2019 IL App (4th) 170421-U

NO. 4-17-0421

FILED
July 11, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTOPHER D. MARSHALL, Defendant-Appellant.	)	Appeal from the Circuit Court of McLean County No. 16DT801 The Honorable William A. Yoder, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Holder White and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted counsel's motion to withdraw because no meritorious issue could be raised on appeal.

¶ 2 In February 2017, a jury found defendant, Christopher Marshall, guilty of driving under the influence (DUI), two counts of obstructing a peace officer, speeding, and open alcohol in a vehicle. In June 2017, defendant filed a notice of appeal for his DUI conviction. In March 2019, the Office of the State Appellate Defender (OSAD) filed a motion to withdraw and asserted that there were no meritorious issues to raise on appeal. We agree with OSAD, grant its motion to withdraw, and affirm defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 A. The Traffic Stop and Criminal Charges

¶ 5 On the night of December 1, 2016, defendant was stopped for speeding. The of-

ficer who stopped defendant believed that he displayed signs of intoxication and ordered him out of the car for a field sobriety test. Defendant refused to exit the vehicle, was forcibly removed by the police, and was placed under arrest. The police also found an open bottle of alcohol in his car. The State charged defendant with DUI, speeding, open alcohol in a vehicle, and two counts of obstructing a peace officer. 625 ILCS 5/11-501(a)(2) (West 2016); 720 ILCS 5/31-1(a)(West 2016).

¶ 6 B. The Motion To Suppress

¶ 7 In February 2017, a few days before trial, defense counsel made an oral motion to exclude a portion of a dashcam video that was taken on the night of defendant's arrest. In the video, defendant said that he drank heavily on Monday and had gone into detox. Defendant elaborated that this could be why he still smelled of alcohol during the traffic stop, which was on Thursday. The trial court denied defense counsel's oral motion, and the video was played to the jury.

¶ 8 C. The Trial

¶ 9 At defendant's jury trial, Officer Cory McNicol of the Normal Police Department testified that on the night of December 1, 2016, he pulled over defendant's vehicle for speeding. McNicol stated that defendant slurred his words, blew cigarette smoke at McNicol's face, and dropped his license on the floor of his vehicle. A video of this discussion showed defendant telling the officers that he had been in detox in Peoria and that he had drank heavily earlier in the week. McNicol stated that defendant (1) refused to exit the vehicle and (2) refused to do field sobriety testing. Officers forcefully removed defendant from the vehicle and placed him under arrest for resisting a peace officer. However, the officers apparently did not give *Miranda* warnings to defendant. McNicol testified that he then took defendant, who smelled of alcohol, to the

police station.

¶ 10 At the police station, McNicol conducted a horizontal gaze nystagmus test (HGN test). See *People v. Buening*, 229 Ill. App. 3d 538, 539, 592 N.E.2d 1222, 1223 (1992) ("Nystagmus, a physiological phenomenon, is a term used to describe an involuntary jerking of the eyeball. [It] *** is characterized by a slow drift, usually away from the direction of gaze, followed by a quick jerk of recovery in the direction of gaze. A motor disorder, it may be *** due to a variety of conditions affecting the brain, including ingestion of drugs such as alcohol ***." (emphasis and internal quotation marks omitted)). McNicol explained that the HGN test is comprised of six possible factors because there are three different HGN clues and each eye is scored separately for each factor. McNicol testified that defendant failed four of the six HGN factors: lack of smooth pursuit in both eyes and distinct and sustained nystagmus at maximum deviation in both eyes. McNicol stated that failing four of the six HGN factors shows signs of possible intoxication. McNicol noted that the other HGN clue—which defendant did not fail—appears "when people are highly, highly intoxicated." McNicol testified that defendant refused to do the second and third field sobriety tests—the "walk and turn" and "one-leg stand"—because he was in too much pain due to a preexisting condition. Ultimately, as McNicol was ending his testing, an ambulance arrived to take defendant to the hospital for the minor injuries he sustained from being removed from his vehicle. At the hospital, McNicol arrested defendant for DUI. McNicol requested blood and urine tests from defendant, but he refused. McNicol stated that defendant still seemed very drunk.

¶ 11 McNicol also testified that defendant—while at the hospital—told him that he had been in detox since Monday. Defense counsel objected to this testimony and moved for a mistrial because there had been no testimony regarding *Miranda* warnings. The trial court denied the mo-

tion but concluded that McNicol's testimony was improper and sustained the objection. The court instructed the jury to disregard the testimony regarding detox. McNicol then testified that defendant told him that he had a blood alcohol content (BAC) of 0.7 on Monday. McNicol stated that he had never heard of a BAC that high. Defendant objected to this, and the trial court sustained defendant's objection.

¶ 12 Officer Melaine Crays and Sergeant Adam Kapchinske also testified regarding defendant's arrest. Crays stated that defendant had glassy eyes and slurred speech. Kapchinske stated that defendant smelled of alcohol. They also testified that they conducted an inventory search of defendant's car and found an open bottle of alcohol in the glove compartment.

¶ 13 The trial court denied defendant's motion for a directed verdict. The court also refused to use defense counsel's proposed non-Illinois Pattern Criminal Jury Instruction (IPI instruction) stating that HGN test results should not be correlated to a specific level of intoxication. Ultimately, the jury found defendant guilty on all counts.

¶ 14 D. The Motion for a New Trial and Defendant's Sentence

¶ 15 Later in February 2017, defense counsel filed a motion for a new trial in which he essentially argued that (1) the trial court erred in denying the non-IPI instruction, (2) McNicol's testimony was unduly prejudicial, and (3) the State failed to prove defendant guilty of DUI. In March 2017, the trial court denied this motion. The court sentenced defendant to 24 months of probation, 180 days in jail (time served), 75 hours of alcohol treatment, 100 hours of community service, and various fines and fees.

¶ 16 E. The Notice of Appeal and Motion To Withdraw

¶ 17 In June 2017, defendant filed a notice of appeal for his DUI conviction. In March 2019, OSAD filed a motion to withdraw and served a copy on defendant. Defendant had until

May 2, 2019, to file a response. On June 24, 2019, OSAD's motion was returned to this court as undeliverable.

¶ 18 II. ANALYSIS

¶ 19 In this case, OSAD argues there are no meritorious issues to appeal. We agree with OSAD, grant its motion to withdraw, and affirm defendant's conviction.

¶ 20 A. The *Anders'* Framework

¶ 21 The Supreme Court of the United States has set forth the procedures to be followed for an appellate attorney to withdraw as counsel. *Anders v. California*, 386 U.S. 738, 744 (1967); *In re Brazelton*, 237 Ill. App. 3d 269, 270, 604 N.E.2d 376, 377 (1992). Counsel's request to withdraw must be accompanied by a brief referring to anything in the record that could support an appeal. *Brazelton*, 237 Ill. App. 3d at 270. After identifying issues that counsel could conceivably raise, counsel must then explain why these potential arguments are without merit. *Id.* at 271. A copy of this motion must be given to the defendant, who will then be given an opportunity to respond to the motion to withdraw. *Id.* at 270-71. The appellate court will then review the record to determine whether the available arguments are wholly without merit. *Id.* at 271. We hold the ultimate responsibility to determine whether an argument is without merit. *People v. Teran*, 376 Ill. App. 3d 1, 5, 876 N.E.2d 734, 738 (2007).

¶ 22 B. Sufficiency of the Evidence

¶ 23 OSAD first argues that no meritorious issue can be raised regarding the sufficiency of the evidence. We agree.

¶ 24 On a challenge to the sufficiency of the evidence, a reviewing court must determine whether any rational trier of fact—after viewing the evidence in the light most favorable to the State—could have found the essential elements of the offense beyond a reasonable doubt.

People v. Brown, 2013 IL 114196, ¶ 48, 1 N.E.3d 888. A reviewing court will not substitute its judgment for that of the trier of fact for issues involving the weight of the evidence or the credibility of the witnesses. *Id.* A conviction will only be reversed when the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id.*

¶ 25 "To sustain a conviction for driving under the influence of alcohol, the State has to prove that [the defendant], while in 'actual physical control' of a car, was 'under the influence of alcohol.' " *People v. Phillips*, 2015 IL App (1st) 131147, ¶ 17, 44 N.E.3d 422 (quoting 625 ILCS 5/11-501(a)(2) (West 2010)). To be under the influence of alcohol, a defendant must be "under the influence to a degree that renders the driver incapable of driving safely." *People v. Love*, 2013 IL App (3d) 120113, ¶ 34, 996 N.E.2d 735. "The testimony of a single, credible police officer may alone sustain a convition for driving under the influence of alcohol." *Phillips*, 2015 IL App (1st) 131147, ¶ 18. "Circumstantial evidence may be used to prove the presence of a substance in a defendant's breath, blood, or urine." *People v. Castino*, 2019 IL App (2d) 170298, ¶ 19. "Circumstantial evidence is proof of facts and circumstances from which the trier of fact may infer other connected facts that reasonably and usually follow according to common experience." *Id.* Further, "a conviction of DUI may be supported solely by the credible testimony of the arresting officer. [Citation.] Opinion testimony of the arresting officer is not necessary, however." *Id.*

¶ 26 In this case, Officer McNicol testified that defendant slurred his words. McNicol stated that defendant (1) refused to exit the vehicle and (2) refused to do field sobriety testing. At the police station, McNicol conducted a HGN test. McNicol explained that defendant failed four of the six HGN factors and that failing four of the six HGN factors shows signs of possible intoxication. At the hospital, McNicol arrested defendant for DUI. McNicol testified that defendant

still seemed very drunk while at the hospital. Officer Crays stated that defendant had glassy eyes and slurred speech. Sergeant Kapchinske stated that defendant smelled of alcohol. Officers also found an open bottle of alcohol in defendant's glove compartment.

¶ 27 Based upon this evidence, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Accordingly, we agree with OSAD that no meritorious issue could be raised regarding the sufficiency of the State's evidence.

¶ 28 C. Ineffective Assistance of Counsel

¶ 29 OSAD argues that it is not arguable that trial counsel provided ineffective assistance of counsel. Specifically, OSAD argues that defendant was not prejudiced by counsel's failure to file a motion to suppress defendant's statements made at the hospital regarding his time spent in detox. We agree.

¶ 30 The sixth amendment guarantees a defendant the right to effective assistance of counsel at all critical stages of a criminal proceeding. U.S. Const., amend. VI*; People v. Hughes*, 2012 IL 112817, ¶ 44, 983 N.E.2d 439. "To prevail on a claim that trial counsel was ineffective for failing to file a motion to suppress, a defendant must show a reasonable probability that the motion would have been granted and that the trial outcome would have been different." *People v. Brannon*, 2013 IL App (2d) 111084, ¶ 35, 990 N.E.2d 1170. "A defendant's appeal rises and falls with the merits of the motion to suppress that he proposes trial counsel should have presented." *Id.*

¶ 31 The fifth amendment provides that "[n]o person *** shall be compelled in any criminal case to be a witness against himself ***." U.S. Const., amend. V; see also Ill. Const. 1970, art. I, § 10. "The rule set forth in *Miranda* requires suppression of statements made by a defendant in response to a custodial interrogation unless police officers warn the defendant of

certain rights, including the right to remain silent and the right to an attorney, and obtain a voluntary waiver of those rights." *People v. Loewenstein*, 378 Ill. App. 3d 984, 989, 883 N.E.2d 690, 694 (2008) (citing *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966)). However, "*Miranda* will not apply to a traffic stop unless a defendant can 'demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest.' " *People v. Wright*, 2011 IL App (4th) 100047, ¶ 33, 960 N.E.2d 56 (citing *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984)). "Additionally, the mere fact that an accused is not free to leave during a traffic stop or an investigation does not mean that a defendant is in custody for *Miranda* purposes." *People v. Havlin*, 409 Ill. App. 3d 427, 434, 947 N.E.2d 893, 899 (2011).

¶ 32 In this case, defendant made two statements regarding his treatment in detox. The first statement arose during the initial traffic stop, during which he explained that he might smell of alcohol because he went to detox earlier in the week. The second statement arose while defendant was sitting in the hospital room. Even if defense counsel had filed a motion to suppress the statement made at the hospital, the nearly identical statement made during the traffic stop would still have been admissible. See *Wright*, 2011 IL App (4th) 100047, ¶ 33; *Havlin*, 409 Ill. App. 3d at 434. Accordingly, even if we assume that counsel could have suppressed the statements made at the hospital, there is not a reasonable probability that the result of the trial would have been different because the jury still would have heard about defendant's time in detox.

¶ 33 Furthermore, due to the strength of the State's evidence, we conclude that there is not a reasonable probability that the result of the trial would have been different even if counsel could have suppressed *all* of the statements regarding detox prior to trial. Put differently, even if there was no mention of defendant's time in detox, there is not a reasonable probability that a jury would have found defendant not guilty of DUI. Therefore, we agree with OSAD that no

meritorious issue could be raised regarding ineffective assistance of counsel. Instead, notwithstanding the possibility of filing a motion to suppress, we note that counsel performed admirably and subjected the State's witnesses to considerable cross-examination.

¶ 34 D. Jury Instructions

¶ 35 OSAD argues that the trial court did not abuse its discretion by rejecting defense counsel's proposed non-IPI instruction which stated that HGN test results should not be correlated to a specific level of intoxication. We agree.

¶ 36 Illinois Supreme Court Rule 451(a) (eff. Apr. 8, 2013) requires a trial court to instruct the jury pursuant to the IPI criminal instructions unless the trial court determines that the IPI instruction does not accurately state the law. *People v. Hudson*, 222 Ill. 2d 392, 399-400, 856 N.E.2d 1078, 1082 (2006). "Where there is no IPI jury instruction on a subject on which the court determines the jury should be instructed, the court has the discretion to give a non-IPI instruction." *Id.* at 400. "An abuse of discretion occurs only where the trial court's decision is 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Lerma*, 2016 IL 118496, ¶ 23, 47 N.E.3d 985 (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37, 986 N.E.2d 634)).

¶ 37 Based on this deferential standard, we conclude that the trial court did not abuse its discretion when it denied defense counsel's request for a non-IPI instruction. Stated simply, the trial court's conduct was neither arbitrary nor unreasonable. Accordingly, we agree with OSAD that no meritorious argument could be raised on this issue.

¶ 38 E. Sentencing

¶ 39 Finally, OSAD argues that no meritorious argument could be raised regarding defendant's sentence. We agree.

¶ 40 "An issue on appeal becomes moot where events occurring after the filing of the appeal render it impossible to grant effectual relief to the complaining party." *In re Shelby R.*, 2012 IL App (4th) 110191, ¶ 16, 974 N.E.2d 431. "Generally, where the relief sought is to set aside a sentence, the question of the validity of its imposition is moot when the sentence has been served." *Id.* Generally speaking, a reviewing court will not consider the merits of a moot issue because "[i]t is a basic tenet of justiciability that reviewing courts will not decide moot or abstract questions or render advisory opinions." *In re J.T.*, 221 Ill. 2d 338, 349, 851 N.E.2d 1, 7 (2006).

¶ 41 In March 2017, the trial court sentenced defendant to 24 months of probation. As of March 2019, defendant's term of probation has finished. Because defendant's sentence is complete, any issue regarding the propriety of his sentence is moot. For that reason, we agree with OSAD that no meritorious issue could be raised regarding the trial court's sentence.

¶ 42 III. CONCLUSION

¶ 43 For reasons stated, we agree with OSAD that no meritorious issue could be raised on appeal. We therefore grant OSAD's motion to withdraw as appellate counsel and affirm defendant's conviction. See *Anders*, 386 U.S. at 744.

¶ 44 Affirmed.