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2013 IL App (3d) 110903-U

Order filed June 19, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

|                                      |   |                               |
|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
|                                      | ) | of the 9th Judicial Circuit,  |
| Plaintiff-Appellee,                  | ) | Knox County, Illinois,        |
|                                      | ) |                               |
| v.                                   | ) | Appeal No. 3-11-0903          |
|                                      | ) | Circuit No. 11-DT-78          |
|                                      | ) |                               |
| TERRY P. O'CONNOR,                   | ) | Honorable                     |
|                                      | ) | James B. Stewart,             |
| Defendant-Appellant.                 | ) | Judge, Presiding.             |

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JUSTICE CARTER delivered the judgment of the court.  
Justices Holdridge and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The defendant received effective assistance of trial counsel.

¶ 2 After a jury trial, the defendant, Terry P. O'Connor, was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2010)) and speeding (625 ILCS 5/11-601(b) (West 2010)). The trial court sentenced the defendant to two years of court supervision. On appeal, the defendant argues that he was denied the effective assistance of trial counsel where counsel improperly attempted to introduce his medical records under the business records

hearsay exception. We affirm.

¶ 3

### FACTS

¶ 4 On April 13, 2011, the defendant was charged by citation with driving under the influence of alcohol. Prior to trial, the defendant filed a motion *in limine* to bar admission of evidence regarding a portable breath test that he took at the scene. The trial court granted the motion and prohibited the State from admitting evidence of the defendant's acceptance or refusal of the portable breath test.

¶ 5 On October 21, 2012, the case proceeded to a jury trial. Illinois State Police Trooper Marvin Wagle testified that on April 13, 2011, at 12:50 a.m., he observed a gray Ford traveling in front of his patrol car. Wagle observed the Ford cross over the yellow line as if it was going to turn. Wagle clocked the Ford at a speed of 45 miles per hour in a posted 35 miles-per-hour zone. As a result, Wagle stopped and approached the vehicle. Wagle identified the defendant as the driver of the Ford. Wagle noticed that the defendant had watery, bloodshot eyes, slurred speech, and breath that smelled of alcohol. The defendant told Wagle that he had a 24-ounce beer approximately two hours before the traffic stop. Wagle asked the defendant to exit the vehicle to perform field sobriety tests. Wagle did not notice anything unusual about the defendant's movements as he exited the vehicle.

¶ 6 Wagle first conducted the horizontal gaze nystagmus (HGN) test. At the start of the test, the defendant told Wagle that he did not have any eye injuries, but he wore glasses. To conduct the test, Wagle moved his finger in front of the defendant's eyes to determine if the defendant's pupil size was normal and if the defendant's eyes equally tracked his finger. Wagle observed the defendant's eyes for smooth pursuit and noticed that the defendant exhibited a nystagmus—an

involuntary jerking of the eye. Wagle also noticed that the defendant was unsteady while he performed the test. Wagle concluded that the defendant's HGN results indicated impairment.

¶ 7 Next, Wagle asked the defendant to perform the walk-and-turn test. Wagle began by reading the instructions for the test to the defendant. Wagle instructed the defendant to imagine a line on the road, place his left foot in front of his right foot on the imaginary line, and stand in place until directed to move. The defendant was to then take nine heel-to-toe steps down the imaginary line, turn around by keeping his front foot on the line and using his back foot to make several small steps, and take nine heel-to-toe steps back. Wagle physically demonstrated the test for the defendant. Prior to starting the test, the defendant told Wagle that he had a neck injury, but he did not mention that it would affect his ability to perform the test. Wagle did not notice that the defendant's ability to walk was previously affected by this injury. During the instruction phase, the defendant was unable to keep his balance, and he began to perform the test three times before he was instructed to begin. During the performance phase, the defendant stepped off the line on the first nine steps, raised his arms, raised both feet and turned around normally. On the return walk, the defendant stepped off the line and took an incorrect number of steps.

¶ 8 Finally, Wagle had the defendant perform the one-leg stand test. Wagle instructed the defendant to stand with his heels and toes together and his arms at his side. The defendant was to then raise either foot approximately six inches off the ground with his toes pointed out, his legs straight, and while counting aloud "[o]ne thousand one, one thousand two, one thousand three and so on." While the defendant performed the test, Wagle noticed that the defendant swayed, raised his arms up, and put his foot down on three different occasions.

¶ 9 At the conclusion of the defendant's field sobriety tests, Wagle arrested the defendant for

driving under the influence of alcohol. At the Knox County jail, the defendant refused to submit to a breath test. Considering all of his observations, Wagle opined that the defendant's mental and physical faculties were so impaired as to reduce his ability to act with ordinary care.

¶ 10 During Wagle's testimony, the State introduced the video and audio recording of the traffic stop. The recording corroborated Wagle's testimony regarding the defendant's performance of the field sobriety tests.

¶ 11 The defendant testified that on the day of the incident, he had a 24-ounce can of Budweiser before 7 p.m. Around 12 a.m., the defendant awoke from a nap and went to get something to eat. The defendant denied swerving while driving, but admitted that he started to turn into the Circle K and then decided to continue driving to Beck's because it had different pizza. The defendant was driving under 35 miles per hour, and he pulled over immediately after he saw Wagle's overhead lights. The defendant denied slurring his words and stated that he was compliant with Wagle's requests. However, the defendant was worried about his ability to perform the field sobriety tests because he had sustained an injury to his neck in 2007. As a result of the injury, the defendant suffered from four protruding discs in his back that pinched the nerve that ran to his arm, hips, and legs. Consequently, the defendant suffered from tingling in his feet and hands. He stated that the pain affected his ability to walk, but the effect changed on a daily basis depending on the amount of pain.

¶ 12 Defense counsel also had the defendant identify several medical reports that were prepared throughout the course of his treatment. When defense counsel attempted to elicit testimony regarding the contents of the medical reports, the State objected. The court sustained the objection. When the testimony resumed, the defendant stated that he agreed to the field

sobriety tests because he thought that he could at least pass them. The defendant thought he had performed the tests "real good."

¶ 13 On cross-examination, the defendant stated that he did not submit to the breath test because he was not under the influence, and because he thought that he would still be under arrest even if he passed the test.

¶ 14 Outside the presence of the jury, the court stated that it had sustained the State's objections to the defendant's testimony regarding his medical records because defense counsel failed to lay a foundation for the admission of the evidence by calling someone familiar with the business and mode of operation of the business that had generated the records. The defendant made an offer of proof that the records would show that the defendant had an injured vertebrae in his neck, cramping in his left leg, upturned toes on both feet, a degenerating neck condition, and difficulty walking. Afterwards, the case proceeded to closing arguments.

¶ 15 Following deliberations, the jury found the defendant guilty of driving under the influence of alcohol and speeding. The case proceeded directly to sentencing, and the trial court noted that "this was a close case." The court sentenced the defendant to two years of court supervision. The defendant appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, the defendant argues that he was denied the effective assistance of trial counsel because counsel improperly attempted to introduce his medical records under the business records exception to the hearsay rule. The defendant contends that trial counsel's action resulted in prejudice because the evidence was closely balanced.

¶ 18 To prevail on an ineffective assistance of counsel claim, a defendant must show that: (1)

counsel's representation fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish the deficient performance prong, the defendant must overcome the presumption that counsel's action or inaction was the result of trial strategy. *People v. Perry*, 224 Ill. 2d 312 (2007). Decisions about which witnesses to call and which evidence to present are matters of trial strategy that are generally immune from ineffective assistance claims unless counsel's strategy is so unsound that he or she fails to conduct any meaningful adversarial testing. *People v. York*, 312 Ill. App. 3d 434 (2000). Additionally, the defendant must establish that, except for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. 668. Where we do not find the requisite prejudice, we may decide the defendant's claim without analyzing the effectiveness of counsel's representation. *People v. Edgeston*, 243 Ill. App. 3d 1 (1993). We review, *de novo*, whether counsel's failure to call a witness supports an ineffective assistance claim. *People v. Davis*, 353 Ill. App. 3d 790 (2004).

¶ 19 Section 115-5 of the Code of Criminal Procedure of 1963 does not allow the introduction of hospital or medical records as business records in criminal proceedings. 725 ILCS 5/115-5(c)(1) (West 2010). Illinois Rules of Evidence 803(6) and 803(8) exclude medical records from admissibility in criminal cases, but permit the admission of medical records in civil cases. Ill. R. Evid. 803(6), 803(8) (eff. Jan. 1, 2011); see also *People v. Sykes*, 341 Ill. App. 3d 950 (2003). In place of medical records, a party to a criminal proceeding may call the respective authors of the medical reports to testify to the contents of the reports. See *Sykes*, 341 Ill. App. 3d 950 (content of the medical reports which the defendant sought to admit was fully testified to by the respective

authors).

¶ 20 In the instant case, the defendant's trial counsel attempted to lay a foundation for the admission of the defendant's medical records through the defendant's testimony. Both parties admit that trial counsel's attempt to admit the defendant's medical records was erroneous. See 725 ILCS 5/115-5(c)(1) (West 2010); Ill. R. Evid. 803(6), 803(8) (eff. Jan. 1, 2011). However, the defendant has not demonstrated that he suffered prejudice as a result of counsel's error such that the additional evidence would have changed the outcome of the case. While the trial court stated that this was a "close case," Wagle's testimony and the video recording of the traffic stop documented acts of impairment that were not explained by the defendant's medical history. The evidence showed that the defendant was pulled over after he was found to be speeding and he had crossed the yellow line. While talking to the defendant, Wagle noted that the defendant had bloodshot eyes and breath that smelled of alcohol. The defendant also admitted that he drank before the stop. During the sobriety tests, the defendant started the walk-and-turn test three times before Wagle instructed him to begin. The defendant did not follow Wagle's direction when he made his turn in the walk-and-turn test, and he took an incorrect number of steps on his return walk. Finally, Wagle noted that the defendant failed the HGN test, and there was no indication that his injury affected his eyes. Additionally, we note that the defendant notified Wagle of his neck injury, but did not inform Wagle that the injury would impact his ability to perform the tests. In light of this evidence, the outcome of the case would not have been different if the defendant's trial counsel had called his treating physician to testify to his medical records. Therefore, we affirm the defendant's conviction and sentence.

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed.

¶ 23 Affirmed.