

THIRD DIVISION
February 6, 2013

No. 1-11-1628

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.	)	Nos. YM 321247
	)	YM 321248
	)	YM 321249
	)	YM 321270
)	
FRANK LOCONTE,	)	Honorable
	)	Thaddeus S. Machnik,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where police officer testified that defendant crossed into adjoining lanes, prompting traffic stop, and court viewed squad car video of defendant's driving, motion to quash arrest would not have been successful, and evidence was sufficient to support defendant's DUI conviction; the judgment of the trial court was affirmed.
- ¶ 2 Following a bench trial, defendant Frank Loconte was convicted of driving under the influence (DUI), improper lane usage and illegal transportation of alcohol. Defendant was

sentenced to 12 months of conditional discharge. On appeal, defendant argues his trial counsel was ineffective for failing to challenge the validity of his arrest and seek the suppression of the result of a portable breath test (PBT). Defendant also challenges the sufficiency of the evidence as to his DUI conviction. We affirm.

¶ 3 Defendant was charged with DUI pursuant to section 11-501(a)(2) of the Illinois Vehicle Code (the Code) (625 ILCS 5/11-501(a)(2) (West 2008)), which provides that a person shall not drive or be in actual physical control of any vehicle within this State while under the influence of alcohol. At trial, Park Ridge police officer Matt McGannon testified he stopped defendant's vehicle at 3:53 a.m. on May 17, 2008. McGannon said he observed the vehicle "repeatedly leave its lane of travel, veer to the right over the dotted white lines, and then dot [*sic*] to the left over the double yellow lines" as it approached an intersection. The officer's squad car was equipped with a dashboard video camera.

¶ 4 After defendant pulled onto a side street and stopped, McGannon approached defendant's car and asked for his driver's license and insurance card. The officer testified he observed a strong odor of alcohol on defendant's breath, and defendant moved slowly and "repeatedly dropped items." Defendant complied with the officer's request to get out of his vehicle. In response to McGannon's questioning, defendant said he just had breakfast and had consumed alcohol earlier in the evening.

¶ 5 McGannon asked defendant to perform a series of field sobriety tests, beginning with the horizontal gaze nystagmus (HGN) test. The officer then asked defendant to complete a "walk and turn" test, instructing defendant to walk heel-to-toe in a straight line and returning in the same way. McGannon testified defendant "fell off his stance a couple times" as the officer was describing the test. When completing the test, defendant did not walk each step heel-to-toe or count his steps in each direction. Defendant also "used his arms slightly for balance." Lastly,

McGannon asked defendant to take a "one-leg stand" test, which defendant began to perform before directed and in which defendant "used his arms for balance and [] swayed while balancing," as the officer stated in a report. Defendant failed all three tests.

¶ 6 At that point in McGannon's testimony, the prosecutor asked the officer what occurred next, and the following exchange occurred:

"THE WITNESS: Then I offered the subject the opportunity to produce a breath sample in a PBT, or a portable breath test.

MR. NORRIS [defense counsel]: Judge, I object to the PBT.

MR. WIESEN [assistant State's Attorney]: That's okay, judge. Then I withdraw that.

THE COURT: Okay, then I suppose you can withdraw your objection, Mr. Norris.

MR. NORRIS: I will, Judge."

¶ 7 McGannon testified that based upon his observations of defendant during those tests, he believed defendant was under the influence of alcohol, and McGannon arrested defendant. McGannon continued to notice a strong odor of alcohol from defendant's breath as he was placed under arrest, and the officer also noted defendant's eyes were glassy and bloodshot and his speech was slurred. Defendant was upset at his arrest and was being "argumentative and belligerent." When searching defendant's vehicle, McGannon recovered from the center console an open "airplane bottle" of whiskey, which was half-full.

¶ 8 At the police station, defendant was given the required warning to motorists setting out the penalties for refusal to submit to chemical testing. Defendant refused to take a breath test or

any other chemical test. After defendant posted bond, which was about 90 minutes after the traffic stop, he agreed to take a breath test. McGannon testified his opinion that defendant was driving under the influence of alcohol was based on his observations of defendant's driving and actions and his performance on the field sobriety tests.

¶ 9 The attorneys agreed the squad car video footage would be shown to the court after defense counsel cross-examined McGannon. On cross, McGannon testified that although defendant's speech was slightly slurred and he spoke with an accent, he did not have trouble understanding defendant. The officer reviewed defendant's performance on the three field sobriety tests.

¶ 10 On redirect, McGannon testified he had viewed the video footage of the sobriety tests. The following colloquy occurred:

"Q. Now, in your opinion does the video accurately and truly portray the lane violations that you observed as you're on the street?

MR. NORRIS: Objection, Judge. There's already been testimony that it does.

MR. WIESEN: I don't believe he testified if it accurately portrayed it, Judge.

THE COURT: Overruled.

A. Um, they're not as, I guess, egregious as you see them on the video as you do in person."

¶ 11 McGannon noted "at one point" the video depicted the glare of headlights from an oncoming car and thus "you lose some of your vision" on defendant's vehicle. The officer said, "At one point there's a glare with the lights and the video is a tad fuzzy from a distance," further

stating, "I think you get the general depiction if you look close that there are some lane violations." McGannon said he was able to view defendant's lane violations more clearly than they were shown in the video. On re-cross, McGannon stated that although he detected an odor of alcohol, he could not tell how much defendant had consumed or when. On redirect, McGannon stated defendant emitted a strong scent of alcohol indicative of someone who had been drinking.

¶ 12 After McGannon's testimony, the parties stipulated to the foundation of the video, and the video footage was played for the court. In addition to footage of the field sobriety tests, the video depicts defendant completing a PBT and McGannon reporting that defendant's blood alcohol level measured .095.

¶ 13 The court found defendant guilty of driving under the influence, improper lane usage and the illegal transportation and possession of alcohol. The court did not mention any evidence. The defense's motion for a new trial, which did not include any reference to the PBT, was denied. The court sentenced defendant to 12 months of conditional discharge and ordered him to perform 240 hours of community service, attend a victim impact panel and pay \$1,670 in fines and fees.

¶ 14 On appeal, defendant contends his trial counsel provided ineffective assistance in failing to file a motion to quash his arrest and suppress the video footage of his traffic stop and in failing to object to the admission into evidence of the PBT. To support a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was objectively unreasonable and that, but for counsel's unprofessional errors, it is reasonably probable that a different result would have followed. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 15 Defendant first argues his attorney should have challenged the legality of the stop because the video footage from the police car established that McGannon lacked a basis to detain him. He argues that a motion to quash his arrest would have succeeded because the video footage

shown to the court contradicted McGannon's testimony that he observed defendant's car veer out of its lane.

¶ 16 The decision of defense counsel as to the filing of a motion to suppress evidence or quash an arrest is generally a matter of trial strategy which is entitled to great deference. *People v. Bew*, 228 Ill. 2d 122, 128 (2008). Where an ineffective assistance claim is based on defense counsel's failure to file a motion to quash an arrest and suppress evidence, the defendant must prove prejudice by showing there was a reasonable probability the motion would have been granted and, moreover, that the outcome of the trial would have been different had the evidence been suppressed. *Bew*, 228 Ill. 2d at 128-29. The record reflects the trial court heard Officer McGannon testify that he observed defendant's car leave its lane of traffic by moving to the right and then to the left. The officer testified the movements of defendant's car were not as "egregious" on the video as he observed them to be in person. The court heard the officer's version of events and viewed the video footage. The court's ruling that defendant was guilty of the offense supports an inference that it found the officer's account to be credible, including his reference to the video footage. Therefore, it was not reasonably probable that a motion to quash arrest and suppress evidence would have been successful, and defendant's ineffective assistance of counsel claim on this point therefore must fail.

¶ 17 Defendant also contends that his counsel should have objected to the admission into evidence of the result of the PBT. Results of a PBT are not admissible in the State's case-in-chief in a DUI proceeding. *People v. Rose*, 268 Ill. App. 3d 174, 181 (1994). However, as the State points out, defendant was not charged with DUI under the statutory section requiring the proof of a blood alcohol concentration of .08 or more (625 ILCS 5/11-501(a)(1) (West 2008)). The charge against defendant was instead based on the officer's observations and defendant's performance on the field sobriety tests. Indeed, as the record reflects, defense counsel did object

to McGannon's testimony that he administered a PBT, and the prosecutor agreed to withdraw that question. Although the court did view the administration of the PBT to defendant and learn the result of that test via the video, we cannot conclude defendant was prejudiced by the admission of the evidence given that it was not an element of the charge against him. Moreover, the trial court is presumed to know the law (*People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001)), and so would have disregarded the PBT evidence.

¶ 18 Defendant also challenges the admission of the PBT results as plain error because he did not preserve this issue for appeal. The plain-error doctrine allows a reviewing court to consider unpreserved claims of error when a clear or obvious error occurred and either the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or the error is so serious that it affected the fairness of the defendant's trial. *People v. Thompson*, 239 Ill. 2d 598, 613 (2010). Our review of the PBT portion of the video footage as plain error does not persuade us that a different result is warranted.

¶ 19 Defendant's remaining contention is that the evidence was insufficient to support his DUI conviction. As set out above, defendant was convicted under section 501(a)(2) of the Code, which prohibits individuals from driving while under the influence of alcohol. A defendant is under the influence when, as a result of consuming alcohol or any other intoxicating substance, the defendant's " 'mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care.' " *People v. Hires*, 396 Ill. App. 3d 315, 318 (2009), quoting Illinois Pattern Jury Instructions, Criminal, No. 23.29 at 203 (4th ed. 2000). Intoxication is a question of fact, which is the responsibility of the trier of fact to resolve; the trier of fact also must assess the credibility of the witnesses and determine the sufficiency of the evidence. *Hires*, 396 Ill. App. 3d at 318.

¶ 20 As effectuated by section 501(a)(2) of the Code, direct evidence of a suspect's intoxication, such as the result of a blood alcohol test, is not needed to establish a DUI; rather, to prove that a defendant committed the crime of DUI, the State may rely on circumstantial evidence. *Id.* The testimony of the arresting officer, in and of itself, may be sufficient to sustain a DUI conviction. *Id.* Officer McGannon testified that after he stopped defendant's vehicle, he approached defendant and observed a strong odor of alcohol on defendant's breath. McGannon administered three field sobriety tests to defendant and reported that, in his opinion, he failed each of those tests. The trial court viewed a video that memorialized defendant's performance on those tests. The evidence presented to the trial court was sufficient to support defendant's DUI conviction.

¶ 21 Accordingly, the judgment of the trial court is affirmed.