2012 IL App (1st) 110365-U

THIRD DIVISION
December 28, 2012

No. 1-11-0365

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.	)	Nos. YP 316903
	)	YP 316904
	)	
GAYLE WILKOFF,	)	Honorable
	)	Jane Bridget Hughes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Steele concurred in the judgment.

O R D E R

¶ 1 *Held:* Where probable cause to arrest existed, there was no reasonable probability that a motion to quash arrest and suppress evidence would have been granted, and trial counsel was not ineffective for failing to pursue the motion.

¶ 2 Following a bench trial, defendant Gayle Wilkoff was convicted of driving under the influence of alcohol and improper lane usage. She was sentenced to one year of conditional discharge and 45 days in jail, with the jail sentence stayed pending successful completion of an in-patient alcohol treatment program. On appeal, defendant contends that she received ineffective assistance of trial counsel where counsel filed, but did not pursue, a pretrial motion to

quash arrest and suppress evidence based on probable cause. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of March 11, 2010. On that date, defendant was arrested and charged with one count of driving under the influence of alcohol and one count of improper lane usage.

¶ 4 Defendant filed a petition to rescind the statutory summary suspension of her driver's license, asserting that the arresting officer did not have reasonable grounds to believe that she was driving while under the influence of alcohol. At the hearing on the petition, defendant testified that she dropped a lit cigarette as she was driving, and when she bent down to retrieve it, she swerved between lanes and was immediately pulled over. According to defendant, she refused to perform field sobriety tests because she had recently had surgery on her ankle. Additionally, after her arrest, she refused to take a breathalyzer test because she had taken cough medicine and Benadryl.

¶ 5 Wheeling police officer James Borchardt testified that he and his partner pulled defendant over because her car was straddling two lanes of the road and then drifted between lanes three times. Officer Borchardt detected a strong odor of alcohol on defendant's breath, and she had glassy, bloodshot eyes and slurred speech. When defendant got out of the car, she staggered and swayed. Officer Borchardt performed a horizontal gaze nystagmus test. Then, as he explained an additional field sobriety test to defendant, she twice lost her balance and fell against her car. Officer Borchardt testified that because of defendant's level of intoxication and his concern for her safety, he did not conduct any more field sobriety tests. Based on all his observations, he placed defendant under arrest.

¶ 6 Following arguments, the trial court rescinded the statutory summary suspension, finding that there were no reasonable grounds to arrest. In announcing its decision, the trial court stated

that the key to its ruling was that there was no testimony from Officer Borchardt regarding whether he saw defendant with a cigarette, noticed a cigarette in the car, or smelled cigarette smoke when he stopped defendant.

¶ 7 Thereafter, defense counsel filed a motion to quash arrest and suppress evidence, alleging, among other things, that the arresting officer did not have probable cause to believe that defendant had committed or was about to commit a crime. No hearing was ever held on the motion.

¶ 8 At trial, before a different circuit court judge, Officer Borchardt testified that about 11:51 p.m. on March 11, 2010, he was on patrol with his partner when he observed a car ahead of him straddling both eastbound lanes of the road. The car swerved between the lanes three times and came within inches of hitting the curb before Officer Borchardt and his partner stopped the car.

¶ 9 Officer Borchardt testified that he approached the driver, identified in court as defendant. As he spoke with defendant, Officer Borchardt noticed she had glassy, bloodshot eyes, slurred speech, and a strong odor of alcohol on her breath. In response to the officer's questions, defendant related that she was coming from a wake and a funeral; had had "a few drinks"; was not ill, injured, or taking medication; and was wearing contact lenses. At Officer Borchardt's request, defendant got out of her car to perform field sobriety tests. Officer Borchardt noted that defendant swayed and staggered as she walked toward the rear of her car. There, Officer Borchardt conducted the horizontal gaze nystagmus test. Then, as he was explaining the one-leg-stand test, defendant twice lost her balance and fell against her car. Due to his concern for defendant's safety, that is, his concern that defendant would fall and injure herself, Officer Borchardt decided not to conduct the one-leg-stand test. At one point while they were talking, defendant's contact lens fell out of her eye and stuck to her cheek. Defendant did not say anything about that contact lens to the officer.

¶ 10 Officer Borchardt testified that he had been a police officer for a little over 10 years. In his professional and personal capacity, he had observed people under the influence of alcohol thousands of times. Based on his observations of defendant's driving, defendant's admission to having had a few drinks, and the field sobriety tests, Officer Borchardt determined that defendant was extremely intoxicated and had been driving under the influence of alcohol. Accordingly, he placed her under arrest. After she was transported to the police station, defendant refused to submit to electro-chemical infra-red (EC/IR) intoximeter testing.

¶ 11 Defendant testified that late in the evening on the day in question, she went to a restaurant for about an hour or an hour and a half. During that time, she drank two beers. According to defendant, she was not intoxicated. Some time between 11 and 11:30 p.m., she left the restaurant with a bag of food to take home to her husband. She placed the food on the floor on the passenger side of the car. As defendant was driving, she dropped a lit cigarette on the floorboards near the bag of food. Not wanting the bag to catch on fire, she bent down twice to pick up the cigarette, causing the car to swerve. At that point, she saw police lights behind her. Defendant put on her turn signal and pulled over at the first well-lit location she came across.

¶ 12 Defendant testified that a police officer came up to her window. In response to his questions, defendant related that she was coming from a restaurant and had drunk two beers. The officer shined a light in her face, put a finger or pencil in front of her eyes, and had her get out of her car. According to defendant, after she and the officer "talked a little bit," he told her she was under arrest. Defendant denied having fallen onto her car.

¶ 13 Defendant testified that she had had surgery on her ankle six months prior to the date in question and had just finished physical therapy. She stated that when the officer asked her to perform a one-leg-stand test, she told him about the surgery and explained to him that she had no balance and could not perform the test even if she had had nothing to drink. Defendant further

testified that later, when she was at the police station, she refused to take a breathalyzer test because she had a cold and was taking cough medicine and Benadryl, and friends who were lawyers and police officers had told her any kind of medicine can "show up" on a breathalyzer. Defendant testified that she told the officer about her cold medication when they were at the police station.

¶ 14 In rebuttal, Officer Borchardt testified that when he pulled defendant over, he did not at any time smell cigarettes or observe a cigarette in defendant's hands or in the car. In addition, defendant did not indicate to him that she had swerved because she was smoking a cigarette and had dropped it, or that she did not want to perform field sobriety tests because she had had surgery on her foot.

¶ 15 Following argument, the trial court convicted defendant of driving under the influence of alcohol and improper lane usage. Subsequently, the trial court sentenced defendant to one year of conditional discharge and 45 days in jail, with the jail sentence stayed pending successful completion of an in-patient alcohol treatment program.

¶ 16 On appeal, defendant contends that she received ineffective assistance of trial counsel because her attorney filed, but did not pursue, a pretrial motion to quash arrest and suppress evidence based on probable cause. Defendant argues that there was a reasonable probability that the motion would have succeeded, as another judge had granted her motion to rescind the statutory suspension of her driver's license based on a finding that reasonable grounds to arrest did not exist.

¶ 17 The standard for a claim of ineffective assistance of counsel has two prongs: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must

overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶ 18 Generally, the decision whether to file a motion to suppress evidence is considered a matter of trial strategy that is immune from ineffective assistance claims. *People v. Deloney*, 359 Ill. App. 3d 458, 466 (2005). To succeed on a claim of ineffectiveness based on the failure to file a motion to quash and suppress, a defendant must demonstrate a reasonable probability both that the motion would have been granted and that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

¶ 19 Defendant argues that there is a reasonable probability that the motion to suppress, which was based on a claim of lack of probable cause, would have been granted. We disagree.

¶ 20 Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the suspect has committed a crime. *People v. Jackson*, 232 Ill. 2d 246, 275 (2009). The existence of probable cause depends upon the totality of the circumstances at the time of the arrest. *People v. Love*, 199 Ill. 2d 269, 279 (2002). The standard for determining whether probable cause exists is probability of criminal activity, not proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005). A police officer's factual knowledge, based on prior law-enforcement experience, is a relevant factor when considering whether probable cause existed at the time of arrest. *People v. Harris*, 352 Ill. App. 3d 63, 67 (2004).

¶ 21 At the time of the arrest in the instant case, Officer Borchardt had observed defendant driving while straddling two lanes of the road. He saw her swerve between the lanes three times,

coming within inches of hitting the curb. After he pulled defendant over, Officer Borchardt observed that her eyes were glassy and bloodshot, that her speech was slurred, and that her breath smelled strongly of alcohol. Defendant admitted to the officer that she had had "a few drinks" and stated she was not ill, injured, or taking medication. When defendant got out of her car, she swayed and staggered, lost her balance twice, and fell against her car. Officer Borchardt testified that he had worked as a police officer for over 10 years, and that in his professional and personal capacity, he had observed people under the influence of alcohol thousands of times. Based on his experience, his observations of defendant's driving, defendant's admission to having had a few drinks, and the field sobriety tests, Officer Borchardt determined that defendant was extremely intoxicated and had been driving under the influence of alcohol.

¶ 22 Given the totality of the circumstances in this case, we find that at the time of arrest, a reasonably cautious person would believe that defendant was committing a crime. Therefore, Officer Borchardt had probable cause to arrest, and defendant has not demonstrated a reasonable probability that the motion to quash arrest and suppress evidence would have been granted. In light of defendant's failure to make this showing, we need not consider whether the trial's outcome would have been different had the motion been granted.

¶ 23 Defense counsel was not ineffective for failing to pursue what would have been a futile motion. See *People v. Rucker*, 346 Ill. App. 3d 873, 889 (2004); *Rodriguez*, 312 Ill. App. 3d at 926. The claim of ineffective assistance of counsel fails.

¶ 24 We are mindful of defendant's reliance on the fact that she succeeded in having the statutory suspension of her driver's license rescinded. This circumstance does not change our conclusion in this case. Statutory summary suspension hearings are civil in nature, and therefore are separate and distinct from criminal prosecution for driving under the influence of alcohol. *People v. Wear*, 371 Ill. App. 3d 517, 526-27 (2007). The dismissal of a criminal charge of

driving under the influence does not result in an automatic rescission of a driver's license suspension. *Wear*, 371 Ill. App. 3d at 527. Moreover, the results of a statutory summary suspension hearing cannot bar litigation of the same issues in a criminal proceeding. *People v. Moore*, 138 Ill. 2d 162, 166 (1990); see also *Hurlbert v. Charles*, 238 Ill. 2d 248, 256-60 (2010) (discussing *Moore* and concluding that collateral estoppel would not act as a bar to litigating the same issues in subsequent civil ligtations).

¶ 25 Defendant has not overcome the strong presumption that counsel's decision not to pursue the motion to quash and suppress was the product of sound trial strategy. Because defendant has failed to establish that trial counsel's performance was deficient, we need not consider whether prejudice resulted from counsel's actions.

¶ 26 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.