2018 IL App (1st) 152761-U
Order filed: July 20, 2018

FIFTH DIVISION

Nos. 1-15-2761 and 1-16-0620, consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RONALD JEKA, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. Nos. TB 712-702 TB 648-179 Honorable Patrick Coughlin, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's conviction for misdemeanor driving under the influence of alcohol where his counsel was not ineffective for failing to use a peremptory challenge against a juror based on a *voir dire* answer.

¶ 2 Defendant-appellant, Ronald Jeka, appeals from his conviction for misdemeanor driving under the influence of alcohol arguing that his counsel was ineffective for failing to use a preemptory challenge against juror, A.Q., based on his response to a question about assessing the credibility of a law enforcement officer. We affirm.[1]

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[1] In a prior order, pursuant to Supreme Court Rule 352(a) (eff. July 1, 2018), we determined that this appeal could be resolved without oral argument for the reasons stated therein.

¶ 3 On October 22, 2012, defendant was charged with driving under the influence of alcohol (DUI) in violation of 625 ILCS 5/11-501(a)(2) (West 2012); illegal transportation of alcohol in violation of 625 ILCS 5/11-502 (West 2012); failure to reduce speed to avoid an accident in violation of 625 ILCS 5/11-601(a) (West 2012); and failure to produce a valid driver's license in violation of 625 ILCS 5/6-112 (West 2012),[2] after defendant's vehicle rear-ended the vehicle of Sonia Capoccia while she was stopped at a red light. Initially, defendant proceeded to a bench trial, where he was found guilty of the DUI and failure to reduce speed to avoid an accident charges, and not guilty as to the illegal transportation of alcohol charge. Following defendant's bench trial, the trial court granted defense counsel leave to withdraw and an Assistant Public Defender (APD) was appointed to represent defendant. The APD filed a motion for a new trial arguing that defendant had not been properly admonished as to his right to a jury trial and, therefore, had not knowingly and voluntarily waived that right. The motion for new trial was granted.

¶ 4 On March 10, 2015, defendant proceeded to a jury trial on the DUI charge; a bench trial was held simultaneously on the failure to reduce speed charge.

¶ 5 During *voir dire*, the trial court pursuant to *People v. Zehr*, 103 Ill. 2d 472 (1984), informed the entire venire that: defendant was presumed innocent; the State was required to prove him guilty beyond a reasonable doubt before he could be convicted; defendant was not required to offer any evidence on his own behalf; and, if defendant did not testify, it could not be held against him. All members of the venire, including A.Q., indicated that they understood and accepted each of these principles.

[2] Defendant's failure to produce a valid driver's license was dismissed before the case proceeded to the bench trial.

¶ 6 In response to questioning by the trial court, the first group of the venire, including A.Q., indicated that they would apply the law as given by the court. Additionally, the court informed the first group of potential jurors that law enforcement officers may testify at trial, and then admonished the group as follows:

> "You are to judge the testimony of an officer in the same manner as you judge the credibility or believability of any other witness and not give any more credence to an officer's testimony simply because they are police officer[s]."

All of the potential jurors in the first group, including A.Q., indicated that they could follow this instruction.

¶ 7 During the court's questioning of A.Q., the following colloquy occurred:

> "[A.Q.]: I got my car broken into on more than one occasion. My parents' house was just broken into a couple months ago.
>
> THE COURT: Okay, is there anything about those instances either with your parents or with yourself that would prevent you from being fair and impartial in this particular case?
>
> [A.Q.]: I don't think so.
>
> THE COURT: Okay. And you also raised your hands when asked if you knew of or were close friends with anyone who was an officer, State's Attorney, defense attorney or anyone else in law enforcement?
>
> [A.Q.]: I have a family [who are] LAPD, friends [who are] Chicago PD, and a good friend who is an attorney for the DEA.
>
> THE COURT: And do you have conversation with any of these individuals about their work?

[A.Q.]: Yes.

THE COURT: Do they talk to you about cases?

[A.Q.]: Sure.

THE COURT: Do you think you can put aside anything that they may have told you about what happened on other cases and only consider this case [based upon] the evidence that you hear in court?

[A.Q.]: I would hope so.

THE COURT: And is there any other reason that you can think of that would prevent you from being fair and impartial in this case?

[A.Q.]: No."

The Assistant State's Attorney (ASA), on behalf of the State, asked A.Q. the following questions:

"[ASA]: [A.Q.] you said that you had some friends in *** different police departments and you have actually discussed cases with them?

[A.Q.]: At family parties ***

"[ASA]: Just socially. When you talk to them, you obviously found out what other people's opinions were on those cases, correct?

[A.Q.]: [Yes].

"[ASA]: After the judge will instruct you on the law and after you hear evidence on this case, will you be able to set all those opinions aside and [make your] own decision?

[A.Q.]: I would hope so."

The APD then asked A.Q. the following questions:

"[APD]: Okay, thank you [A.Q.]. The fact that you have family in CPD and LAPD, can you describe in *** what way that might affect the perception that you have in this case or how you might view the facts in this case?

[A.Q.]: You know, I believe my family, I believe my friends when they are telling you stories. I know every story has more than one side to it. So, you know, like I said I tend to believe my family and friends so I don't, I think that might affect judgment, I don't know. I mean like I said, it would, I would hope it wouldn't.

[APD]: Do you feel that you would give any greater amount of weight to the testimony of a law enforcement officer versus any other witness?

[A.Q.]: Having family in law enforcement and I know that one's different, but I would tend to say yes."

¶ 8 The APD then posed several questions to the entire first group of jurors, as follows:

"Is there anyone that does not drink alcoholic beverages?"

"Is there anyone in the jury that believes that a person should not drive a vehicle after having *** consumed any amount of alcohol?"

"Is there anyone in the jury whether it be family sustained any injury, personal injury, or property damage as a result of the negligence of somebody who is under the influence of alcohol?"

A.Q. did not respond in the affirmative to any of these questions.

¶ 9 Following the completion of the questioning of the first group of jurors, the proceedings moved to chambers. The APD requested that the court strike A.Q. for cause arguing that he may give greater weight to the testimony of a law enforcement officer and, thus, could not be fair and impartial. In denying the APD's motion to strike A.Q. for cause, the court stated:

> "I also asked him twice whether or not in general he would be fair and impartial and whether or not this relationship with the officers that he knew prevented him from being fair and impartial. Twice he indicated that he would hope so, that he could be. Although [he] did express in different terms when asked about the defense would he judge the officers differently because of family. He still had indicated that he could be fair and impartial and that he would just consider the facts [of] this case. So cause for it would be denied."

¶ 10 During the jury selection, the APD used peremptory challenges on two potential jurors—K.G. and S.O.—from the first venire group who had indicated that they did not drink alcohol. The APD also used peremptory challenges on two jurors from the second group: A.B., who did not consume alcohol, had nearly been hit by a drunk driver, and had "very little tolerance for drinking and driving;" and Y.C. Finally, the APD used a fifth peremptory challenge on an alternate juror, M.K., whose mother had been killed by a drunk driver.

¶ 11 After the jury was selected, the court's instructions to the selected jurors included the direction to "keep an open mind," and that "[w]hat you may have seen or heard outside the courtroom is not evidence." The trial court further instructed the jurors:

> "You should give careful attention to the testimony in evidence as it is received and presented for your consideration. But you should not form or express any opinion about the case until you have retired to the jury room to consider your verdict. If you experience any personal problems or if you are in doubt about your duties, please inform the deputy."

¶ 12 At trial, Sonia Capoccia testified that, on October 22, 2012, at approximately 3:35 p.m., she was driving a Toyota in the vicinity of the intersection of 31st and Robinson Streets and was

stopped at a red light. The street was not slippery and she had no difficulty applying her brakes at the stop light. A silver SUV collided into the rear of her vehicle. She described the impact from defendant's vehicle as "full," and as if "somebody just like rammed right into me." While looking in the rear view mirror, she saw a person whom she identified in court as defendant, exiting the driver side door of the SUV and approaching her. Defendant pounded on the window of her vehicle screaming: "hey, sh** happens, I have insurance because I'm an American." Ms. Capoccia rolled down the window only "three inches" because she was "freaked out" by defendant's behavior. He then began to search his pockets. During this exchange, Ms. Capoccia noticed that defendant was swaying and slurring his speech. He appeared disheveled, and both his pants and shirt were unbuttoned and "open." Ms. Capoccia called 9-1-1.

¶ 13 When the police arrived on the scene, Ms. Capoccia observed from her rear view mirror that the front of defendant's vehicle had been dented and that a passenger in the SUV was "falling out of the car." She also observed cans of beer on the ground under the driver side of defendant's vehicle. Ms. Capoccia could see the police assist the passenger, who kept falling down. She could also see the police speaking to defendant as he stood near his vehicle. Based on her observations and prior experience, Ms. Capoccia believed that the driver of the vehicle was under the influence of "something."

¶ 14 When her husband arrived at the scene, Ms. Capoccia exited her vehicle and she saw that the rear bumper of her vehicle had been damaged.

¶ 15 On cross-examination, Ms. Capoccia testified that she was unfamiliar with the manner in which defendant normally spoke and walked because she did not know him prior to the incident. She also acknowledged that she did not know if the beer cans on the ground were empty or full or if they belonged to defendant's passenger.

¶ 16 Officer Rosales investigated the collision. He had been a member of the Chicago police department for the past eight years and, after military service, had been previously employed by the Palm Beach County Sheriff's Office for nine years. The officer had been trained to conduct DUI investigations, had passed written and practical examinations in this area, and was a certified breath alcohol technician. He had received 40 hours of training in conducting standard field sobriety and horizontal gaze nystagmus (HGN) tests.

¶ 17 When Officer Rosales arrived at the scene of the collision, he saw a gray Mazda touching the back of a Toyota. The Toyota's bumper was scraped and its "skirting" was cracked and pushed in. As the officer approached the driver of the Toyota, who he identified in court as Ms. Capoccia, he saw a can of beer on the street. The officer asked Ms. Capoccia to produce her license and proof of insurance and if she needed medical assistance. After Ms. Capoccia refused medical assistance, the officer spoke to the driver of the Mazda, who he identified in court as defendant. Defendant was leaning against the driver side front fender of the Mazda and he appeared to be in "a good mood." Defendant told Officer Rosales that he was the owner and driver of the Mazda. Officer Rosales observed an empty beer can in the center console and unopened beer cans in the backseat of defendant's vehicle.

¶ 18 Defendant's eyes were bloodshot and glassy, he had a strong odor of alcohol on his breath, and his speech was slurred. Based on these observations, the officer believed that he should continue a DUI investigation at the police station. Because defendant did not produce a driver's license, the officer was required to place defendant in handcuffs to transport him to the police station. The officer assisted defendant into (and later, out of) the squad car because he was not "balancing very well." The officer asserted that defendant left an odor of alcohol in the squad car.

¶ 19 The officer explained that he did not perform field sobriety testing at the scene of the collision due to safety issues, as there were no sidewalks and traffic was heavy. At the police station, Officer Rosales asked defendant to perform field sobriety tests and defendant refused. The officer read the Warning to Motorists to defendant and he refused to take a Breathalyzer test. Officer Rosales maintained that, at the station, defendant's eyes remained bloodshot and his breath still strongly smelled of alcohol. When the officer asked if he had been drinking, defendant said that he "had a beer." Based on his observations and his professional and personal experience, the officer was of the opinion that defendant was under the influence of alcohol.

¶ 20 On cross-examination, Officer Rosales stated that, on the day of the incident, it had been raining and the roads were wet. Other than defendant's admission that he had consumed one beer, the officer could not say if defendant had any more to drink. He did not know if defendant's eyes were bloodshot from lack of sleep, allergies, or wearing contact lenses. The officer acknowledged that defendant would not have been free to leave the police station regardless of whether or not he had performed the field sobriety tests or taken a Breathalyzer test. Officer Rosales admitted that the time listed on the Warning to Motorist form indicated the warnings had not been read to defendant prior to his refusal to take the Breathalyzer test.

¶ 21 On redirect, Officer Rosales clarified that he had not arrested defendant for DUI at the scene, although defendant had been handcuffed. The handcuffing is standard procedure when placing a suspect into a squad car for transport. The officer also clarified that he had read the Warnings to Motorist about 20 to 25 minutes prior to defendant's refusal to take the Breathalyzer test and he admitted that the time of refusal written on the Warnings to Motorist was incorrect.

¶ 22 Defendant did not testify or call witnesses.

¶ 23 In its final instructions to the jury, the trial court directed the jurors, *inter alia*, that they should not be influenced by sympathy or prejudice, and instructed them as to the proper determinations of the credibility of the witnesses and the weight to be given their testimony. The court admonished the jurors to "determine the facts and to determine them only from the evidence in this case."

¶ 24 The jury found defendant guilty of the DUI charge, and the court found him guilty of failing to reduce speed to avoid an accident. Defendant's motion for a new trial was denied. The court entered a conviction and assessed a $200 fine against defendant for the failure to reduce speed. Additionally, as to the DUI charge, defendant was sentenced to 24 months' conditional discharge which required him to undergo treatment, attend a victim impact panel, and serve eight days in the Cook County Department of Corrections (CCDOC). Defendant was also assessed $1,829 in fines and fees with a $200 credit based on the time he had served in CCDOC. This court granted defendant's motion to file a late notice of appeal.

¶ 25 On appeal, defendant's sole argument challenging his DUI conviction is that his trial counsel was ineffective for failing to exercise a peremptory challenge against juror A.Q. He does not seek review of his conviction for failure to reduce speed to avoid an accident.

¶ 26 We begin our consideration of this issue by setting forth the applicable and familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test requires a defendant claiming ineffectiveness of counsel to "show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688, 694). A

defendant must establish both prongs of the *Strickland* test in order to prevail on his ineffectiveness of counsel claim. *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 27 To meet the first prong of *Strickland*, a defendant " 'must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy.' " *People v. McCarter*, 385 Ill. App. 3d 919, 929 (2008) (quoting *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)). Additionally, " '[m]atters of trial strategy are generally immune from claims of ineffective assistance of counsel.' " *Manning*, 241 Ill. 2d at 327 (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)). Counsel's decisions during jury selection are considered matters of trial strategy "to which courts should be highly deferential" *(id.* at 333), and "are virtually unchallengeable." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In determining whether counsel was ineffective, the entire *voir dire* of the juror at issue must be considered. *Manning*, 241 Ill. 2d at 334.

¶ 28 During *voir dire*, A.Q. indicated he understood and accepted each of the principles set forth in *Zehr*. He also indicated, in response to the trial court's initial questioning of the first group of potential jurors, that he would follow the law as given to the jurors and, specifically, the court's instruction that the testimony of a law enforcement officer must be evaluated as to credibility as any other witness and not be given any more credence. When asked by the court whether the fact that he and his family had been victims of break-ins in the past would prevent him from being fair and impartial, A.Q. answered: "I don't think so." A.Q. revealed to the court that he had "family [who are] LAPD, friends [who are] Chicago PD, and a good friend who is an attorney for the DEA" and that he had conversations about their cases. When asked by the court, could he put those discussions aside and "only consider this case [based upon] the evidence [he heard] in court," A.Q. responded: "I would hope so." He gave a similar response when the ASA

asked him whether he could set aside any opinions he learned from these discussions. In response to questions by the APD, A.Q. said that he tended to "believe" his family members and friends, and he did not know if it would "affect [his] judgment." He also said: "I hope it wouldn't" and that "I know every story has more than one side to it." Then, when asked by the APD: "Do you feel that you would give any greater amount of weight to the testimony of a law enforcement officer versus any other witness," he responded: "Having family in law enforcement and I know that one's different, but I would tend to say yes."

¶ 29 A.Q. did not respond affirmatively when the APD asked the first group of jurors whether there was anyone who does not drink alcohol, believes a person should not drive after consuming any amount of alcohol, and had sustained or had a family member sustain an injury as a result of someone under the influence of alcohol.

¶ 30 The trial court, who had observed A.Q.'s demeanor, denied the APD's motion to strike A.Q. for cause based on its review of A.Q.'s answers to the *voir dire* questions. The trial court found that A.Q.'s *voir dire*, as a whole, indicated that he could be fair and impartial. Viewing the totality of the *voir dire*, we also find that A.Q. did not demonstrate a lack of impartiality or bias toward defendant. The APD chose not to exercise a peremptory challenge against A.Q. after the *voir dire* of the first group of the venue, but used two peremptory challenges as to other potential jurors. The APD made a strategic decision based upon all of the circumstances and the need to preserve peremptory challenges for the second group of potential jurors. We conclude that defendant's counsel was not deficient.

¶ 31 Even assuming that counsel's decision as to juror A.Q. was not objectively reasonable, defendant did not establish that he was prejudiced by that decision. "The prejudice prong of the *Strickland* test generally requires the defendant to show 'a reasonable probability that, but for the

counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Cook*, 2018 IL App (1st) 142134, ¶ 101 (quoting *Strickland*, 466 U.S. at 694). "[T]he prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Jackson*, 205 Ill. 2d at 259 (citing *People v. Simms*, 192 Ill. 2d 348, 362 (2000)); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004) ("a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair").

¶ 32 The evidence of defendant's guilt of DUI was overwhelming, and included the testimony of a civilian witness.

¶ 33 A conviction for DUI may be supported by circumstantial evidence. *People v. Toler*, 32 Ill. App. 3d 793, 799 (1975). This evidence may include testimony that defendant exhibited altered speech, staggered walking, poor balance, blood shot eyes, or unusual behavior. *People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007); *People v. Love*, 2013 IL App (3d) 120113, ¶ 36.

¶ 34 Ms. Capoccia testified that defendant drove his vehicle into the rear of her vehicle while she was stopped at a red light. She testified to his erratic behavior after the collision and her observations that he was swaying, his speech was slurred, and he appeared disheveled. She expressed an opinion that defendant was under the influence of "something." Officer Rosales's observations of defendant, as to his lack of balance and slurred speech, were consistent with Ms. Cappocia's observations of defendant. In addition, the officer testified that defendant's eyes were bloodshot and glassy, and that he had a strong odor of alcohol. Both witnesses testified to the beer cans on the ground near defendant's vehicle. Additionally, defendant refused to perform

field sobriety tests and to take a Breathalyzer test and those refusals may be considered as circumstantial evidence of defendant's consciousness of guilt. *People v. Johnson*, 218 Ill. 2d 125, 140 (2005). The officer opined that, based on his substantial experience, defendant was under the influence of alcohol. Defendant offers only conjecture or speculation that A.Q. exercised any bias or prejudice over the jury's deliberations. Based on this evidentiary record, we cannot say there was a reasonable probability that the result of the trial would have been different if A.Q. had not served on the jury. Further, there has been no showing that the trial proceeding was unreliable.

¶ 35 For the reasons stated, we find that defendant has not shown that his trial counsel was ineffective and, therefore, we affirm his conviction for DUI based on the jury's verdict. Further, because defendant has not raised a challenge as to his conviction for failing to reduce speed to avoid an accident, we affirm that conviction.

¶ 36 Affirmed.