2012 IL App (1st) 102628-U

FOURTH DIVISION
September 20, 2012

No. 1-10-2628

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. 10 CR 3266
	)	
TOMAS HAVLICEK,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court. Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not violate defendant's confrontation right by admitting breathalyzer log books and permitting the testimony of an officer who did not personally certify the accuracy of the machine; defendant's trial counsel was not ineffective for failing to challenge the admission of testimony regarding the results of a field sobriety test for lack of foundation, particularly where any error in admitting the testimony was harmless.

¶ 2 Following a bench trial, defendant, Tomas Havlicek, was convicted of aggravated driving under the influence (DUI) and sentenced to three years in prison. On appeal, defendant first contends that his Sixth Amendment right to confront the witnesses against him was violated where the State introduced breathalyzer log books through the in-court testimony of an officer

who did not conduct the accuracy certifications. Second, defendant contends his trial counsel was ineffective for failing to challenge the admission of the horizontal gaze nystagmus field sobriety test ("HGN test") for lack of proper foundation. We affirm the trial court's judgment.

¶ 3 Officer Bergadon testified that on February 1, 2010, at approximately 11:46 p.m. he was on patrol with his partner Officer Kehl and observed defendant's Volkswagon go through a stop sign in the area of 3334 North Lavergne. Defendant stopped when Bergadon activated his emergency light. Bergadon smelled a strong odor of an alcoholic beverage on defendant's breath while speaking to defendant. Defendant's speech also appeared to be a little impaired. Although defendant spoke with an accent, Bergadon believed the impairment he heard was not solely attributable to his accent. Defendant was placed in the back of Bergadon's vehicle. Officer Travis was then called to the scene to take over the DUI investigation. On cross-examination, Bergadon testified that defendant properly curbed his vehicle and that he was unsure of how much alcohol defendant drank.

¶ 4 Officer Kehl testified that upon running a check on defendant's name and date of birth, he learned that defendant's driver's license was revoked for DUI. On cross-examination, Kehl confirmed that the defendant ran the stop sign at approximately 11 p.m.

¶ 5 Officer Travis testified that he also noticed the strong odor of alcohol on defendant's breath when he spoke to defendant. Defendant's eyes were red, his speech was slurred, and he veered to the right while walking on the sidewalk. When Travis asked whether defendant had been drinking, defendant responded that he drank three or four beers a short time earlier.

¶ 6 Travis is certified to administer field sobriety tests. He administered a horizontal gaze nystagmus test ("HGN test"), a walk and turn test, a one leg stand test, and a finger to nose test. Defendant agreed to take all of the tests and verbally confirmed that he understood the

instructions to each test. Defendant failed each test that Travis administered. In Travis' opinion, defendant was driving while under the influence of alcohol.

¶ 7 Travis then transported defendant to the police station where Travis read defendant "Warnings to Motorist" and defendant agreed to take a breath test. Travis then observed defendant for 20 minutes; defendant did not drink or eat anything during this time. Travis was licensed to administer the breath test. Prior to testing defendant's breath, Travis observed the breath machine conduct a diagnostic self-check and indicate that there was no presence of alcohol in the machine. He also observed that the machine was working properly. Travis identified People's Exhibit Number 3 ("People's 3") as the printed breath test ticket indicating that defendant's blood alcohol content ("BAC") was .136. Travis logged the result in the Chicago Police Department breath analysis logs for District 16, as shown in People's Exhibit Number 4 ("People's 4"). Defense counsel did not object to People's 4 being admitted into evidence. After the breath test, Travis read defendant his *Miranda* rights and then interviewed him. Defendant again stated that he drank three to four beers and that he was under the influence of alcohol.

¶ 8 On cross-examination, Travis confirmed that defendant was not combative and did not have thick-tongued speech. Defense counsel then questioned Travis about the administration of the field sobriety tests. Counsel questioned Travis about his procedure in administering the HGN test, but limited these questions to confirming that Travis held a pen 12 inches from defendant's face as Travis moved the pen across defendant's field of vision. Defendant did not sway while Travis read the instructions to the walk and turn test, he did not start the test before the instructions were given, and he never stopped walking to steady himself. Defendant failed to walk heel to toe and there was a more than two inch gap between his heel and toe on the instances that he missed. Defendant also stepped off of the line twice and used his arms for balance throughout the test. He also lost his balance while turning. Defendant touched various

parts of his nose five times during the finger to nose test, although he was supposed to touch the tip of his nose six times. He was able to complete the tests, although not as demonstrated. Travis confirmed that he did not receive training on maintaining or repairing the breath analysis machine and that he did not perform the maintenance on the machine. Travis also did not personally certify that the machine was working properly.

¶ 9 The trial court then admitted into evidence defendant's certified driver's license abstract showing that defendant had two prior DUI convictions.

¶ 10 Defendant testified that he was looking for a parking spot near his home, and the only available spot was in front of a vehicle that had been pulled over by police. He approached the spot, rolling down his passenger window to ask the police whether it was safe to drive around and park in front of them. The police responded by cursing at him and telling him to exit his vehicle. The police then placed defendant against the hood of the police vehicle and asked defendant whether he had any drugs or weapons. Defendant replied that he did not. Defendant then consented to a search of his vehicle, and after the police did not find anything, the police said they smelled alcohol on defendant. Defendant asserts that the police smelled his deodorant, not alcohol. He was then arrested and placed in the back of the police car for approximately 20 minutes. Defendant confirmed that he understood the instructions to the field sobriety tests. However, defendant did not tell the officers, either at the scene or at the station, that he drank three to four beers. Defendant explained that he had a stomach ulcer, so he could not drink because it could kill him. He also never told the officers that he was intoxicated. On cross-examination, defendant again asserted that the police must have smelled the deodorant that he sprayed on himself.

¶ 11 The trial court found that the testifying officers were more credible than defendant. Defendant was found guilty of aggravated DUI. His post trial motion to reconsider and in the

alternative for a new trial was summarily denied. Defendant was sentenced to three years of imprisonment.

¶ 12 Defendant first contends in this appeal that his Sixth Amendment right to confront the witnesses against him was violated where the State introduced breathalyzer log books through the in-court testimony of an officer who did not conduct the accuracy certifications. Recently, the United States Supreme Court held that "if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming v. New Mexico*, 564 U.S. __, 131 S. Ct. 2705, 2713 (2011). For a statement to be "testimonial," its primary purpose must be to establish or prove past events that are potentially relevant to later criminal prosecution. *Id*. at 2714, n. 6.

¶ 13 Defendant requests this court review this issue under the plain error doctrine, as his counsel did not object at trial and did not raise the issue post-trial. *People v. Enoch*, 122 Ill. 2d 176 (1988) (in order to preserve an error for appeal, the error must be objected to and included in the post-trial motion). Because this issue concerns whether the trial court violated a constitutional right, we review this issue *de novo*. *People v. Russell*, 385 Ill. App. 3d 468, 474 (2008).

¶ 14 The plain error doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. R. 615(a) (eff. 1999); *People v. Piatkowski*, 225 Ill. 2d 551, 565, (2007); see also *People v. Woods*, 214 Ill. 2d 455, 471-72 (2005). In reviewing a plain error

contention, this court first determines whether error occurred at all. See *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); and *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009). This requires "a substantive look at the issue." *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 15 To support his confrontation argument, defendant relies upon recent Supreme Court precedent in *Bullcoming*, 564 U.S. __, 131 S. Ct. 2705 and *Melendez-Diaz v. Massachussetts*, 557 U.S. 305 (2009). In *Bullcoming*, the Supreme Court held that forensic evidence of the defendant's blood alcohol concentration was improperly admitted at trial where a surrogate analyst who did not test or observe the test on the defendant's blood sample testified to the forensic evidence of the defendant's BAC, while the analyst who actually analyzed the defendant's blood sample did not testify. *Bullcoming*, 564 U.S. at --, 131 S. Ct. at 2709 (2011). In *Melendez-Diaz*, the Supreme Court held that admission of certificates of state laboratory analysts certifying the composition and quantity of narcotics seized from defendant, and submitted as *prima facie* evidence of the same violated the defendant's Sixth Amendment right to confront the witnesses against him. *Melendex-Diaz*, 557 U.S. at 2531-32. In both cases, the Court concluded the certificates were "testimonial." *Bullcoming*, 564 U.S. at --, 131 S. Ct. at 2713; *Melendez*, 557 U.S. at 2532.

¶ 16 Defendant argues there is "no meaningful difference" between the crime lab reports in *Melendez-Diaz v. Massachusetts* and *Bullcoming* and the log books in this case, and that as a result, the log books are similarly testimonial. Defendant further claims that *People v. Jacobs*, 405 Ill. App. 3d 210, 216-18 (2010); *People v. Russell*, 385 Ill. App. 3d 468 (2008); and *People v. Kim*, 368 Ill. App. 3d 717 (2006) were wrongly decided in light of *Bullcoming*. Those three cases concluded that records related to maintenance and proper functioning of alcohol breath test machines are business records and are not testimonial evidence. *Jacobs*, 405 Ill. App. 3d at 216-18, *Russell*, 385 Ill. App. 3d at 474-75; *Kim*, 368 Ill. App. 3d at 719-20. Business and public

records "are generally admissible absent confrontation *** because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." *Melendez-Diaz*, 557 U.S., at ---, 129 S. Ct., at 2539-2540. However, *Bullcoming* does not render these cases wrongly decided, as the affidavits in *Bullcoming* and *Melendez-Diaz* were entirely distinguishable from those in *Jacobs*, *Russell*, and *Kim*.

¶ 17 At issue in *Bullcoming* was whether a surrogate analyst could testify to the certification of another analyst who, in a form titled "Report of Blood Alcohol Analysis," certified that the defendant's blood sample contained a BAC of 0.21 gram per millimeter; that the seal of the sample was received intact and was broken in the lab, and that he followed the procedures set out on the reverse of the report in testing the sample. *Bullcoming*, 131 S. Ct. at 2710. A surrogate analyst, who did not observe or review the analysis, testified to the contents of the analyst's report at trial. *Id.* at 2712. The Court concluded that the certifications were testimonial and that the accused had the right to confront the analyst who made the certification. *Id.* at 2710. The testimonial nature of the certifications was supported by the fact that a law-enforcement officer provided the defendant's blood sample to a state laboratory required by law to assist in police investigations. *Id.* at 2717. The analysts tested the evidence and prepared a certificate concerning the result of the analysis; and the certificate was "formalized" in a signed document. *Id.*

¶ 18 The certification in *Melendez-Diaz* was similar. In that case, the State introduced certificates of forensic analysis performed by state laboratory analysts stating that material seized by police and connected to the defendant was a certain quantity of cocaine. *Melendez-Diaz*, 557 U.S. at 308. The certificates were also sworn to before a notary public and submitted as substantive evidence of the charge that the defendant was distributing and trafficking illegal

narcotics. *Id.* The Court held that the certificates were testimonial statements and the analysts were "witnesses." *Id.* at 311. The documents were "plainly affidavits" because they were "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.* at 310, quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Further, under Massachusetts law, the sole purpose of the affidavits was to provide "*prima facie* evidence of the composition, quality, and the net weight" of the analyzed substance. *Id.* at 311, quoting Mass. Gen. Laws. Ch. 111, § 13.

¶ 19 In contrast, the certification in *Kim* was not testimonial evidence. *Kim*, 368 Ill. App. 3d at 720 In *Kim*, the State attempted to introduce an affidavit certifying that the Breathalyzer machine used to test the defendant's BAC was tested and working properly. The appellate court held that the certification was non-testimonial evidence, and thus did not infringe upon the defendant's confrontation rights. *Id.* at 719-20. The court explained that the certification was not compiled during the investigation of a particular crime and was not intended to be used against a particular defendant. *Id.* at 720. The court further explained that "documents establishing the existence or absence of some objective fact, rather than detailing the criminal wrongdoing of the defendant, are not testimonial." *Id.* at 720, quoting *Michels v. Commonwealth*, 47 Va. App. 461, 467, 624 S.E. 2d 675, 678 (2006). See also *People v. Russell*, 385 Ill. App. 3d 468 (2008) (adopting the reasoning of *Kim* and holding the admission of affidavits and logbook entries certifying the accuracy of police breath alcohol testing machines does not violate the defendant's *Crawford* right to confront witnesses against him).

¶ 20 Similarly, the court in *Jacobs* reviewed the issue in light of *Melendez-Diaz* and held that foundational and log book testimony related to the accuracy of a breath alcohol testing machine was not testimonial and did not violate the Confrontation Clause. *Id.* at 218. The *Jacobs* court recognized that the certifications of accuracy were different from the affidavits in *Melendez-Diaz*,

and did not establish an element of the offense. *Id.* The certifications were not compiled during the investigation of a particular crime and did not establish the defendant's criminal wrongdoing. *Id.* The same is true here. Officer Travis's testimony that the Breathalyzer was tested 30 days before and 30 days after defendant's test is an objective statement that does not concern defendant's fault or identity. See, *Kim*, 368 Ill. App. 3d at 720 (explaining that deciding whether a statement is testimonial focuses on whether the statement concerns fault or identity). Further, the testing and accuracy certification in defendant's case does not establish defendant's guilt. Rather, his failure of the breath test, along with his failure of multiple roadside sobriety tests, establishes his guilt.

¶ 21 *Kim, Russell*, and *Jacobs* were not wrongly decided in light of *Bullcoming* because the former cases did not involve substantive evidence submitted to prove the elements of the offenses for which the accused were charged. They did not tend to prove the defendants' fault or identity. Rather, they were objective certifications that the breath test machines were tested regularly and working properly. Following *Kim*, *Russell*, and *Jacobs*, we also conclude that the log book showing the breathalyzer machine in this case was tested and working properly is not testimonial evidence. Therefore, the trial court did not violate defendant's right to confrontation by admitting it into evidence.

¶ 22 Defendant next asserts that his trial counsel provided ineffective assistance when counsel failed to challenge the foundation for the admission of the HGN field sobriety test. To establish a claim for ineffective assistance of counsel, the defendant must show that his counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance was so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (adopting *Strickland*). Proceeding directly to the prejudice prong, the defendant carries the burden of

affirmatively showing within a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Id.* at 694, 697. Defendant has not met his burden in this case because even if the HGN test had been excluded for lack of proper foundation, other evidence supported defendant's conviction for DUI, thus any error admitting the HGN test was harmless. See *People v. McKown*, 236 Ill. 2d 278, 311 (2010) ("Error will be deemed harmless and a new trial unnecessary when the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result.") [Internal citation omitted].

¶ 23 Defendant properly cites *People v. McKown*, 236 Ill. 2d 278, 303 (2010) for his contention that the State was required to lay the proper foundation for admission of Officer Travis's testimony regarding the results of the HGN test he administered to defendant. To establish a proper foundation, the State was required to show that Travis was properly trained in performing the HGN test and that he performed the test in accordance with the procedures outlined in the National Highway and Traffic Safety Administration DWI Detection and Standardized Field Sobriety Testing Manual (2004) ("NHTSA manual"). *Id*. at 306. Although Travis testified that he is certified to administer field sobriety tests, the record does not reveal testimony from Travis that he was trained in administering the HGN test in accordance with the NHTSA manual or that Travis administered the test according to those guidelines. If defendant had objected at trial, the State may have been able to lay a proper foundation, but even if we assume that the State would have failed to do so, any error was harmless. The evidence overwhelmingly established that defendant was guilty beyond a reasonable doubt of aggravated DUI.

¶ 24 Bergadon and Kehl testified that they observed defendant fail to stop at a stop sign. The officers smelled a strong odor of alcohol on defendant's breath. Travis testified that defendant's eyes were red, his speech was slurred, and he veered to the right while walking on the sidewalk. Aside from the HGN test, defendant failed each of the three other field sobriety tests that Travis administered. Defendant twice told the officers that he drank three to four beers and that he was under the influence of alcohol.

¶ 25 Finally, and most importantly, while the legal limit for blood alcohol content is .08, the printed breath test ticket indicated that defendant's test result was .136. This evidence was more than sufficient to find defendant guilty beyond a reasonable doubt of aggravated DUI. A new trial without evidence of HGN testing would not produce a different result. See also *People v. Graves*, 2012 IL App. (4th) 110536, ¶¶ 32-33 (2012) (concluding that even if evidence of the HGN testing was excluded for lack of foundation, the evidence against the defendant overwhelmingly proved him guilty beyond a reasonable doubt of aggravated DUI).

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County finding defendant guilty of aggravated driving under the influence.

¶ 27 Affirmed.