NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

VICKI SUE SANDERS

Appellant,

v.

Appeal No. CRC 08-00042 APANO
UCN: 522008MM000042XXXXNO

STATE OF FLORIDA

Appellee.
_____/

Opinion filed _____

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Donald Horrox

Thomas Matthew McLaughlin, Esquire
Attorney for Appellant

Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

ANDREWS, Judge.

THIS MATTER is before the Court on Appellant, Vicki Sue Sanders', appeal from a conviction, after a jury trial, of Driving Under the Influence of Alcoholic Beverage or Controlled Substance, a first degree misdemeanor, in violation of §316.193 Fla. Stat. (2008). After review

of the record and the briefs, this Court affirms the judgment and affirms the sentence in part. The cause is remanded the trial court to reconsider the imposition of the fines and court cost.

Factual Background and Trial Court Proceedings

Appellant was charged by Driving While Under the Influence of an Alcoholic Beverage or Controlled Substance (DUI) in violation of Fla. Stat. §316.193. Prior to trial, the Appellant filed a motion in limine seeking to exclude: (1) any statements made during an accident investigation regarding the type and number of prescription medications she had taken, (2) any hearsay testimony from witness Shirley Muscarella, and (3) any testimony regarding Flexeril or Duragesic patches. The motion was granted as to all issues. The State's first witness at trial, Shirley Muscarella lived across the street from the Appellant. Ms. Muscarella had known the Defendant for six years. She observed the Appellant back her car into a truck parked in front of Ms. Muscarella's house. Ms. Muscarella testified that when the Appellant exited her vehicle Appellant was not acting normal and was slurring her speech. She felt that the Appellant was under the influence of either "drugs or drinking." The Appellant was stumbling and acting differently than she had in the past. Ms. Muscarella denied knowing anything about the Appellant having surgery for back pain.

Patrick Haines testified next for the State. He too has known Appellant for six years. His truck is the truck the Appellant struck. He made contact with the Appellant and he observed that "she wasn't normal Vicki. She seemed impaired to me." Mr. Haines observed the Appellant's speech to be slurred and real slow. He observed that Appellant was also not stable on her feet – that she was "slow and a little wobbly."

Officer John Norman of the Pinellas Park Police Department responded to the scene to conduct a traffic crash investigation. As part of the accident investigation, Officer Norman

spoke to the Appellant. He observed Appellant to be "extremely emotional- and her eyes were bloodshot and watery." He testified that Appellant's speech was very slow and slurred, her movements were groggy and lethargic and she was moving in an erratic manner. During the accident investigation the Appellant was asked if she was injured and her nonresponsive answer was to list eight different drugs she takes and had apparently ingested that day including Wellbutrin, Celexa, Cymbalta, hydrocodone, oxycodone, Haldol, Xanax and Ativan. This response was excluded by the motion in limine heard prior to trial. Officer Norman then conducted a DUI investigation. During the DUI investigation the Appellant advised the officer that she was taking and under the influence of Xanax and Vicodin. Later during the DUI investigation the Appellant also admitted to being under the influence of Wellbutrin and Celexa in addition to Xanax. Appellant's breath sample indicated a blood alcohol level of .000/.000. A urine sample was collected.

During cross-examination, and in an effort to impeach the witness Shirley Muscarella, defense counsel asked Officer Norman if Ms. Muscarella informed him that the Appellant was in pain from her past surgeries. Over the State's objection the officer confirmed that Ms. Muscarella had in fact made the statement. Defense counsel also elicited from this witness the Appellant's admission to taking prescription drugs for the pain. The State argued that the defense opened the door to any statements made during the crash investigation by eliciting testimony from Officer Norman about Ms. Muscarella's inconsistent statement and the Appellant's medication. The trial court agreed with the State and allowed the State to ask about the statements made during the crash investigation. On re-direct, Officer Norman testified that during his crash investigation, the Defendant admitted taking Wellbutrin, Celexa, Cymbalta, hydrocodone, oxycodone, Haldol, Xanax, and Ativan prior to driving her car.

The State's next witness was Charles Foster, a forensic toxicologist. Mr. Foster testified that he analyzed the Appellant's urine sample and found dihydrocodeine, hydrocodone, norpropoxyphene, and alprazolam. Mr. Foster explained that hydrocodone is a prescription pain reliever commonly known as Vicodin and dihydrocodeine is a metabolite of the Vicodin that appears when Vicodin is taken. Mr. Foster testified that Vicodin is a narcotic pain reliever that can commonly cause drowsiness, nausea, euphoria and also the inability to focus and sleepiness. Mr. Foster also explained that norpropoxyphene is another narcotic pain-reliever commonly known as Darvocet, alprazolam is an anti-anxiety drug commonly known as Xanax. (T. 144-145). Mr. Foster testified that all these drugs have the potential to impair a person's normal faculties and that the additive effect of these drugs created an even larger potential for impairment. Mr. Foster indicated he could not determine when the drugs were taken.

The State then called Deputy Kenneth Euler, a Pinellas County Sheriff s Office drug recognition expert. Deputy Euler met with the Appellant after she was arrested and brought to CBT. During his observations of the Appellant Deputy observed that she was swaying, stumbling, had slurred speech, droopy eyelids and bloodshot eyes. In addition Deputy Euler testified that the Appellant admitted to taking Percocet, Vicodin, Xanax and Duragesic patches that day. Deputy Euler testified that he then performed a horizontal gaze nystagmus (HGN) test on the Appellant and she exhibited symptoms of high impairment. Deputy Euler also administered a second round of FSEs and checked the Appellant's pupils, and based on all of these observations, concluded that the Appellant was under the influence of a narcotic analgesic.

Toxicologist Ron Bell testified for the defense. He testified that there was no way to know when the Appellant ingested the drugs in her system. The Appellant was found guilty.

Issues

Appellant raises three issues for the court's consideration. First she argues that trial counsel's representation of her was ineffective because counsel opened the door to suppressed evidence causing the revelation that Appellant acknowledged using eight different prescription medications. Second, Appellant argues that the trial court improperly found that she opened the door causing cumulative impeachment evidence. Third, Appellant argues the trial court improperly assessed court costs and fines without specifically delineating how much of the fines and cost were imposed as discretionary costs or mandatory costs. In addition the court imposed $150 in investigative costs without orally pronouncing the costs.

Standard of Review

A trial judge's rulings on the admission or exclusion of evidence are reviewed under the abuse of discretion standard. *LaMarca v. State,* 785 So.2d 1209, 1212 (Fla.2001). Under the abuse of discretion standard, discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. *Frances v. State*, 970 So.2d 806, 813 (Fla. 2007).

I. Ineffective Assistance of Counsel

Appellant asserts that her conviction for driving under the influence resulted from the ineffective assistance she was rendered by trial counsel. In her brief she states "[a]ssuming that the jury 'reasonably, conscientiously, and impartially' applied the standards that govern the decision, it is reasonable and probable that it would have returned a different verdict had the jury not heard that the Appellant was taking eight different medications on the night of the accident." In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the Supreme

Court established the standard applicable to ineffective assistance of counsel claims. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In *Hamner v. State*, 2009 WL 1872531 (Fla. 4th DCA 2009) the Fourth District provides clarity on what is required to establish an ineffective assistance claim:

> 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.' '[T]he defendant must show that [the errors] actually had an adverse effect on the defense.' 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.' 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

(citations omitted). As a general rule, claims of ineffective assistance of counsel may not be raised on direct appeal. *See Antunes-Salgado v. State*, 987 So.2d 222 (Fla. 2d DCA 2008); *Martinez v. State*, 761 So.2d 1074 (Fla. 2000) ("ineffective assistance of counsel claims are not cognizable on direct appeal.") However, "[t]here are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue." *Blanco v. Wainwright*, 507 So.2d 1377 (Fla. 1987). *See also, Martinez v. State*, 761 So.2d 1074 (Fla. 2000). A claim of ineffectiveness can properly be raised on direct appeal only if the record on its face demonstrates ineffectiveness. *Nairn v. State*, 978 So.2d 268, 269 (Fla. 4th DCA 2008). The "rare" exceptions subject to direct appeal tend to occur only when trial counsel's actions or inaction is acutely prejudicial to his or her client. In *Foster v. State*,

387 So.2d 344 (Fla. 1980) the supreme court found ineffective assistance of counsel where trial counsel represented codefendants charged with murder. The defendants were tried separately. The State listed the co-defendant as a witness in the defendant's case and called the co-defendant as a witness at trial. *Id.* In the presence of the jury on cross examination the witness admitted to being charged as a co-defendant and that she and the defendant were both represented by defense counsel. *Id.* At the completion of her testimony the state dismissed the charges against her. *Id.* The supreme court found the defendant did not have counsel that was "effective and unimpaired." *Id.* The joint appointment and joint representation was a conflict of interest and reversible error even though there were no objections. *Id.* In *Robinson v. State,* 702 So.2d 213, 215-217 (Fla. 1997) trial counsel was found to be ineffective for failing to prepare for trial, lying to the jury, offering no evidence in mitigation and being improperly compensated. In *Ross v. State,* 726 So. 2d 317, 319 (Fla. 2d DCA 1998) defense counsel was ineffective for failing to object to the prosecutor repeatedly stressing that the defense presented witnesses who were "pathetic," "ridiculous," "inappropriate," "insulting" to the jury's intelligence, "totally incredible," and who had "just flat out" lied. Ross's testimony was characterized as "preposterous," "nonsense" and "bologna." In *Gordon v. State,* 469 So.2d 795 (Fla. 4th DCA 1985), the convictions were reversed on direct appeal based on a determination that defense counsel's failure to object to the prosecutor's numerous improper questions and comments constituted ineffective assistance of counsel appearing on the face of the record.

At bar, Appellant first focuses on questions asked of Officer Norman regarding inconsistent statements made by witness Shirley Muscarella. The suggestion is that counsel's effort to impeach Ms. Muscarella lead to excluded statements made by the Appellant being admitted into evidence. The connection is tenuous. Witness Shirley Muscarella was the first

witness called by the State. She testified to Appellant's impairment. She had known Appellant for six years and considered Appellant a friend. She knows the way the Appellant acts "normally" and felt Appellant was not acting normally on the night in question. She observed signs of impairment that included slurred speech and stumbling. She testified that she "felt that [Appellant] was under the influence of either drugs or drinking." In addition, Ms. Muscarella was the only witness who could put the Appellant behind the wheel of the car at the time of the accident. She was a necessary and critical State witness. Trial counsel's strategic decision to impeach the witness by establishing that she had once previously made an inconsistent statement was, under the facts of this case, prudent. Challenging the credibility of this witness was as important if not more important than any other. Further, no rule of exclusion or privilege is violated when an officer testifies regarding statements made by any witness, other than the defendant, as a result of an accident investigation. *See State v. Cino*, 931 So.2d 164, 167 (Fla. 5th DCA 2006) (statements made by witnesses during an accident investigation are not privileged). The statements made by Ms. Muscarella as testified to by Officer Norman, were not among the statements excluded by the trial court. There is nothing about trial counsel's impeachment of witness Muscarella that shows ineffectiveness on the face of the record. *Nairn*, 978 So.2d at 269.

On direct examination a significant part of the State's case related to Appellant's failure to successfully complete the field sobriety exercises Officer Norman administered. Because of Appellant's injuries she was not able to perform each exercise. Appellant performed poorly on the exercises she was able to attempt. During cross examination Officer Norman was asked if the Defendant "told [him] she took prescription drugs for pain" related to surgeries. His response was "she gave me a list of all of the medications she takes." This question and answer

are cited by the trial court as the reason for finding that the door had been opened. In an effort to explain his reasoning for asking the question Appellant's trial counsel stated "[p]art of our defense is that Ms. Sanders was incapable of performing the field sobriety exercises . . ." Several questions were directed to Officer Norman about the mechanics of performing field sobriety exercises and whether persons with disabilities or injuries would be expected to complete such exercises. Counsel endeavored to use the fact that Appellant was prescribed medication for pain as an explanation and justification for why she could not perform the field sobriety exercises. Counsel's strategy in explaining away poor performance on field sobriety exercises cannot be said to show ineffectiveness on the face of the record. *Id.* If there was any chance of convincing this jury of Appellant's innocence such matters have to be dealt with.

Finally, at trial each of the four witnesses who had contact with the Appellant was able to testify to obvious physical manifestations of impairment that included slurred speech, stumbling, bloodshot watery eyes, droopy eyelids, grogginess, lethargic, wobbly, slow and erratic movement. During the trial the testimony, admissions and other evidence established that the Appellant took, was currently prescribed or had in her urine screen Xanax (also called alprazolam), Vicodin (also known as hydrocodone), Wellbutrin, Celexa, Darvon (also known as Darvocet) and Duragesic patches. Breakdown products of the above named drugs specifically dihydrocodeine, and norpropoxyphene were also found in Appellant's urine. At least four of the above listed drugs are among the list of eight the Appellant confessed to taking during the accident investigation. Even without the admission of the statements made during the accident investigation the evidence of Appellant's impairment is overwhelming. The evidence does not support the argument that "there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance" of trial counsel. *Strickland v.*

Washington, 466 U.S. 668, 694; *Hamner v. State*, 2009 WL 1872531 (Fla. 4th DCA 2009). The evidence presented suggesting trial counsel was ineffective is insufficient to be sustained on direct appeal and is similarly insufficient to sustain a motion for post conviction relief. Trial counsel's representation of Appellant did not fall "outside the range of reasonable professional assistance." *Antunes-Salgado v. State*, 987 So.2d 222.

II. "Opening the Door"

Appellant argues the trial court abused its discretion when it allowed the State to introduce evidence of her statements made during the accident investigation after the court found the Appellant "opened the door" to the admission of such evidence. In *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000), the supreme court stated: "As an evidentiary principle, the concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted. The concept of 'opening the door' is 'based on considerations of fairness and the truth-seeking function of a trial.'" *Id.* at 42 (citations omitted). To open the door to excluded evidence, the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled. *Washington v. State*, 758 So.2d 1148, 1155 (Fla. 4 DCA 2000). The state is entitled to transcend normal bounds of questioning a witness in order to negate delusive innuendos of defense counsel. *Tompkins v. State*, 502 So.2d 415, 420 (Fla. 1986).

The following questions were asked by defense counsel of Officer Norman:

Page lines 1 – 18

Q: Okay. And she (*referring to witness Muscarella)* also advised that Ms. Sanders is in a lot of pain from her surgeries?

MS. McKINNEY: Objection, Your Honor.

THE COURT: Overruled, I'll permit it.

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Q: I'll repeat the question. She also advised that Ms. Sanders is in a lot of pain from her surgeries?

A: Those are the statements Ms. Muscarella made to me, yes, they are.

Q: And she made those statements?

A: Ms. Muscarella did, yes.

Q: And Ms. Sanders said - - told you the she took prescription drugs for that pain.

A: Ms. Sanders later on told me, yeah, she gave me a list of all medications that she takes.

Page 118 – lines 16-20

Q: And Ms. Sanders had a hernia problem?

A: She complained of back and neck injuries, nerve, et cetera.

Q: And that's what she is taking the medication for?

A: That's correct.

Appellant argues that she was only eliciting cumulative testimony from the officer regarding the fact that the Appellant told him she was on prescribed medication for pain from surgeries. The implication to the jury, however, is that Appellant's drug use was legal or justified and that Appellant's culpability is lessened by medical necessity. Appellant successfully sought to prohibit the State from introducing any statements made during the accident investigation and then sought to use some of the statements to benefit her in her defense. She cannot have it both ways. The statements are either excluded or they are not. The state's introduction of evidence of

all of the drugs Appellant was under the influence of does serve to qualify and limit Appellant's explanation of her drug use. *Rodriguez,* 753 So.2d at 42. We find no error here.

III. Imposition of Fines and Court Costs

The Appellant argues that the trial court improperly imposed certain fines and court cost. One such cost was "investigative cost" that was apparently mistakenly orally pronounced as "court cost" at sentencing. The Appellant filed a motion asking the court to correct the sentencing error and the court granted the motion striking the $150. Appellant, however, complains that the trial court failed to address the fine of $1000 that it illegally imposed. Additionally, Appellant now argues that the trial court was without jurisdiction to strike the investigative costs of $150 because it failed to do so within the sixty day window prescribed by Fla. R. Crim. P. 3.800(b)(2). Rule 3.800 requires the court to file its order within sixty days or the motion is considered denied. The trial court entered its order outside of the sixty day window. The State concedes this issue. This court similarly agrees there is no explanation or justification for the imposition of the $1000 fine. At the time the fine was imposed the maximum fine the trial court could impose for the offense charged was $500. The court does not agree with Appellant's assertion that because the trial court has the discretion to impose a fine between $250 and $500 that the trial court is required to impose the minimum fine unless it first makes a determination that Appellant has the ability to pay more. The cases cited by Appellant to support this proposition relate to the additional court cost authorized in §893.13(4)(b) Fla. Stat. for drug offenses. The imposition of the fee is discretionary. Section 938.25 Fla. Stat. requires that the court make a finding that the defendant has the ability to pay and will not be prevented from being rehabilitated or making restitution if required to pay the fine. Such inquiry is not a general requirement for all costs, fees and fines and is not required to be made when not

statutorily mandated. This issue remanded for resentencing. Upon remand the trial court may impose a fine not to exceed $500 and shall strike the investigative costs. All other cost and fees previously orally pronounced and assessed and not addressed in this opinion may be reassessed.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is affirmed in part and reversed in part and the case is remanded to the trial court for further consideration of the imposition of the fines and court cost.

ORDERED at Clearwater, Florida this 31st day of August, 2009.

Original opinion entered by Circuit Judges Michael F. Andrews, Raymond O. Gross, & R. Timothy Pete

cc: Honorable Donald E. Horrox
Office of the State Attorney
Thomas McLaughlin, Esquire