IN THE COURT OF APPEALS OF IOWA

No. 6-239 / 95-0726

FILED
MAY 31 1996
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

THOMAS GENE COOLEY,

Appellant.

Appeal from the Iowa District Court for Buchanan County, Thomas M. Bauer, Judge.

Defendant appeals conviction, following a jury trial, for operating while intoxicated, second offense. **AFFIRMED.**

Robert P. Montgomery of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, Allan W. Vander Hart, County Attorney, and Andrea Dryer, Assistant County Attorney, for appellee.

Heard by Sackett, P.J , and Habhab and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

The defendant, Thomas Cooley, appeals his conviction of operating while intoxicated, second offense. He claims there was insufficient evidence to support the conviction and his trial counsel was ineffective. We affirm.

I. ***Sufficiency of the Evidence.*** When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980)

The defendant was convicted pursuant to the "under the influence" alternative of our OWI statutes Iowa Code § 321J.2(1)(a) (1993).[1] A defendant's manner of driving is relevant evidence when determining if he was under the influence of alcohol.

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[1] A person commits the offense of operating while intoxicated if the person operates a motor vehicle . . . [w]hile under the influence of an alcoholic beverage. . . .
Iowa Code § 321J.2(1)(a) (1993).

State v. Walker, 499 N.W.2d 323, 325 (Iowa App. 1993). Factors indicating a person is under the influence include: 1) reason or mental ability has been affected; 2) judgment is impaired; 3) emotions are visibly excited; and 4) loss of control of bodily actions or motions. *Id.*

It is undisputed the defendant had consumed alcohol and was operating a motor vehicle on the night in question. The only issue before the jury was whether the defendant was operating the vehicle while under the influence of an alcoholic beverage. A review of the evidence reveals that in the early morning hours of November 18, 1994, a tire had blown out on the defendant's car. Unable to repair or replace it, the defendant continued traveling at least fifty-five miles per hour. Sparks could be seen up to a mile away as the defendant traveled on three tires and a rim.

The defendant followed another driver, Mr. Olmstead, for at least ten to twelve miles. Mr. Olmstead observed the sparks and testified the defendant "swerved badly" after he passed him and returned to the right-hand lane of traffic. Olmstead alerted law enforcement authorities because he did not believe the defendant was going to be able to maintain control of the vehicle

When stopped by a deputy sheriff at 1:49 a.m., the deputy observed the "rim that the tire goes on was actually ground down to the hub or the wheel of the hub." It as obvious the defendant had been driving on the rim for awhile because it was "red hot" and emanated an odor.

The deputy testified the defendant staggered as he exited his vehicle, smelled of alcohol, was confused about the car, spoke with slurred speech, was flushed, and had bloodshot and watery eyes. The defendant failed several field sobriety tests including the Horizontal Gaze Nystagmus and the "walk and turn" tests. The defendant was arrested at 2:05 a.m.

An intoxilyzer test was administered at 2:23 a.m. The defendant was not cooperative and would only puff and would not provide a deep breath as required for an accurate breath sample. As a result, the intoxilyzer only registered an alcohol concentration of .038. With defendant's consent, a blood test was administered sometime between 3:07 and 3:34 a.m. The blood test revealed an alcohol concentration of .092.

At trial, the defendant admitted having consumed four beers between 4:30 p.m. and approximately 9:30 p.m. while attending a car auction and two mixed drinks between 10 p.m. and 12 30 a.m while at a river boat.[2] Expert evidence was offered regarding alcohol consumption and absorption Given the results of defendant's blood test and his testimony about when he stopped drinking, the expert testified the defendant would have had an alcohol concentration of approximately .11 to .12 when pulled over by the deputy

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[2] After his arrest the defendant had told the deputy he drank five beers while on the river boat.

The defendant argues it may have been poor judgment to continue driving fifty-five miles per hour on a blown tire, but it is not evidence of impaired judgment. He relies on evidence which indicated he had not been speeding or weaving, and, while his vehicle was traveling on only three tires, it appeared to be in control.

There was abundant evidence to support the jury's finding that defendant had been operating the vehicle while under the influence of alcohol. Given the defendant's decision to continue driving fifty-five miles per hour on a blown tire, the jury could have found his reason, mental ability, and judgment were impaired. Given his failure of the field sobriety tests, his staggering, slurred speech, physical appearance and swerve when passing Olmstead, the jury could have concluded the defendant had, to some extent, a loss of control of bodily actions or motions. Finally, the defendant's admitted consumption of alcohol and his relatively high blood alcohol level is evidence he was operating under the influence

II. Ineffective Assistance of Counsel. When a defendant asserts a violation of a constitutional right, our review is de novo *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). To prevail on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence 1) counsel failed to perform an essential duty and 2) prejudice resulted *Id.* "This two-pronged test requires, first, a defendant overcome the strong presumption that counsel was competent. Second, defendant must prove that counsel's error worked to the defendant's actual and substantial disadvantage,

creating a reasonable probability that but for the error the trial's result would have been different." *Id.* (citation omitted). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982).

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Capper*, 539 N.W.2d 361, 367 (Iowa 1995). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.*

The defendant contends his trial counsel was ineffective in failing to object to the admissibility of the blood test results without a showing the blood test was requested in writing and a foundational showing, including evidence the withdrawal was approved by a physician. Prior to trial, the defendant's counsel stipulated to the admission of the blood test evidence without requiring foundational witnesses be called to testify.

In his brief the defendant makes no specific allegations as to how requiring evidence of a written request or a foundational showing for the blood test would have affected the outcome of his case. In alleging ineffective assistance of counsel, a defendant is required to "state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Likewise, the

defendant does not explain how objections to the deputy's or the expert's testimony could have changed the outcome of the case. Absent any argument as to how the alleged errors affected the outcome of the case, we will neither address nor preserve claims of ineffective assistance for review.

AFFIRMED.