2018 IL App (2d) 160352-U
No. 2-16-0352
Order filed July 16, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD E. MANRING, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 12-CF-124 Honorable C. Robert Tobin III, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was ineffective for not objecting to the State's improper evidence that defendant invoked his rights to silence and to counsel: counsel's inaction had no strategic basis, and, given that the evidence of defendant's identity was not overwhelming, there was a reasonable probability that it affected the outcome; we reversed and remanded for a new trial.

¶ 2 Following a jury trial, defendant, Richard E. Manring, was convicted of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(B) (West 2012)) and aggravated driving while his license was revoked (*id.* § 6-303(d-3) (West 2012)). He appeals, contending that his attorney was ineffective for failing to object to testimony about his postarrest

silence, his invocation of the right to counsel, and his refusal to perform field sobriety tests after receiving *Miranda* warnings. We reverse and remand.

¶ 3 At trial, Ryan Heiden testified that he was driving home from work during the early morning hours of May 31, 2012, on Poplar Grove Road approaching its intersection with Squaw Prairie Road. The area was very dark. At approximately 12:55 a.m., a westbound vehicle on Squaw Prairie ran a stop sign and hit Heiden's truck, which flipped over and came to rest in a ditch. The driver of the other vehicle did not stop. Heiden escaped with only minor injuries.

¶ 4 Anthony Grano was driving east on Squaw Prairie Road at approximately 12:55 a.m. when he saw a blue Ford Explorer approaching. The Explorer stopped momentarily at a stop sign, started again, and collided with a pickup in the intersection. The Explorer stopped for a second before driving off. Grano turned around and followed it. He called the police and described the Explorer's route. He did not see it driving erratically. The Explorer eventually stopped at Altamore's, an auto repair shop. After pulling into a parking spot, the driver got out and "wandered out." Grano described the driver as heavyset, between 5'9" and 6 feet tall, wearing denim shorts and a dark T-shirt. Grano did not notice any facial hair on the driver. He could not identify the driver in court.

¶ 5 Sergeant Edward Krieger of the Boone County Sheriff's Department was the first officer to arrive at Altamore's. He searched the immediate area but did not find anything. While waiting for backup, he noticed that the Explorer was unlocked. He opened the door and saw a half-full bottle of beer in the center console. He found two sealed bottles, but no empties. The vehicle also contained various documents with defendant's name, but police could not immediately locate the vehicle's driver. Krieger found a cell phone and, by calling contacts, learned that the vehicle was registered to Dawn Mounds.

¶ 6 Deputy Michael Schwartz was patrolling the area around 7:30 a.m. Despite heavy rain, he saw a man wearing jeans and a dark sweatshirt walking along the road. The man, defendant, said that he was on his way home. He had been at a party with friends and was walking because he had car trouble.

¶ 7 Schwartz said that defendant's arms and hands were scratched, his eyes were red and glassy, and he smelled of alcohol. However, he had no problems walking or talking.

¶ 8 Schwartz discovered that defendant had an unrelated warrant, so he arrested him. The prosecutor asked Schwartz, "While en route to the patrol office did you take notice of anything? Were there any statements from the defendant, anything of that nature?" Schwartz answered, "No, sir."

¶ 9 Deputy Rich McGill interviewed defendant at the station. McGill observed that defendant was about 5-feet-4-inches tall and had a goatee. He was wearing a white shirt. McGill read defendant the *Miranda* warnings and told him that he would be charged with driving on a revoked license and leaving the scene of an accident. Defendant said that he was not driving. He explained that he left the Explorer at a house he was working on and that it must have been stolen.

¶ 10 The prosecutor asked, "What happened at that point?" McGill answered, "He said he wanted a lawyer, and he wasn't going to cooperate any further."

¶ 11 McGill then asked defendant if he wanted to perform field sobriety tests. Defendant refused. He did take a breath test. McGill opined that defendant was not intoxicated at the time of the interview.

¶ 12 Christopher Morgan testified that he often "hung out" with defendant. In the early morning of May 31, 2012, he woke up in his garage with two officers and his mother yelling at

him. He had been drinking the previous night, but he had no idea whom he had been drinking with.

¶ 13 Defendant's father, Richard Manring Sr. testified that the Explorer belonged to Mounds, defendant's girlfriend. Mounds was living in Florida in 2012 but the Explorer was kept at the defendant's grandparents' property in Garden Prairie. On May 30, 2012, defendant said that he was going out with Morgan. Manring Sr. heard a car arrive and pick up defendant, but he did not see who was driving it.

¶ 14 The jury found defendant guilty and the court sentenced him to 30 months' probation and 180 days in jail. Defendant timely appeals.

¶ 15 Defendant contends that his attorney was ineffective for failing to object to testimony about his postarrest silence and request for counsel, and testimony that he refused to perform field sobriety tests after receiving *Miranda* warnings. A defendant is guaranteed the effective assistance of counsel at trial. *People v. Simms*, 192 Ill. 2d 348, 361 (2000). To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged *Strickland* test. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). First, a defendant must prove that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. To establish a deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Id.*

¶ 16 Second, a defendant must establish prejudice by demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the

proceeding's outcome. *Id.* at 362. Where, as here, the claim of ineffective assistance was not raised in the trial court, our review is *de novo. People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 17 Defendant identifies three areas of improper testimony to which his trial counsel failed to object. First, the prosecutor asked Schwartz whether there were "any statements from the defendant," to which Schwartz replied that there were not.

¶ 18 Citing, *inter alia*, *Doyle v. Ohio*, 426 U.S. 610 (1976), defendant argues that evidence of his postarrest silence was inadmissible. In *Doyle*, the Court observed that, because an officer is required to immediately advise an arrestee of his right to remain silent, an arrestee's subsequent silence is "insolubly ambiguous" in that it may be nothing more than an invocation of that right. *Id.* at 617 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). Moreover, "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings," and it would thus be "fundamentally unfair and a deprivation of due process" to allow a person's silence to be used against him. *Id.* at 618.

¶ 19 The State responds that *Doyle* forbids using postarrest silence for impeachment and that, as defendant did not testify, the testimony was admissible and, accordingly, counsel was not ineffective for failing to object. We disagree.

¶ 20 Illinois courts have long held, as a matter of evidentiary law, that evidence of a defendant's postarrest silence, whether before or after receiving *Miranda* warnings, is inadmissible in the prosecution's case-in-chief. *People v. Strong*, 215 Ill. App. 3d 484, 488 (1991); see also *People v. Quinonez*, 2011 IL App (1st) 092333 ¶ 26. This is so because a defendant's exercise of his rights " 'has no tendency to prove or disprove the charge against him, thus making evidence of his refusal neither material or relevant to the issue being tried.' " *Id.*

(quoting *People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962)). This court has held that admission of testimony similar to that in this case during the prosecution's case-in-chief was reversible error. *People v. Malkiewicz*, 86 Ill. App. 3d 417, 420-21 (1980). Further, in *People v. Moore*, 279 Ill. App. 3d 152, 157 (1996), counsel was deemed ineffective for, *inter alia*, failing to object to evidence of the defendant's postarrest silence.

¶ 21 Moreover, the Supreme Court has strongly suggested that such testimony is inadmissible in the State's case-in-chief. In *Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986), the Court held that evidence of the defendant's post-*Miranda* silence and request for counsel was inadmissible in the State's case-in-chief to prove the defendant's sanity. Under Florida law, once a defendant raised a reasonable doubt about his sanity, the State had the burden of proving sanity beyond a reasonable doubt. *Id.* at 286 (citing *Farrell v. State*, 101 So. 2d 130, 133 n.1 (Fla. 1958)). The Court observed that the constitutional violation might be "especially egregious" (*id.* at 292 n.8) because the evidence was used as affirmative proof, not impeachment. At least two courts have interpreted *Greenfield* as barring use of a defendant's silence as substantive evidence of guilt. See *People v. Shafier*, 768 N.W.2d 305, 310-11 (Mich. 2009); *State v. Leach*, 807 N.E.2d 335, 339-40 (Ohio 2004); see also *Miller v. State*, 189 A.2d 635, 636 (Md. 1963). Thus, here evidence that defendant made no statement while en route to the police station was inadmissible in the State's case-in-chief.

¶ 22 Second, defendant complains that counsel failed to object to McGill's testimony that he invoked his right to counsel. Like postarrest silence, testimony about a defendant's invocation of his right to counsel is a violation of due process. *Greenfield*, 474 U.S. at 292. In *People v. Lucas*, 132 Ill. 2d 399, 431-32 (1989), the court explained that the rights should be treated similarly as both were guaranteed by *Miranda*. Thus, the court held that admitting evidence that the

defendant asked to speak to an attorney was error, albeit harmless under the specific facts of that case. *Id.* at 432.

¶ 23 Defendant finally contends that his attorney should have objected to testimony that he refused field sobriety tests after receiving the *Miranda* warnings. Defendant cites *People v. Eghan*, 344 Ill. App. 3d 301 (2003), where we held that the trial court erred in allowing evidence that the defendant, after receiving *Miranda* warnings, refused a drug test. We held that the limited probative value of such evidence was outweighed by its significant prejudicial effect, as it "allowed the State to argue that defendant's attempt to exercise his rights indicated that defendant knew he was guilty of the charged offense." *Id.* at 312.

¶ 24 Defendant contends that the field sobriety tests here are the functional equivalent of the drug test in *Eghan* and that counsel should have objected to that evidence. However, we need not decide whether *Eghan* should be extended to cover the post-*Miranda* refusal to submit to field sobriety tests, as we agree with defendant that (1) clear precedent exists to establish that counsel's performance was deficient for failing to object to evidence of his silence and request for counsel, and (2) there is a reasonable probability that, but for these two errors, the result of the trial would have been different.

¶ 25 The evidence in this case was almost entirely circumstantial. No one directly placed defendant behind the wheel of the Explorer at the time of the collision with Heiden's car. Grano, who followed the Explorer after the accident, observed no erratic driving. Moreover, his description of the person he saw getting out of the car varied in significant respects from defendant's actual appearance. He described the driver as 5-feet-9 to 6 feet tall and wearing a dark shirt. He did not notice facial hair. Defendant, by contrast, is 5-feet-4, had a distinctive goatee, and, at least at the time of his booking photo, wore a white shirt. Grano could not identify

defendant in court. McGill, who interviewed defendant the following morning, did not believe that he was intoxicated at that time. Defendant passed a breath test. The car was not registered to defendant. Defendant's statement that he was walking home because he had had car trouble is ambiguous. It is not clear whether the car trouble occurred before he began driving or resulted from the accident.

¶ 26 Thus, the evidence, while sufficient to prove defendant's guilt beyond a reasonable doubt (see *People v. Lopez*, 229 Ill. 2d 322, 367-68 (2008)), was not so overwhelming that we can say confidently that the improper evidence made no difference.

¶ 27 The judgment of the circuit court of Boone County is reversed and the cause is remanded for a new trial.

¶ 28 Reversed and remanded.