2018 IL App (4th) 150975-U

NO. 4-15-0975

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 28, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
JASON SKINNER,	)	No. 14DT39
Defendant-Appellant.	)	
	)	Honorable
	)	Michael L. Stroh,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to establish that his defense counsel provided him with ineffective assistance at his trial.

(2) This court lacks jurisdiction to address defendant's claim that the circuit clerk improperly assessed fines against defendant.

¶ 2 Following a jury trial, defendant, Jason Skinner, was convicted of driving with a breath-alcohol concentration (BAC) of 0.08 or more and sentenced to 24 months' probation. He appeals, arguing (1) his defense counsel provided ineffective assistance by eliciting testimony from a witness that contradicted a stipulation of the parties and defense counsel's own trial strategy and (2) the circuit clerk improperly imposed fines that must be vacated. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a traffic stop in June 2014, Woodford County sheriff's deputy Nathan

Campbell issued defendant traffic citations for (1) driving under the influence (DUI) of a combination of drugs and alcohol (625 ILCS 5/11-501(a)(4) (West 2012)) (count I) and (2) driving with a BAC of 0.08 or more (625 ILCS 5/11-501(a)(1) (West 2012)) (count II). On the latter citation, Campbell specifically noted that defendant had a "[b]reath [s]ample" of "[0].086." In June 2015, the State charged defendant with a third DUI count, alleging he drove while under the influence of alcohol (count III). *Id.* § 11-501(a)(2).

¶ 5 In September 2015, defendant's jury trial was conducted. At the outset of the trial, the State moved to dismiss count I against defendant, alleging DUI based upon defendant having a combination of drugs and alcohol in his system, and the trial court granted the motion. Defendant's counsel then informed the court that the parties had agreed upon two stipulations. The record contains a handwritten document setting forth those stipulations as follows:

> "(1) The defendant took a breathalyzer after the traffic stop. The result was a [0].08.
>
> (2) The manual for the breathalyzer machine is the manual for the Intox EC/IR II[,] which is being placed into evidence."

Upon inquiry by the court, the State indicated it had reviewed the stipulations and had no objection.

¶ 6 During opening statements, both parties informed the jury that the evidence would show defendant underwent a breathalyzer test and received a result of 0.08. During the State's case, Campbell testified that on June 15, 2014, at approximately 11 p.m., he observed a vehicle pass him and heard loud music. He decided to conduct a traffic stop and followed behind the vehicle. Campbell observed that the vehicle "drove over top" of the yellow center dividing line and

that the driver activated the vehicle's turn signal when taking a 90 degree curve in the road. Campbell then pulled the vehicle over and made contact with the driver, whom he identified as defendant.

¶ 7 While talking with defendant, Campbell noticed glassiness in defendant's eyes and could smell the odor of an alcoholic beverage. Campbell also noted that defendant "was pretty vigorously chewing some gum." Campbell asked defendant whether he had consumed any alcohol, and defendant acknowledged that he had been drinking "earlier." Defendant apologized, and [Campbell testified defendant] stated that "[h]e knew it was risky *** to drive, but he needed to go get cigarettes from the gas station." Campbell testified that he directed defendant to the front of his patrol car, where he began to write defendant a warning ticket for "the music offense." At that time, he noticed defendant "seemed a little thick[-]tongued" and lethargic. Defendant also stood "a little too close" to Campbell in his "personal space."

¶ 8 Campbell testified he performed a series of field sobriety tests on defendant. He first performed the horizontal gaze nystagmus (HGN) test, checking for involuntary jerking in the movement of defendant's eyes. Campbell testified that he initially verified that defendant was qualified to take the test by determining that he had "no resting eye factors" like "jerking" or "wavering." Upon performing the HGN test, he noticed a lack of smooth pursuit, *i.e.*, "involuntary jerking," when defendant followed a stimulus with his eyes. Campbell also determined that defendant had jerking of his eyes at maximum deviation and "prior to 45 degrees." Defendant, however, did not show signs of vertical nystagmus.

¶ 9 Campbell stated he performed another eye test on defendant to determine whether defendant exhibited "a lack in nearpoint conversion." He stated he held his finger in front of de-

fendant's face and moved it toward the center of defendant's nose. Campbell asserted that a person's eyes "should track [his finger] equally until [the person is] cross-eyed." However, if the person has used a depressant, such as alcohol, his or her eyes would not come together and there would be "a lack of nearpoint conversion." In other words, one eye tracks the finger while the other looks straight ahead. When performing the test on defendant, Campbell observed "a complete loss of nearpoint conversion," indicating defendant was intoxicated by depressants.

¶ 10 Campbell next asked defendant to perform the walk and turn test. Prior to Campbell explaining the test, defendant asserted he was cold and Campbell allowed him to put on a long-sleeved shirt. Campbell testified the shirt was inside out and, although defendant spent about a minute trying to "correct the shirt," defendant still put the shirt on inside out. When performing the walk and turn test, defendant "showed six of eight available clues" that would indicate intoxication, including stepping "off line," raising his arms for balance, and taking too many steps.

¶ 11 Finally, Campbell testified he asked defendant to perform the one-legged stand test. While performing that test, defendant showed four out of four "clues" that indicated intoxication, including hopping for balance, putting his foot down, raising his arms for balance, and swaying for balance.

¶ 12 Upon the completion of field sobriety testing, Campbell determined that defendant "was too intoxicated to be driving on the road" and placed him under arrest. He transported defendant to the jail and showed defendant "the one citation that [Campbell] was going to be issuing him," which "was for the DUI." He also showed defendant the "warning to motorists," which described the consequences of a DUI arrest. Campbell additionally asked defendant to

provide a breath sample using a breathalyzer machine. He testified that defendant's breath sample "read over [0].08." Campbell asserted that he had been trained to operate the breathalyzer machine and, as part of his training, he read the machine's manual. He testified he had heard that there was "a plus or minus variance" on the machine. Campbell also stated that the breathalyzer machine was working at the time he obtained a breath sample from defendant, maintaining that "if there was any malfunction *** it would [have] shut down."

¶ 13 Finally, Campbell testified that defendant's traffic stop was recorded by a dash camera on his patrol car. He identified a recording of the traffic stop, which the State submitted into evidence and played for the jury.

¶ 14 On cross-examination, Campbell acknowledged that not everyone could perform the field sobriety tests even when sober and that some people experienced naturally occurring nystagmus. He agreed that he had never met defendant before and further acknowledged that defendant had not been speeding when he was pulled over. According to Campbell, defendant also followed directions "[f]or the most part," did not exhibit problems with his balance, did not stumble with "normal" walking, and did not sway when standing still. Campbell described the odor of alcohol that he detected when speaking with defendant as "mild."

¶ 15 Campbell also identified the manual for the breathalyzer machine used on defendant, which was admitted into evidence at defendant's request. He agreed that, according to the manual, the breathalyzer machine had a variance. Specifically, the manual provided that the machine was "accurate within +/- 0.005 at 0.100 g/210L, or +/- 5%, whichever is the greater." Campbell further acknowledged that the manual provided that the machine's internal clock was "accurate to plus or minus one minute per month." Finally, Campbell acknowledged that, accord-

ing to the manual, the machine had an "operating temperate range." He stated, however, that he did not know if the temperature of the room where the breathalyzer machine was kept was within the applicable range, stating that he was not the person in charge of where the breathalyzer machine was kept or the room's temperature.

¶ 16 On further questioning, the following colloquy occurred during defense counsel's cross-examination of Campbell:

"Q. Okay. And the only ticket that you wrote my client, Deputy, was the combination [DUI] ticket, correct?

A. I believe I wrote him two, sir. One is a combination, and then also for the breath sample of [0].086—or [0].08 and over gets an additional citation.

MR. GORDON [(defense counsel)]: Judge, may I approach?

THE COURT: You may.

MR. GORDON: There's a reason we stipulated to the [0].08. Under department of public health regulations you can't use the 6.

THE COURT: So you asked the question. What, are you objecting to something?

MR. GORDON: I'll just let it go then.

THE COURT: Are you or are you not?

MR. GORDON: Yes.

THE COURT: Objection is overruled. Ask your next question.

BY MR. GORDON:

Q. So you wrote a ticket for the [0.]08?

A. Yes, sir."

¶ 17 At the conclusion of the State's case, defense counsel moved for a directed verdict. Initially, he began to argue that the State presented insufficient evidence as to the combination DUI charge. The following colloquy then occurred between the trial court and defense counsel:

"THE COURT: Okay. I'm going to question you real quick. If you recall, [the] State dismissed Count 1.

MR. GORDON: Right.

THE COURT: We're only going on Count 2, [and] that's the *** BAC, and the other one is—

MR. GORDON: I thought he said he wrote the combo.

THE COURT: Right, he wrote the combo, but—

MR. GORDON: Never mind. I don't have a motion with that."

Defense counsel then moved for a directed verdict as to count 2, which the court denied.

¶ 18 Defendant then testified on his own behalf. He asserted that he only had trouble with his balance once on the night of the traffic stop, which he attributed to the cowboy boots he was wearing and the fact that he had "two bulging disks in his lower back." Defendant further explained that he used his turn signal when taking the curve in the road because he intended to turn at the end of the road. However, because it was dark outside and he had never been down that road in the dark, he "wasn't sure how far down [the turn] was." Defendant denied that he had been intoxicated on the night of the alleged offense or that his ability to drive had been impaired. He stated it had been over three hours since he had a "drink" and estimated that his last

drink had been around 5 or 6 p.m.

¶ 19 During closing argument, the State pointed out testimony from Campbell that the breathalyzer machine was "working perfectly." It also argued as follows: "In fact, you heard from the officer that the machine actually spit out a reading of [0].086. And so for variance reasons, [defendant's breathalyzer result is] still [0].08." Ultimately, the jury found defendant guilty of count II, driving with an alcohol concentration of 0.08 or more, but not guilty of count III, driving while under the influence of alcohol.

¶ 20 In October 2015, defendant filed a motion for judgment notwithstanding the verdict and a motion for a new trial. He argued the jury's guilty verdict on count II was obtained by the introduction of evidence contrary to the parties' BAC stipulation. In particular, he noted that the parties stipulated that the breathalyzer reading was 0.08 but Campbell testified that the reading was 0.086. Defendant also asserted that the jury's two verdicts were logically inconsistent and that the inconsistency in the verdicts demonstrated that defendant was prejudiced by the admission of the improper breathalyzer test result evidence.

¶ 21 The same month, the trial court conducted a hearing and denied defendant's posttrial motions. Although the record does not contain a transcript of the hearing, the parties submitted a bystander's report, showing defendant reiterated the arguments presented in his motions. In response, the State argued, in part, that defense counsel "opened the door" to the alleged inadmissible breathalyzer test result evidence because he elicited Campbell's challenged testimony.

¶ 22 In November 2015, defendant filed a motion to reconsider the denial of his posttrial motions. The same month, the trial court denied defendant's motion and sentenced him

to 24 months' probation with a $500 fine.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Ineffective Assistance of Counsel

¶ 26 On appeal, defendant first raises a claim of ineffective assistance of counsel. Specifically, he maintains that because his defense counsel "was confused about the charges [he] was facing," counsel improperly elicited testimony from Campbell that defendant had a breathalyzer test result of 0.086. Defendant maintains such evidence was inadmissible because it was contrary to the parties' stipulation that his breathalyzer test result was 0.08. Defendant further contends that "[b]ut for counsel's error, the evidence presented to the jury would have been inconclusive as to whether [his] BAC was above or below 0.08."

¶ 27 An ineffective-assistance-of-counsel claim is judged under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Peterson*, 2017 IL 120331, ¶ 79, 106 N.E.3d 944. Pursuant to *Strickland*, "[t]o prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *Id.* "A failure by the defendant to satisfy either prong of the *Strickland* standard precludes a finding of ineffective assistance of counsel." *Id.*

¶ 28 Defendant maintains his trial counsel had a strategy of stipulating that defendant's breathalyzer test result was 0.08 and presenting evidence that the breathalyzer machine had a built in variance of plus or minus 0.005. According to defendant, the factual stipulation com-

bined with the variance "meant [his] BAC was anywhere from 0.075 to 0.085" and would have created a reasonable doubt as to his guilt for the offense of driving with a BAC of 0.08 or more. Thus, he contends his defense counsel undercut his own trial strategy by eliciting evidence that was contrary to the 0.08 stipulation when cross-examining Campbell. The State responds by arguing that defendant's counsel did not improperly "elicit" Campbell's challenged testimony. It also contends that evidence of defendant's precise 0.086 breathalyzer test result *was* admissible.

¶ 29 Initially, we note that defendant argues the State was judicially estopped from raising its aforementioned arguments on appeal because it took "factually inconsistent" positions before the trial court. In particular, defendant contends that the State behaved during the trial as if the 0.086 breathalyzer test result evidence was inadmissible and argued during posttrial proceedings that defense counsel "asked questions that elicited [Campbell's] response" and, therefore, "opened the door" to the otherwise inadmissible 0.086 evidence.

¶ 30 We disagree that the doctrine of judicial estoppel bars the State's arguments on appeal.

> "Five elements are generally required for the doctrine of judicial estoppel to apply: the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *People v. Caballero*, 206 Ill. 2d 65, 80, 794 N.E.2d 251, 262 (2002).

¶ 31 In *People v. Jones*, 223 Ill. 2d 569, 598, 861 N.E.2d 967, 984 (2006), the supreme court was called upon to address whether a particular monetary charge imposed upon the defend-

ant at the time of his conviction was a fee or a fine. In considering that issue, the court first noted that the defendant argued that the State should be judicially estopped from taking the position that the charge at issue was a fine because it had argued before the appellate court that the charge was a fee. *Id.* The supreme court rejected that argument, finding the doctrine did not apply for several reasons. *Id.* Initially, it found that "the State's two positions were not factually inconsistent" because "there was no dispute that the charge was imposed" and "the only question was whether the charge was a 'fine' or a 'fee.' " *Id.* The court characterized the State's positions as "legally," rather than factually, inconsistent. *Id.* The court also held that the State's two positions were not adopted in separate proceedings because the appeal before it was "a continuation of the proceedings before the appellate court and the proceedings before the circuit court." *Id.*

¶ 32 This case is similar to *Jones*. Specifically, on appeal, the State does not dispute that the parties entered into a stipulation or that the 0.086 breathalyzer evidence was first introduced at trial during defense counsel's cross-examination of Campbell. Like in *Jones*, the State's positions are simply legally inconsistent rather than factually inconsistent, precluding application of the doctrine of judicial estoppel. Additionally, per *Jones*, the State's inconsistent legal positions were not adopted in separate proceedings, as this appeal represents "a continuation of the proceedings before *** the circuit court." *Id.* Accordingly, the doctrine of judicial estoppel does not bar the State from arguing on appeal that defendant's counsel did not "elicit" testimony from a witness in a manner which could be viewed as objectively unreasonable or that the challenged breathalyzer test result evidence was admissible.

¶ 33 We now turn to the merits of defendant's claim. In support of his argument that his counsel provided ineffective assistance, defendant relies on the First District's decision in

People v. Dupree, 2014 IL App (1st) 111872, 16 N.E.3d 788. There, the defendant's counsel cross-examined one of the State's witnesses and suggested that the witness's trial testimony was a recent fabrication when counsel "was necessarily aware" that such testimony was consistent with a prior statement that the witness made to the police. *Id*. ¶¶ 43-46. As a result, defense counsel "opened the door to the admission of" the witness's prior consistent statement. *Id.* ¶ 46. On review, the court agreed with the defendant's assertion that his counsel's performance fell below an objective standard of reasonableness when cross-examining the witness. *Id.* ¶ 44.

¶ 34 Here, the State responds by arguing this case is more similar to *People v. White*, 2011 IL App (1st) 092852, ¶ 73, 963 N.E.2d 994, wherein the defendant's counsel was alleged to have elicited " 'inflammatory' testimony implicating [the defendant] in 'several past murders.' " The First District determined, however, that the defendant's counsel did not " 'elicit' " the complained of witness testimony. *Id.* ¶ 74. Instead, "[t]he witness testified unexpectedly to a general question [from the defendant's counsel] calling for 'a little bit more' information ***[.]" *Id.*

¶ 35 Here, we agree with the State and find *White* is more similar to the present case than *Dupree*, in that Campbell unexpectedly provided more information than was necessary to answer defense counsel's question. The record shows that on cross-examination, defense counsel asked Campbell whether the only citation he issued to defendant was the combination DUI citation. Campbell answered defense counsel's question by responding that he actually issued defendant two citations. He further explained that one citation was for a combination DUI and the second citation involved a breathalyzer test result of 0.086. Defense counsel, however, had not posed any question regarding the specific breathalyzer test result attributable to defendant, and there were several ways in which Campbell could have answered the actual question posed to

him without including such information. In particular, Campbell could have simply responded "no," stated that he ultimately issued defendant two citations, or provided information regarding the specific traffic violation defendant was alleged to have committed—driving with an alcohol content of 0.08 or more.

¶ 36 Further, we do not find it was objectively unreasonable for defense counsel to cross-examine Campbell regarding the citations he issued to defendant. Although defense counsel did exhibit some confusion as to whether Campbell issued defendant more than one citation, the record does not reflect that defense counsel was ignorant of the three charges brought against defendant. Further, the record also shows that immediately following the traffic stop, Campbell issued defendant only one citation for DUI based on defendant being under the influence of a combination of drugs and alcohol. Later, following defendant's arrest, Campbell issued a second citation based on defendant's breathalyzer test result. The State then added a third DUI count based on allegations that defendant was under the influence of only alcohol. Prior to trial, the combination DUI count was dismissed and no evidence was presented to support that charge. Based on defense counsel's arguments during trial, at least part of his trial strategy appeared to be geared toward showing that the two counts remaining at trial, pertaining to intoxication by only alcohol, were weak because Campbell's decision to arrest defendant at the scene of the traffic stop was not based on either charge.

¶ 37 Further, we agree with the State's assertion on appeal that the 0.086 breathalyzer test result was admissible evidence and not in conflict with the parties' stipulation. Defendant operates under the erroneous assumption that a breathalyzer test result of 0.08 is the equivalent of a breathalyzer test result of 0.080. As pointed out by the State, that is simply not the case. See

People v. Cady, 311 Ill. App. 3d 348, 353, 724 N.E.2d 549, 553 (2000) (noting that 0.07 does not necessarily equal 0.070)*; People v. Kilpatrick*, 216 Ill. App. 3d 875, 882, 576 N.E.2d 546, 551 (1991) (stating "[0].09 does not necessarily equal [0].090"). In this instance, there is no indication from the record that the parties stipulated that defendant's breathalyzer test result was 0.080. Rather, it reflects that they limited their stipulation to only the two digits to the right of the decimal point. Therefore, testimony that defendant's actual breathalyzer test result was 0.086 did not necessarily contradict the parties' stipulation. Instead, such testimony constituted evidence in excess of the stipulation.

¶ 38 For the reasons expressed, we find defendant has failed to establish that his counsel's performance was deficient based on allegations that he improperly cross-examined Campbell and elicited inadmissible evidence. Further, to the extent that defendant argues that his counsel was ineffective for failing to have the parties' stipulations read to the jury at trial, we must also disagree. Evidence presented by both parties was wholly consistent with both stipulations. Thus, even if we were to find that counsel's performance was objectively unreasonable in failing to introduce the stipulations at trial, defendant would be unable to demonstrate any prejudice.

¶ 39 B. Clerk Assessed Fines

¶ 40 On appeal, defendant also argues that the circuit clerk improperly assessed several fines against him following his conviction and sentence. He asks this court to vacate those fines on review. The State concedes the fines were improperly imposed and should be vacated. However, pursuant to the supreme court's decision in *People v. Vara*, 2018 IL 121823, ¶ 23, the appellate court lacks jurisdiction to review the circuit court's improper recording of fines not imposed by the trial court. Thus, under *Vara*, we lack jurisdiction to address this issue.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $50 as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 43 Affirmed.