2019 IL App (1st) 163411-U

No. 1-16-3411

Order filed June 10, 2019

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 09864
	)	
PAUL DAVAL,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to demonstrate trial counsel was ineffective for failing to investigate and present evidence of his medical records and interfering with his right to testify.

¶ 2 Following a bench trial, defendant Paul Daval was convicted of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a) (West 2014)) and sentenced to six years' imprisonment. On appeal, defendant contends that trial counsel was ineffective for (1) failing to present his medical records in support of the defense theory that his behavior was caused by

medical conditions rather than alcohol, and (2) interfering with his right to testify. For the following reasons, we affirm.

¶ 3 Defendant was charged with multiple counts of aggravated DUI and felony driving while his driver's license was suspended or revoked. At a status date prior to trial, trial counsel sought a continuance, stating "There is an additional witness who I think we're going to need. *** [I]t's a physician, so I need to check his availability."

¶ 4 At trial, Chicago police officer Chisa Santiago testified she was on patrol on May 2, 2014 in plain clothes and a marked squad car with her partner, Officer Johnson. About 8:25 a.m., she received a dispatch to go to the 8600 block of South Vernon Avenue to check on a suspicious person inside a vehicle. Upon arriving at the location, Santiago observed a black Volkswagen parked at an angle with the passenger's side front tire on the curb on the grass. An individual, later identified as defendant, was seated in the driver's seat. There were no other occupants in the vehicle. The keys were in the ignition and the vehicle was running.

¶ 5 When Santiago initially observed defendant, he was asleep: his head was down, his eyes were closed, and he was not moving. Santiago knocked on the window twice to attempt to wake him up, but he did not move. The driver's door was unlocked so she opened the door, and nudged and spoke to defendant to wake him up. After approximately a minute, defendant opened his eyes. Santiago began asking him questions, but defendant just looked around and failed to respond.

¶ 6 Santiago and Johnson helped defendant exit the vehicle because he was unable to get out on his own. Defendant smelled strongly of alcohol and his eyes were glassy and bloodshot. He was unable to stand on his own so the officers propped him up against his vehicle. Defendant

swayed back and forth and was unbalanced on his feet. Santiago learned defendant's driver's license had been revoked so she placed him into custody for driving on a revoked license.

¶ 7 Santiago learned that the vehicle was not registered to defendant. She drove the Volkswagen to the police station. There was not a breath alcohol ignition interlock device (BAIID) in the vehicle and Santiago drove the vehicle without using such a device. They arrived around 8:45 or 9 a.m. In the processing area at the station, defendant was initially combative and "a little bit angry." He refused to remove his jewelry and other personal items to be inventoried and refused to allow the officers to conduct a custodial search of him. However, eventually, he cooperated. Santiago, Johnson, and two assisting officers were present in the processing area. Santiago asked defendant several questions, and he admitted he drank two shots of Hennessy. A few minutes later, defendant "changed his wording" and said he drank a pint of Hennessy.

¶ 8 Because she was not trained in administering field sobriety tests, Santiago had Officer Christopher Oehmen administer the test at the police station. Santiago was present for the administration of the field sobriety tests and when an officer read the "warnings to motorist" form to defendant. She was also present during the 20-minute observation period. Following the observation period, defendant refused to submit to a breathalyzer test.

¶ 9 On cross-examination, Santiago testified she did not observe defendant's vehicle for any period of time prior to approaching it. She was not aware of how defendant arrived to the location on South Vernon. She could not tell from the odor of alcohol how much defendant had consumed or when he consumed it. When defendant eventually "came to," he attempted to exit the vehicle on his own but was unable to do so. Defendant appeared to be confused and disoriented. Santiago could not recall whether she had training to handle a person who was

unconscious but not intoxicated. She did not call for medical assistance at any point and had no medical training herself. She was not aware of any conditions that would cause a person's eyes to be glassy or bloodshot, and she acknowledged at that time she did not know what caused defendant's eyes to be glassy and bloodshot. Santiago did not remember asking defendant where or when he consumed alcohol.

¶ 10 Officer Oehmen testified that he was on duty on May 2, 2014. He was called to the station to administer field sobriety tests around 8:45 or 9 a.m. Oehmen had special training from the Chicago Police Academy in detecting and apprehending drivers under the influence of alcohol. He identified defendant as the individual to whom he administered the tests that day. When Oehmen first arrived in the processing area, defendant appeared to be sleeping in a holding cell.

¶ 11 Oehmen first administered the horizontal gaze nystagmus test to defendant. He instructed defendant to look at the tip of his pen and follow it back and forth with his eyes and without moving his head. Regarding defendant's performance, Oehmen observed "lack of smooth pursuit," which meant defendant was unable to follow the pen with just his eyes. He additionally observed "[a]t maximum deviation, there was distinct nystagmus." Defendant would be able to follow the pen with just his eyes for a short time, but would then move his head back and forth. Oehmen told defendant he needed to keep his head still at least one time. These observations led Oehmen to believe, based on his training, that defendant had consumed alcohol.

¶ 12 Oehmen next administered the one-leg stand test. He first demonstrated it for defendant and instructed him to stand with his hands at his sides, raise one leg, and count to 30 or until Oehmen told him to stop. Defendant swayed during the test and was unable to keep his balance.

Defendant repeatedly put his foot down and raised his arms for balance. This behavior indicated to Oehmen that defendant was impaired.

¶ 13 Finally, Oehmen administered to defendant the "walk-and-turn" test. He again demonstrated and explained the test to defendant. Oehmen instructed defendant to stand heel to toe and take nine steps while walking heel to toe, and then turn around and repeat the same process. Oehmen noticed defendant was losing his balance and started the test before Oehmen had finished giving him instructions. Defendant also did not take the correct amount of steps. All of this indicated to Oehmen that defendant was impaired.

¶ 14 During the course of his career, Oehmen had observed hundreds of people under the influence of alcohol. In his opinion, defendant was unfit to safely operate a motor vehicle and was unable to perform the field sobriety tests because he was under the influence of alcohol.

¶ 15 On cross-examination, Oehmen testified that another officer prepared an alcohol and drug influence report in this case. Defendant had trouble understanding Oehmen's instructions. Oehmen did not ask defendant whether he was wearing contact lenses. He did not ask defendant whether he had injuries to his legs or back that would cause him to have difficulty performing the tests. Oehmen did not know whether defendant's inability to perform the tests was due to a physical injury. He acknowledged defendant was cooperative during the tests, but testified "confused" was the "wrong word" for defendant's behavior. Oehmen further acknowledged he was unable to exclude any reason other than alcohol for defendant's inability to perform the field sobriety tests.

¶ 16 The State introduced into evidence defendant's certified driving abstract. After the State rested, the defense moved for a directed finding. Regarding defendant's behavior, defense

counsel argued the State failed to prove that he was intoxicated. Specifically, counsel contended Officer Santiago had no specific training in DUI cases and was not able to offer an opinion as to "whether or not this defendant was intoxicated or simply unconscious for some other reason." Further, counsel argued Officer Oehmen "was not able to offer any information to support a conclusion" that defendant's "performance of the tests was caused by intoxication as opposed to any other impairment." Counsel pointed out that Oehmen failed to ask whether defendant was wearing contact lenses or had injuries that would have affected his performance of the tests. Although defendant was "confused," counsel asserted that was distinct from being intoxicated and could have been caused by "an allergic reaction to medication he was taking or having a diabetic reaction or having some other medical issue that causes confusion" such as "[d]ementia or Alzheimer's."

¶ 17 The trial court denied defendant's motion for a directed finding and took "a brief recess" for defense counsel to speak with defendant. Following the recess, the defense rested, and the following exchange occurred:

> "THE COURT: You spoke to your client, and based on speaking to you, he determined he does not wish to testify?
>
> [DEFENSE COUNSEL]: Yes."

¶ 18 During closing arguments, defense counsel adopted his earlier argument from the motion for a directed finding. Counsel emphasized that Officer Santiago's testimony indicated that because she smelled alcohol, she attributed the rest of defendant's behavior to being intoxicated, but failed to inquire further "to determine whether there was anything else." Counsel pointed out defendant was confused and his behavior did not necessarily mean he was intoxicated and also

argued that the officers failed to determine whether defendant's behavior was attributable to any other possible cause.

¶ 19 The court found defendant guilty of aggravated DUI and felony driving on a suspended or revoked license. In so finding, the court noted the testimony showed defendant was unable to extricate himself from the car and needed assistance, he fell asleep for a second time in the police station, and failed the three field sobriety tests.

¶ 20 Following the guilty findings, defense counsel filed a motion for a new trial. Defendant then changed attorneys twice prior to the ruling on his motion. Posttrial counsel amended the motion for a new trial, alleging, in pertinent part, that trial counsel was ineffective for (1) failing to investigate defendant's medical conditions and how those conditions would affect his performance on field sobriety tests and his general demeanor, and (2) failing to adequately explain to defendant his right to testify and "frustrat[ing]" him from exercising his right to testify.

¶ 21 At the hearing on defendant's amended motion, trial counsel testified that the majority of his pretrial investigation involved speaking with defendant, who provided "some medical information." Trial counsel both spoke with defendant and made "some phone calls to try and get some other information" regarding defendant's medical information. However, he was unable to obtain further information. Trial counsel denied consulting with or hiring a doctor to review defendant's medical records.

¶ 22 Trial counsel investigated defendant's driving status prior to trial. During his investigations, he learned that defendant had a restricted driving permit that allowed him to drive

to and from work and required him to have a BAIID machine in his vehicle. The restricted permit was valid at the time of the offense.

¶ 23 On cross-examination, trial counsel testified he represented defendant on three cases, including the instant case. During the pendency of his cases, trial counsel met with defendant "dozens" of times at his office and at court dates. At their meetings, trial counsel discussed with defendant the strengths and weaknesses of his cases. He also discussed the various ways of resolving the instant case, including going to trial and pleading. Trial counsel participated in a Rule 402 conference in the instant case in 2015. Defendant ultimately elected to have a bench trial. When the case proceeded to trial, trial counsel "believe[d] [he] had all the reports" that were necessary.

¶ 24 Trial counsel had reason to believe that defendant had a medical condition, but there "[was not] enough information to indicate the it could have effected [*sic*] the performance test in this case." He "believed" he subpoenaed defendant's medical records and was "pretty sure" he had "some contact with the doctor's office," but did not recall. Trial counsel knew he received "at least one document indicating some treatment." However, trial counsel was concerned because there were several months between defendant's arrest and his subsequent medical treatment.

¶ 25 Regarding defendant's right to testify, trial counsel explained to defendant during their meetings that defendant had the right to testify if he chose to do so. Defendant chose not to testify.

¶ 26 Defendant testified that he suffered from diabetes and sarcoidosis, a pulmonary respiratory disease. He also had cataracts surgery "due to the sarcoidosis on uveitis;" "prior

injuries in [his] youth, a broken pelvis bone;" and physical injuries from a "nightclub incident" in 2002. Defendant informed trial counsel of his injuries prior to trial. He also gave trial counsel medical records from Stroger Hospital, where he had previously received treatments, and Wood Lawn Health Clinic. Defendant gave to trial counsel 100 to 200 pages of medical records "going back to the 90's." Defendant acknowledged he met with trial counsel "[o]ver 10 to 15 times" prior to trial, both in trial counsel's office and at court. They spoke about defendant's records and medical conditions.

¶ 27 Defendant also spoke with trial counsel outside of court prior to trial to discuss trial strategy and whether he should testify in this case. He also talked to trial counsel about testifying during trial. However, trial counsel did not prepare him to testify and did not inform defendant that it was his choice whether to testify. Defendant wrote trial counsel a note "during the cross-examination," asking "am I going to get on the stand." Trial counsel did not respond to the note. They spoke again about defendant testifying during the court's recess and defendant asked "Am I going to be on the stand?" but counsel responded, "no." Trial counsel never informed defendant that it was his right alone to decide whether to testify.

¶ 28 On cross-examination, defendant testified he was still suffering from sarcoidosis, uveitis, and diabetes. He stated that "perhaps" his medical conditions caused him to slur his speech, but he was "not sure," and he spoke the same way on the day of his arrest as he did while testifying in court. He later testified that sarcoidosis "could have" caused him to have mumbled speech on the day of his arrest because of the respiratory condition and his medication, prednisone. Defendant also "could have" had "thick tongued speech on the day of his arrest due to his medical conditions but he did not know. He was "sleepy" on the day of his arrest as a result of

sarcoidosis. Uveitis would have caused his eyes to be bloodshot on the day of his arrest, but he did not know whether his eyes were bloodshot. Uveitis, sarcoidosis, and his prior cataract surgery could have caused his eyes to be glassy. Defendant denied being confused on the day he was arrested, but testified sarcoidosis could have caused him to be unable to follow instructions.

¶ 29 Defendant could not recall whether he was unable to answer questions when he was arrested. On the date of his arrest, defendant was taking prednisone, a steroid, which could have caused him to be unable to answer questions. He was also taking eye drops. He did not remember being unsteady on his feet when he was arrested, but that could have been attributed to sarcoidosis and the injury to his pelvis. He was still suffering from the injury to his pelvis at the time of the hearing. Defendant testified sarcoidosis caused fatigue so "if" swaying on his feet was a "form of fatigue," then his medical condition would have caused him to sway on the day he was arrested. Swaying also could have been attributed to pain in his pelvis or leg. He acknowledged that he was not a medical doctor and his medical conditions would not have caused him to have a strong odor of alcohol on his breath, start a field sobriety test before the instructions were given, or take too many steps during the walk-and-turn test.

¶ 30 Defendant did not recall the trial court asking whether he wanted to testify. He acknowledged counsel spoke with him about different options for his case, including participating in a Rule 402 conference, going to trial, and having a bench or jury trial. He further acknowledged talking to counsel in the hallway during trial about whether or not he would testify.

¶ 31 The State introduced into evidence two certified copies of defendant's prior convictions for aggravated battery of a government employee and unlawful use of a weapon by a felon.

¶ 32 The court denied defendant's motion for a new trial in part, finding that defendant failed to show trial counsel provided ineffective assistance.[1] With regard to the ineffectiveness claims relating to defendant's medical records, the court noted trial counsel did some investigation into the medical records because the court's half sheet dated August 7, 2015, indicated trial counsel was "checking regarding availability of doctor witness." The court then determined that trial counsel's testimony showed that, as a matter of trial strategy, counsel concluded any potential doctor testimony "would not have applied at the time *** of the charges here." Moreover, defendant had appeared before the court "numerous times" and had "never tumbled over from a pelvic injury."

¶ 33 With respect to the ineffectiveness claims regarding defendant's right to testify, the court acknowledged it did not speak with defendant at trial, but instead inquired of counsel whether defendant wished to testify, and defendant at no point stated he wanted to testify. The court further stated, "And it's my experience over the years, defendants who want to testify, are not shy about making that fact known." The court subsequently sentenced defendant, as a Class X offender based on his criminal history, to six years' imprisonment.

¶ 34 On appeal, defendant argues trial counsel provided ineffective assistance by (1) failing to investigate defendant's medical history and present medical records to support the defense theory that his behavior was caused by his medical conditions rather than alcohol and (2) interfering with his right to testify. We address each contention in turn.

[1]The court granted defendant's motion with respect to his driving with a suspended or revoked license, finding his driving abstract indicated he had a previously suspended license, but at the time of the offense, the suspension had been rescinded.

¶ 35 Both the United States and Illinois constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const., amends VI, XIV; Ill. Const. 1970, art. 1, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prevail on an ineffective assistance of counsel claim, defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced defendant as to deny him a fair trial. *Strickland*, 466 U.S. at 667-88. To establish the deficient performance prong, defendant must overcome the presumption that counsel's conduct was the result of trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007).

¶ 36 To show prejudice, defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The question, therefore, is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 37 Here, even assuming, *arguendo*, that counsel was deficient for not presenting evidence of defendant's medical conditions, defendant has failed to prove he was prejudiced by counsel's decision. See *Strickland*, 466 U.S. at 697 (where a defendant fails to satisfy the prejudice prong, a reviewing court need not determine whether counsel's performance was deficient). The officers testified defendant was asleep in a car that was running and partially parked on a curb and was unable to exit the vehicle without assistance. He had to be propped against his car to stand upright, smelled of alcohol, and had bloodshot, glassy eyes. Defendant admitted first to taking

two shots of Hennessy and then to drinking a pint of Hennessy. At the police station, defendant exhibited signs of impairment during three field sobriety tests. Specifically, defendant was unable to move just his eyes without moving his head during the horizontal gaze nystagmus test; he was unable to keep his balance, raised his arms, and put his foot down during the one-legged stand test; and he was losing his balance and started the heel-to-toe test while the officer was giving him instructions and eventually took the wrong amount of steps. Officer Oehmen, who had special training in detecting and apprehending drivers under the influence of alcohol, opined that defendant had consumed alcohol. Defendant then refused to submit to a breathalyzer test. *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993) (refusal to submit to breathalyzer test is relevant as circumstantial evidence of defendant's consciousness of guilt). This evidence overwhelmingly showed defendant was intoxicated while operating a vehicle.

¶ 38 At the posttrial motion hearing, defendant testified his medical conditions caused or "could have" caused his behavior on the day of his arrest. However, defendant failed to support his self-serving testimony with any evidence that could corroborate his claims, apart from his own speculation that his medical conditions caused or "could have" caused his behavior on the day of his arrest. The burden is on the defendant to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693. We find his conclusory statements insufficient to show that there is a reasonable probability that evidence of his medical conditions would have changed the outcome of his case. Importantly, *Strickland* requires actual prejudice be shown, not mere speculation as to prejudice. See *People v. Olinger*, 176 Ill. 2d 326, 363 (1997) ("pure speculation falls far short of the demonstration of actual prejudice required by *Strickland*"); *People v. Palmer*, 162 Ill. 2d 465,

481 (1994) ("Proof of prejudice, however, cannot be based on mere conjecture or speculation as to outcome") (citing *People v. Hills*, 78 Ill. 2d 500 (1980)).

¶ 39 Moreover, the officers' testimony showed defendant exhibited acts of impairment that were not explained by his medical conditions. As mentioned, Santiago testified defendant smelled like alcohol and admitted to drinking Hennessy. Oehmen testified that defendant started the heel-to-toe walking test before he finished giving instructions and took the incorrect amount of steps. Defendant acknowledged that his conditions would not cause such behavior. Defendant also refused to submit to a breathalyzer test, which shows consciousness of guilt. Accordingly, we find defendant failed to demonstrate counsel was ineffective in this respect.

¶ 40 We additionally find defendant failed to show trial counsel was ineffective for interfering with his right to testify about his medical issues in support of his defense. A defendant's right to testify at trial is a fundamental constitutional right, as is his right to choose not to testify. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997), *overruled in part on other grounds by People v. Coleman*, 183 Ill. 2d 366 (1998); see also *Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987). The decision whether to testify ultimately rests with the defendant and only the defendant may waive this right. *Madej*, 177 Ill. 2d at 146. Therefore, it is not considered a strategic or tactical decision best left to trial counsel. *Id.* However, "[a]dvice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify." *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). A defendant who claims on appeal he was precluded from testifying at trial must have contemporaneously asserted his right to testify by informing counsel at the time of trial. *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

¶ 41 Here, the record does not show counsel refused to allow defendant to testify over his assertion that he wanted to testify on his behalf. Both trial counsel and defendant testified that they discussed defendant's right to testify prior to trial and at the recess after the State rested during trial, undermining defendant's contention that he did not know he could choose to testify. Trial counsel testified that he informed defendant he had the right to testify if he wished, although defendant disputed that testimony. Critically, however, defendant did not contemporaneously assert his wish to testify by informing counsel at trial. See *Brown*, 54 Ill. 2d at 24. Contrary to defendant's assertion, his own testimony shows he simply asked counsel twice "Am I getting on the stand?" This is not an assertion of his right to testify, but instead is a question, indicating he was seeking counsel's advice on whether or not to testify. Based on the record, it appears defendant chose not to testify based on his conversation with counsel during the recess at trial. Thus, a review of the record shows counsel did not interfere with defendant's right to testify and therefore was not ineffective for apparently advising defendant not to testify.

¶ 42 Moreover, we are unpersuaded that defendant's own testimony regarding his medical issues would have been sufficient to undermine confidence in the outcome of his trial, as required to demonstrate prejudice. See *Strickland*, 466 U.S. at 694. As previously detailed, the evidence regarding defendant's intoxication was overwhelming. Defendant's testimony at the posttrial motion hearing largely showed that his medical conditions "could have" contributed to his behavior on the date of his arrest but his conclusions were uncorroborated and failed to explain much of the evidence against him; namely, that he smelled of alcohol, admitted to drinking alcohol, started a field sobriety test before the instructions were given, took too many steps during the walk-and-turn test and refused a breathalyzer test. Defendant acknowledged that

these factors were not attributable to his medical conditions. Accordingly, we find defendant failed to demonstrate trial counsel was ineffective.

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.