2019 IL App (1st) 171825-U

No. 1-17-1825

Order filed February 7, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 C3 30282
	)	
STEVEN MINOGUE,	)	Honorable
	)	James Karahalios,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated driving under the influence of alcohol is affirmed over his contentions that: he received ineffective assistance of trial counsel based on counsel's failure to file a motion to quash his arrest and suppress evidence; and the State failed to prove the elements of the crime beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Steven Minogue was convicted of aggravated driving under the influence of alcohol and sentenced, based on his background, as a Class 1 offender to five years' imprisonment. On appeal, defendant contends that his trial counsel was ineffective for

failing to file a motion to quash his arrest and suppress evidence and that he was not proven guilty beyond a reasonable doubt. We affirm.

¶ 3 Defendant was charged, by information, with three counts of aggravated driving under the influence of alcohol: two counts under section 11-501(a)(1) and one count under section 11-501(a)(2) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(1), (2) (West 2016)). Counts 1 and 2 alleged that defendant drove or was in actual physical control of a motor vehicle while the alcohol concentration in his blood or breath was 0.08 or more in violation of section 11-501(a)(1). Count 3 alleged that defendant drove or was in actual physical control of a motor vehicle while under the influence of alcohol in violation of section 11-501(a)(2). For count 1, the State sought to sentence defendant as a Class 1 offender based on him having committed four previous violations of section 11-501(a) and at the time of the violation the alcohol concentration in his blood, breath or urine was 0.16 or more. For counts 2 and 3, the State sought to sentence defendant as a Class 1 offender based on him having committed four previous violations of section 11-501(a). Defendant waived his right to a jury trial and the case proceeded to a bench trial.

¶ 4 The facts adduced at trial show that on January 16, 2016, at approximately 12:11 a.m., Illinois State Trooper Michael Cortez, who was patrolling Interstate 90 (I-90), received a call of a crash at milepost 67 near Roselle Road. When Cortez arrived on the scene, he saw a sport utility vehicle (SUV) on the left shoulder of a construction area. The SUV had damage to the undercarriage and the front driver's side. Cortez spoke with the driver of the SUV then proceeded west bound to a Dodge pickup truck that was less than a quarter of a mile away on the right shoulder of the road. Cortez saw a tollway help truck behind the pickup truck. Cortez spoke

with the driver of the tollway truck, and he then went to the pickup where he saw damage to the front passenger side and that the front tire was missing. Cortez testified that the damage to the pickup truck looked as if it had struck a fixed object.

¶ 5 Cortez approached defendant, who was standing outside the pickup truck, and asked "what happened." Defendant replied "I shouldn't have gotten so close to the side but I did." Cortez asked defendant where he was coming from and to where he was travelling. In speaking to defendant, Cortez detected a strong odor of alcohol and noticed that defendant's eyes were bloodshot and glassy, and his speech was slurred. Cortez asked defendant to sit in his police car while he finished the crash investigation form. While defendant was seated in the police car, Cortez noticed the same strong odor of alcohol and that defendant's eyes were bloodshot and glassy, and his speech was slurred. Defendant's pickup truck was inoperable and had to be towed. Cortez asked defendant for the keys to the vehicle. Defendant retrieved the keys from his pocket and handed them to either Cortez or Trooper Knight. Believing that defendant may be under the influence of alcohol, Cortez transported him to a tollway maintenance garage in order for defendant to perform a field sobriety test. Cortez's patrol car was equipped with a dashboard video camera that recorded his arrival at the scene and his interactions with defendant.

¶ 6 The first field sobriety test Cortez administered to defendant was the horizontal gaze nystagmus test (HGN). Cortez explained that during this test he looks for involuntary movement in the eye. Cortez had performed this test many times before and received certification in administrating the HGN test. While performing the test on defendant, Cortez noticed defendant's eyes did not have smooth pursuit and that they "moved in segments." Cortez also noticed involuntary movement of defendant's eyes, indicating alcohol consumption. Defendant became

more argumentative as the test went on and he refused to perform any other field sobriety test. Cortez placed defendant under arrest and transported him to the State Police Zone 4 office for processing.

¶ 7 At the police station, Cortez read defendant the "warning to motorist form" that informed him what would happen regarding his driver's license if he refused to submit to a breathalyzer test. Defendant refused to sign the form but agreed to take the breathalyzer test. Cortez had been certified in administering the breathalyzer. Before defendant blew into the breathalyzer, Cortez observed defendant for 33 minutes to determine if he vomited, ingested alcohol, or had anything to eat that would affect the results of the breathalyzer. The breathalyzer was certified and accurate on the day defendant took the test. Defendant blew into the breathalyzer and his blood alcohol content (BAC) was .166. Cortez testified the legal limit for driving in Illinois is .08. Cortez opined, based on his experience, that defendant's driving abilities were impaired by the use of alcohol because of the "strong odor of an alcoholic beverage coming from his breath," the results of the field sobriety test, and the results of the breathalyzer test.

¶ 8 On cross-examination, Cortez acknowledged he never observed defendant drinking alcohol, or driving and being in control of the pickup truck. Based on the time of the call that he received regarding the crash and his arrival on the scene, Cortez was of the "assumption" that defendant was behind the wheel of the pickup truck when he crashed. Cortez did not know what defendant had to drink or how many drinks he had consumed that evening. Cortez observed nothing unusual about defendant's balance, walking or turning and he understood what defendant was saying. Cortez asked defendant if he had been drinking before the accident and he responded that he had not been drinking. With regard to the field sobriety test, Cortez

acknowledged that involuntary eye movement in the HGN test could be caused by a bump on the head from a car accident and that "nystagmus" can be found in 20 percent of the population. Cortez testified he knew that defendant had been involved in an accident that evening but defendant never complained he was injured. Defendant took the breathalyzer at 1:54 a.m., approximately two hours after Cortez first encountered defendant. Cortez stated it appeared defendant became more intoxicated as time passed and acknowledged that it could not be determined what defendant's BAC was at the time of the accident.

¶ 9 On re-direct examination, Cortez testified defendant never told him that he had been drinking that evening. Defendant also denied driving the pickup truck and never told Cortez who was driving it.

¶ 10 Illinois State Police trooper Jason Knight testified that on January 16, 2016, he was on duty and assisted trooper Cortez by staying with defendant's pickup truck and waiting for a tow truck to arrive. Knight did not see any beer cans or liquor bottles around defendant's vehicle or at the scene of the accident. Knight testified that he would have noted the presence of liquor bottles and cans in his police report. He acknowledged that defendant's pickup truck was inoperable. At the conclusion of Knight's testimony, the State introduced the dashboard camera video from Trooper Cortez's patrol car.

¶ 11 Defendant filed a motion for directed finding and the court heard arguments from the parties. The court granted defendant's motion as to count one, finding that there was no proof that defendant's BAC was .166 at the time he was driving. The court denied defendant's motion as to counts two and three.

¶ 12 Robert Clement testified that on January 15, 2016, defendant was doing work on Clement's home in Long Grove, Illinois. When defendant completed the job, Clement and defendant went to his shop in Chicago at about 5 or 6 p.m. They then went to a restaurant for dinner and met a few friends. Clement, who was sitting next to defendant at the restaurant, testified that defendant was drinking with his meal but he was not drinking an alcoholic beverage. They finished dinner about 9 p.m. and defendant gave Clement a ride home. They arrived at Clement's home about 10 p.m. and defendant stayed for about an hour. Defendant left at approximately 11 p.m. Clement testified that in the time he spent with defendant, he did not see defendant drink any alcohol nor did defendant appear to be intoxicated.

¶ 13 On cross-examination, Clement acknowledged that Coca Cola is defendant's normal drink, but that he did not know if there was alcohol in defendant's drink at the restaurant. Clement did not see alcohol in defendant's pickup truck.

¶ 14 Defendant testified that he is a remodeling contractor and on January 15, 2016, he was at Robert Clement's home, remodeling the kitchen. Defendant arrived at the home at 9 a.m. and left sometime after 3 p.m. Defendant went with Clement to his warehouse in Chicago and arrived between 4 and 5 p.m. After defendant finished picking out the tools he needed, he went with Clement and a few other individuals to a restaurant to have dinner. Defendant testified he did not have anything to drink at the restaurant including water. Defendant drove Clement home after the meal and they arrived at the house about 10 p.m. Defendant stayed at Clement's house until approximately 11 p.m. As defendant was driving home on "frontage road" near Meacham, another car attempted to merge into his lane. Defendant had to slow down so he would not hit the car merging. Defendant drove his pickup to the right side of the road and he hit the barricade or

guardrail. His airbag deployed and his front tire came off of the vehicle. Defendant could not steer the vehicle due to the missing front tire. The passenger fender and quarter panel was "squished" and the window on the passenger side was broken out. Defendant pulled onto the shoulder and shut off his engine. Defendant tried to start the engine to no avail.

¶ 15 Because defendant could not start his truck and the passenger window was broken out, he did not sit inside the truck. Defendant testified the night was very cold and the temperature was in "the teens." He was wearing a light jacket and had a wind breaker in his truck. Defendant remembered that, inside his truck, he had homemade alcohol in water bottles that he was planning to give as gifts. Defendant described the alcohol as "harder than hard cider." In an effort to stay warm, defendant drank "pretty much" all the bottles of cider. Defendant testified he was worried about explaining the homemade liquor to the police. About midnight a "help truck" from the State Police arrived but defendant "didn't get any help from him." A State Trooper arrived and began asking defendant questions. Defendant testified he was not drinking at the time of the accident. He admitted that from the time he started drinking until the time the officer arrived he "definitely felt the impairment" and felt more intoxicated as the night wore on.

¶ 16 After hearing arguments from both the State and defense counsel, the court noted that the issue in the case was not that defendant was driving the vehicle, but whether or not defendant was under the influence of alcohol at the time he was driving. In addressing defendant's argument that he consumed the alcohol after the crash while waiting for help, the court found "the officers testified there was no alcohol in the truck, there was no alcohol around the truck at the scene. Both troopers surveyed the scene and found no containers. And I saw the second officer actually looking around the scene with a flashlight on the passenger side of the truck and

on the shoulder and in that entire area. So there were not alcohol containers there." The court ultimately found defendant guilty of two counts of aggravated DUI (counts 2 and 3). In doing so, the court noted that it believed the officer's testimony and that "I was moved by what I saw—greatly moved by what I saw on the DVD: [defendant's] attitude, his evasiveness, his combativeness, his not telling the truth, which I felt he didn't tell on the stand."

¶ 17 Defendant filed a motion for new trial, which the court denied. After hearing arguments in aggravation and mitigation, the court sentenced defendant on count 2 to five years' imprisonment based on his four prior convictions for driving under the influence of alcohol. Defendant's motion to reconsider his sentence was denied.

¶ 18 On appeal, defendant first contends that his trial counsel was ineffective for failing to file a motion to quash his arrest and suppress evidence—principally, the results of his breathalyzer test.

¶ 19 Claims of ineffective assistance of counsel are evaluated under the two-prong approach set forth in *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *People v. Givens,* 237 Ill. 2d 311, 330-31 (2010). To prevail on a claim of ineffective assistance of counsel, a defendant must show that "counsel's performance fell below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson,* 2013 IL 114040, ¶ 11. Defendant must satisfy both prongs to establish ineffective assistance of trial counsel. *People v. Everhard,* 405 Ill. App. 3d 687, 698 (2010). A failure to establish either *Strickland* prong precludes a finding of ineffective assistance of counsel. *People v. Henderson,* 2013 IL 114040, ¶ 11.

¶ 20 "Where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 11. "Meritorious" means that the unargued motion "would have succeeded." *Id.* ¶ 12. A reasonable probability that the outcome would have been different occurs when the "probability is sufficient to undermine confidence in the outcome." *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 21 The decision of whether to file a pretrial motion to suppress is considered a matter of trial strategy and counsel's decision is accorded great deference. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). "As a general rule, matters of trial strategy, such as whether to file a motion to suppress are immune from claims of ineffective assistance of counsel." *Id*. Although another attorney may have chosen a different trial strategy, that fact alone does not establish ineffective assistance of counsel. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). "Counsel is not required to make futile motions in order to provide effective assistance." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 28. If filing a motion to suppress would have been futile, it is axiomatic that failing to file such a motion would not constitute ineffective assistance of counsel. *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010).

¶ 22 Defendant argues that he was prejudiced when his trial counsel failed to file a motion to quash his arrest and suppress the results of the breathalyzer. Defendant claims that a motion to suppress the breathalyzer test would have been meritorious because Cortez lacked probable cause to place him under arrest since all the evidence Cortez had was that defendant consumed

alcohol at some point during the evening and was involved in a single car accident. Defendant maintains that had the evidence of the breathalyzer been excluded, he would have been found not guilty.

¶ 23 The State responds that defendant cannot establish that he was prejudiced by counsel's failure to file the motion to suppress where the evidence presented at trial showed that defendant's arrest was legal and thus the motion would not have been meritorious. We agree with the State.

¶ 24 The existence of probable cause is determined at the time of the arrest and depends on whether the facts known to the police officer at that time are sufficient to lead a reasonable cautious person to believe that the arrestee has committed a crime. *People v. Love,* 199 Ill. 2d 269, 279 (2002). The existence of probable cause is based on the totality of the circumstances at the time of the arrest, and that determination is governed by common sense considerations. *People v. Jackson,* 232 Ill. 2d 246, 275 (2009).

¶ 25 Here, we find that defendant was not prejudiced by counsel's failure to file the motion to suppress because the motion would not have been meritorious. That is to say that the totality of the circumstances at the time of the arrest shows that Cortez had probable cause to believe that defendant committed a crime. When Cortez responded to the scene of the accident he observed that defendant's truck looked as if it had struck a fixed object. Cortez spoke with defendant and asked him about the accident. Defendant replied "I shouldn't have gotten so close to the side but I did." In speaking with defendant on the side of the road, Cortez detected a strong odor of alcohol and noticed his eyes were bloodshot and glassy. Defendant was also slurring his speech. After the pair relocated to Cortez's police car, Cortez again noticed: the same strong odor of

alcohol; that defendant's eyes were bloodshot and glassy; and his speech was slurred. Believing defendant may be under the influence of alcohol, Cortez administered the HGN field sobriety test to defendant. During the test, Cortez observed that defendant's eyes moved involuntarily and did not follow in a smooth manner, indicating defendant had consumed alcohol. Cortez then placed him under arrest. Based on the totality of these circumstances, Cortez had probable cause to arrest defendant for driving under the influence of alcohol**.** See *People v. Montgomery*, 112 Ill. 2d 517, 525 ("Whether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt."). Accordingly, given that defendant's arrest was lawful, a motion to suppress would not have been meritorious and thus defendant was not prejudiced by counsel's failure to file the motion.

¶ 26 Defendant next contends that the State failed to prove him guilty beyond a reasonable doubt because there was no evidence to contradict his testimony that he consumed the alcohol after the accident.

¶ 27 The standard of review on a challenge to the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Lloyd*, 2013 IL 113510, ¶ 42. The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, resolving any conflicts in the evidence and drawing reasonable inferences therefrom. *People v. Hutchinson*, 2013 IL App (1st) 102332, ¶ 27; *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). As such, "a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of

witnesses." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A reviewing court will only reverse a criminal conviction when the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Moreover, when a conviction depends on eyewitness testimony alone, the reviewing court may find the testimony to be insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001).

¶ 28 In this case, defendant was found guilty of two counts of aggravated driving under the influence of alcohol for violating sections 11-501(a)(1) (count 2) and 11-501(a)(2) (count 3). In order to sustain defendant's conviction under count 2, the State was required to prove beyond a reasonable doubt that he drove or was in actual physical control of a motor vehicle while the alcohol concentration in his blood or breath was 0.08 or more. 625 ILCS 5/11-501(a)(1) (West 2016). Where, as in this case, breathalyzer results are presented at trial and show that the alcohol concentration in defendant's breath was over the legal limit, proof of impairment is not necessary to establish a violation of section 11-501(a)(1). *People v. Martin*, 2011 IL 109102, ¶ 26; *People v. Ikerman*, 2012 IL App (5th) 110299, ¶ 50. In order to sustain his conviction under count 3, the State was required to prove beyond a reasonable doubt that defendant was: (1) in actual physical control of a vehicle; and (2) under the influence of alcohol at the time. 625 ILCS 5/11-501(a)(2) (West 2016); *People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009) (the State must prove each element of an offense beyond a reasonable doubt).

¶ 29 Here, defendant does not dispute that he was driving, nor does he dispute that he consumed alcohol. Rather, his only contention is that he consumed the alcohol after his vehicle became disabled.

¶ 30 After viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the elements of both counts of aggravated driving under the influence of alcohol beyond a reasonable doubt. Stated differently, the trier of fact could reasonably infer, based on the evidence presented, that defendant was driving under the influence of alcohol and at the time the alcohol concentration in his breath was 0.08 or more. Cortez testified he responded to a call of an accident and observed defendant's disabled vehicle that was missing one of its front tires. Cortez spoke with defendant at the scene and defendant acknowledged that he was driving and hit a barricade or guardrail. As Cortez spoke with defendant, he smelled a strong odor of alcohol on defendant's breath. Cortez also noticed that defendant's eyes were bloodshot and glassy and defendant slurred his speech. See *Morris*, 2014 IL App (1st) 130512, ¶ 20 (the credible testimony of an arresting officer by itself can sustain a conviction of driving under the influence and evidence of the odor of alcohol on defendant's breath, and that his eyes were bloodshot and glassy are all relevant factors to a conviction). In addition, defendant failed the HGN field sobriety test and the results of his breathalyzer were .166. This evidence, and reasonable inferences therefrom, were sufficient for rational trier of fact to concluded that defendant was driving under the influence of alcohol and that, at the time, his BAC was 0.08 or more.

¶ 31 Although defendant testified that he consumed homemade alcohol from plastic water bottles after the crash, the troopers testified that a search of defendant's vehicle and the

surrounding area did not produce evidence of bottles containing alcohol or discarded liquor bottles. In announcing its finding, the court expressly rejected defendant's claim that he threw the empty bottle back into his truck, finding "there were no alcohol containers of any kind in that truck that's homemade, that's anything else. There just weren't." This credibility determination was a question for the trier of fact to resolve based upon its assessment of witness credibility and the evidence presented at trial. *People v. Morris*, 2014 IL App (1st) 130512, ¶ 20. As mentioned, this court will not substitute its judgment for that of the trier of fact on this issue and we will not reverse a criminal conviction unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 224-25; *Beauchamp*, 241 Ill. 2d at 8. This is not one of those cases.

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.