2013 IL App (4th) 120213-U

NO. 4-12-0213

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 17, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MARIO R. STROUD,	)	No. 09DT111
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justice Holder White concurred in the judgment. Justice Appleton specially concurred.

ORDER

¶ 1 *Held*: Where (1) the prosecutor remarked on defendant's consciousness of guilt during closing argument, he did not shift the burden of proof to defendant; (2) even if the prosecutor's closing argument constituted error, real justice was not denied and the guilty verdict did not result from the error; (3) where the trial court erred in ordering defendant to reimburse the county for his appointed counsel without notice and a proper hearing, the $100 fee is vacated and the cause remanded for a proper hearing; and (4) where defendant spent two days in custody prior to his release on bond, he is entitled to an amended sentencing judgment reflecting a $10 credit against his fine and two days' credit against any jail term.

¶ 2 In April 2010, a jury found defendant, Mario R. Stroud, guilty of driving under the influence of alcohol (DUI). In November 2010, the trial court sentenced him to two years' conditional discharge and ordered him to serve 20 days in jail with the sentence stayed. The court also fined defendant $700 and ordered him to pay $100 to reimburse his court-appointed counsel.

¶ 3 On appeal, defendant argues (1) the prosecutor improperly shifted the burden of proof during closing arguments, (2) the trial court erred in ordering him to reimburse the county for his court-appointed counsel without proper notice and a hearing, and (3) he is entitled to credit against his fine and his jail term based on the time he spent in jail prior to being released on bond. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In September 2009, defendant was charged by traffic complaint with the offense of DUI (625 ILCS 5/11-501(a)(2) (West 2008)). In April 2010, defendant's jury trial commenced.

¶ 6 Illinois State Police Trooper Billy Quinn testified he was monitoring traffic on Interstate 55 on September 7, 2009, at approximately 9:30 p.m. He observed a Cadillac traveling at a "high rate of speed," and his radar unit indicated the vehicle was traveling at 85 miles per hour. Quinn proceeded to drive after the vehicle, and when he finally caught up to it and maintained the same speed, Quinn was driving 92 miles per hour. While following the vehicle in the left-hand lane, Quinn observed the car cross over the centerline twice and twice over the line marking the left shoulder.

¶ 7 Quinn activated his overhead lights, and the driver pulled over onto the left shoulder. With gravel on the left shoulder, the driver "almost lost control of the vehicle." Upon approach, Quinn "could smell the odor of alcohol coming from inside the vehicle." He also noticed the driver's "eyes were glossy and red" and his "speech was [a] little slurred at times." Quinn stated these characteristics could be indicators of alcohol impairment. Quinn identified defendant as the driver of the vehicle and stated there were two other occupants.

¶ 8 Upon questioning defendant in the squad car, defendant stated he might have had one or two drinks when he was in St. Louis around noon. Defendant then agreed to perform field-sobriety tests. Utilizing the horizontal gaze nystagmus test, Quinn concluded defendant was "possibly impaired." Prior to starting the walk-and-turn test, defendant stated he "could not stand with his right foot in front of his left and balance himself because he was left-handed." When defendant did proceed, Quinn observed that "he stepped off line a couple of times. He missed heel to toe a couple of times. He raised his arms for balance. And he took 17 steps instead of the nine as instructed." During the one-legged-stand test, defendant lost his balance "at least three times" and failed to count as instructed. Based on defendant's performance on the tests, Quinn concluded he was impaired.

¶ 9 On redirect examination, Quinn testified he saw defendant's vehicle twice cross the center line and twice cross the fog line during the approximately four miles he followed the car. Prior to asking defendant if he wanted to take a Breathalyzer test, Quinn read the warning-to-motorist to him and explained the possible driver's license suspension penalties if he refused to take the test. Defendant then refused the test.

¶ 10 Illinois State Police Trooper Nathaniel Lunt testified he responded to the stop of defendant's vehicle to assist Trooper Quinn. Lunt stated he "smelled a strong odor of an alcoholic beverage emanating from [defendant's] breath."

¶ 11 After the State rested its case, defense counsel called Bernard Butler, defendant's brother. On September 7, 2009, Butler stated he and another individual were in St. Louis early in the day. Defendant picked them up at approximately 4 p.m. to travel to Chicago. At the start of the trip, Butler stated defendant did not appear to have consumed alcohol. While traveling,

Butler fell asleep. He awoke when defendant pulled the car to the side of the road with the police officer behind them. He did not see any alcohol containers in the vehicle.

¶ 12 Eric Batey, Butler's friend, testified he did not observe any indicators that defendant had been drinking too much. Batey also fell asleep on the drive to Chicago and awoke to find the police pulling them over. He did not see any containers of alcohol in the vehicle.

¶ 13 Defendant testified he was at his uncle's house in St. Louis on the morning of September 7, 2009. He had "a couple of beers" and "a little wine" while he was there. When he picked up Butler and Batey at 4 p.m., he did not feel any effects of the alcohol he had with lunch. Defendant did not have any alcohol in the car as they traveled toward Chicago. Once he saw the police lights behind him, he pulled over to the left shoulder because he did not want to open his door into traffic. As he pulled over, his car hit some rocks, which "made it look like [he] was out of control."

¶ 14 As to the field-sobriety tests, defendant stated he has a problem with his right eye, which had been scratched by a nail when he was young. On the walk-and-turn test, defendant asked the officer if he could start out with his left foot because he was left-handed. The officer did not allow him to do so. On the one-legged-stand test, defendant stated the road was not smooth but had "a nice hump on it." Defendant denied being under the influence of alcohol.

¶ 15 On cross-examination, the prosecutor asked defendant why he crossed over the centerline twice during those four miles the officer was behind him. Defendant stated it was because he was speeding and "might have been a little tired." He stated he followed the instructions for the field-sobriety tests to the best of his ability. Defendant stated the officer read him the warning to motorist, but he refused because he did not understand it.

¶ 16 During closing arguments, the following exchanges occurred:

"MR. BUKALSKI [(prosecutor)]: And you can hear the defendant on the video say he has never done these tests before in response to the officer's saying that. How does he know he is going to fail, folks? Well, if you are asked something that you think that you know you are not going to be able to pass, you are not going to be able to do, what do you start doing before you do it? You start making excuses. And in this case, in the instance of field sobriety, why would anybody start making excuses as to why they are not going to be successful doing that until they have actually begun them? Because they know they are the under the influence of alcohol. That is why. It speaks for itself. He is telling you he is guilty in that moment. He is telling you he is guilty later on when he has the opportunity to provide that chemical test to you and he doesn't do it. Remember, he has read that long form and he is given the opportunity to. He doesn't take advantage of it. So what does that all get to?

MR. BERTRAM [(defense counsel)]: Objection. Can I approach?

THE COURT: Yes.

(OUT OF THE HEARING OF THE JURY.)

MR. BERTRAM: Mr. Bukalski just crossed the line that

now he has got to—I mean, this is—he, when you are talking about the refusal, you can say, gosh, this is guilt, but he just crossed the line into he has got to—you know, it is wrong. I mean, he is beyond that.

MR. BUKALSKI: This is an attempt to break up the closing argument, Your Honor. It goes exactly to consciousness of guilt and the defendant is in control of the evidence. So, of course—

THE COURT: Overruled.

MR. BERTRAM: Just for the record I wanted to continue my objection through this.

THE COURT: Go ahead."

Following deliberations, the jury found defendant guilty.

¶ 17 In May 2010, defense counsel filed a motion for a new trial, arguing, in part, the State made improper remarks during closing arguments. In November 2010, the trial court sentenced defendant to two years' conditional discharge and ordered him to serve 20 days in jail with the sentence stayed. The court also fined defendant $700 and ordered him to pay $100 to reimburse the county for his court-appointed counsel. In December 2010, defense counsel filed a motion to reconsider sentence, which the court denied. A notice of appeal was then filed.

¶ 18 The cause was ultimately remanded to the trial court for a ruling on defendant's motion for a new trial. In March 2012, the court denied the motion, ruling, in part, as follows:

"This was as a no-blow DUI. The defendant did not submit to any

> testing, which was an issue raised at trial. Under the law that was applicable then, consciousness of guilt—as it is now, consciousness of guilt is fair game as far as an argument to be made by the State if they choose that. There is always going to be some sort of argument from the defense that by commenting on that, that the burden has been shifted to the defendant improperly. And I think this trial as I presided over it, I didn't see anything wrong as far as any errors from my standpoint. I think it was a fairly clean trial, or it was a clean trial. And obviously the issue of burden shifting gets raised in almost all no-blow DUIs where there's a comment on consciousness of guilt."

This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Burden Shifting

¶ 21 Defendant argues the prosecutor improperly shifted the burden of proof during closing arguments when he argued defendant had refused to take a Breathalyzer but declined his opportunity to present the results to the jury. We disagree.

¶ 22 "Every defendant is entitled to [a] fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924, 807 N.E.2d 1125, 1137 (2004). "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009). A reviewing court "will find reversible error only if the defendant

demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009).

¶ 23 Section 11-501.2(c)(1) of the Illinois Vehicle Code (625 ILCS 5/11-501.2(c)(1) (West 2008)) provides that a person's refusal to submit to chemical testing following a DUI arrest can be used as evidence against him in a criminal action arising out of the DUI. Courts have also noted "that evidence of a person's refusal to take a test designed to determine the person's blood-alcohol content is admissible and may be used to argue the defendant's consciousness of guilt." *People v. Johnson*, 218 Ill. 2d 125, 140, 842 N.E.2d 714, 723 (2005); *People v. Graves*, 2012 IL App (4th) 110536, ¶ 45, 965 N.E.2d 546 (stating "a prosecutor may argue that a defendant's refusal to submit to chemical testing shows consciousness of guilt"); *People v. Garriott*, 253 Ill. App. 3d 1048, 1052, 625 N.E.2d 780, 784 (1993) (stating the refusal to submit to a Breathalyzer test is relevant as circumstantial evidence of the defendant's consciousness of guilt).

¶ 24 In *Johnson*, 218 Ill. 2d at 128, 842 N.E.2d at 716, the defendant was charged with DUI. At the defendant's jury trial, the prosecutor made an opening statement, which included the following remarks:

> " 'Finally, I believe you're going to hear that Mr. Johnson was given the opportunity to prove to the officer that he was not overly impaired by being offered to take what is called a breath alcohol test to determine how much alcohol was on his breath at the time, yet the defendant failed to do so.
>
> I believe at the end of this we'll have met our burden and

> proved to you beyond a reasonable doubt that Mr. Johnson was under the influence of alcohol and was driving a motor vehicle in Champaign County at that time, and that influence of alcohol impaired his ability to do so.' " *Johnson*, 218 Ill. 2d at 128, 842 N.E.2d at 716.

In part, the evidence indicated the officer placed the defendant under arrest, believing him to be impaired by alcohol. *Johnson*, 218 Ill. 2d at 130, 842 N.E.2d at 717. The officer read the warning-to-motorist to the defendant, who declined to take a breath test. *Johnson*, 218 Ill. 2d at 130-31, 842 N.E.2d at 717-18. At the close of his argument, the prosecutor stated:

> " 'Officer Parsons thought that [defendant] was impaired based on his performance on the field sobriety test, based on the alcohol that he smelled, based on watching [defendant] drive, based on the fact that [defendant] gave him the wrong card initially, gave him a registration card instead of an insurance card.
>
> He said, you know what? I am going to give you one more chance to prove that you're not guilty of this offence. Take a breath test. You're aware of the penalties that might result with this test and as a result of not taking it at all.
>
> You heard Mr. Johnson testify. He understood it. He knew what he was doing. He refused. He didn't want to take the risk. He took the stiffest penalty right off the bat. He wouldn't take the chance to prove it once and for all.' " *Johnson*, 218 Ill. 2d at 135-

36, 842 N.E.2d at 720.

The jury found the defendant guilty, and the appellate court affirmed with one justice dissenting. *Johnson*, 218 Ill. 2d at 137, 842 N.E.2d at 721.

¶ 25 On appeal to the supreme court, the defendant argued the prosecutor improperly "told the jury, in his opening statement and closing argument, that defendant failed to prove his innocence to the police officer by refusing to take the breath test." *Johnson*, 218 Ill. 2d at 138, 842 N.E.2d at 722. The defendant argued the remarks inferred he had a duty to prove his innocence and improperly shifted the burden of proof to him. *Johnson*, 218 Ill. 2d at 138, 842 N.E.2d at 722. The supreme court stated, in part, as follows:

> "We agree with the prosecutor, the trial court judge, and the dissenting appellate justice and find that the remarks made in opening and closing argument, which suggest that defendant failed to prove his innocence to the police officer by failing to take the breath test, were improper and that, as a result, error occurred. It is true, as the appellate court held, that evidence of a person's refusal to take a test designed to determine the person's blood-alcohol content is admissible and may be used to argue the defendant's consciousness of guilt. [Citations.] However, we believe, as did the dissenting appellate justice, that the argument complained of in the case at bar goes beyond such legitimate purpose and 'blur[s] the distinction between the defendant's state of mind and the State's burden of proof and thus should not be permitted.' [Citation.]

> Moreover, like the trial judge in the case at bar, we feel strongly that the argument here, which implied that defendant might have proven his innocence by submitting to a breath test, is in conflict with the constitutional principle that a defendant is innocent until proven guilty. This type of argument should not be countenanced." *Johnson*, 218 Ill. 2d at 140-41, 842 N.E.2d at 723.

¶ 26 This court confronted a similar issue in *Graves*, 2012 IL App (4th) 110536, ¶ 1, 965 N.E.2d 546, where the defendant was charged with aggravated DUI. The defendant was arrested, read the warning-to-motorist, and refused to submit to a breath test. *Graves*, 2012 IL App (4th) 110536, ¶ 9, 965 N.E.2d 546. The jury found him guilty. *Graves*, 2012 IL App (4th) 110536, ¶ 12, 965 N.E.2d 546. On appeal, the defendant argued the trial court erred in allowing the State to argue, over objection, that his refusal to take the breath test was proof that he knew he was over the legal limit. *Graves*, 2012 IL App (4th) 110536, ¶ 43, 965 N.E.2d 546. We described the argument as follows:

> "Here, during closing, the State pointed out that police officers gave defendant the opportunity to submit a breath sample. It argued that defendant knew that if he submitted a breath sample and his blood-alcohol content was over the legal limit of 0.08 his license would be suspended for a period of time. The State further argued that defendant was told by police that, if he refused the breath test, his license would be suspended for a longer period of time. The State continued its argument, noting as follows: '[De-

fendant] chose the longer suspension. Why? Because he knew he would be over the legal limit.' Finally, during rebuttal, the State argued as follows:

> 'We know that the Defendant refused to submit to chemical testing. I maintain that is because he knew he would be over the legal limit. He was told the ramifications of this. He chose not to submit that breath test.' " *Graves*, 2012 IL App (4th) 110536, ¶ 44, 965 N.E.2d 546.

This court found the facts distinguishable from those in *Johnson*. *Graves*, 2012 IL App (4th) 110536, ¶ 45, 965 N.E.2d 546. We found "the State did not improperly shift the burden of proof to defendant by suggesting he missed the opportunity to prove his innocence by refusing the breath test." *Graves*, 2012 IL App (4th) 110536, ¶ 45, 965 N.E.2d 546. Thus, we found the State's argument was proper. *Graves*, 2012 IL App (4th) 110536, ¶ 45, 965 N.E.2d 546.

¶ 27 In this case, the prosecutor's closing argument included the following:

> "And you can hear the defendant on the video say he has never done these tests before in response to the officer's saying that. How does he know he is going to fail, folks? Well, if you are asked something that you think that you know you are not going to be able to pass, you are not going to be able to do, what do you start doing before you do it? You start making excuses. And in this case, in the instance of field sobriety, why would anybody start

> making excuses as to why they are not going to be successful doing that until they have actually begun them? Because they know they are the under the influence of alcohol. That is why. It speaks for itself. He is telling you he is guilty in that moment. He is telling you he is guilty later on when he has the opportunity to provide that chemical test to you and he doesn't do it. Remember, he has read that long form and he is given the opportunity to. He doesn't take advantage of it. So what does that all get to?"

Defendant claims the use of the phrase "opportunity to provide that chemical test to you" shifted the burden of proof and implied it was his failure to produce evidence of his innocence.

¶ 28 We find the facts of this case are more in line with *Graves* than with *Johnson*. Here, unlike in *Johnson*, the prosecutor did not use the words "prove" and "not guilty." Further, he did not use words such as "burden," "proof," or "innocence." The prosecutor did not claim defendant failed to prove his innocence. Instead, the prosecutor was referring to defendant's consciousness of guilt—first, when he made excuses before even starting the field-sobriety tests and second, when he refused to undergo chemical testing after being read the warning-to-motorist. Looking at the remarks as a whole, the prosecutor properly argued the failure to take a chemical test demonstrated consciousness of guilt. Thus, we find no error.

¶ 29 Even if the prosecutor's argument did constitute error, reversal is not required. Reversible error will only be found " if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *Runge*, 234 Ill. 2d at 142, 917 N.E.2d at 982. Here, defendant cannot meet this burden.

¶ 30 The evidence indicated defendant was initially clocked going 85 miles per hour. Trooper Quinn testified defendant crossed the center line on two occasions and the fog line on two occasions during the four miles that he followed defendant's vehicle. Both Quinn and Trooper Lunt testified they smelled an odor of alcoholic beverage coming from defendant. Defendant admitted he had consumed alcohol earlier that day. Quinn noticed defendant's eyes were "glossy and red" and his speech was slurred at times. Quinn also stated defendant failed the horizontal gaze nystagmus test. Defendant stepped off the line a couple of times during the walk-and-turn test, missed heel-to-toe a couple of times, and took 17 steps instead of the 9 as instructed. During the one-legged-stand test, defendant lost his balance at least three times and failed to count as instructed.

¶ 31 Here, the evidence of defendant's guilt was compelling. Further, the alleged offending argument by the prosecutor that defendant had "the opportunity to provide that chemical test to you and he [did not] do it" was brief and did not claim defendant failed to prove his innocence. Even if the statement could be found to be improper, it was not so prejudicial that real justice was denied and it cannot be said that the verdict resulted from the error.

¶ 32 B. Reimbursement for Court-Appointed Counsel

¶ 33 Defendant argues the trial court erred in ordering him to reimburse the county for the services of his appointed counsel without notice and without conducting a hearing to determine his ability to pay. We agree, and the State indicates it will not contest the issue.

¶ 34 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) provides, in part, as follows:

"Whenever *** the court appoints counsel to represent a defen-

> dant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2008).

Section 113-3.1 requires the trial court to conduct a hearing into a defendant's financial circumstances and find an ability to pay before ordering him to pay reimbursement for his appointed counsel. *People v. Love*, 177 Ill. 2d 550, 555-56, 687 N.E.2d 32, 35 (1997). "[T]he defendant must (1) have notice that the trial court is considering imposing a payment order under section 113-3.1 of the Code and (2) be given the opportunity to present evidence or argument regarding his ability to pay and other relevant circumstances." *People v. Somers*, 2012 IL App (4th) 110180, ¶ 28, 970 N.E.2d 606 (quoting *People v. Barbosa*, 365 Ill. App. 3d 297, 301, 849 N.E.2d 152, 154 (2006)).

¶ 35 In the case *sub judice*, the trial court did not conduct a hearing into defendant's ability to pay the $100 to reimburse the county for his appointed counsel. The sentencing hearing was not recorded. The parties submitted a bystander's report, but no mention of any discussion

into defendant's ability to pay appears. Moreover, no reference to a hearing is mentioned in the docket sheets. Without proper notice and a hearing pursuant to section 113-3.1 of the Code, the $100 reimbursement must be vacated. We remand the cause for a hearing in accord with section 113-3.1.

¶ 36 C. Credit Against Fine and Jail Term

¶ 37 Defendant argues he is entitled to credit against his fine and his 20-day jail term, should he be ordered to serve it, for the 2 days he spent in jail prior to being released on bond. We agree, and the State indicates it will not contest the issue.

¶ 38 Section 110-14(a) of the Code states, "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2008). The statutory right to the monetary credit is mandatory. *People v. Brown*, 406 Ill. App. 3d 1068, 1084, 952 N.E.2d 32, 45 (2011). Moreover, "[t]he issue of monetary credit against a defendant's fine cannot be waived and may be raised for the first time on appeal." *People v. Sulton*, 395 Ill. App. 3d 186, 188, 916 N.E.2d 642, 644 (2009).

¶ 39 In addition, a defendant shall be given credit on his determinate sentence "for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2008). "A 'defendant is entitled to one day of credit for each day (or portion thereof) that he spends in custody prior to sentencing, including the day he was taken into custody.' " *People v. Hill*, 409 Ill. App. 3d 451, 456, 949 N.E.2d 1180, 1185 (2011) (quoting *People v. Ligons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001)).

¶ 40 Here, defendant's traffic ticket shows he was confined at the Livingston County

jail with no bond on the day he was arrested—September 7, 2009. He posted $100 and a valid driver's license as bond on September 8, 2009. As he was in custody for two days, he is entitled to $10 credit against his fine and two days of credit should he be ordered to serve his time in jail. We remand the cause to the trial court for an amended sentencing judgment to reflect these credits.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm in part, vacate in part, and remand with directions. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 43 Affirmed in part and vacated in part; cause remanded with directions.

¶ 44 JUSTICE APPLETON, specially concurring.

¶ 45 I write separately as I believe the prosecutor in this case did commit error in his use of defendant's refusal of testing as substantive evidence of guilt. I agree, however, in ¶ 29 with the majority that the error was harmless based on the weight of the evidence adduced other than the prosecutor's comments.