2013 IL App (1st) 100708-UB

THIRD DIVISION
March 13, 2013

No. 1-10-0708

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 15641
	)	
TANIA JONES,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant received effective assistance of counsel, even though counsel did not file a motion to quash arrest and suppress evidence, where record demonstrated that there was probable cause to arrest defendant for driving under the influence of alcohol.

¶ 2 In a bench trial, defendant Tania Jones was convicted of aggravated driving while under the influence of alcohol and sentenced to two years' probation. We dismissed defendant's appeal for lack of jurisdiction in an unpublished order dated August 25, 2011, because defendant had filed a late notice of appeal. *People v. Jones*, 2011 IL App (1st) 100708-U. The Illinois Supreme

Court subsequently issued a supervisory order directing us to vacate our order dismissing this appeal and to allow defendant's notice of appeal, filed February 25, 2010, to stand as a properly filed notice of appeal. *People v. Jones*, No. 112891 (September 15, 2011). On remand, defendant has withdrawn her claim that the trial court considered improper factors in sentencing her. Accordingly, defendant's sole contention on appeal is that she was denied the effective assistance of counsel when her trial counsel failed to file a motion to quash her arrest and to suppress the evidence obtained pursuant to that arrest.

¶ 3 At trial, Chicago police officer Elliott Musial testified that on July 27, 2007, at 2:37 a.m., he was in a marked squad car on Lake Shore Drive, looking for drivers who were exceeding the speed limit, which was 45 miles per hour. When defendant drove past him at a speed of 79 miles per hour, Officer Musial pulled her over. Defendant was unable to produce a driver's license and she said she had loaned her State identification card to a friend to get into a club. As Officer Musial spoke to defendant, he observed that she had a strong odor of alcohol on her breath, bloodshot eyes, and mumbled when she spoke. Officer Musial asked defendant to get out of her car. When she did so, he noticed that she used the car as support. She also was swaying as she walked with him to the front of her car. Defendant admitted to Officer Musial that she had one drink earlier that night. Officer Musial conducted the horizontal gaze nystagmus test (HGN) on her, a field sobriety test which she did not pass. As he conducted this test, he could still smell the odor of alcohol on defendant's breath. Officer Musial did not administer other field sobriety tests, which called for defendant to stand on one foot or walk, because she was wearing high heeled shoes and a short skirt. Based on the results of the HGN test, his observations of her, and the fact that she was driving without a driver's license, Officer Musial took defendant into custody and had her sit in the back seat of his squad car.

¶ 4 When Officer Musial got into the front seat, he observed a strong odor of alcohol coming from the rear seat where defendant was seated. Officer Musial advised defendant of her *Miranda* rights. He then attempted to look up her identification, but she would not give him her correct social security number, name, or date of birth. At about 3 a.m., Officer Musial drove defendant to the First District police station. On the way, defendant was very talkative, saying she did not know what was going on, asking why her car was being impounded, and stating that she did not think she was drunk. She also kept repeating herself, which Officer Musial testified could be a sign of excessive alcohol use. At the police station, Officer Musial put defendant into a processing area, where he observed her for 20 minutes. At about 3:30 a.m. he administered a breathalyzer test, which indicated that she had a .102 blood alcohol content. He also continued to detect the odor of alcohol on her breath. Officer Musial summarized the basis of his conclusion that defendant was under the influence of alcohol that evening. The factors he cited were: the strong odor of alcohol on her breath; her bloodshot eyes; her slurred speech; her admission that she had been drinking; failing the HGN test; swaying when she walked; and the breathalyzer results.

¶ 5 The State also introduced into evidence a video recording from Officer Musial's squad car, which showed what had occurred when he stopped defendant's vehicle. Officer Musial testified that the audio portion of the recording was inaudible part of the time. The trial judge watched this recording, but it has not been included in the record on appeal.

¶ 6 The trial judge found defendant guilty of aggravated driving while under the influence of alcohol, in that she drove while the alcohol concentration in her blood was .08 or more, and she did not possess a driver's license at the time. 625 ILCS 5/11-501(a)(1), (d)(1)(H) (West 2010). The judge noted that defendant had been driving 79 miles per hour in a zone where the speed limit was 45 miles per hour. The judge also stated that he believed Officer Murial's testimony

that defendant had a strong odor of alcohol on her breath. He stated that he did not observe on the video recording that defendant needed to support herself when getting out of her car, and he observed that she did not touch her car to maintain her balance as she walked to the front of it. The judge stated that he would not take the HGN test results into account, but also stated that they might be important if he were hearing a motion to quash arrest and suppress evidence. The judge said he did not notice defendant mumbling in the portions of audio which he heard. But he did observe that she was excited and "a little giddy inappropriately." She also became excited and agitated when she spoke about her car being impounded, and she repeated herself. The judge noted that Officer Musial continued to smell the odor of alcohol on her breath. Finally, the judge noted that the result of the breathalyzer test was .102. Based upon all of these factors, the judge found defendant guilty of aggravated driving under the influence of alcohol and sentenced her to two years' probation.

¶ 7 Defendant does not contest the sufficiency of the evidence of her guilt. She contends that she was denied the effective assistance of counsel because her trial counsel failed to make a motion to quash her arrest and suppress the resulting evidence, principally the results of the breathalyzer test. To establish ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) because of that ineffective representation, defendant was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On review, we need not determine counsel's effectiveness before determining whether defendant was prejudiced. *Strickland,* 466 U.S. at 696. To establish prejudice from the failure to file a motion to quash and suppress, a defendant must show that there is a reasonable possibility that the motion would have been successful and that the result of his trial would have been different. *People v. Orange*, 168 Ill. 2d 138, 153 (1995); see *Strickland*, 466 U.S. at 694.

¶ 8 In this cause, defendant argues that she was prejudiced because a motion to quash her arrest and suppress evidence would have been successful, thereby precluding the State from introducing the results of the breathalyzer test. Intoxication is a question of fact, which is the trier of fact's responsibility to determine, along with the credibility of witnesses and the sufficiency of the evidence. *People v. Hires*, 396 Ill. App. 3d 315, 319 (2009). Numerous factors have been cited as indicative that a defendant was intoxicated when he drove. In *People v. Sturgis*, 364 Ill. App. 3d 107, 115-116 (2006), the court found that the defendant was intoxicated when he swayed when he stood up, failed several field sobriety tests, and had the odor of alcohol on his breath, bloodshot eyes, and slurred speech. In *People v. Cortez*, 361 Ill. App. 3d 456, 364-65 (2005), although there was no field sobriety test, the other *Sturgis* factors, along with the defendant's admission that he had been drinking, were cited in finding probable cause to arrest him for driving under the influence of alcohol. In this case, a number of these factors were present along with other indicators of intoxication. Defendant was speeding at 79 miles per hour, 34 miles per hour over the speed limit. When Officer Musial stopped her, he immediately noticed the odor of alcohol coming from her breath and saw that her eyes were bloodshot. Defendant could not produce a driver's license or a State identification card. She resisted Officer Musial's efforts to identify her by giving him false information. She admitted that she had been drinking. The trial judge found, when reviewing the video recording of the incident, that when defendant was placed in the back of the squad car, she became agitated, excited, and inappropriately giddy. Officer Musial also testified that defendant kept repeating herself, behavior which in his experience could mean that a person was intoxicated.

¶ 9 Defendant notes that the trial judge found that he did not observe defendant swaying as she walked or needing to lean on her car to get out of it. He also stated that he could not detect defendant mumbling on the recording, although some of the audio portions of the recording were

absent. The judge also stated that he was not considering the HGN test, although he said he might have considered it in a hearing on a motion to suppress. Even without consideration of these factors, the numerous other factors we have cited make it clear that Officer Musial had probable cause to arrest defendant for driving under the influence of alcohol and there is no reasonable possibility that defendant would have been successful in a motion to quash her arrest and suppress evidence.

¶ 10 Defendant contends that the trial judge considered improper factors when he speculated about whether a motion to suppress would have been successful. In stating that he was not considering the HGN test, the judge stated that the test might be important if he was hearing a motion to quash and suppress. He then said "under these circumstances with the strong odor of alcohol and the attire that [defendant] was in and where they were located" it was obvious that Officer Murial had probable cause. The trial judge was apparently referring to the high heels and short dress that defendant was wearing and the fact that she was stopped on Lake Shore Drive. At trial, Officer Murial cited defendant's attire as the reason he did not give her field sobriety tests which required her to stand on one leg or walk. In finding defendant guilty, the trial judge noted that she showed very poor judgment when she drove at 79 miles per hour on Lake Shore Drive. The judge specifically noted that, even at 3 a.m., the area of Lake Shore Drive where defendant was stopped was "like high noon." As we have noted, the judge was only speculating on whether probable cause would have been found in a hearing on a motion to quash arrest and suppress evidence. Even if these factors were not probative of defendant's intoxication, we do not find that these brief references by the trial judge played a significant role in the judge's findings. Nor has defendant established that these remarks were prejudicial. *People v. English*, 287 Ill. App. 3d 1043, 1047 (1997). The judge went on to consider numerous other factors

indicating that defendant was under the influence of alcohol when she was stopped. For all of these reasons, we find that defendant was not prejudiced by the trial judge's remarks.

¶ 11 For the reasons set out in this order, we affirm defendant's conviction and sentence.

¶ 12 Affirmed.