

No. 1-12-0622

**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. YP 310-975
	)	
PATRICK T. O'KRONGLEY, JR.,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Howse and Justice Lavin concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Defendant's trial counsel was not ineffective for failing to challenge breathalyzer test results in a pretrial motion rather than at trial; DUI assessments in the fines-and-fees order were excessive.
- ¶ 2 Following a bench trial, defendant Patrick T. O'Krongley, Jr. was found guilty of driving under the influence of alcohol with a blood alcohol content (BAC) of 0.128, and sentenced to an 18-month term of conditional discharge. The court also imposed fines and fees in the amount of \$2,605. On appeal, defendant contends he was denied the effective assistance of counsel when

his trial attorney failed to file a pretrial motion to suppress the results of a breathalyzer test.

Defendant also challenges the total of the fines and fees assessed against him. We affirm defendant's conviction and reduce the fines and fees assessment.

¶ 3 Defendant was charged with driving under the influence of alcohol (DUI), driving with a BAC of 0.08 or more, and improper lane usage. His driver's license was summarily suspended. Defense counsel moved for rescission of the summary suspension, which was denied. The case proceeded to trial, at which the following evidence was adduced.

¶ 4 Officer Tony Ikis of the River Grove Police Department testified that in the early morning hours of September 26, 2009, he stopped defendant's vehicle for improper lane usage after defendant had veered his vehicle into the oncoming lane in which Ikis was driving. Ikis observed on defendant a strong odor of an alcoholic beverage, bloodshot watery eyes, and a flushed face. Ikis asked defendant whether he had been drinking, and defendant said he had had some beers. Ikis administered a battery of field sobriety tests which defendant failed to pass. At the police station, Ikis gave defendant the *Miranda* warnings and observed him for a 20-minute period during which time defendant did not regurgitate or put anything into his mouth. Ikis asked defendant whether he had taken any medications in the previous six hours; defendant replied he had taken amoxicillin and steroids. Ikis administered a test using an Intox EC-IR breathalyzer apparatus, which he was certified to use by the Illinois Department of State Police. The machine was regularly checked for accuracy by a State Police technician and was last certified accurate on September 8, 2009. Ikis did a self-diagnostic test on the machine, and it recorded a value of .000. Defendant submitted to the breathalyzer test and the result showed he had a BAC of 0.128. Ikis formed the opinion that defendant was under the influence of alcohol.

¶ 5 Defendant testified he was 28 years old and a licensed paramedic. Before the officer stopped him, he had had two beers over a five-hour period. He may have veered into the officer's lane when he maneuvered around a pothole. He did not speed or commit any other traffic violation. A week earlier he had been admitted to Our Lady of Resurrection Hospital for treatment of pneumonia and influenza. He had also been in and out of the emergency room for gastroesophageal reflux disease (GERD), which he had had for about 12 years. Between the end of August and mid-September, 2009, he had been to the hospital three times for GERD because it was accompanied by severe chest pains. He took prevacid for GERD, and he used an albuterol inhaler for his asthma and pneumonia. His pneumonia was also treated with a steroid, methylprednisone, and with amoxicillin. Defendant also testified to knee and foot disabilities which affected his ability to do one of the field sobriety tests. About 5 to 10 minutes before defendant was pulled over, he took his albuterol medication, which contained alcohol. At the police station, he was not vomiting but he was regurgitating stomach acid up into his throat; he could feel the burning sensation. He did not tell the police officer about it.

¶ 6 In closing argument, defense counsel contended that defendant's GERD caused him to regurgitate some alcohol that would lead to inaccurate breathalyzer test results. Counsel cited *People v. Bonutti*, 212 Ill. 2d 182 (2004), in which the defendant had moved before trial to exclude the results of his breath-alcohol test from trial on the basis that a GERD episode rendered those tests unreliable. There, the trial court granted the motion on the basis that the defendant had experienced a reflux episode during the 20-minute observation period that may have compromised the results of his breath-alcohol test. The supreme court upheld the trial court's ruling because the section of the Illinois Administrative Code (the Code) regulating the

administering of breathalyzer tests required at that time that if the subject "regurgitates or vomits" within the 20-minute observation period, the process shall start over.<sup>1</sup> *Id.* at 189-91.

¶ 7 In the instant case, the trial court ruled that *Bonutti* was not controlling because, prior to defendant's breath-alcohol test, the regulations for the admissibility of breath tests were amended to exclude regurgitation.<sup>2</sup> The court noted that post-amendment cases hold that regurgitation is no longer a condition for suppression of the breathalyzer results based on noncompliance with section 1286.310(a), but the court may consider whether GERD existed and whether it may have affected the results of a breathalyzer test. The court observed that in the instant case, defendant never told Ikis that he suffered from GERD. The court also ruled that the defense had presented nothing more than mere speculation as to the effects of albuterol and no competent evidence that the use of albuterol could affect the breathalyzer test results.

¶ 8 The court looked at the totality of the evidence, including the State's evidence of defendant's vehicle veering into Ikis's lane, defendant's failed field sobriety tests, his bloodshot watery eyes, flushed face and odor of alcohol, and his admission he had been drinking, as well as defendant's trial testimony. The court concluded that the State had proven defendant's guilt beyond a reasonable doubt. The DUI count was merged into the count of driving with a BAC of 0.08 or more, and defendant was sentenced on that count to 18 months of conditional discharge with conditions, together with fines, fees and costs totaling \$2,605. The court also found defendant guilty of improper lane usage without imposing a fine.

---

<sup>1</sup> 20 Ill. Adm. Code § 1286.310(a), adopted at 25 Ill. Reg. 3023, 3042-43 (eff. Feb. 1, 2001).

<sup>2</sup> Since 2004, the regulations provide that, for a breath test to be admissible, the subject must not have vomited during the 20-minute period. 20 Ill. Adm. Code § 1286.310(a), amended at 28 Ill. Reg. 10017, 10038 (eff. June 30, 2004). The pertinent provision does not mention regurgitation.

¶ 9 Defendant's sole issue on appeal is that his trial counsel was ineffective for failing to challenge the admissibility of the breathalyzer test results before trial by filing a pretrial motion to exclude or suppress the test results, which he claims would have enjoyed a reasonable probability of success.

¶ 10 We note that both the common law record and the report of proceedings before us reveal that more than one year before defendant's trial, defense counsel filed a petition to rescind the summary suspension of defendant's driving privileges. On June 17, 2010, that motion was heard and denied by a judge other than the trial judge. The record on appeal contains no transcript of that hearing. We are unable to determine whether a motion to exclude the results of defendant's breathalyzer test was submitted and ruled on in that proceeding.

¶ 11 To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's representation fell below an objective standard of reasonableness, and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To satisfy the first prong, a defendant must overcome the presumption that counsel's performance was competent and that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). To satisfy the second prong, a defendant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 12 A party may file a motion *in limine* to obtain an order before trial excluding inadmissible evidence. *People v. Ebert*, 401 Ill. App. 3d 958, 960 (2010). The decision whether to file a pretrial motion is considered trial strategy, and trial counsel enjoys a strong presumption that failure to file such a motion was proper. *People v. Morris*, 2013 IL App (1st) 111251, ¶ 116. To

overcome this presumption, a defendant must demonstrate that: (1) the motion had a reasonable probability of success; and (2) the outcome of the trial would have been different if the evidence at issue had been suppressed. *People v. Henderson*, 2012 IL App (1st) 101494, ¶ 8. Trial counsel cannot be found ineffective when the filing of a motion to suppress would have been futile. *Id.*, citing *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 13 When a motorist files a motion *in limine* to bar breath test results, the State is required to establish a sufficient foundation for the admission of the evidence. *People v. Clairmont*, 2011 IL App (2d) 100924, ¶ 12, citing *Ebert*, 401 Ill. App. 3d at 960. The State must establish that the test was performed in accordance with section 11-501.2 of the Illinois Vehicle Code (625 ILCS 5/11-501.2(a) (West 2008)) and according to standards promulgated by the Department of State Police. *Clairmont*, 2011 IL App (2d) 100924, ¶ 12. Those standards are set forth in section 1286.310(a) of the Code. Failure to comply with section 11-501.2(a) and the regulations renders the test results unreliable and, thus, inadmissible. *Clairmont*, 2011 IL App (2d) 100924, ¶ 12. In *Bonutti*, the basis of the defendant's claim was the failure to conduct the breathalyzer test in compliance with the section 1286.310(a) standards.

¶ 14 At trial, defense counsel contended that defendant's breath-test results were inadmissible based on *Bonutti*, where our supreme court ruled the breathalyzer test was not conducted in compliance with section 1286.310(a). Counsel also contended that defendant's use of an albuterol inhaler shortly before he was stopped by Ikis, in addition to his GERD, adversely affected the reliability of the breathalyzer test results. On appeal, defendant asserts that his trial counsel was ineffective for failing to challenge the breathalyzer test results in a pretrial motion, which would have enjoyed a reasonable probability of success.

¶ 15 We disagree with defendant's claim that a pretrial motion would have succeeded, for two reasons. First, before defendant's arrest, "regurgitate" had been omitted from section 1286.310(a). Previously, the applicable regulations provided that a breath test subject shall not have "regurgitated or vomited" during the 20-minute observation period, and if the subject "regurgitates or vomits," the process shall begin again. 20 Ill. Adm. Code § 1286.310(a), adopted at 25 Ill. Reg. 3023, 3042-43 (eff. Feb. 1, 2001). The *Bonutti* court indicated that "reflux" and "regurgitation" were synonymous. *Bonutti*, 212 Ill. 2d at 187. Under the amended regulations applicable to defendant, "regurgitate" no longer indicated a false positive result. Second, the trial court noted that, unlike the defendant in *Bonutti*, defendant here proffered no medical corroboration in support of his claim that he suffered from GERD.

¶ 16 Moreover, there was a sound strategic reason for not challenging the breathalyzer results before trial. If defense counsel had filed a pretrial motion *in limine*, he would have had to call defendant as a witness to testify about his GERD condition to try to establish the testing officer's failure to comply with section 1286.310(a) of the regulations. Critically, defendant's testimony in support of the motion would have subjected him to pretrial cross-examination and possibly have opened defendant's subsequent trial testimony to impeachment with his prior sworn testimony. See *People v. Williams*, 182 Ill. App. 3d 598, 603 (1989), citing *People v. Sturgis*, 58 Ill. 2d 211, 216 (1974). It also would have given the State an opportunity prior to trial to investigate defendant's various claims of medical conditions and treatments.

¶ 17 We conclude that a pretrial motion *in limine* to exclude the breathalyzer test results would have been futile and possibly deleterious to the defense, and that defense counsel's representation of defendant was not deficient by the fact no pretrial motion appears to have been filed.

¶ 18 Defendant complains that the trial court noted during closing argument that the issue had not been presented in a pretrial motion, as was done in *Bonutti*. We note, however, that despite the fact defense counsel had not filed a pretrial motion to exclude the breathalyzer test results, the trial court considered counsel's argument that administrative regulations for administering the test had not been met, as presented in *Bonutti*; the court noted the change in the Code that precluded relief; the court observed that here, unlike *Bonutti*, defendant presented no medical evidence that defendant suffered from GERD; and the court ruled on the issue. Nevertheless, defendant argues that, by waiting until trial, his counsel's attack on the reliability of the test results was ill-timed. We conclude that defendant was not prejudiced by the fact that defense counsel did not challenge the admissibility of the breathalyzer test results before trial, not only because the motion would have failed, but also because he was not precluded from challenging the test results at trial on the basis that the results were inaccurate and unreliable. In *People v. Weidner*, 2014 IL App (5th) 130022, ¶ 18, a DUI case where defendant was transported to a hospital to have his blood drawn for blood-alcohol analysis, we noted

"that the issue before the trial court was the admissibility of the evidence, and its ruling on admissibility would not have prevented the defendant from challenging the accuracy of and the weight to be accorded to the State's evidence regarding the propriety of the [blood sample] collection technique, the lab analyses, and the results, or presenting his own evidence as to those factual matters."

¶ 19 In *Bonutti*, 212 Ill. 2d at 191, the supreme court distinguished between the admissibility of breath-alcohol tests and the reliability of results that are admitted. The trial court observed the same distinction in this case. Defendant appears not to understand that distinction. He asserts

that "Illinois courts continue to recognize that regurgitation can be grounds for suppression." However, the cases he cites in support of that claim deal, not with suppression based on 1286.310(a), but with the accuracy and reliability of test results. *People v. Van Bellehem*, 389 Ill. App. 3d 1129, 1135 (2009) (regurgitation of stomach contents likely to affect the reliability of testing); *Ebert*, 401 Ill. App. 3d at 965 (listing regurgitation among activities compromising a breathalyzer test's accuracy or reliability). Here, defense counsel presented the alternate argument at trial that his albuterol inhaler and/or his GERD may have compromised the accuracy or reliability of the breathalyzer test, even if the testing was in compliance with section 1286.310(a). The trial court rejected that argument.

¶ 20 As defendant's trial counsel challenged both the admissibility and the reliability of the breathalyzer test results, and as a pretrial motion to exclude test results would have been denied, defendant has failed to overcome the presumption that his counsel's performance was competent and that the failure to file a pretrial motion was the product of sound trial strategy. We conclude defendant has failed to demonstrate that his counsel's representation fell below an objective standard of reasonableness.

¶ 21 Next, defendant and the State agree that the imposition of certain fines and a fee was error. A \$1,000 fine/fee for a subsequent DUI offense pursuant to 11-501.01(f) of the Illinois Vehicle Code (the Code) (625 ILCS 5/11-501.01(f) (West 2012)) was erroneously imposed where defendant's DUI conviction here was not a subsequent offense because he had received supervision for a previous DUI charge. A notation on the Order Assessing Fines, Fees and Costs stated: "Old Fines based on Date of Arrest." When defendant was arrested on September 26, 2009, the then-applicable statute mandated an assessment of only \$500 (a \$100 fine subject to

credit and a \$400 fee). 625 ILCS 5/11-501.01(f) (West 2008). Accordingly, defendant must be credited with the additional \$500 he was ordered to pay in error.

¶ 22 It was also error to impose a \$1,000 fine under section 11-501(c)(3) of the Code (625 ILCS 5/11-501(c)(3) (West 2008)). That section authorizes, *inter alia*, a mandatory minimum fine of \$1,000 if the person was transporting a person under the age of 16 at the time of the violation. Defendant was alone in his car, and this subsection did not apply. Consequently, defendant must be credited with \$1,000.

¶ 23 Through a math error, the total of the fines and fees order was entered as \$2,605 but should have been entered as \$2,620. Crediting defendant with a total offset of \$1,500 (\$500 plus \$1,000) leaves a corrected total of \$1,120.

¶ 24 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our authority to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we vacate the \$1,000 fine under section 11-501(c)(3), order that the \$1,000 fine/cost under section 11-501.01(f) be reduced to \$500, and order that the fines and fees order be modified to reflect the correction of the original total to \$2,620, the offset of \$1,500, and a corrected total amount of \$1,120. We affirm the judgment of the trial court in all other respects.

¶ 25 Affirmed; fines and fees order corrected.