

No. 1-11-1815

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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. 10 C6 61132
)	
TERRENCE HARRIS,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Judgments entered on driving offenses affirmed over defendant's contentions that he was denied his constitutional right to counsel of choice and effective assistance of trial counsel.

¶ 2 Following a jury trial, defendant Terrence Harris was convicted of aggravated driving under the influence of alcohol (DUI) and felony driving on a revoked license, then sentenced to concurrent terms of two years' imprisonment. On appeal, defendant contends that the circuit court denied him his constitutional right to counsel of his choice, and that trial counsel was ineffective for failing to challenge the foundation for the admission of certain evidence.

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¶ 3 The record shows that on September 10, 2010, defendant was arrested in Oak Forest, Illinois and charged with aggravated DUI and felony driving on a revoked license. Defendant was appointed counsel from the Office of the Public Defender of Cook County, and the matter was continued several times, before being set for a jury trial on April 19, 2011. On that date, the matter was continued, by agreement, to May 16, 2011, when the following colloquy was had:

[DEFENSE COUNSEL]: [I] have had an opportunity to speak to [defendant], both on the phone and in person last week, as well as speaking with him today. It is not his desire to have me continue as his counsel.

THE COURT: Well, you know what -- Go ahead.

[STATE]: I find it very disingenuous that on the day of trial this happens. This was set back in April for trial. Another jury -- You know, it's now set today. There is no reason that we shouldn't go forward with this case.

THE COURT: We're going to trial today, [defendant]. You're not getting another attorney. And the case is set for trial. And on the day of trial, you don't come back -- come in and tell me you want another attorney. You should have done that on May -- back on April 19th. You don't change your mind on the day of trial. So we're going to trial today whether you like it or not. You have a lawyer, and she's going to represent you.

That's it."

¶ 4 The court then allowed a recess, and when the parties reconvened, the court asked defendant why he was not wearing civilian clothes. Defendant replied that he chose not to wear the clothes that were supplied to him, and when the court asked "why?," defendant stated that he "declines" to wear them. The court concluded that defendant was wearing the prison clothing because he is "being dilatory in nature," and that it refuses to continue the matter. The court further noted that defendant was refusing to cooperate with the court because he does not want to

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go to trial, and that on the last court date, when the matter was set for trial, there was no complaint by defendant.

¶ 5 At the ensuing jury trial, Oak Forest police officer Shaughnessy testified that he underwent training for DUI detection and the administration of field sobriety tests. The field sobriety tests, including the Horizontal Gaze Nystagmus (HGN), the one-leg stand, and the walk-and-turn are standardized national tests, which he has administered over 100 times. Officer Shaughnessy testified that he underwent training for the HGN test at the Police Training Institute at the University of Illinois, and was certified after passing a practical skills examination.

¶ 6 Officer Shaughnessy explained that the HGN test checks the eyes for involuntary jerking, which is a physiological effect from alcohol, and a very strong sign of intoxication. For the first part of the HGN test, the officer holds a ballpoint pen and sees if the person can focus on it as he moves it. He tests both eyes twice, and if the person has been drinking, his eyes will involuntarily jerk. For the second part of the test he holds the pen all the way to the right and then to the left to test the nystagmus, and for the final part, he tests the angle of onset at "prior to forty-five degrees or the rule of thumb is outside of the shoulder," to "insure that nystagmus begins at prior to forty-five degrees before [he] hit[s] that shoulder."

¶ 7 As to the offense at bar, Officer Shaughnessy testified that at 12:45 a.m. on September 10, 2010, he was patrolling the area of 159th Street and Central Avenue in Oak Forest when he observed defendant driving a car without any taillights. The officer stopped defendant in a nearby, well-lit parking lot, then approached him. The window of defendant's car was down, and the officer detected a strong odor of alcohol emitting from defendant's breath. He also observed that defendant had watery, bloodshot, glassy eyes, and "thick-tongued, slurred speech." When the officer asked defendant for his driver's license and proof of insurance, defendant provided an Indiana state identification card. The officer then conducted a computer name check, and learned that defendant's license had been revoked.

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¶ 8 Officer Shaughnessy asked defendant to exit the vehicle, and, as he did so, defendant held onto the door for support. The officer then directed defendant to the rear of the vehicle, and as he proceeded there he leaned against the vehicle, and was unsteady on his feet. The officer then asked defendant if he would submit to field sobriety tests. He agreed to perform them after indicating that he had no mental or physical impairment preventing him from doing so. The officer then showed defendant how to perform the one-leg stand test, and when defendant attempted it, he swayed, hopped, placed his foot down more than three times, and raised his arms more than six inches away from his sides, thereby failing the test.

¶ 9 Officer Shaughnessy also had defendant perform the walk-and-turn test, *i.e.*, take nine heel-to-toe steps while counting aloud each step, then turn around and take nine steps back in a straight line. The officer demonstrated this test for defendant, who then started before he was told to do so, did not walk in a straight line, took six instead of nine steps, turned incorrectly, and was falling as he was walking, which prompted the officer to stop the test for defendant's safety.

¶ 10 As for the HGN test, Officer Shaughnessy first checked defendant for lack of smooth tracking, had him follow his ballpoint pen with his eyes, and observed involuntary jerking in both eyes. He reported that defendant also had "the onset prior to forty-five degrees and the sustained and distinct nystagmus at maximum deviations." Based on the officer's training and experience with the HGN test, he determined that defendant was intoxicated.

¶ 11 At that point, Officer Shaughnessy took defendant into custody and transported him to the Oak Forest police station where defendant was uncooperative and insulting. Prior to conducting the breathalyzer test, the officer discovered that defendant had a dime in his mouth. He explained that this was consistent with the myth that a coin in the mouth would provide a better result on the breathalyzer test. After the officer had defendant remove the dime from his mouth, defendant refused to do the test.

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¶ 12 Officer Shaughnessy further testified that defendant informed him that he had consumed three beers, that he did not know what city he was in, continued to be uncooperative, and refused to be fingerprinted and photographed. Based on his experience, training, the field sobriety tests, the strong odor of alcohol emanating from defendant's breath, his watery blood-shot eyes, and slurred mumbling speech, Officer Shaughnessy opined that defendant was under the influence of alcohol. The State then introduced into evidence a certified abstract from the Illinois Secretary of State indicating that defendant's license was revoked on September 10, 2010.

¶ 13 At the close of evidence, the jury found defendant guilty of aggravated DUI and felony driving with a revoked license. Defendant filed a motion for a new trial, which the court denied, then sentenced him to concurrent terms of two years' imprisonment.

¶ 14 On appeal, defendant first contends that the trial court denied him his constitutional right to counsel of his choice when it failed to make a meaningful inquiry into his request for a new lawyer, and, instead, summarily concluded that his motion was a delay tactic. He claims that the court failed to fulfill its duty of balancing his right to counsel of choice with the judicial interest of trying a case with due diligence. Defendant acknowledges his failure to raise this issue in his post-trial motion, but maintains that it should be addressed as plain error.

¶ 15 Where, as here, defendant clearly failed to preserve this issue for review (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), we may review it only if defendant has established plain error (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)). The burden of persuasion remains with defendant and the first step is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 16 In this case, defendant does not argue the closely balanced prong of the plain error rule, but asserts that the trial court's denial of his right to counsel of choice is a structural error affecting the framework of the trial and not subject to forfeiture under the second prong of the rule. The Supreme Court has recognized that the erroneous deprivation of the right to counsel of

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choice qualifies as "structural error;" however, the Court has continued to find that this right does not extend to defendants, *inter alia*, who require counsel to be appointed for them. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006); accord *People v. Baez*, 241 Ill. 2d 44, 106, n.5 (2011); *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008). In addition, the right is not absolute, but limited (*People v. Howard*, 376 Ill. App. 3d 322, 335 (2007)), and a defendant who abuses the sixth amendment in an attempt to delay the trial and the effective administration of justice forfeits his right to counsel of choice (*Tucker*, 382 Ill. App. 3d at 920). A determination of the issue turns on the particular facts of each case, and is a matter within the discretion of the trial court. *Tucker*, 382 Ill. App. 3d at 920.

¶ 17 Here, the record shows that defendant was arrested on September 10, 2010, and when the case appeared on the court's docket on October 28, 2010, defendant was represented by a public defender. As of December 1, 2010, defendant was represented by new counsel from the same office who remained on his case throughout the six months that the case was on the court's docket, and in April 2011. Throughout this period, defendant did not indicate that he was dissatisfied with his counsel or that he wanted new counsel, defendant raised no objection or issue to the assignment of an additional public defender to assist with his trial.

¶ 18 The original trial date was April 19, 2011, and the case was continued for trial on May 16, 2011, the date on which defendant first indicated that he did not want his current counsel to represent him anymore. Defendant, however, failed to identify any private counsel or indicate that such counsel was standing ready, willing and able to make an unconditional entry of appearance *instanter* (*People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992)), or even file a motion representing that he had secured substitute counsel who was ready, and willing to enter an appearance in his case (*People v. Segoviano*, 189 Ill. 2d 228, 245 (2000)). Defendant failed to show that he fell within the ambit of the right he now challenges, and under the circumstances reflected in the record, the court could reasonably conclude that the trial-day request was made

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solely as a delaying tactic. *People v. Staple*, 402 Ill. App. 3d 1098, 1103-04 (2010) (and cases cited therein). This conclusion finds support in defendant's refusal to wear the civilian clothes provided for him and the demeanor reflected in his response to the court's inquiry. *People v. Terry*, 177 Ill. App. 3d 185, 190-91 (1988).

¶ 19 Defendant, nonetheless, maintains that it was the court's responsibility to conduct an inquiry into whether the request was being made as a delaying tactic, and that the court's failure to conduct such an inquiry is reversible error. In support of his contention, defendant cites *People v. Green*, 42 Ill. 2d 555, 557 (1969), *People v. Bingham*, 364 Ill. App. 3d 642, 645, 646-47 (2006), *People v. Basler*, 304 Ill. App. 3d 230, 232 (1999), and *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008).

¶ 20 As noted above, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. In this respect, we find this case readily distinguishable from *Green*, 42 Ill. 2d at 557, *Bingham*, 364 Ill. App. 3d at 644-45, and *Tucker*, 382 Ill. App. 3d at 922-24, where defendants moved for a continuance, informed the court that they had or were in the process of retaining private counsel, and the reviewing courts determined that the trial court abused its discretion in failing to inquire into the truth of the defendants' statements. Here, unlike *Green*, *Bingham*, and *Tucker*, defendant made no such representation to the court, but merely told his appointed counsel that he no longer wanted her to represent him.

¶ 21 In *Basler*, the court denied defendant's motion for a continuance to obtain private counsel, but failed to make any finding that the request was a delay tactic, and there was no suggestion that it was, or to inquire into the circumstances of the request, which led the reviewing court to conclude that the denial was an abuse of discretion. *Basler*, 304 Ill. App. 3d at 233. Here, unlike *Basler*, there was no motion or request for a continuance to obtain private counsel, the court found that defendant's late expression of dissatisfaction with his appointed counsel was a delaying tactic, the circumstances suggest that this was the case, and the court explained the

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reasons for its decision, which defendant did not refute. *Basler* is thus distinguishable from the case at bar, where although the court addressed this matter in a brusque fashion and the better practice would have been for the trial court to inquire as to why he wanted another attorney, we find, under the circumstances, no abuse of discretion in its decision (*Segoviano*, 189 Ill. 2d at 245; *Staple*, 402 Ill. App. 3d at 1103), or error to excuse defendant's forfeiture of this issue.

¶ 22 Defendant next contends that his trial counsel was ineffective for failing to challenge the inadequate foundation for the admission of the HGN test. He claims that the foundation was inadequate where Officer Shaughnessy failed to testify that he performed the test in accordance with the National Highway Traffic Safety Administration (NHTSA) protocol. He thus requests this court to grant him a new trial, or, at minimum, a hearing to determine if the HGN test was properly performed.

¶ 23 We initially note defendant's contention that ineffective assistance is established where trial counsel neglects to present proper arguments for the suppression of incriminating evidence when he shows that there is a reasonable probability that a motion raising these arguments would have been granted, and the outcome of the trial would have been different, citing *People v. Little*, 322 Ill. App. 3d 607, 611 (2001), *People v. Spann*, 332 Ill. App. 3d 425, 432-33 (2002), and *People v. McPhee*, 256 Ill. App. 3d 102, 107 (1993). In these cases, defendants were convicted of possession of a controlled substance with intent to deliver, and counsel failed to file a motion to quash arrest and suppress evidence, challenging the legality of the arrest and/or the search. *Little*, 322 Ill. App. 3d at 610-11; *Spann*, 332 Ill. App. 3d at 429, 436-37; *McPhee*, 256 Ill. App. 3d at 107, 110. Here, in contrast, this is not a drug case where defendant is arguing that counsel was ineffective for failing to quash arrest and suppress evidence. Rather, defendant challenges counsel's failure to object to the foundation for an officer's testimony at trial. Since counsel could not have anticipated a foundation issue to the officer's testimony regarding the HGN test prior to trial, it would not be included in a pre-trial motion (*People v. Korzenewski*, 2012 IL App

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(4th) 101026, ¶9), and, accordingly, we find that *Little, Spann, and McPhee*, have no bearing on the instant case.

¶ 24 Under the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for that deficient performance, the result of the proceeding would have been different. Defendant must satisfy both prongs to establish ineffective assistance of trial counsel. *People v. Everhard*, 405 Ill. App. 3d , 698. For the reasons that follow, we find that defendant cannot show prejudice resulting from counsel's omission.

¶ 25 The totality of the evidence regarding defendant's condition was overwhelming. That evidence showed that he failed the one-leg stand and walk-and-turn tests, that he had blood-shot, watery eyes, slurred speech, and was unsteady on his feet. *People v. Graves*, 2012 IL App (4th) 110536, ¶¶32-33. He also admitted to drinking three beers, the arresting officer detected a strong odor of alcohol emanating from his breath, and he was uncooperative at the police station where he attempted to thwart the breathalyzer test by placing a coin in his mouth, and then refused to take the test. *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993). The evidence also showed that defendant did not know what city he was in, even after being taken to the Oak Forest police station, and refused to be fingerprinted and photographed. Thus, even excluding the HGN testing results, the evidence was more than sufficient to allow the jury to find him guilty of aggravating DUI beyond a reasonable doubt. *Graves*, ¶33. Accordingly, we find that defendant cannot satisfy the prejudice prong of the *Strickland* test, and his claim of ineffective assistance necessarily fails. *Everhard*, 405 Ill. App. 3d at 698.

¶ 26 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.