2019 IL App (4th) 160718-U

NO. 4-16-0718

FILED
April 2, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
SCOTT FISHEL,	)	No. 15DT458
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea, (2) the statute under which defendant was prosecuted was not facially unconstitutional, and (3) trial counsel was not ineffective for failing to challenge the constitutionality of the statute.

¶ 2 Following a fatal accident in August 2015, the State charged defendant, Scott Fishel, with driving under the influence (DUI) "of any other drug or combination of drugs to a degree that renders the person incapable of safely driving" (625 ILCS 5/11-501(a)(4) (West 2014)) (count I). In September 2015, the State charged defendant with DUI where there was any amount of a drug in defendant's "breath, blood, or urine resulting from the unlawful use or consumption of cannabis" (620 ILCS 5/11-501(a)(6) (West 2014)) (count II). In June 2016, defendant pleaded guilty to count II. Prior to sentencing, defendant filed a motion to withdraw his guilty plea. In August 2016, the trial court denied the motion to withdraw defendant's guilty

plea. That same month, the court sentenced defendant to 90 days' incarceration and 24 months' probation.

¶ 3 Defendant appeals, arguing (1) the trial court abused its discretion in denying his motion to withdraw his guilty plea, (2) section 11-501(a)(6) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(6) (West 2014)) violated the constitutional guarantee of substantive due process, and (3) he received ineffective assistance of counsel. We note defendant has withdrawn his claim regarding fines improperly imposed by the circuit clerk. We affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In August 2015, the State charged defendant with DUI while "under the influence of any other drug or combination of drugs to a degree that renders the person incapable of safely driving" (625 ILCS 5/11-501(a)(4) (West 2014)). The following month, the State added a second count of DUI while "there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis" (620 ILCS 5/11-501(a)(6) (West 2014)).

¶ 6 In June 2016, defendant pleaded guilty to a violation of section 11-501(a)(6) of the Code. As part of the factual basis, the State informed the trial court the evidence would show that on August 28, 2015, Illinois State Police officers responded to an accident on Interstate 57. At the scene, officers found a wrecked vehicle and determined defendant was the driver. Three other passengers were involved in the accident, one of whom was killed. As part of a DUI investigation, officers sent defendant's blood sample to a private lab. The lab results showed defendant had 1.1 nanograms of delta-9-tetrahydrocannabinol (THC) per milliliter in his blood.

The State described this as a "very trace amount." The court accepted defendant's guilty plea and set the matter for sentencing.

¶ 7 In August 2016, prior to sentencing, defendant filed a motion to withdraw his guilty plea. The motion alleged legislation proposed in 2015 would have changed DUI laws to raise the legal limit of delta-9-THC to 15 nanograms per milliliter. In August 2015, Governor Rauner's amendatory veto would have changed DUI laws to raise the limit of delta-9-THC to five nanograms per milliliter. Effective July 29, 2016, section 11-501(a)(6) was amended to specifically remove cannabis. Effective that same date, the change in the law prohibited driving with "5 nanograms or more of delta-9-[THC] per milliliter of whole blood." 625 ILCS 5/11-501.2(a)(6) (West 2016). The motion alleged the change in the law showed "[t]he clear legislative intent at the time of this accident was to prevent DUI charges in this situation, where a driver was not impaired and blood tests revealed less than 5 [nanograms] per [milliliter] of delta-9-THC."

¶ 8 At the hearing on the motion to withdraw his guilty plea, defendant argued it would be a manifest injustice to allow the plea to go forward because defendant had only 1.1 nanograms of THC per milliliter in his blood. Counsel argued that, at the time of the accident, "the House, the Senate, and the Governor had all agreed that a DUI should not arise in a situation like this where there was no impairment and where the levels of THC in a driver's blood were less than 5 nanograms." Counsel noted defendant had not been sentenced and asked the court to allow him to withdraw his guilty plea.

¶ 9 The State agreed defendant would not have been charged with DUI had the accident occurred in August 2016. The change in the law went into effect on July 29, 2016, and the State argued the legislature did not intend the change to be retroactive. According to the

State, defendant was charged according to the law at the time of the incident and at the time of his guilty plea. The State further argued allowing defendant to withdraw his guilty plea would set a "dangerous precedent" and open the door to challenges in other old cases. Accordingly, the State argued defendant should not be allowed to withdraw his guilty plea.

¶ 10 In response, defendant argued withdrawing his guilty plea would not set a precedent in other cases. Defendant argued the testing done in his case was not routinely performed and the only reason there was a test showing defendant's blood had 1.1 nanograms of delta-9-THC per milliliter was the fatal accident. Because most closed or pending cases would not have this information available, allowing defendant to withdraw his plea would not jeopardize other closed or pending cases.

¶ 11 The trial court noted there was no mistake of law, mistake of fact, or allegation that the plea was involuntary. The court further noted defendant pleaded guilty to a charge that was the law at the time he committed the offense and at the time he entered his guilty plea. Although there was pending legislation, the legislation became effective on July 29, 2016, after defendant entered his guilty plea. Accordingly, the court denied the motion to withdraw defendant's guilty plea. The court sentenced defendant to 90 days in the Champaign County jail and 24 months' probation.

¶ 12 Defendant filed a second motion to withdraw his guilty plea and a motion to vacate the judgment. Defendant again argued he should be allowed to withdraw his guilty plea based on the new legislation that prohibited driving with five nanograms or more of delta-9-THC per milliliter of whole blood. The trial court denied the motion to withdraw the guilty plea and the motion to vacate the judgment.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues (1) the trial court abused its discretion in denying his motion to withdraw his guilty plea, (2) section 11-501(a)(6) of the Code (625 ILCS 5/11-501(a)(6) (West 2014)) violated the constitutional guarantee of substantive due process, and (3) he received ineffective assistance of counsel. We turn first to the denial of defendant's motion to vacate his guilty plea.

¶ 16 A. Motion to Withdraw Guilty Plea

¶ 17 Defendant contends the trial court abused its discretion in denying the motion to withdraw his guilty plea where he demonstrated a manifest injustice based on the statutory amendment that decriminalized his conduct after he entered his guilty plea. Defendant relies on the Statute on Statutes (5 ILCS 70/0.01 *et seq.* (West 2016)) to support his argument that the legislature did not intend defendant's conduct to sustain a criminal conviction. The State disagrees and argues section 4 of the Statute on Statutes allowed defendant's prosecution to proceed. The State further contends this issue presents a legal question requiring interpreting section 4 of the Statute on Statutes and, therefore, our review is *de novo*.

¶ 18 A defendant does not have an absolute right to withdraw a guilty plea but instead "must show a manifest injustice under the facts involved." *People v. Hughes*, 2012 IL 112817, ¶ 32, 983 N.E.2d 439. The withdrawal of a guilty plea is appropriate (1) where a plea is entered under a misapprehension of the facts or of the law or (2) where there is doubt as to the defendant's guilt and justice would be better served through trial. *Id.* "Generally, the decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion." *Id.* However, when an issue involves the

legal question of statutory interpretation, our review is *de novo*. *People v. Glisson*, 202 Ill. 2d 499, 504, 782 N.E.2d 251, 254 (2002).

¶ 19 Effective after the date of defendant's relevant conduct and his guilty plea, the General Assembly amended section 11-501(a)(6) of the Code (625 ILCS 5/11-501(a)(6) (West 2014)), which originally prohibited driving a vehicle where "there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis" (620 ILCS 5/11-501(a)(6) (West 2014)). The amendment to this law, effective July 29, 2016, specifically removed cannabis from section 11-501(a)(6) and prohibited driving with "5 nanograms or more of delta-9-[THC] per milliliter of whole blood." 625 ILCS 5/11-501(a)(6), 11-501.2(a)(6) (West 2016). This change in the law effectively repealed the crime to which defendant pleaded guilty.

¶ 20 Under common law principles, the repeal of a criminal statute abated prosecutions that had yet to result in a final judgment, unless some authority allowed pending prosecutions to go forward. *Glisson*, 202 Ill. 2d at 504. Indeed, a common law presumption for abatement of nonfinal prosecutions applied where the legislature was silent. *Id.* "Dissatisfaction with the common law rule developed because the conviction and punishment of similarly situated defendants could be disparate solely because the proceedings of one had moved more quickly and had become final before the change in the law." *Id.* The legislature enacted section 4 of the Statute on Statutes to reverse this common law presumption through a general saving clause. *Id.*

¶ 21 Section 4 of the Statute on Statutes provides as follows:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done,

> any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act." 5 ILCS 70/4 (West 2016).

Section 1 of the Statute on Statutes provides as follows: "In the construction of statutes, this Act shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute." 5 ILCS 70/1 (West 2016).

¶ 22 No specific savings clause was passed with the change in the law at issue in this case, and defendant argues this court should not interpret the general savings clause of section 4 of the Statute on Statutes to preserve his conviction for DUI with any amount of cannabis in his system. Defendant argues that interpreting section 4 of the Statute on Statutes to enforce his DUI conviction fails to account for the "clear command" of section 1, which bars a construction inconsistent with the manifest intent of the legislature. Defendant contends legislation proposed

in 2015 would have changed DUI laws to raise the limit of delta-9-THC to 15 nanograms per milliliter. In August 2015, Governor Rauner's amendatory veto would have changed DUI laws to raise the limit of delta-9-THC to five nanograms per milliliter. In July 2016, the legislature passed a law raising the limit of delta-9-THC to five nanograms per milliliter. Although the effective date of the change in the law was July 29, 2016, defendant contends this legislative history showed a clear legislative intent at the time of the accident and at the time of defendant's guilty plea to decriminalize driving with less than five nanograms of delta-9-THC per milliliter of whole blood when the driver was not impaired. Based on this legislative history, defendant argues that allowing his plea to go forward was inconsistent with the General Assembly's intent to decriminalize his conduct. We disagree.

¶ 23 Defendant argues this court should not read section 4 of the Statute on Statutes to preserve defendant's guilty plea because it would be inconsistent with the legislative intent behind the change in the DUI law. In our view, the legislative intent behind the change in the law—which went into effect after defendant committed the offense, after the State charged defendant under existing law at the time, and after defendant entered his guilty plea—has no bearing on whether section 4 of the Statute on Statutes preserves defendant's guilty plea. Even if we agree the legislative intent in amending the DUI statute was to decriminalize conduct such as that of defendant in this case, defendant was properly charged under the law as it existed at the time of the offense, and he voluntarily entered a guilty plea under the same statute, which was still in effect at the time of his plea.

¶ 24 Defendant argues section 4 allows a criminal defendant to elect to be sentenced under the law in effect at the time of sentencing, rather than the law in effect at the time he committed the offense, or was charged with the offense, or was convicted of the offense. Section

4 does provide, in part, "If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." 5 ILCS 70/4 (West 2016). In cases where the punishment for an offense has been reduced prior to sentencing, a defendant may elect to be sentenced under the law in effect at the time of the offense or at the time of sentencing. See *People v. Hansen*, 28 Ill. 2d 322, 341, 192 N.E.2d 359, 369 (1963) ("[A] punishment mitigated by a new law is applicable only to judgments after the new law takes effect."). According to defendant, the right of election regarding mitigated punishment at sentencing should be extended to situations where a criminal offense has been repealed.

¶ 25 Although a change in the law decriminalizing certain conduct obviously mitigates the punishment because one will not be punished for that conduct, the repeal of a statute is not the same as a new law mitigating punishment, for example, by reducing the sentence for the conviction. An amendment to a law that decriminalizes conduct is a substantive change to the existing law and not a law mitigating the punishment for the criminal conduct. Section 4 of the Statute on Statutes forbids the retroactive application of substantive changes to statutes, which is precisely what defendant attempts to achieve. "[W]here the newly enacted statute changes the substance of an existing law, rather than merely mitigating the punishment, a defendant cannot take advantage of the mitigation of the punishment in the new law." *People v. Gancarz*, 228 Ill. 2d 312, 319, 888 N.E.2d 48, 52 (2008). The argument that the "mitigation" of punishment that arises from the decriminalization of driving with less than five nanograms of delta-9-THC per milliliter of whole blood operates to prevent defendant's continued prosecution under section 4 of the Statute on Statutes is, thus, unpersuasive. The change in the law was substantive, not

merely procedural or mitigating the punishment. The change in the law is, therefore, not retroactive and does not apply to defendant. *Id.*

¶ 26 Defendant argues *People v. Bilderback*, 9 Ill. 2d 175, 137 N.E.2d 389 (1956), and *Glisson* are distinguishable and do not control the outcome of this case. In *Bilderback*, the defendant committed an assault with the intent to commit the felony of escape from the Illinois State Farm. *Bilderback*, 9 Ill. 2d at 176. Defendant was indicted, pleaded guilty, and sentenced on the same day. *Id.* In the interim between the offense and the judgment, the legislature amended the law and made escape from the Illinois State Farm a misdemeanor instead of a felony. *Id.* Therefore, defendant's conduct was an assault with intent to commit a felony when it was committed, but "the offense of which he was convicted no longer existed when he pleaded guilty and was sentenced." *Id.* at 177. The court treated the change in the law as if the statutory offense had been repealed and concluded the general savings clause in section 4 applied. The court noted the common law presumption that prosecutions cease upon the repeal of a law operated unsatisfactorily because the effect of the repeal would depend "upon the fortuitous circumstances of the apprehension and conviction of the defendant." *Id.* at 181.

¶ 27 Defendant attempts to distinguish *Bilderback* by arguing that the statutory change in the law affected only the underlying felony in the defendant's conviction for assault with the intent to commit a felony. Defendant contends the change had nothing to do with whether criminal conduct occurred. We disagree. The defendant in *Bilderback* committed an assault with the intent to escape from the Illinois State Farm. Once the legislature amended the law to make escape from the Illinois State Farm a misdemeanor, the elements of assault with the intent to commit a felony could not be met. There was "no general provision with respect to assault with intent to commit a misdemeanor." *Id.* at 177. Nonetheless, the court concluded the savings

clause in section 4 allowed his prosecution to proceed. Accordingly, we find defendant's attempt to distinguish *Bilderback* unpersuasive.

¶ 28 Defendant next engages in a discussion of the development of actual innocence case law in the postconviction context. Defendant contends the defendant in *Bilderback* arguably committed assault despite the change in the law reclassifying escape from the Illinois State Farm as a misdemeanor. Defendant contrasts this with his case, where he "committed no crime" following the amendment to the DUI law prohibiting driving with more than five nanograms of delta-9-THC per milliliter of whole blood. Defendant concludes by arguing *Bilderback* should not control the outcome of this case because the *Bilderback* court was not considering a claim of actual innocence. We find this argument unpersuasive.

¶ 29 The law at the time of the offense and at the time of defendant's guilty plea imposed criminal liability for driving with "any amount" of cannabis in a person's system. A subsequent change in the law does not give defendant a claim of actual innocence under the prior version of the statute. Nor does it provide any basis to find that section 4 of the Statute on Statutes does not apply in this case.

¶ 30 Defendant next attempts to distinguish *Glisson*, 202 Ill. 2d at 499. In *Glisson*, the defendant was convicted of chemical breakdown of an illicit controlled substance and judgment was entered in November 1999. *Id.* at 501. In January 2000, the legislature added a subsection to the Illinois Controlled Substances Act (720 ILCS 570/401.5(c) (West 2000)) exempting the defendant's conduct from criminal liability. *Glisson*, 202 Ill. 2d at 501. The amendment effectively repealed possession with intent to manufacture methamphetamine from the section on chemical breakdown of illicit controlled substance. *Id.* Accordingly, the appellate court vacated the defendant's conviction for chemical breakdown of illicit controlled substance. *Id.*

¶ 31 The Illinois Supreme Court reversed the judgment of the appellate court and held that section 4 of the Statute on Statutes applied to both repeals and amendments of statutes and preserved the defendant's conviction. *Id.* at 506, 509. In coming to this conclusion, the supreme court found that section 4 "forbids retroactive application of substantive changes to statutes," and "retroactive application of amendments or repeals in criminal statutes is permissible only if such changes are procedural in nature." *Id.* at 507.

¶ 32 As discussed above, the change in the DUI law at issue in this case involved a substantive change, not one merely procedural or mitigating punishment. Therefore, we find *Glisson* to be directly on point. Defendant attempts to distinguish *Glisson* by arguing the court only concluded section 4 applied because the change in the law came after the defendant was sentenced, *i.e.*, after a final order had been issued. Defendant contends this is distinguishable from his case, where defendant had not been sentenced and no final order had been issued before the change to the statute. However, this ignores the following passage from *Glisson*:

> "[C]ourts apply section 4 and bar retroactive application where statutory changes alter or repeal the crime itself. For example, in *People v. Tanner*, 27 Ill. 2d 82[, 188 N.E.2d 42] (1963), this court reviewed an indictment that was quashed based on the repeal of the charging statute by the Criminal Code of 1961 ('new Code'). We held that the prosecution could continue despite the repeal. The new Code, however, also incorporated section 4 by reference explicitly, which we acknowledged in our analysis. [Citation.] Soon after, the First District of the appellate court evaluated a case in which the repealing statute did not refer expressly to section 4 in

> *People v. DeStefano*, 64 Ill. App. 2d 389[, 212 N.E.2d 357] (1965). In that case, *the charging statute was repealed after defendant's conduct but before his indictment*. The court found that *Tanner* did not require that a repealing statute explicitly refer to section 4 for that provision to apply. Citing *Bilderback*, the court held that the prosecution could proceed. [Citation.] Therefore, the appellate court and defendant incorrectly assert that section 4 is inapplicable to all repeals." (Emphasis added.) *Glisson*, 202 Ill. 2d at 508-09.

Nothing in *Glisson* suggests its holding that section 4 applies to substantive changes in the law only after a final order has been entered. Indeed, *Glisson* cites with approval a case where section 4 was found to allow prosecution to continue when the repeal of the charging statute came after the defendant's conduct but before indictment. Accordingly, we find defendant's attempt to distinguish *Glisson* unpersuasive.

¶ 33 Defendant has failed to demonstrate that section 4 of the Statute on Statutes does not apply to bar retroactive application of the substantive change in the DUI law to his case. Indeed, we find the change in the law was substantive, not procedural or mitigating punishment, and conclude section 4 allows defendant's prosecution to continue. Accordingly, where nothing shows a mistake of fact or law or that defendant did not voluntarily enter the plea, we find the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 34 B. Due Process

¶ 35 Defendant next contends the prior version of section 11-501(a)(6) of the Code (625 ILCS 5/11-501(a)(6) (West 2014)) was unconstitutional because it was not a reasonable method of accomplishing the desired legislative objective of keeping cannabis-impaired drivers

off the road. The State urges this court to follow the precedent set by the Illinois Supreme Court in *People v. Fate*, 159 Ill. 2d 267, 636 N.E.2d 549 (1994), finding a prior version of section 11-501 constitutional.

¶ 36 "Statutes are presumed constitutional, and a party challenging the constitutionality of a statute has the burden of establishing its invalidity." *People v. Wright*, 194 Ill. 2d 1, 24, 740 N.E.2d 755, 766 (2000). Although the legislature has wide discretion to establish criminal offenses, that discretion is limited by the constitutional guarantee of substantive due process. *Id.* When a statute does not affect a fundamental right, courts use the rational-basis test to determine whether the statute complies with the requirements of substantive due process. *Id.* "Under this test, a statute will be upheld if it 'bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective.' " *Id.* (quoting *People v. Adams*, 144 Ill. 2d 381, 390, 581 N.E.2d 637, 642 (1991)). We review *de novo* a challenge to the constitutionality of a statute. *People v. Madrigal*, 241 Ill. 2d 463, 466, 948 N.E.2d 591, 593 (2011).

¶ 37 Section 11-501(a)(6) was intended to keep drug-impaired drivers off of the road. *Fate*, 159 Ill. 2d at 269. The statute prohibited driving with "any amount" of cannabis in one's blood or urine, creating a *per se* violation. *Id.* The supreme court observed, "At the lowest levels of drug ingestion, no one is impaired. At the highest levels, all are impaired. In the vast middle range, however, the tolerance for drugs varies from person to person and from drug to drug." *Id.* In that middle range, some people will be impaired and some will not, depending on the person and the drug. *Id.* at 269-70. The supreme court analogized the prohibition on driving with any amount of cannabis in a person's blood or urine to the legal fiction of presumed impairment for persons driving with a certain blood-alcohol concentration. *Id.* at 270. "This, in

spite of the fact that certain people can operate a motor vehicle without noticeable impairment at and above that level of alcohol in their systems." *Id.*

¶ 38 The supreme court noted the legislature considered the flat prohibition of driving with any amount of cannabis in one's system necessary because, unlike blood alcohol concentration, there was no standard to determine whether someone's driving was impaired by the controlled substance. *Id.* The court cited expert testimony that the scientific instruments were not sensitive enough to measure the precise amount of drugs in a blood or urine sample. *Id.* The expert "further testified that although there is a general correlation between the level of cannabis use and impairment, the relationship was not simple." *Id.* The supreme court concluded as follows:

> "The statute in question creates an absolute bar against driving a motor vehicle following the illegal ingestion of any cannabis or controlled substance. This is without regard to physical impairment. Given the vast number of contraband drugs, the difficulties in measuring the concentration of these drugs with precision from blood and urine samples and, finally, the variation in impairment from drug to drug and from person to person, we believe that the statute constitutes a reasonable exercise of the police power of the State in the interest of safe streets and highways." *Id.* at 271.

¶ 39 Despite the supreme court's holding in *Fate*, defendant asks this court to revisit the constitutionality of the statutory ban on driving with any amount of cannabis in one's system. Defendant argues advancements in science and the accuracy of detecting THC and its

metabolites in a person's system show the prior version of section 11-501(a)(6) "criminalized an overwhelmingly large amount of unimpaired drivers" such that it was not a reasonable method of keeping impaired drivers off the road. Defendant further argues that because his "THC concentration was well below the current threshold necessary for prosecution, his driving with a THC concentration of 1.1 ng/mL fell into the category of wholly innocent conduct that was criminalized by the prior version of Section 5/11-501(a)(6)." We disagree.

¶ 40 First, we note that the scientific advancements in detecting THC and its metabolites does indeed appear to have informed the legislature's decision to amend the DUI laws to set the level for presumed impairment at five nanograms of delta-9-THC per milliliter of whole blood. That, however, does not render the prior version of section 11-501(a)(6) unconstitutional. In the past, the methods for determining cannabis's impairing effects on a person were less accurate, and the legislature reasonably determined a flat prohibition on driving with any amount of cannabis in one's system was necessary to protect the public from impaired drivers. *Fate*, 159 Ill. 2d at 270. That was a reasonable policy that bore a reasonable relationship to the legitimate interest in protecting the public from impaired drivers. Although scientific advancements have led to the amendment of the DUI laws, that does not mean the prior version of section 11-501(a)(6) was not a reasonable way to protect the public from impaired drivers.

¶ 41 As to defendant's contention that the law criminalized "wholly innocent conduct," we note that marijuana was, and remains today, an illegal drug for recreational use. Although the legislature has decriminalized driving with less than five nanograms of delta-9-THC per milliliter of whole blood, it does not follow that the prior version of 11-501(a)(6) unconstitutionally criminalized "innocent conduct." Even in view of the scientific

advancements, we conclude there was a rational basis for the legislature's decision to protect the public from drug-impaired drivers and section 11-501(a)(6) was a reasonable means of promoting that interest. Accordingly, we decline to depart from the Illinois Supreme Court's determination in *Fate* that the statute prohibiting driving with "any amount" of cannabis in a person's system was a "reasonable exercise of the police power of the State" and did not violate the constitutional guarantee of due process. *Id.* at 271.

¶ 42 Following oral argument in this matter, defendant filed a motion to cite additional authority in response to queries regarding a case where the Supreme Court found a statute constitutional and later found the same statute unconstitutional. We granted the motion and reviewed the additional authority defendant provided. Having considered the case law, we conclude that, as the appellate court, we are nevertheless compelled to follow the binding precedent from the Illinois Supreme Court holding the prior version of the statute constitutional. Accordingly, we affirm the judgment of the trial court.

¶ 43 C. Ineffective Assistance of Counsel

¶ 44 Finally, defendant argues he received ineffective assistance of counsel because his trial counsel failed to challenge the constitutionality of section 11-501(a)(6). The State argues defense counsel's representation did not fall below an objective standard of reasonableness and defendant cannot show prejudice.

¶ 45 A claim of ineffective assistance of counsel is governed by the familiar framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. The deficient-performance prong requires a defendant to

show that counsel's performance was objectively unreasonable under prevailing professional norms. *People v. Veach*, 2017 IL 120649, ¶ 30, 89 N.E.3d 366. The prejudice prong requires a showing that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Id.* A defendant must satisfy both prongs to prevail on a claim of ineffective assistance of counsel. *Id.*

¶ 46 In light of our conclusion above that the prior version of section 11-501(a)(6) did not violate due process and was a reasonable means to achieve the State's legitimate interest in protecting the public from cannabis-impaired drivers, we conclude counsel's performance was not deficient. Indeed, given that the supreme court found the same statutory provision constitutional in 1994, we cannot say that counsel's performance was objectively unreasonable under prevailing professional norms. Because defendant cannot demonstrate counsel's performance fell below prevailing professional norms, we conclude defendant has failed to establish a claim of ineffective assistance of counsel. Accordingly, we affirm the judgment of the trial court.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 49 Affirmed.