2012 IL App (1st) 103242-U

SIXTH DIVISION
June 22, 2012

No. 1-10-3242

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. 09 CR 22142
	)	
SAUL PALOMERA,	)	Honorable
	)	Catherine M. Haberkorn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant forfeited his contention that evidence of the horizontal gaze nystagmus test was erroneously introduced when he failed to raise it in his posttrial motion. Nor did evidence of that test give rise to plain error because defendant cannot show he was prejudiced by its admission.

¶ 2 After a bench trial, defendant Saul Palomera was convicted of aggravated driving under the influence of alcohol and sentenced to six years in prison. On appeal, defendant contends that the trial court abused its discretion when it permitted a police officer to testify regarding the horizontal gaze nystagmus test (HGN test) when the State failed to lay a proper foundation for the officer's testimony. Defendant further contends that the trial court improperly

imposed the $200 DNA analysis fee when his DNA profile had previously been collected and submitted to the state database. We affirm and correct the fines and fees order.

¶ 3 At trial, Maria Rosas testified that the car she was driving was struck by another car on the evening of November 20, 2009. When she got out of her car and looked into the car that struck her vehicle, she saw defendant sitting in the driver's seat. Defendant told Rosas that he had a license and insurance and that they could settle the situation because everyone was "okay." Although defendant was courteous, Rosas characterized him as drunk. She explained that she was close enough to smell defendant's breath and could see him swaying on his feet. Rosas further testified that defendant did not use the correct words when speaking and his eyes were bloodshot. About 30 minutes after the accident, the police arrived.

¶ 4 Officer Dallas Tyler testified that he had been a Chicago police officer for just under eight years. On the evening in question, he and his partner responded to the scene of an automobile accident. As Tyler walked up to defendant, he could smell a "strong odor" of alcohol emanating from defendant and defendant's breath. Defendant's eyes were bloodshot and his speech was "slurred." Although Tyler asked defendant for his driver's licence and registration, defendant was unable to produce either. Tyler then offered defendant field sobriety tests and defendant agreed to perform them. Tyler explained that he had been trained in the administration of field sobriety tests at the police academy and had participated in a "DUI" refresher course the previous April. He had been trained to administer four field sobriety tests, the HGN, the "one-legged" stand, the "walk-and-turn," and the "finger to the nose." In this case, he administered the HGN test first.

¶ 5 Defense counsel then objected to testimony regarding the HGN test because the test was controversial in nature and the test's "scientific basis" was in question. The court overruled the objection.

¶ 6 Tyler explained that the HGN test observed the ability of an individual's eyes to track an item smoothly. The test is administered by holding a stylus in front of the subject's nose approximately 12 inches away from the face. The stylus is then moved from right to left at least six times. Tyler explained that the person administering the test looks to see if the subject's eyes are following the object or the stylus smoothly and whether there is a "distinct nystagmus[1] at maximum deviation," that is, when the eye is completely to the side. The test also looks for "onset prior to 45 degrees," that is, when there is still white showing at the corner of the eyes as they track from side to side.

¶ 7 Prior to administering the HGN test, Tyler asked defendant whether defendant had any health issues that would preclude him from taking the test and defendant indicated that he did not. Tyler then administered the HGN test. Defendant displayed onset prior to 45 degrees and onset of nystagmus at maximum deviation in both eyes. Tyler then administered the one-legged stand test. During this test, defendant had difficulty maintaining his balance, swayed from side to side, and reached for a wall to hold himself up. During the walk-and-turn test, defendant took an incorrect number of steps each way and had to steady himself several times. Tyler did not ask defendant to perform the fourth test because of a fear defendant would fall over if defendant were to close his eyes and lean his head back. Ultimately, Tyler concluded that defendant was under the influence of alcohol and took him into custody. A subsequent custodial search of defendant revealed an unopened can of Bud Light his jacket pocket. A half-full can of "Ice House" beer was recovered from the front seat of defendant's automobile. The contents of

[1] "Nystagmus is 'an involuntary, rapid, rhythmic movement of the eyeball, which may be horizontal, vertical, rotatory, or mixed, i.e., of two varieties.' " *People v. McKown,* 236 Ill. 2d 278 284 (2010), quoting Dorland's Illustrated Medical Dictionary 1296 (30th ed. 2003).

this can looked and smelled like beer to Tyler. Defendant later declined to take a Breathalyzer test.

¶ 8 During cross-examination, Tyler admitted that when he arrived at the scene, defendant was not sitting in a car and he did not see defendant driving or drinking an alcoholic beverage.

¶ 9 The defense then presented the testimony of Alejandro Sanchez and Benjamin Luebano. Both men testified that at the time of the accident Sanchez was driving defendant's car and that defendant and Luebano were passengers.

¶ 10 In finding defendant guilty, the court stated that Tyler had testified clearly and convincingly and his testimony that he could smell alcohol on defendant was corroborated by Rosas. Ultimately, defendant was found guilty of aggravated driving under the influence and sentenced to six years in prison.

¶ 11 On appeal, defendant contends that the trial court erred when it permitted Tyler to testify and give opinions regarding the HGN test because Tyler's testimony lacked sufficient foundation under the standards set forth in *People v. McKown*, 236 Ill. 2d 278 (2010).

¶ 12 Defendant admits that he has forfeited this issue for purposes of appeal by failing to raise it in his posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); however, he asks this court to review this issue for plain error (*People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). Pursuant to the plain error doctrine, this court may address unpreserved errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 186-87. In the first instance, a defendant must prove "prejudicial error." *Herron*, 215 Ill. 2d at 187. An error is prejudicial only if the evidence is so closely balanced that the error, in and of itself, severely threatened to tip the scales of justice against the defendant. *Herron*, 215 Ill. 2d at 187.

¶ 13 In *People v. McKown*, 236 Ill. 2d 278, 306 (2010), our supreme court held that "evidence of HGN field-sobriety testing, when performed according to the [National Highway Transportation Safety Administration] protocol by a properly trained officer, is admissible * * * for the purpose of showing whether the subject has likely consumed alcohol and may be impaired." The admissibility of HGN evidence in any particular case "will depend on the State's ability to lay a proper foundation" and to demonstrate the witness's qualifications, subject to the balancing of the probative value of the evidence against the risk of unfair prejudice. *McKown*, 236 Ill. 2d at 314. Therefore, a properly trained officer who followed National Highway Transportation Safety Administration (NHTSA) procedure may give expert testimony regarding the results of a HGN test and "may use the HGN test results as a part of the basis for his opinion that the defendant was under the influence and impaired." *McKown*, 236 Ill. 2d at 306.

¶ 14 In the case at bar, defendant contends that the State failed to lay a foundation establishing that Tyler had been properly trained to conduct the HGN test. He also contends that Tyler did not properly administer the test in this case.

¶ 15 Here, the record reveals that although the defense objected to testimony regarding the HGN test, the objection went to the test's "controversial nature and the fact that courts have recently ruled that the scientific basis is in question." Defendant did not, however, raise any objections regarding Tyler's training or ability to perform the HGN pursuant to NHTSA standards, and, consequently, has waived this issue for purposes of this appeal. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (waiver is appropriate when "a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence," and it was the defendant's lack of a timely and specific objection that deprived the State of the chance to correct that deficiency). Accordingly, defendant has forfeited the issue of whether the State laid a proper foundation for the HGN testing.

¶ 16 Further, even were this court to assume that some error occurred in the admission of this evidence, we cannot conclude that the error rises to the level of plain error. Defendant cannot establish that he was prejudiced by the alleged error. See *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (defendant bears the burden of persuasion under both prongs of the plain error doctrine). In order to prevail on his claim, defendant must establish that his conviction "may have resulted from the error and not the evidence" properly adduced at trial. *Herron*, 215 Ill. 2d at 178.

¶ 17 Defendant has not met this burden, as it is clear in this case, after reviewing the record, that defendant cannot show prejudice. The evidence of the failed HGN test, in and of itself, did not tip the scales of justice against defendant when the evidence at trial was not closely balanced. Unlike *McKown*, this was not a case where defendant was subjected to only one field sobriety test. See *McKown*, 226 Ill. 2d 245, 276 (2007) (determining that it was reasonable to conclude that the trial court relied heavily on the improperly admitted HGN test result when the defendant's blood alcohol was not verified by a chemical test and no other field sobriety tests were given). Here, Tyler testified that defendant failed the one-legged stand test and the walk-and-turn test. Tyler and Rosas also both testified that defendant smelled of alcohol, had bloodshot eyes and exhibited difficulty speaking. Accordingly, because defendant has failed to establish that it was the evidence of the HGN test, in and of itself, that resulted in his conviction, the alleged error does not rise to the level of a first prong plain error exception. See *Naylor*, 229 Ill. 2d at 593.

¶ 18 Defendant next contends, and the State concedes, that the trial court improperly imposed a $200 DNA analysis fee when he had previously submitted DNA for analysis. See *People v. Marshall*, 242 Ill. 2d 285, 302-03 (2011). We agree and direct the circuit court clerk to

vacate the $200 DNA analysis fee. See *People v. Price*, 375 Ill. App. 3d 684, 697 (2007) (the imposition of fines and fees is subject to *de novo* review).

¶ 19 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we vacate the $200 DNA analysis fee. We affirm the judgment of the trial court in all other aspects.

¶ 20 Affirmed; DNA fee vacated.