

NOTICE

Decision filed 03/28/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0387

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Shelby County.
	)	
v.	)	No. 06-DT-28
	)	
ANNETTE I. WESSELMAN,	)	Honorable
	)	Kimberly G. Koester,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE DONOVAN delivered the judgment of the court.  
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held:* The trial court properly denied defendant's claims of ineffective assistance of counsel after a thorough hearing on remand regarding whether the decision not to call certain witnesses to testify was a matter of trial strategy or attorney incompetence.

Annette I. Wesselman, defendant, was found guilty after a jury trial in the circuit court of Shelby County of driving while under the influence of alcohol. Defendant appealed her conviction, and this court remanded the cause for further proceedings on her *pro se* claims of ineffective assistance of counsel. *People v. Wesselman*, No. 5-08-0162 (2008) (unpublished order under Supreme Court Rule 23(c)(2) (eff. May 30, 2008)). On remand, the circuit court denied her claims after a hearing. Defendant appeals the denial of her claims on remand and asserts she was not allowed to present her witnesses at the hearing. We affirm.

The evidence at defendant's trial revealed that on April 21, 2006, at approximately 10:30 p.m., Deputy Cody Reeves was driving near Cowden when he encountered a vehicle

driving the opposite way into town. Deputy Reeves noticed that the car had a loud muffler. He further observed, when looking in his rearview mirror, a white light coming from the taillight. He turned his car around, activated the flashing lights, and stopped the vehicle. Defendant was driving the vehicle. Upon walking up to the car, Deputy Reeves noticed a strong smell of alcohol. Deputy Reeves testified that upon speaking to the defendant driver, he observed that she had bloodshot, watery eyes and that her speech was slurred. Deputy Reeves asked defendant if she had been drinking, and she admitted that she had a few beers. Defendant was ordered to get out of the car and undergo several field sobriety tests. After defendant failed the sobriety tests, Deputy Reeves arrested her and transported her to the Shelby County Detention Center. The rear seat passenger, Debra Payne, was also arrested on an outstanding warrant, while the front seat passenger was cited for having an open beer can. At the detention center, defendant took a breath test in which she blew 0.153.

Defendant claimed that there were problems with her breath samples and that the test results actually belonged to her passenger Payne. Defendant further claimed that she had flown back into town in the late afternoon and, while on the plane, had two beers. Around 10 p.m. the same day, she agreed to drive her friend Payne, who was intoxicated, to Cowden. While driving into Cowden, she noticed a police vehicle going the opposite direction with its lights activated. She also observed the car turn around and begin to follow her before stopping her. Defendant denied having anything else to drink that day and further testified that she was asked to remove her sandals to take the sobriety tests. Defendant claimed she informed the officer that she could not take the field sobriety tests because of bad ankles and knees and because she was barefooted on a gravelly surface. She further stated that she did not understand how to take the field tests and asked the officer several times to demonstrate them for her but that he refused. Defendant claimed that after she was arrested and transported to the detention center along with Payne, Payne took the breath test. Defendant

testified that she attempted to take the test, but after trying three different times, she still could not make her breath register. Deputy Reeves testified in rebuttal that Payne never blew into the breath-test machine, given that she was arrested on a different matter, and that there were no problems with the breath sample from defendant. At the trial, defendant objected to her attorney's failure to call Payne to testify as a witness on her behalf. Defense counsel informed the court that based on his evaluation of the case, she was not a necessary witness.

The jury found defendant guilty after deliberating 20 minutes, and the court sentenced her to two years' supervision. Defendant appealed her conviction, and we remanded the cause for further proceedings on her motion for a new trial on the grounds of ineffective assistance of counsel. On remand, the court denied her motion for a new trial after determining that her claims lacked merit. Defendant again appeals, contending that she is entitled to a new trial because counsel was ineffective for failing to contact and call as witnesses those people who could support her defense. She also contends she was denied a fair hearing on remand.

Defendant first argues on appeal that she was denied the effective assistance of counsel because defense counsel did not properly investigate and call witnesses who could have supported her theory of defense. We agree with the State that the record does not support defendant's assertions. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. A defendant has the burden of overcoming the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *People v. Barrow*, 133 Ill. 2d 226, 247, 549 N.E.2d 240, 249 (1989). Defendant could not meet this burden in this instance.

At the trial, the State presented evidence that defendant had slurred speech and

bloodshot eyes and smelled strongly of alcohol while operating a motor vehicle. She failed field sobriety tests and had a blood-alcohol content of 0.153. Defendant claimed that she was not the one who actually blew into the breath-test machine and that she was sober when pulled over by Deputy Reeves for a broken taillight which had been painted to shine red. Deputy Reeves denied giving Payne a breath test, explaining that she had been arrested on an outstanding warrant and was placed into a holding cell. Deputy Reeves also testified that the breath test would register an insufficient sample and that the logbook showed only a test given to defendant with a result of 0.153. Defense counsel investigated the logbook and concluded that defendant's theory was not believable. When the court inquired of counsel about Payne testifying, defense counsel stated that he was aware of what her testimony was supposed to be and further noted that she had an extensive criminal history. At the subsequent hearing on defendant's claims, defense counsel stated he was also fearful of what Payne might say. He further reported that he had gone over her previous record and had concluded as follows:

"everything tied together in front of a jury with what I have to admit was almost a preposterous proposition that the sheriff's office had confused the breathalyzer test, when I, in fact, had gone and checked out that was not the case, I just did not think she was the proper person to worry about in this particular case to call her."

He further noted that if he were to make the judgment call now, under the same circumstances, he would do the same thing. Clearly, there was very little, if any, possibility of a different outcome had Payne's testimony been presented. While defendant did not have to prove an absolute likelihood of a different outcome, she nonetheless had to show a reasonable likelihood. The inherent implausibility of defendant's theory cannot meet this reasonableness standard. Counsel exercised professional judgment in what witnesses to call or not to call to testify. Defendant could not and cannot show that counsel was ineffective

under the circumstances presented.

Defendant also argues that her cause needed to be remanded for another hearing with new counsel. New counsel is not automatically required every time a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, however. *People v. Moore*, 207 Ill. 2d 68, 77, 797 N.E.2d 631, 637 (2003). The trial court must conduct a preliminary inquiry to examine the factual basis behind defendant's claim. If the claim is not meritorious or if it solely concerns matters of trial strategy, then the court may deny the motion without appointing new counsel. *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637. Here, the court conducted a very thorough hearing, allowing defendant to fully explain her allegations and counsel an opportunity to explain or rebut those allegations. The court concluded that counsel's decision not to have Payne testify was a matter of trial strategy and that the appointment of new counsel was not necessary. The decision to decline to appoint new counsel for a defendant shall not be overturned on appeal unless the decision is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 942, 897 N.E.2d 265, 285 (2008). The court's decision here was not manifestly erroneous. When defendant requested to call certain witnesses, the court first examined defendant's claims and then interacted with both defendant and defense counsel and determined whether there should be further proceedings that would include new counsel and an evidentiary hearing. The trial court did everything it was required to do, and we find no error. Defendant was not denied a fair hearing on remand.

For the aforementioned reasons, we affirm the judgment of the circuit court of Shelby County.

Affirmed.