

No. 1-15-0047

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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, Illinois.
)	
v.)	No. 14 C5 50128
)	
JAMELL THOMAS,)	Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant forfeited his claim on appeal that the results of his HGN test lacked an adequate foundation. And trial counsel was not ineffective for failing to object to the admission of the HGN evidence on this basis.

¶ 2 Following a 2014 bench trial, defendant Jamell Thomas was convicted of aggravated driving under the influence (DUI) and sentenced to six years of imprisonment. On appeal, Thomas challenges the trial evidence regarding the results of the horizontal gaze nystagmus (HGN) test as lacking adequate foundation. Because we find that there was sufficient evidence apart from the results of the HGN test to sustain Thomas's conviction, we affirm.

¶ 3

BACKGROUND

¶ 4

Thomas was charged with aggravated driving under the influence, driving on a suspended license, and improper traffic lane usage on February 3, 2014, in Orland Park, Illinois. At trial, Officer Eppolito testified regarding the events of that night.

¶ 5

Officer Eppolito was on patrol at approximately 1:00 a.m. in Orland Park when he noticed a car ahead of him whose tires drifted over the lane lines. He followed the car for six blocks, during which time he observed two additional lane violations. On the last occasion, the car straddled the line between the lanes without crossing entirely into the other lane. Officer Eppolito pulled the car over on 159th Street and approached the driver, whom he identified in court as Thomas. Eppolito detected a "strong odor of alcohol" emanating from the car and further noted that Thomas had glassy eyes. In quick succession, the officer asked Thomas to pull into a nearby parking lot and requested that he produce his driver's license. Thomas replied that he was pulled over (although he was obstructing a lane of traffic) and fumbled to retrieve his state identification, which he dropped while attempting to hand it to Eppolito. Thomas admitted that his license was suspended.

¶ 6

Backup arrived, and Eppolito asked Thomas to exit his car. While questioning Thomas outside the vehicle, Eppolito noticed Thomas' speech was slurred and his breath smelled of alcohol. Thomas, in reply to Eppolito's question regarding how much alcohol he had consumed, initially responded "Super Bowl," and then said he drank two beers over the course of three to four hours. Thomas told Eppolito that he was on his way home, but the address he provided Eppolito did not match the address on his state ID. Thomas then said his aunt lived in the area, but gave her address as 153rd Street and Indiana, which Eppolito said did not exist.

¶ 7 Eppolito arrested Thomas for driving with a suspended license and, because it was extremely cold outside, took him to the police station for sobriety tests, where he observed that Thomas's pants were undone. At trial, Eppolito testified that he had received training in DUI investigations, which included training in field sobriety tests. He had made hundreds of DUI arrests during his career.

¶ 8 Eppolito began by performing the HGN test. He instructed Thomas to stand still, keep his head straight, and follow Eppolito's pen with his eyes. Eppolito testified that Thomas demonstrated all six cues indicating that he had consumed alcohol. Specifically, Eppolito described those cues as follows: "[T]he first two is with both eyes following my stimulus smoothly. And then looking for nystagmus at maximum deviation, which is the farthest that I could see with still a little white showing, and then prior to 45 degree angle with the eyes with white showing." On cross-examination, Eppolito admitted that "hundreds of other things" aside from alcohol consumption could cause nystagmus.

¶ 9 The second test Thomas took was the one-legged stand test. Prior to asking Thomas to perform the test, Eppolito inquired whether Thomas had any injuries that would impair his performance. Thomas indicated that he had a problem with his hip, but did not think that would prevent him from standing on one leg. Eppolito then instructed Thomas to keep his hands at his sides and lift one leg six inches above the ground and begin counting. Thomas raised his arms at one point during the test, but Eppolito determined that he passed.

¶ 10 The final test Eppolito asked Thomas to complete was the walk and turn, which required Thomas to take nine heel to toe steps forward along an imaginary line, and then turn and take nine heel to toe steps back, all while keeping his hands at his sides. Eppolito testified that the test would not normally be performed with an imaginary line, but that there was no line in the

garage where the tests were performed. Thomas stepped off the "line" several times, did not touch his feet heel to toe, and lost his balance when turning. The results of this test led Eppolito to conclude that Thomas was impaired, and he was placed into custody. After a 20-minute observation period, Thomas refused to take a breathalyzer test.

¶ 11 Ultimately, Eppolito testified that in light of his extensive personal and professional experience with people under the influence of alcohol, he believed Thomas was under the influence based on his driving, physical cues of impairment, admission to drinking, not knowing where he was, and failing two of the three field sobriety tests.

¶ 12 Following the conclusion of Eppolito's testimony, the State played a DVD of both the traffic stop as well as the sobriety tests performed at the police station. The DVD corroborates Eppolito's testimony regarding the traffic stop, as well as certain testimony regarding the sobriety tests. Specifically, with regard to the HGN test, it was performed with Thomas's back to the camera, so the viewer can see only Eppolito's movements. The DVD reflects that Eppolito performed the test over the course of approximately 22 seconds, moving his pen four times quickly from side to side in front of Thomas's face for five seconds, and making seven slower movements with his pen over 17 seconds. With regard to the walk and turn test, the video reveals that Thomas stumbled after two steps and Eppolito permitted him to restart the test, at which point Thomas, as Eppolito testified, lost his balance when turning, stepped off the "line," and did not touch his feet heel to toe.

¶ 13 After the court denied Thomas' motion for a directed finding at the conclusion of the State's case, Thomas rested without putting on evidence. The court found Thomas guilty of aggravated DUI based on Officer Eppolito's testimony and the DVD evidence. The court

specifically referenced Thomas's slurred speech, his admission to drinking, the failed HGN test, and the failed walk and turn test.

¶ 14 Following the denial of his posttrial motion, Thomas was sentenced to six years' imprisonment. This appeal follows.

¶ 15 ANALYSIS

¶ 16 The issues on appeal surround the admission of the results HGN test. First, Thomas contends that Officer Eppolito's testimony regarding the results of the test lacked an adequate foundation. Our supreme court held that an adequate foundation for admission of HGN test results includes "a showing that the witness is properly trained and that he performed the test in accordance with proper procedures." *People v. McKown*, 236 Ill. 2d 278, 306 (2010) (*McKown II*).

¶ 17 As an initial matter, the State argues, and we agree, that Thomas has forfeited this issue on appeal, as he failed to object to the admission of this evidence at trial or raise it in his posttrial motion. See *People v. McDonald*, 2016 IL 118882, ¶ 45 (a defendant must both object at trial include the issue in a posttrial motion to preserve it for review). The forfeiture rule is particularly appropriate where a defendant argues that the State failed to lay a proper foundation for the admission of evidence. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). In this situation, a defendant's failure to object at trial "deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *Id.*

¶ 18 Thomas concedes that he forfeited this issue, but asks us to review for plain error. Specifically, Thomas invokes the first prong of the plain error doctrine, which permits us to consider unpreserved error where the error is clear and obvious and the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant. *People v.*

Sargent, 239 Ill. 2d 166, 189 (2010). In conducting our review under this prong, we need not consider whether an error occurred if the record is clear that the alleged error would not have affected the outcome of the case. *People v. White*, 2011 IL 109689, ¶ 148 (declining to engage in "meaningless endeavor of determining whether error occurred" where evidence was not closely balanced). In this case, there was ample evidence, aside from the HGN results, to support Thomas's conviction for aggravated DUI.

¶ 19 A defendant is under the influence when, as a result of consuming alcohol, "his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care."

People v. Halerwicz, 2013 IL App (4th) 120388, ¶ 24 (internal quotation omitted).

Circumstantial evidence, in the form of testimony that a defendant's breath smelled of alcohol or his eyes were glassy, may suffice to prove a defendant guilty of DUI. *People v. Morris*, 2014 IL App (1st) 130512, ¶ 20. And, importantly, credible testimony by the arresting officer of the defendant's intoxication renders scientific proof unnecessary. *Id.* (citing *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2007)).

¶ 20 Here, the evidence of Thomas's impairment was overwhelming. First, Officer Eppolito testified that following his stop of Thomas's vehicle, he detected a strong odor of alcohol coming from Thomas's car as well as his breath. Eppolito further noted that Thomas's eyes were glassy and his speech was slurred. Thomas himself admitted to having consumed two beers earlier in the night. In addition to this strong evidence of alcohol consumption, there was ample evidence of Thomas's resulting impairment. Thomas drifted between lanes while driving and failed the walk-and-turn field sobriety test when he lost his balance and stepped off the "line." He also gave non-responsive answers to Officer Eppolito's questions and was unable to provide the officer with his accurate destination address. Finally, Thomas's refusal to take a Breathalyzer test

evinces consciousness of guilt. See *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993); see generally *Morris*, 2014 IL App (1st) 130512, ¶¶ 21-22 (finding testimony by two arresting officers that defendant had bloodshot eyes and a strong odor of alcohol on his breath sufficient to sustain conviction for aggravated DUI even if, as defendant maintained, testimony regarding his failed HGN test had been improperly admitted).

¶ 21 Nevertheless, Thomas argues that the evidence was closely balanced, relying heavily on *People v. McKown*, 226 Ill. 2d 245 (2007) (*McKown I*). But *McKown I* is inapposite. In that case, the supreme court held that the admission of the HGN test without a *Frye* hearing was not harmless error where no other field sobriety test was given and the defendant's blood alcohol content was not verified by a chemical test. *Id.* at 276. Here, however, two other field sobriety tests were administered, one of which (the walk-and-turn) Thomas failed, and the other (the one-legged stand), he passed with difficulty, raising his arms for balance when he was instructed to keep them to the side. This alone renders *McKown I* distinguishable.

¶ 22 Moreover, unlike in *McKown I*, where the court concluded that the trial court relied heavily on the HGN test results in finding the defendant guilty, we do not find evidence of such reliance here. To be sure, the trial court mentioned that Thomas failed the HGN test in delivering its ruling, but the court focused more on Thomas's failure of the walk-and-turn test as well as his slurred speech and uncoordinated movements. Additionally, trial counsel called into question the value of the HGN test when he elicited testimony from Officer Eppolito that "hundreds" of things other than alcohol consumption could cause nystagmus. Under these circumstances, we do not believe that the HGN test results overpersuaded the trial court.

¶ 23 Because the evidence was not closely balanced, Thomas's claim does not warrant plain error review and we conclude that he has forfeited this issue.

¶ 24 Alternatively, Thomas alleges error in his trial counsel's decision not to object to the admission of the test results on foundational grounds and in his counsel's failure to highlight to alleged errors in Eppolito's administration of the test.

¶ 25 To succeed on a claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). While both prongs of this test must be satisfied in order for defendant to prevail on his claim, we have the option of beginning our analysis under either prong, and, if we find the standard for that prong is not satisfied, we need not consider the remaining prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 26 Here, for the same reasons that we concluded that the evidence was not closely balanced, we conclude that Thomas has not established that he was arguably prejudiced by counsel's failure to make a foundational objection (the second prong of *Strickland*). Prejudice exists only when there is a reasonable probability that but for defense counsel's errors, the outcome of the trial would have been different. *People v. Manning*, 214 Ill. 2d 319, 326 (2011). And we have already determined that that there was ample evidence to support Thomas's conviction even if counsel had succeeded in excluding the HGN results. See *supra* ¶ 20.

¶ 27 CONCLUSION

¶ 28 Accordingly, the judgment of the trial court is affirmed.

¶ 29 Affirmed.