2013 IL App (5th) 120326-U

NO. 5-12-0326

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 11-DT-21
	)	
TERRY STRONG,	)	Honorable
	)	Eugene E. Gross,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: In this prosecution for driving under the influence of alcohol the defendant's claim of ineffective assistance of counsel fails where his counsel's assistance was not deficient and/or did not prejudice the defendant.

¶ 2 The defendant, Terry Strong, appeals from his convictions for driving under the influence of alcohol and improper lane usage. He was tried before a jury, which found him guilty after only 18 minutes of deliberation, and was sentenced by the circuit court of Randolph County to a fine of $120 on the improper lane usage conviction, and five days in jail on work-release and a fine of $1,800 on the driving under the influence of alcohol conviction. On appeal, the defendant argues that he received ineffective assistance of counsel at his jury trial. For reasons which follow, we affirm.

¶ 3 The defendant had been involved in a single-vehicle car accident after which he was found by the police sitting, apparently asleep, in the vehicle. Upon exiting the vehicle, the defendant had difficulty walking and maintaining his balance, his speech was slurred, and

he seemed confused and disoriented. Because he smelled strongly of alcohol, the police administered a field sobriety test which the defendant failed. He was arrested for driving under the influence but refused to submit to a blood-alcohol "breathalyzer" test. The defendant's theory of defense was that a deer had run out in front of his car and the defendant had swerved to avoid hitting it, driving off the road and striking his head in the accident. He thereby suffered a concussion which resulted in the symptoms which the police assumed to be signs of intoxication.

¶ 4 Prior to trial, the defendant's counsel filed a motion *in limine* seeking to exclude from evidence as having been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), an admission made by the defendant in response to questioning at a time he was in custody that he had had quite a bit of beer that evening and should not have been driving. This motion was granted but the court explicitly stated that if the defendant testified at trial contrary to the statement, the statement could come in as impeachment.

¶ 5 In opening statement, defense counsel stated that he believed the evidence was going to show that the defendant had suffered a concussion as a result of the accident, and that the evidence would further show that the symptoms of a concussion include confusion, feeling dazed, headache, nausea, double and fuzzy vision, dizziness, loss of balance, short-term memory loss and loss of consciousness.

¶ 6 The following evidence was adduced at the defendant's jury trial. At approximately 11:30 p.m. on March 5, 2011, the defendant was involved in a single-vehicle car accident in which the vehicle he was driving missed a curve in the road and traveled 75 to 100 yards off the roadway into the back yard of a residence. The car had traveled into and out of a drainage ditch and had spun around, landing in a yard, where it hit an old metal fence, an old swing set, and children's playground equipment. When the police officer arrived, he found the defendant sitting upright in the driver's seat with his head down, apparently sleeping. The

vehicle was not running and the lights on the vehicle were very dim, indicating that the battery was low. The police officer woke the defendant up by knocking on the window. The defendant looked up at the officer, smiled and chuckled, and turned away. The officer asked the defendant to open the driver-side door, which was locked. The defendant could not seem to figure out how to do this, reaching for the window switch and slapping at the door handle. The officer removed the defendant from the passenger side of the vehicle. The defendant and vehicle smelled strongly of alcohol and the defendant was unsteady on his feet. The police officer had to assist the defendant in walking back to the squad car. The officer administered a field sobriety test, which the defendant failed.

¶ 7 The defendant told the officer that he had been coming from his workplace at the time of the accident, but it was clear that his vehicle had been traveling in the opposite direction. The defendant also indicated that a deer had run out in front of him and that had been the cause of the accident.

¶ 8 The officer noticed a red scuff or bump on the defendant's forehead. The defendant repeatedly declined medical treatment and finally indicated that he had been wearing his seat belt and had injured his head at work earlier that day.

¶ 9 The defendant refused to submit to a blood-alcohol "breathalyzer" test. The defendant exhibited mumbled, slurred speech, and obviously poor balance. The officer considered the defendant to be extremely impaired. The officer was absolutely sure that the defendant was intoxicated at the time of his crash.

¶ 10 The officer did not characterize the accident as a "violent" crash or a hard collision. He thought the defendant would have been "banged up" as a result of the accident. The officer was not familiar with any of the signs of a concussion but acknowledged that a car accident could possibly result in a driver being disoriented and dizzy and unable to accurately recall events.

¶ 11 A second police officer who assisted at the scene testified that the defendant was very unsteady on his feet and was unable to maintain balance. The defendant emitted a strong odor of alcoholic beverages. This officer also acknowledged that hitting one's head in a car accident can cause one to be dazed, confused, and unable to walk straight, but the officer had no doubt that the defendant was intoxicated.

¶ 12 The State rested. The defendant's motion for a directed verdict was denied. The defense rested without presenting any evidence. In closing argument, although defense counsel mentioned that the defendant had driven off the road because there were deer in the road, he did not argue that the defendant had suffered a concussion in the accident and that this explained the symptoms which the officers believed were signs of intoxication. Defense counsel argued only that the State had failed to meet its burden of proof.

¶ 13 After deliberating for less than 20 minutes, the jury returned with a verdict of guilty on both offenses. The defendant was sentenced immediately following the verdict.

¶ 14 After retaining new counsel, the defendant filed a motion for a new trial in which he argued that his trial counsel had been ineffective in failing to call witnesses Alice Hatfield, Gordon Strong, and Dorris Strong, all of whom would have testified to the defendant's physical condition both before and after the accident; failing to introduce into evidence photographs taken by Gordon Strong showing the condition of the vehicle after the accident, including the presence of deer hair, the injury to the defendant's head, and the accident scene; failing to introduce medical records or any evidence that the defendant had suffered a concussion in the accident; and failing to introduce into evidence a letter from the defendant's insurance company stating that it would cover the damages from the accident because the accident had occurred as a result of a deer strike. Attached to the motion for new trial are affidavits of the three witnesses not called, the photographs which were not introduced, medical records which were not introduced, and a letter dated May 2, 2012, from Progressive

Insurance Company stating that the defendant had "struck a deer."

¶ 15 The State filed a response to the motion for new trial to which was attached the affidavit of the defendant's trial counsel stating that after the close of the State's case at trial, he and the defendant had agreed that the State had not introduced sufficient evidence of intoxication in its case in chief, that the medical records would only come in if the defendant testified, in which case he was subject to impeachment by his prior admissions made to the police. As a matter of trial strategy, defense counsel elected not to introduce the testimony of the three witnesses, the medical records, or the photographs. The affidavit does not mention the letter from Progressive Insurance Company.

¶ 16 At oral argument on the motion for new trial, the defendant expanded on his arguments that his counsel had been ineffective. He argued that his counsel was also ineffective for failing to move to have the defendant's statements at the time of his arrest excluded as the involuntary product of his having suffered a concussion. He argued that if these statements had been excluded as involuntary, and not just as having been obtained in violation of *Miranda*, they could not have been used for impeachment, obviating any danger of introducing the defendant's medical records. He also argued that trial counsel had been ineffective for failing to move to exclude the results of the defendant's field sobriety test because any consent to take that test was the involuntary product of his having suffered a concussion. Finally, the defendant argued that his counsel was ineffective for having failed to further investigate the letter from the defendant's insurer.

¶ 17 After taking the matter under advisement, the circuit court entered an order denying the defendant's motion for a new trial. The court concluded that the alleged deficiencies in trial counsel's performance were the result of trial strategy. Trial counsel had believed that the State had not met its burden of proof in its case in chief and that the best strategy was to let the case go to the jury without the presentation of defense evidence. The trial court

concluded that this was sound trial strategy. The defendant now appeals.

¶ 18 On appeal, the defendant argues that his trial counsel was ineffective for failing to challenge as the involuntary product of a concussion certain statements he made to the police upon his arrest as well as his refusal to submit to a blood-alcohol test; for promising in opening statement to present evidence that the defendant was suffering from a concussion and not from intoxication but failing to present any such evidence; and for offering no defense to the charge of improper lane usage although the defendant had claimed to swerve off the road as a result of striking a deer.

¶ 19 Claims of ineffective assistance of counsel are evaluated according to the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), as adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). Under this two-prong *Strickland* test, a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Houston*, 226 Ill. 2d at 144.

¶ 20 In demonstrating that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy. *Houston*, 226 Ill. 2d at 144. Counsel is afforded wide latitude when making tactical decisions, and the law presumes that counsel will faithfully fulfill his role envisioned by the sixth amendment. *People v. Cunningham*, 376 Ill. App. 3d 298, 301 (2007). Hence, counsel's performance must fall " 'outside the wide range of professionally competent assistance' " considering all the circumstances. *Cunningham*, 376 Ill. App. 3d at 301 (quoting *Strickland*, 466 U.S. at 690). Choices of trial strategy are

virtually unchallengeable because such a choice " 'is a matter of professional judgment to which a review of counsel's competency does not extend.' " *Cunningham*, 376 Ill. App. 3d at 301 (quoting *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001)). Furthermore, trial strategy includes an attorney's choice of one theory of defense over another. *Cunningham*, 376 Ill. App. 3d at 301-02.

¶ 21 In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. However, in determining whether a defendant has received ineffective assistance of counsel, a reviewing court may review either prong first, and the court need not consider both prongs of the standard if the defendant fails to show one prong. *People v. Cunningham*, 376 Ill. App. 3d 298, 301 (2007).

¶ 22 The defendant's first argument on appeal is that his counsel was ineffective in failing to move to suppress, as the involuntary product of a concussion, the admissions he made to the police that he had had quite a few beers that evening and should not have been driving, as well as his refusal to submit to a breathalyzer test. He argues that had the out-of-court statements been found to have been involuntary, they would not have been admissible even for impeachment purposes (see *People v. Lefler*, 38 Ill. 2d 216, 220 (1967)), and the defendant could have introduced into evidence at his trial medical records showing he had suffered a concussion in the accident without risk of the out-of-court admissions being used against him. He further argues that had the medical records demonstrating that he had suffered a concussion in the accident been admitted there is a reasonable probability he would have been acquitted.

¶ 23 In order to prevail on a claim of ineffectiveness based on the failure to file a motion to suppress, the defendant must show not only that his counsel's failure was outside the bounds of reasonable professional standards, but also that a reasonable probability exists both that the motion would have been granted and that the trial outcome would have been

different had the evidence been suppressed. *People v. Orange*, 168 Ill. 2d 138, 153 (1995).

¶ 24 The defendant asserts as the basis of his argument that the medical records from his visit to the emergency room the day after the accident show that he had been diagnosed as having suffered a concussion in the car accident. We have carefully reviewed those records and find no such diagnosis.

¶ 25 The patient was assessed in the emergency room the day after the accident, based on his own reporting of the car accident in which he was wearing a seat belt and his air bag did not deploy. He reported that he thought he had suffered a loss of consciousness for at least one hour. He complained of a head and neck injury as well as blurry vision with slight nausea. He did exhibit slight swelling to his right forehead area. Examination did not reveal any other abnormality. He was administered a CT scan of his head and cervical spine. Both were negative for any injuries from the accident. The departure information indicated a "head trauma without CNS bleed or C spine abnormality." The defendant was sent home with a cervical collar, pain medication, and Flexeril. Upon leaving the hospital he was given a patient instruction sheet for "Concussion/Head Injury–Adult."

¶ 26 The medical records contain no diagnosis of a concussion. The defendant can show neither a reasonable probability that his motion to suppress based on his having suffered a concussion which the medical records do not support would have been successful, nor that, had the motion been granted, the result of the trial would have been different. Admission of the medical records at trial would not have established a defense of concussion, and there is no reasonable probability that he would have been acquitted of driving under the influence.

¶ 27 The defendant also argues that had his counsel filed a motion to suppress, the damaging evidence of his refusal to submit to a breathalyzer test would also have been suppressed as involuntary. We note that the defendant cites to no case law in support of his argument, and we reject it out of hand. Because a driver has no constitutional right to refuse

a breathalyzer test and may be compelled by the State to take such a test, evidence of the driver's refusal to take such a test does not violate the self-incrimination privilege and may properly be admitted at trial. *People v. Johnson*, 218 Ill. 2d 125, 140 (2005) (citing *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 141 (1984)). Accordingly, the performance of defendant's counsel in failing to move to suppress the defendant's refusal to submit to a breathalyzer test was not deficient and did not fall outside the bounds of reasonable professional standards. Furthermore, the defendant cannot establish prejudice as a result of his counsel's failure to file a motion to suppress his refusal to submit to a breathalyzer test because there is no reasonable probability such a motion would have been granted.

¶ 28 The defendant next argues that his counsel was ineffective for promising the jury, in opening statement, a concussion defense, but then presenting no evidence to support such a defense. The defendant acknowledges that his counsel did try to elicit from the police officers who testified the symptoms and signs of a concussion but argues that his counsel should have gone further and introduced into evidence the medical records which diagnose the defendant with having suffered a concussion in the accident. As we have already pointed out, the medical records contain no such diagnosis. Even if introduced, they would not have established that the defendant suffered a concussion in the accident and that his symptoms, which appeared to the police officers to be signs of intoxication, were actually due to a concussion. Because there is no reasonable probability that the result of the trial would have been different had the medical records been introduced into evidence, the defendant cannot establish that his counsel's failure to introduce those records, if deficient, prejudiced him.

¶ 29 The defendant also argues that his counsel should have called certain witnesses, Gordon and Dorris Strong and Alice Hatfield, to testify that, contrary to the defendant's statement to the police, the defendant had not injured his head at work prior to the accident, but had injured it in the accident. But without evidence that the defendant had, indeed,

suffered a concussion in the accident, the testimony of these witnesses would have added little to a concussion defense. Had they testified, there is no reasonable probability that the result of the trial would have been different. The defendant cannot establish that his counsel's failure to call them, even if professionally deficient, prejudiced him.

¶ 30 Finally, the defendant argues that his counsel was ineffective for failing to offer any defense to the charge of improper lane usage, although such a defense was available. The defendant asserts that his counsel had in his possession at the time of trial a letter from the defendant's insurer stating that it would cover any damages because the accident resulted from the defendant striking a deer and crashing into a yard. The defendant's counsel also failed to introduce into evidence photographs taken by the defendant's father, Gordon Strong, showing what the defendant contends is deer hair on the defendant's vehicle after the crash.

¶ 31 The letter from the defendant's insurer, Progressive Northern Insurance Company, states in pertinent part:

> "This claim was considered and handled as a 'Not-At-Fault' Comprehensive loss. Mr. Strong struck a deer and went into a yard causing damage to the landscaping."

The insurance company paid for all damage to the landscaping, deemed the defendant's vehicle a total loss and paid for it, and paid the defendant's medical costs.

¶ 32 Interestingly, the letter attached to the defendant's motion for a new trial is dated May 2, 2012, more than one month after the completion of the defendant's jury trial. The defendant's trial counsel could not have had this letter in his possession at the time of trial. In his reply brief on appeal, the defendant's appellate counsel asserts that he mistakenly attached the wrong letter to the motion for a new trial, and includes in an appendix a letter from the defendant's insurance company dated March 14, 2011, stating:

> "This letter is to confirm that Terry Strong's accident on March 5, 2011[,] is being fully covered by Progressive Northern Insurance Company. Progressive is currently

in the process of addressing all the damages that resulted from the above mentioned accident and the accident is considered a not at fault accident that resulted due to a deer hit."

This letter was ordered stricken from the defendant's reply brief. It was not before the circuit court at the time it ruled on the motion for a new trial and will not be considered by this court. Accordingly, the defendant's argument with respect to this letter must fail.

¶ 33 The defendant also argues that his counsel was ineffective in failing to call as a witness Gordon Strong, who could have testified about the photographs he took of the defendant's vehicle after the crash, which the defendant argues show deer hair on the vehicle's side mirror. We note that no witness testified that the defendant had struck a deer and that this was what had caused the accident. The defendant did not so testify, and no one else could have known. The only reference to a deer strike was the police officer's testimony that the defendant had told him that he had swerved off the road to avoid hitting a deer. Accordingly, the introduction into evidence of these photographs would have done little to substantiate such a defense. There is no reasonable probability that, even if Gordon Strong had testified and the photographs been admitted, the result of the trial would have been different.

¶ 34 Furthermore, decisions concerning which witnesses to call at trial and what evidence to present on the defendant's behalf ultimately rest with trial counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). These types of decisions have long been viewed as matters of trial strategy, which are generally immune from claims of ineffective assistance of counsel. *West*, 187 Ill. 2d at 432.

¶ 35 The right to effective assistance of counsel refers to *competent*, not *perfect*, representation. *West*, 187 Ill. 2d at 432. Mistakes in trial strategy or tactics, or even in judgment, do not of themselves render the representation incompetent. *West*, 187 Ill. 2d at

432. The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing of the State's case. *West*, 187 Ill. 2d at 432-33. Such is not the case here.

¶ 36 The defendant's trial counsel did subject the State's case to meaningful adversarial testing. He was prepared for trial and cross-examined the State's witnesses in great detail and with skill. At the close of the State's case, he and his client agreed that the State had not carried its burden of proof and that the best defense strategy was to rest and hold the State to its proof. As the circuit court found, given the evidence presented, this was a sound trial strategy.

¶ 37 For the foregoing reasons, the judgment of the circuit court of Randolph County is hereby affirmed.

¶ 38 Affirmed.