FIFTH DIVISION
November 20, 2015

No. 1-13-1650



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 1171 |
| | ) | |
| REGINALD HUBBERT, | ) | Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

**O R D E R**

¶ 1 *HELD:* Applying the appropriate *Strickland* standard to defendant's ineffective assistance claim, defendant failed to establish he was prejudiced by trial counsel's alleged failure to pursue a legally viable defense due to his misapprehension of the law.

¶ 2 Following a bench trial, defendant Reginald Hubbert was found guilty of aggravated fleeing or attempting to elude a peace officer and sentenced to 18 months' imprisonment. On appeal, defendant contends his trial counsel was ineffective for pursuing a non-viable defense due to his misapprehension of the law surrounding the offense.

¶ 3 Defendant was charged with the Class 4 felony of aggravated fleeing or attempting to elude a peace officer (620 ILCS 5/11-204.1(a)(4) (West 2012)). Section 11-204.1 of the Illinois Vehicle Code provides that this offense is committed by the driver or operator of a motor vehicle who flees or attempts to elude a peace officer after being given a visual or audible signal, when such flight or attempt to elude is accompanied by: (1) a rate of speed at least 21 miles per hour over the speed limit; (2) causes bodily injury to any individual; (3) causes damage in excess of $300 to property; (4) involves disobedience of 2 or more official traffic control devices; or (5) involves the concealing or altering of the vehicle's registration plate. *Id.*

¶ 4 At trial, the State argued defendant was guilty of felonious fleeing and eluding as opposed to the misdemeanor offense because he disregarded two stop signs during the commission of the offense. Defendant argued that, at best, he was guilty only of the misdemeanor offense and repeatedly cited the language of the misdemeanor statute.

¶ 5 Section 11-204 of the Illinois Vehicle Code provides a person commits the offense of misdemeanor fleeing or attempting to elude when any driver or operator of a motor vehicle, having been given a visual or audible signal by a peace officer directing the operator to bring the vehicle to a stop, willfully fails or refuses to obey and instead, increases his speed, extinguishes his lights, or otherwise flees or attempts to elude. 625 ILCS 5/11-204(a) (West 2012). The police officer must be in uniform and must use his "Mars lights" in conjunction with an audible horn or siren if driving an official police vehicle, although the officer may give the signal to stop by hand, voice, siren, red or blue light. *Id.*

¶ 6 Prior to trial, the parties attempted to reach a plea agreement with the trial court. After an initial conference, a plea bargain was advanced which provided defendant would receive 18 months of prison time in exchange for his guilty plea. Ultimately, however, defendant rejected

the plea deal, informed the trial court he was not guilty of the offense, and the case was set for trial.

¶ 7 At trial, Chicago police officer Eric Jehl testified that on December 30, 2012, shortly after midnight, he and his partner were called to respond to a battery in progress in the parking lot of a gas station. When the officer arrived at the scene, he observed defendant sitting in the driver's seat of a vehicle arguing with a female passenger. Upon approaching the driver's side window, Officer Jehl identified himself as a police officer and ordered defendant to "exit the vehicle and show [him his] hands." Defendant responded by putting his vehicle into gear and fleeing the scene at a high rate of speed.

¶ 8 Officer Jehl and his partner pursued defendant in their police vehicle with its lights and sirens activated. Instead of pulling over, the officer observed the taillights of defendant's vehicle extinguish and stated defendant continued to drive at a "high rate of speed" through two intersections ignoring the stop signs posted at each. Once defendant passed the intersection of 15th and Hamlin, another police vehicle assisted in defendant's apprehension by driving his vehicle head-on towards defendant's vehicle. Defendant was forced to pull over and subsequently arrested by Officer Jehl.

¶ 9 During cross-examination, defense counsel pointed out several inconsistencies in the officer's testimony. Initially, defense counsel questioned Officer Jehl as follows:

> "Q: Officer, isn't it true that at 15th and Hamlin there's actually a stoplight, not a stop sign?
>
> A: No, at 15th and Hamlin there's an [sic] a stop sign.
>
> * * *

Q: Officer, showing you what I've shown to the State, may I approach, with permission of the Court, a photograph, correct?

A: Yes.

Q: Do you recognize that as the intersection of 15th and Hamlin?

A: No."

¶ 10 After the officer's negative response, defense counsel appeared to abandon this line of questioning and instead confirmed that defendant was never observed to cause bodily harm, cause over $300 in damaged property, nor was he clocked speeding 21 miles per hour over the speed limit.

¶ 11 Defense counsel also elicited testimony from Officer Jehl that he failed to include in his arrest report information regarding the other police vehicle that assisted in defendant's apprehension. The exchange occurred as follows:

"Q: Officer, taking a look at page 3 of the arrest report, is that the narrative section?

A: Yes.

Q: Can you point to the area where you identify the other vehicle and said that it came straight on at the defendant?

A: It says Beat 4531 Davis arrived on scene at 3830 West 16th Street.

Q: Does it say that he came straight on?

A: No.

Q: It doesn't say that he did a U-turn, correct?

A: Correct."

¶ 12 Defense counsel then questioned the officer with regard to the elements necessary to establish the misdemeanor version of the offense.

¶ 13 Defendant declined to testify on his own behalf and presented no additional witnesses.

¶ 14 During closing argument, defense counsel directed the court's attention to the misdemeanor fleeing and eluding statute prompting an exchange between the trial court and the parties as to the specific action that made defendant's behavior felonious. The trial court stated:

> "Q: What do you say makes this a felony, [Assistant State's Attorney]?
>
> A: That he disobeyed two or mo[r]e traffic control devices. The officer testified there was a stop sign.
>
> Q: What about that, [defense counsel]?
>
> A: Judge, with regard to it, he doesn't testify as to anything else associated with it. There's no accident, there's no personal injury accident, there's no testimony with regards to 21 miles per hour. He's alleged to have been in disregard of traffic control devices.
>
> Q: Let me see the statute, please.
>
> ***
>
> Q: Anything else, [defense counsel]?
>
> A: No."

¶ 15 After reviewing the statute the court found defendant guilty of aggravated fleeing and eluding a peace officer. In so finding, the trial court determined the officer was compelling and testified credibly, and sentenced defendant to 18 months' imprisonment with credit for 124 days served.

¶ 16 Defendant contends on appeal that his trial counsel was ineffective because he misapprehended the law which led him to pursue a legally non-viable defense and concede

defendant's guilt. Defendant further argues that counsel's performance was so deficient that the trial itself was presumptively prejudicial because counsel failed to subject the State's case to "meaningful adversarial testing" in accordance with the Supreme Court's holding in *United States v. Cronic*, 466 U.S. 648, 656 (1986). See *People v. Hattery*, 109 Ill. 2d 449 (1985) (applying *Cronic's* presumptively prejudicial exception to ineffective assistance claim). Defendant asserts, in the alternative, that under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's deficient performance prejudiced the outcome of defendant's trial.

¶ 17 In *Hattery*, our supreme court determined that in accordance with *Cronic*, prejudice will be presumed in certain situations that amount to a complete failure by defense counsel to subject the State's case to meaningful adversarial testing. *Hattery*, 109 Ill. 2d at 461. The *Hattery* court determined that counsel's concession of a defendant's guilt amounts to such a failure. *Id.* at 463 (counsel's concession of defendant's guilt was "unequivocal" where counsel referred to capital case as "death penalty case" during guilt-innocence phase and told jury they would find defendant guilty of murder in opening statement). Furthermore, it determined that defense counsel's trial strategy attempting to show that defendant was guilty of murder but undeserving of the death penalty "was totally at odds with defendant's earlier plea of not guilty." *Id.*

¶ 18 Defendant argues, that like *Hattery*, defense counsel failed to test the prosecution's case by conceding his guilt and effectively giving the court no choice but to convict him. See *People v. Salgado*, 200 Ill. App. 3d 550, 552-53 (1990). In support of his contention, defendant cites to defense counsel's declaration during opening statements that defendant was "at best" guilty of a misdemeanor, combined with defense counsel's cross-examination of Officer Jehl regarding aggravating factors for which defendant was not charged, and counsel's elicitation of testimony

regarding the misdemeanor version of the offense that bolstered the prosecution's case. Defendant argues that under *Cronic*, these deficiencies entitle him to a new trial.

¶ 19 In the case at bar, the elements of the offense were simple and the testimony of the police officer, which the trial court found compelling and credible, overwhelmingly established defendant's guilt. Defendant rejected a plea deal and decided to go to trial. Under these circumstances, counsel's strategy was to (1) attack the officer's credibility to the extent possible, and (2) try to convince the trial court to convict defendant of the misdemeanor version of the offense because no one was hurt, no property was damaged, and there was no evidence that defendant was speeding to the extent necessary to constitute a felony.

¶ 20 Our supreme court has repeatedly held that defense counsel is not ineffective for failing to manufacture a defense where none exists. *People v. Nieves*, 192 Ill. 2d 487, 496-97 (2000); *People v. Shatner*, 174 Ill. 2d 133, 148 (1996); *People v. Page*, 155 Ill. 2d 232, 260 (1993); *People v. Ganus*, 148 Ill. 2d 466, 473-74 (1992). In *Nieves*, the supreme court concluded that defendant must still prove ineffective assistance under *Strickland* despite the attorney's advancement of a nonlegal nullification argument where the attorney was attempting to make his best argument in light of his client's lack of a defense. *Nieves*, 192 Ill. 2d at 495; see also *Page*, 155 Ill. 2d at 262 (not ineffective assistance to concede defendant's guilt in opening argument and argue in closing that defendant did not intend to kill the victim where reasonable to believe mitigating offense to voluntary manslaughter was only defense in light of overwhelming evidence against defendant).

¶ 21 We acknowledge that *Nieves* and the other supreme court cases cited above involved jury trials. However, in *People v. Bloomingburg*, 346 Ill. App. 3d 308, 319-21 (2004), this court applied that reasoning to a bench trial. There, the defendant appealed the trial court's ruling from

a bench trial finding him guilty of first degree murder, contending his trial counsel was ineffective because he conceded defendant's guilt and pursued an unavailable self-defense theory which left the trial court no other choice but to find him guilty. This court held that although the defense pursued by trial counsel was unavailable to the defendant, trial counsel was not ineffective for " ' [using] his imagination and resourcefulness to come up with something where he had nothing to go on,' " and applied *Strickland* when holding the defendant did not prove ineffective assistance. *Id.* at 321, citing *Ganus*, 148 Ill. 2d at 474.

¶ 22 We accordingly reject defendant's argument that this case falls under the *Cronic*/*Hattery* line of case law, and conclude that under *Strickland*, he must prove that he was prejudiced by his attorney's representation. *Strickland*, 466 U.S. at 688, 694 (defendant alleging ineffective assistance must establish counsel rendered deficient performance and that defendant was prejudiced because of such performance).

¶ 23 Prejudice means a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Simpson*, 2015 IL 116512, ¶ 35. If the claim may be disposed of on grounds that defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 24 Here, defendant was faced with the uncontradicted and overwhelming testimony from Officer Jehl that defendant violated the fleeing and eluding statute and disobeyed at least two or more traffic signals when he ignored the police officer's instructions to step out of his vehicle and instead increased speed, extinguished his lights, and drove at a high rate of speed through at least two controlled intersections. See 625 ILCS 5/11-204(a) (West 2012); 625 ILCS 5/11-204.1 (West 2012). The trial court also found the officer was a compelling and credible witness,

despite counsel's attempts at impeachment regarding the presence of traffic control signals or regarding inconsistencies in the arrest report, nor was defendant able to provide an alternate version of events for the court to consider. As such, we cannot conclude the outcome at trial would have been different to establish prejudice sufficient to prove ineffective assistance in light of the overwhelming evidence of defendant's guilt.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.