

NOTICE
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2012 IL App (4th) 100804-U

Filed 5/11/12

NO. 4-10-0804

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
RONALD C. BESWICK,	)	Nos. 08DT149
Defendant-Appellant.	)	09CF137
	)	09TR337
	)	09TR2651
)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* Any error in admitting HGN evidence without a *Frye* hearing was harmless where the arresting officer observed the strong odor of alcohol, defendant's eyes were red, bloodshot, and glassy, defendant admitted drinking alcohol, defendant failed the walk-and-turn test and refused to take the one-legged-stand test, and defendant refused to submit a breath sample.

¶ 2 Following a December 2009 bench trial, defendant, Ronald C. Beswick, was convicted of aggravated battery (Adams County case No. 09-CF-137), driving under the influence (DUI) (case No. 08-DT-149), and two counts of driving on a suspended license (case Nos. 09-TR-337, 09-TR-2651). In April 2010, the trial court sentenced him to 2 1/2 years for the aggravated battery and 90 days in jail on the traffic offenses.

¶ 3 Defendant appeals only his DUI conviction, arguing the State's evidence regarding

the results of the horizontal gaze nystagmus (HGN) field sobriety test was improperly admitted.

¶ 4 We affirm.

¶ 5 I. BACKGROUND

¶ 6 On April 12, 2008, Illinois State Police Officer, Robert Cook, stopped a vehicle defendant was driving at approximately 3 a.m. for having a broken license plate light and an expired registration sticker. Cook testified he "immediately smelled a strong odor of an alcoholic beverage emitting from inside the vehicle." Cook testified the whites of defendant's eyes were "red, bloodshot, [and] glassy," and his eyelids were "droopy and tired." Cook considered defendant's eyelids "sluggish looking." Cook testified defendant admitted consuming two drinks.

¶ 7 Cook testified he suspected defendant was impaired and asked him to perform field sobriety tests. Cook first administered the HGN test. Cook explained the test as follows:

"You start with making sure the subject's eyes track equal, both at the same time. Then you check the subject for smooth pursuit, make sure the eye, eyes will follow the stimulus in a smooth manner. Then you test the subject for distinct nystagmus at maximum deviation, which would be nystagmus.

By nystagmus, I mean the jerking of the eyes where there was no white showing in the corner of the eyes, all the way out. Then, you check for distinct nystagmus before or onset prior to 45 degrees, which were their whites showing in the outside of the eyes."

Cook explained the jerkiness of a person's eyes indicates they have consumed alcohol.

¶ 8 According to Cook's testimony, defendant "displayed all six failing clues," of the

HGN test, which indicated defendant was “above the legal limit.” Cook then administered the walk-and-turn test. Cook testified defendant was unable to keep his balance while in the starting position where he was standing heel to toe with one foot in front of the other, with his hands down by his sides. During the test, defendant stepped off the line and used his arms for balance, both of which Cook testified were “clues” of defendant’s intoxication. Defendant did not complete the walk-and-turn test, stopping after only 6 steps of the 18 total steps he was instructed to take. Cook next attempted to administer the one-legged-stand test. However, defendant refused the test, stating “he could not do that sober or drinking.” Cook then arrested defendant for DUI. When they arrived at the station, Cook requested defendant provide a breath sample. However, defendant refused.

¶ 9 Defendant testified he told Cook he had been the designated driver that evening and "at the last bar we was at I drank two [12-ounce] glasses of beer" over approximately 45 minutes to an hour. When asked if he was feeling the effects of the alcohol, defendant replied, "No, not really. I mean, two, two beers, and it wasn't—."

¶ 10 Defendant also testified he explained to Cook he cannot drink because of the medication he takes for his medical problems. On cross-examination, defendant said he believed he told Cook he could not drink an "excessive" amount of beer. Defendant testified he had a kidney transplant in March 2006 and was on dialysis. Defendant also testified he told Cook he suffers from chronic inflammatory demyelinating polyneuropathy (CIDP), "a form of MS," and that he was "not stable." Defendant testified he told Cook he wore leg braces and had no balance when standing on one leg. He also told Cook he would sometimes “just fall” when walking. Defendant testified he would fail any of the police sobriety tests because his legs “do not work.”

¶ 11 However, Cook testified he did not believe defendant ever mentioned any medical

problems that would have prevented defendant from performing the field-sobriety tests. Further, other than defendant's testimony, no evidence was presented regarding his medical issues.

¶ 12 At the conclusion of the bench trial, defendant was convicted of, *inter alia*, DUI.

¶ 13 In April 2010, the trial court sentenced defendant as stated.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Jurisdiction

¶ 17 While neither party raises an issue of jurisdiction in its briefs, this court possesses "an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them." *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008).

¶ 18 On October 7, 2010, defendant's motions for reduction of sentence and for a new trial were denied. On October 8, 2010, a notice of appeal was filed. However, that notice of appeal, prepared by the circuit clerk's office, failed to include all of the case numbers and did not appeal defendant's DUI conviction, *i.e.*, the subject of the instant appeal.

¶ 19 On December 15, 2010, defendant filed a motion for leave to file an amended notice of appeal to include the DUI conviction, which this court granted.

¶ 20 At first blush, it appears defendant's motion was filed beyond the time period permitted by Illinois Supreme Court Rule 303(d) (eff. May 30, 2008) (party may only amend the notice of appeal within 30 days after expiration of the time for filing a notice of appeal, *i.e.*, within 60 days of the final judgment). Accordingly, defendant would have had to file his motion on or before December 6, 2010, for us to have jurisdiction to amend the notice of appeal, which he did not. See *Boyd Electric v. Dee*, 356 Ill. App. 3d 851, 857, 826 N.E.2d 493, 499 (2005) (after the expiration of the initial 30-day period for filing a notice of appeal and the additional 30

days provided for in Rule 303(d), a reviewing court is without jurisdiction to permit further amendments to the notice of appeal).

¶ 21 However, because *no* appeal had been taken from the DUI conviction, we consider defendant's December 15, 2010, filing to be more in the nature of a motion to file a late notice of appeal. Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009) permits such a motion to be filed in the reviewing court within six months of the expiration of the time for filing the notice of appeal. Here, defendant's motion was filed well within the six-month period, and thus not improvidently granted. Accordingly, we have jurisdiction to consider defendant's appeal.

¶ 22 B. Merits of the Appeal

¶ 23 On appeal, defendant argues the trial court erred in allowing HGN test results to be admitted into evidence without first holding a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (*Frye* hearing). We note the instant appeal concerns only defendant's DUI conviction.

¶ 24 The State concedes no hearing was held but maintains automatic reversal is unnecessary. Instead, the State argues the issue is moot because the supreme court in *People v. McKown*, 236 Ill 2d. 278, 924 N.E.2d 941 (2010) (*McKown II*) ruled HGN tests are admissible. The State contends remand for a *Frye* hearing would amount to an "empty formality" because the trial court would be required to follow the supreme court's decision in *McKown II* and find the HGN test results admissible.

¶ 25 Defendant replies, arguing HGN test results are not automatically admissible and the State is allowed to present the evidence only if it can first satisfy the foundation requirements of *McKown II*. Specifically, defendant contends *McKown II* does not permit the admission of the HGN evidence where the testimony of the officer who administered the test did not establish he

was properly trained or that he performed the test in accordance with proper procedures.

¶ 26 In *People v. McKown*, 226 Ill. 2d 245, 254, 875 N.E.2d 1029, 1034 (2007) (*McKown I*), the supreme court considered whether it was error to admit HGN test results as scientific evidence without holding a hearing pursuant to *Frye*, "to determine whether the HGN test had been generally accepted as a reliable indicator of alcohol impairment by the relevant scientific community." Under the standard set forth in *Frye*, "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." " *McKown I*, 226 Ill. 2d at 254, 875 N.E.2d at 1034 (quoting *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30, 821 N.E.2d 1184, 1188-89 (2004) (quoting *Frye*, 293 F. at 1014)).

¶ 27 The supreme court determined HGN testing is scientific and subject to the *Frye* requirements. *McKown I*, 226 Ill. 2d at 256-57, 875 N.E.2d at 1035-36. A *Frye* hearing was thus required "to determine if the HGN test has been generally accepted as a reliable indicator of alcohol impairment." *McKown I*, 226 Ill. 2d at 275, 875 N.E.2d at 1046. The court remanded the cause to the trial court. *McKown I*, 226 Ill. 2d at 276, 875 N.E.2d at 1047.

¶ 28 The supreme court addressed the HGN testing again after the trial court conducted the requisite hearing and concluded HGN testing satisfied *Frye*. *McKown II*, 236 Ill. 2d at 293, 924 N.E.2d at 950. The supreme court held "HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired." *McKown II*, 236 Ill. 2d at 303, 924 N.E.2d at 955.

¶ 29 To be admissible, however, the test must be performed according to the protocol

established by the National Highway Traffic Safety Administration (NHTSA) by a properly trained officer. *McKown II*, 236 Ill. 2d at 306, 924 N.E.2d at 957. To establish a proper foundation, the evidence must show the witness has been "properly trained and that he performed the test in accordance with proper procedures." *McKown II*, 236 Ill. 2d at 306, 924 N.E.2d at 957.

¶ 30 However, here, no objection was made at trial as to foundation, nor was the issue included in the posttrial motion. In fact, it appears no posttrial motion was filed regarding the DUI conviction. To preserve an issue for review, a defendant must raise an objection *both* at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). "[T]he failure to raise an issue in a written motion for a new trial results in a waiver [(that is, forfeiture,)] of that issue on appeal." *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1129. Thus, the objection as to foundation has been forfeited and defendant does not raise plain error on appeal. Further, we note while defendant argues the requirements of the NHTSA manual, he does so *only* in his reply brief. Points not argued in an opening brief are forfeited and shall not be raised in the reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 31 Forfeiture aside, a conviction for DUI may be sustained based solely on the testimony of the arresting officer. *People v. Wiebler*, 266 Ill. App. 3d 336, 339-40, 640 N.E.2d 24, 27 (1994); see also *People v. Miller*, 101 Ill. App. 2d 361, 365, 243 N.E.2d 277, 279 (1968). Here, Cook testified he detected the strong odor of alcohol coming from defendant's vehicle. Cook observed defendant's eyes were red, bloodshot, and glassy. Cook also characterized defendant's eyelids as "droopy and tired" and "sluggish looking." Defendant also admitted drinking alcohol. Further, defendant failed the walk-and-turn field-sobriety test and refused the one-legged-stand test. While defendant testified his legs "do not work" because of his medical

issues, no medical or expert testimony was presented. Moreover, defendant refused to submit to a breath test after his arrest. Defendant's refusal constitutes circumstantial evidence of his guilt. *People v. Garstecki*, 382 Ill. App. 3d 802, 813, 890 N.E.2d 557, 565 (2008); see also *People v. Garriott*, 253 Ill. App. 3d 1048, 1052, 625 N.E.2d 780, 784 (1993) (noting the trier of fact can infer the driver refused to submit to a breath test because he knew it would confirm he was under the influence).

¶ 32 In this case, the State produced enough evidence, without the HGN test result, to convict defendant of DUI. See *People v. Graves*, 2012 IL App (4th) 4110536, ¶¶ 32-33, 2012 WL 273153 at *8. As a result, the HGN evidence was merely cumulative, *i.e.*, had it been excluded, the result would not have been different. See *People v. Weathersby*, 383 Ill. App. 3d 226, 232, 890 N.E.2d 620, 626 (2008) (finding admission of HGN evidence in the absence of a *Frye* hearing was error, but since the evidence was not closely balanced, the error did not warrant a new trial).

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm defendant's conviction. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed.