STATE OF CONNECTICUT *v.* TYRONE BROWN
(SC 18870)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Vertefeuille, Js.

Argued April 17—officially released August 6, 2013

G. Douglas Nash, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Marc R. Durso*, assistant state's attorney, and, on the brief, *John C. Smriga*, state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. The defendant, Tyrone Brown, was convicted following a jury trial of operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a (a) (1) (driving under the influence) and operating a motor vehicle while having an elevated blood alcohol content in violation of § 14-227a (a) (2).[1] The defendant appealed from the judgment of conviction to the Appellate Court, arguing, inter alia, that the trial court abused its discretion when it admitted certain evidence of his refusal to answer questions from the police. After being arrested for driving under the influence, the defendant was asked a series of standard questions by the arresting officer about his consumption of food and alcohol that evening, and his general health. The defendant answered most, but not all, of these questions. *State* v. *Brown*, 131 Conn. App. 275, 285, 26 A.3d 674 (2011). Concluding that the defendant had opened the door to evidence of his refusals to answer, the Appellate Court affirmed the judgment of the trial court. Id., 287–88. We thereafter granted certification to appeal limited to the following question: "Did the Appellate Court properly determine that the defendant's refusal to answer questions after he was given *Miranda*[2] warnings was admissible?" *State* v. *Brown*, 302 Conn. 944, 31 A.3d 382 (2011). Although the defendant raises several issues on appeal in this court,[3] the dispositive issue in this certified appeal is whether the trial court properly allowed the state to introduce evidence of the defendant's refusal to answer certain of the officer's questions after defense counsel had elicited testimony regarding the defendant's candor in answering others. Because we agree that defense counsel opened the door to the admission of the evidence at issue in the present appeal, we affirm the judgment of the Appellate Court.

The jury reasonably could have found the following facts. Shortly after 1 a.m. on the morning of April 9, 2008, Jeffrey Morgan, a state police trooper on patrol, was traveling northbound on Interstate 95 (I-95) when he received a report of a vehicle operating erratically and traveling at a slow rate of speed. Morgan came upon the vehicle, which was being driven by the defendant, and began following it. He observed that the defendant was indeed "traveling extremely slow[ly]," at approximately thirty miles per hour, on a span of I-95 where the posted speed limit is fifty-five miles per hour. After observing the defendant swerve over the white "fog line" and into the shoulder several times—at one point nearly striking the metal guardrail—Morgan came to suspect that the defendant was intoxicated. Morgan attempted to initiate a traffic stop by activating the overhead lights, siren, and flashing headlights of his police cruiser. Although, in his experience, motorists typically respond to this display "almost instantane-

ously," the defendant did not stop, and, indeed, appeared not to notice the police car at all. Morgan then changed lanes and pulled up alongside the defendant's car "just to try to see if [he] could get [the defendant's] attention in some other fashion . . . ." Eventually, the defendant pulled over.

Morgan approached the defendant's car and asked if the defendant had "had anything to drink that night." The defendant responded that he had "had a beer earlier in the evening."[4] The defendant was unable to produce a license and registration in response to Morgan's request, but provided his driver's license number from memory. Morgan noticed that the defendant's speech was slurred and that his eyes were "bloodshot and watery." As the defendant spoke, Morgan detected the odor of an alcoholic beverage on his breath. Morgan also observed an eight ounce plastic cup filled with a tan liquid in the center console of the defendant's car. The defendant did not respond when asked what the cup contained. After asking the defendant to exit his car, Morgan conducted three field sobriety tests.[5] On the basis of his prior observations and the defendant's performance during these tests, Morgan arrested the defendant for driving under the influence, and transported him to the state police barracks in Bridgeport for further testing and processing.

At the barracks, Morgan read the defendant his *Miranda* rights before asking him to submit to two breath tests. *State* v. *Brown*, supra, 131 Conn. App. 278. The defendant agreed to the breath tests, which indicated that his blood alcohol content was well above the statutory limit.[6] Id. Morgan also conducted a brief postarrest interview, consisting of sixteen questions asked of all persons arrested for driving under the influence. The defendant answered the majority of Morgan's questions, but refused to answer three of them: specifically, how much alcohol he had consumed; where he had consumed it; and when and what he had last eaten. Morgan documented the defendant's blood alcohol content readings, as well as his responses to the interview questions, in a motor vehicle supplemental report, known as the A-44.[7]

On January 26, 2009, the defendant filed a pretrial motion in limine to prohibit the admission of the A-44 report into evidence. As the Appellate Court noted: "[The defendant] alleged that the introduction of the report would violate his constitutional right against self-incrimination pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), because it reflected that the defendant refused to answer certain questions after having been informed of his *Miranda* rights. . . . The court denied the motion on June 1, 2009, and the issue was reserved for resolution at trial.

"At trial, outside the presence of the jury, the state conducted an offer of proof through Morgan regarding

the [A-44] form. The defendant objected to its admission on the grounds of lack of foundation, that it violated his right to confrontation under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and that it constituted hearsay." *State* v. *Brown*, supra, 131 Conn. App. 285. The trial court reviewed and rejected these objections in turn, and admitted the A-44 report as a full exhibit under the business records exception to the hearsay rule.[8]

On direct examination of Morgan, the prosecutor did not elicit any mention of the defendant's refusal to answer three of the questions listed on the A-44 report. During cross-examination, however, defense counsel asked Morgan if, after arriving at the barracks, he "asked [the defendant] a whole bunch of questions . . . ?" Morgan testified that he had done so pursuant to the "normal practice and procedure" of compiling the information needed to complete the A-44 report. Counsel then asked about ten specific questions on the A-44 report—relating to clerical matters such as the defendant's name, age, date of birth, and address, and to health matters, such as the defendant's weight, whether he was a diabetic, and whether he took medications of any kind—which Morgan agreed the defendant had understood and answered. Defense counsel then asked whether the defendant had given Morgan "an answer that [he] did not expect for those questions," and Morgan replied in the negative. More broadly, defense counsel asked Morgan if he would "characterize [the defendant] that evening as being cooperative with [him]?" Morgan answered in the affirmative, noting that the defendant had obeyed his instructions.

Defense counsel then asked Morgan about several questions he had asked the defendant at the roadside, during the initial traffic stop:

"Q. . . . Did you ask [the defendant] . . . if he had been around people who smoked?

"A. I did not ask that, no.

"Q. . . . Did you ask him if he had any allergies?

"A. No.

"Q. Did you ask him how much sleep . . . he had had in the last few days?

"A. No.

"Q. . . . *All you asked him about is if he had anything to drink, correct?*

"A. Correct.

"Q. . . . *And he answered you truthfully?*

"A. *Yes, he did.*" (Emphasis added.)

On redirect examination, the prosecutor further explored the subject of the defendant's cooperation with Morgan, and his willingness to answer Morgan's

questions. Showing Morgan a copy of the A-44 report, the prosecutor asked:

"Q. . . . [Defense counsel] asked you on cross-examination about whether . . . you asked the defendant certain questions from this form. Do you remember that?

"A. Yes.

"Q. Okay. And he asked you whether or not [the] defendant cooperated with you that night. Isn't that correct?

"A. Yes.

"Q. . . . And [defense counsel] asked you if you asked [the defendant] his weight?

"A. Yes.

"Q. . . . Now on April 9, 2008 . . . did you ask the defendant with [regard] to this form how much he had to drink?

"A. I did.

"Q. And did he respond to you?

"A. He refused to answer."

At this point, defense counsel objected, citing *Doyle* v. *Ohio*, supra, 426 U.S. 610. The prosecutor responded that defense counsel had "opened this line of questioning . . . ." The court agreed, overruled the defendant's objection, and allowed the questioning.[9] Morgan thereafter testified that during the interview at the police station, the defendant refused to answer where he had consumed the alcohol and when he had last eaten a meal. Morgan also testified that the defendant had told him he was not on drugs on the night of the arrest.

During closing argument, defense counsel argued to the jury that the defendant's candor toward Morgan and his cooperation during the arrest demonstrated that he was not intoxicated. In particular, defense counsel highlighted the defendant's responses to Morgan's questions regarding alcohol consumption, contending that the defendant "was honest with [Morgan] when [Morgan] asked him if he had anything to drink. Could he [have] denied drinking? Sure. Could he have refused to answer that question? Absolutely, but he didn't; he answered. [Morgan] said, 'I smell something on your breath; you been drinking beer?' 'Yes.' [The defendant] was honest."

In the Appellate Court, the defendant argued, inter alia, that his due process rights were violated by the admission into evidence of his post-*Miranda* silence. The Appellate Court disagreed, holding that in "attempting to show that he had been cooperative and obedient," the defendant had opened the door to the state's introduction of "evidence of his unresponsive

answers on the [A-44] form."[10] *State* v. *Brown*, supra, 131 Conn. App. 287.

With this background in mind, we now turn to the certified question: "Did the Appellate Court properly determine that the defendant's refusal to answer questions after he was given *Miranda* warnings was admissible?" *State* v. *Brown*, supra, 302 Conn. 944. Because we conclude that the defendant opened the door to the admission of the evidence at issue in the present appeal, we answer this question in the affirmative.[11]

"Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it where the party initiating inquiry has made unfair use of the evidence. . . . This rule operates to prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context. . . . The doctrine of opening the door cannot, of course, be subverted into a rule for injection of prejudice. . . . The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal." (Citations omitted; internal quotation marks omitted.) *State* v. *Graham*, 200 Conn. 9, 13–14, 509 A.2d 493 (1986). We review for abuse of discretion the trial court's determination that a party has opened the door to otherwise inadmissible rebuttal evidence. *State* v. *Paulino*, 223 Conn. 461, 467–68, 613 A.2d 720 (1992).

Turning to the present case, we conclude that the Appellate Court properly determined that defense counsel opened the door to the admission of the contested evidence. It is clear from the record that defense counsel attempted to portray his client as honest and forthcoming with the police to support the inference that the defendant had nothing to hide because he was not intoxicated. Defense counsel elicited testimony that Morgan asked the defendant "a whole bunch of questions"—including whether he had consumed alcohol that evening—*and that the defendant answered these questions* "*truthfully* . . . ." (Emphasis added.) During closing argument, defense counsel emphasized evidence that the defendant "never denied drinking beer

that night to the officer. In fact, *he answered that question to the officer* when they were doing the processing." (Emphasis added.) In seeking to introduce cherry-picked evidence of the defendant's candor in answering Morgan's questions, however, defense counsel opened the door to the state "to place [this] evidence in its proper context." (Internal quotation marks omitted.) *State* v. *Graham*, supra, 200 Conn. 13; accord *State* v. *Paulino*, supra, 223 Conn. 469 (upholding admission of otherwise inadmissible hearsay statement to place portion of statement previously offered by defendant in proper context). Importantly, that evidence revealed that there was a limit to the defendant's cooperation.

The defendant disagrees, arguing that his counsel's questions about his cooperativeness and honesty resulted in no material prejudice to the state, and, accordingly, did not open the door to the state's follow-up questions. We need look no further than the basic purpose of the "opening the door" rule—the elimination of unfair prejudice to the state resulting from the defendant's misleading use of evidence—to reject this argument. Simply put, it would be fundamentally unfair to allow the defendant to introduce evidence that he admitted to drinking alcohol on the night of his arrest, without permitting the state, in turn, to show that he refused to admit *how much* he had to drink. Were we to hold otherwise, we would permit the defendant to paint a misleading portrait for the jury.

We likewise have no trouble rejecting the defendant's argument that Morgan's testimony on redirect examination was irrelevant because the evidence elicited during cross-examination related solely to the defendant's cooperation during the traffic stop on I-95, and not to the subsequent processing at the police barracks, where the A-44 report was prepared. This argument is belied by the record.[12] After defense counsel asked Morgan "[n]ow, *after you took* [*the defendant*] *back to the station*, you asked him a whole bunch of questions, correct" he proceeded to list nearly every question on the A-44 form and asked Morgan if he had asked them of the defendant during the processing. (Emphasis added.) Defense counsel then asked not merely whether the defendant appeared to *understand* Morgan's questions, but whether the defendant *had given Morgan* "*an answer that* [*he*] *did not expect* for those questions . . . ." (Emphasis added.) Far from relying upon an "attenuated" link between the events on the roadside and the events at the barracks, the Appellate Court properly held that defense counsel was referring to the defendant's overall cooperation and candor with the police on the night of his arrest when it concluded that counsel had opened the door to the state's evidence.[13]

The defendant cannot, as the Appellate Court aptly noted, "reap the benefits of inquiry into one subject and expect the state's questioning within the same scope to

be held impermissible." *State* v. *Brown*, supra, 131 Conn. App. 288. We agree, and, accordingly, we affirm the judgment of the Appellate Court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[1] General Statutes § 14-227a (a) provides in relevant part: "No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight . . . ."

The defendant also entered a plea of nolo contendere to the second part of the information charging a previous conviction of driving under the influence, and the court rendered judgment thereon. See General Statutes § 14-227a (g) (2).

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] The defendant argues that the Appellate Court improperly (1) concluded that he opened the door to evidence of his post-*Miranda* silence, and (2) rejected his argument that such evidence is constitutionally barred by *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). To the extent that our holding in *State* v. *Talton*, 197 Conn. 280, 497 A.2d 35 (1985), limits the applicability of *Doyle* in the present case, the defendant urges us to modify or overrule *Talton*.

[4] During subsequent questioning at the police barracks, the defendant admitted that he had consumed "[twelve ounce] bottles" of "beer" that evening, but refused to answer how much beer he had consumed.

[5] The defendant's erratic driving and his performance during the field sobriety tests were captured on video by a camera mounted on Morgan's police cruiser. At trial, the video was admitted into evidence as a full exhibit and published to the jury.

[6] The first test indicated that the defendant's blood alcohol content was 0.188 percent. *State* v. *Brown*, supra, 131 Conn. App. 278. A subsequent test, conducted approximately thirty-five minutes later, showed a blood alcohol content of 0.144 percent. Id.

[7] "The A-44 form is used by the police to report an arrest related to operating a motor vehicle [while] under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 157 n.9, 976 A.2d 678 (2009).

[8] The A-44 report was published to the jury at the end of the prosecutor's direct examination of Morgan.

[9] The prosecutor noted for the record that he had "stayed away from this line of questioning until [defense] counsel . . . open[ed] the door . . . ."

[10] Although the Appellate Court appeared to resolve the case on this evidentiary ground, the court also concluded that *Doyle* was inapposite in this context. Citing our decision in *State* v. *Talton*, 197 Conn. 280, 497 A.2d 35 (1985), the Appellate Court concluded that the defendant enjoyed no right to remain "selectively silent" after being apprised of his *Miranda* rights. (Internal quotation marks omitted.) *State* v. *Brown*, supra, 131 Conn. App. 287.

[11] "[I]t is well established that this court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Cameron M.*, 307 Conn. 504, 523 n.20, 55 A.3d 272 (2012), cert. denied, U.S. (81 U.S.L.W. 3658, May 28, 2013). Because the present appeal properly may be resolved on evidentiary grounds, we need not address the defendant's argument that the evidence at issue in this appeal was barred by *Doyle* v. *Ohio*, supra, 426 U.S. 610. We likewise decline the defendant's invitation to modify or overrule our decision in *State* v. *Talton*, 197 Conn. 280, 497 A.2d 35 (1985), to the extent that it limits the applicability of *Doyle* in the present case.

[12] Indeed, defense counsel appeared not to draw any distinction between the questioning at the roadside and the interview at the barracks. At one point during cross-examination, defense counsel leapt from one to the other

so quickly that Morgan became confused as to which location he was being asked about:

"Q. . . . Did [the defendant] seem to understand the questions that you asked him after you gave him his rights?

"A. I don't—I don't recall.

"Q. Okay. Questions regarding date of birth, diabetic, that sort of thing; did he seem to—

"A. Oh, at—

"Q. —understand—

"A. —the processing, yes, yes."

[13] Because we resolve this appeal on the ground that defense counsel opened the door to the disputed evidence, we need not consider the state's alternative argument that any evidentiary impropriety was harmless because the A-44 report had been made a full exhibit prior to the admission of the disputed evidence.