignition interlock system device installed in her vehicle. Notwithstanding that requirement, the trooper observed that no such device had been installed in her truck. The trooper then placed appellant under arrest and transported her to the police barracks.

While en route to the barracks, appellant complained that "this is a party foul," that her boyfriend had broken up with her that evening, and that the trooper had interrupted her "good time." Both during and after his transport of appellant to the barracks, Trooper Meurrens smelled the odor of alcohol in his vehicle, as well as on appellant's person.

**I.**

Appellant contends that the "trial court erred in imposing separate sentences for driving on a revoked license and driving on a suspended license," because, in her words, "it is firmly established under Maryland law that driving on a suspended license merges into driving on a revoked license when both are based on the same underlying act of driving." She therefore requests that the driving on a suspended license sentence be vacated.

The State agrees that, as the record "reveals one continuous act of driving," appellant's convictions for driving on a suspended license and driving on a revoked license merge for sentencing purposes. However, because she "was a repeat offender with respect to driving on a suspended license, but not with respect to driving on a revoked license," and therefore faced a greater maximum penalty with respect to driving on a suspended license, her conviction for driving on a revoked license should, maintains the State, merge into her driving on a suspended license conviction for sentencing purposes, and not vice-versa.

Indeed, the Court of Appeals, in *Jones v. State*, was faced with the same question of merger with respect to driving on a suspended license and driving on a revoked license, where both offenses arose out of the same driving episode. The Court declared that the two statutory violations, though "separate offenses," merge for sentencing purposes, and that "the offense carrying the lesser maximum penalty merges into the offense carrying the greater maximum penalty." 357 Md. 141, 162, 167 (1999).

Appellant was charged with both driving on a revoked license and driving on a suspended license based on a single act of driving. But, she was charged as a subsequent offender for the driving on a suspended license charge. The penalty for a first offense of either driving on a suspended license or driving on a revoked license driving is "a fine of not more than $1,000, or imprisonment for not more than 1 year, or both." Md. Code Ann., Transp. § 27-101(h) (LexisNexis 2012 Repl. Vol.) (current version at Md. Code Ann., Transp. § 16-303(k)). For subsequent violations, however, the penalty is increased to "a fine of not more than $1,000, or imprisonment for not more than 2 years, or both." *Id.* As

a subsequent offender, appellant received an enhanced sentence of two years of imprisonment for driving on a suspended license, which was greater than the one year sentence she received for driving on a revoked license. Consequently, as the two offenses merge for sentencing purposes, her conviction for driving on a revoked license, for which appellant received a sentence of only one year of imprisonment, merges for sentencing purposes into her conviction for driving on a suspended license, for which she received a sentence of two years of imprisonment. Accordingly, we vacate the sentence for driving on a revoked license.

**II.**

Appellant contends that the "trial court erred in allowing the State to make improper and prejudicial statements at closing argument." She claims that "[t]he prosecutor's remarks at closing argument, repeatedly arguing that the defense had failed to present exculpatory evidence to the jury and implying that it was her burden because she was the one on trial, effectively and improperly shifted the burden of proof to the defense." Specifically, she points to the comments the prosecutor made as to her failure to present the testimony of her friend, Caroline Barber, who, she claimed, had been drinking with her earlier on the evening of her arrest, and on her failure to present any medical records to support her claim that she had been drugged that evening. Finally, while conceding that her counsel failed to object to the prosecutor's remarks at trial, appellant suggests that we should review this issue under the plain error doctrine, because "making arguments that effectively shift the ultimate burden of proof to the defendant is an exceptional error which

undoubtedly affected [a]ppellant's right to a fair and impartial trial." The State responds that such review is not warranted, as "[t]here was no error, much less plain error, here." We agree.

Appellant testified, at trial, that she had been out to eat with Ms. Barber earlier in the evening, that the two had wine, that at some point in the evening, everything "got blurry," that she did not intend to drive that evening and that she did not know how she ended up driving. She further stated that the two of them had intended that Ms. Barber would drive both of them home at the end of the evening. She also claimed that, several days after her arrest, she went to the hospital, because she suspected that she had been drugged on the night of her arrest. Then, approximately two weeks after that hospital visit, she went to another hospital because of "symptoms." During her second hospital visit, she was diagnosed with a "sexually transmitted disease." Finally, during her testimony, appellant suggested that, because of the foregoing diagnosis, she believed that she had been sexually assaulted the evening of her arrest, but she admitted that she had no recollection of such an event.

During rebuttal closing argument, the prosecutor made the following statements, to which appellant now objects:

> And then [appellant and her friend] go to Market Street, and she says that they're just sitting there chatting for a long time about ex's, and they both had one glass of water, one glass of wine. This friend, by the way, who she had the power to subpoena and never did.
>
> We have not heard any testimony from [the friend] today, and I will just add that this defendant has the same subpoena powers that the State does. But let's assume that she is telling the truth.

* * *

> After she is charged with a crime, after, she goes to the hospital, and she gets this piece of paper that says Rohypnol.
>
> * * *
>
> Do we know that she, in fact, had Rohypnol in her system? No. There aren't any medical records. What she has is a discharge sheet. This is the piece of paper that the hospital gives you and tells you what to do when you leave the hospital, how to follow up.
>
> But we don't have the actual blood tests that were taken. We don't have any – I don't know who treated her that day. There is no evidence. There's – the medical records are simply not there. She could have called her friend to the stand, this Caroline Barber. She didn't call that person to the stand either to at least corroborate part of her theory, at least give her something to make us believe her statement, but she didn't.
>
> * * *
>
> I'm not a police officer. I'm not an investigator, and the defense attorney is doing a very nice job of trying to turn your focus on what the State should or shouldn't have done. But the fact of the matter is that the State is not on trial. Jaime Lynn Dailey is on trial. Not us. Not the State.

Although "comment by a prosecutor on a defendant's decision not to testify," is improper, *Marshall v. State*, 415 Md. 248, 261 (2010), "[c]ommentary on the lack of corroborating witnesses," as occurred here, "is permissible when a defendant elects to testify." *Marshall v. State*, 213 Md. App. 532, 540 (2013). For example, in *Mines v. State*, Mines "testified in his own defense and, in his own testimony identified potential exculpatory witnesses, but called none of them to the stand." 208 Md. App. 280, 301 (2012). There, we held that the State's comments during closing arguments regarding the missing witnesses did not impair appellant's Fifth Amendment rights, nor "could [they] be construed as an improper shifting of the burden of proof." *Id.* at 295.

Similarly, appellant testified, on her behalf, at trial. During her testimony, she identified a potential exculpatory witness, her "friend," Ms. Barber, who was with her the evening of the traffic stop, and further alleged that there were medical records which corroborated her testimony that she had been drugged and sexually assaulted the evening of her arrest. However, she neither called this "friend" to the stand to corroborate her version of events, nor did she introduce any medical records, other than her "discharge summary" sheet from her hospital visit that occurred several days after her arrest. Therefore, as in *Mines*, it was not error for the State to comment on appellant's failure to produce evidence that corroborated her claims, and, consequently, plain error review is not warranted, as there is no error to review.

**SENTENCE FOR DRIVING WHILE LICENSE IS REVOKED VACATED. JUDGMENTS OTHERWISE AFFIRMED; COSTS TO BE EVENLY DIVIDED BETWEEN WICOMICO COUNTY AND APPELLANT.**