

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICHARD CRAIG HODOWAY,

Defendant-Appellant.

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Filed November 20, 1984

4-354

83-1066

Appeal from the Iowa District Court for Pocahontas County, NewtDraheim,
Judge.

Defendant appeals from judgment and sentence entered upon his conviction for operating a motor vehicle while intoxicated, asserting that he was denied effective assistance of counsel by his trial attorney's failure to seek suppression of inculpatory statements made by defendant. AFFIRMED.

Fern S. Shupek, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

The defendant, Richard Hodoway, claims ineffective assistance from his counsel in his trial resulting in conviction for operating a motor vehicle while intoxicated. We affirm the conviction.

Hodoway was found guilty of drunk driving by a jury after an incident which occurred January 7, 1983. Hodoway was stopped by a Gilmore City police officer, who was his friend, after Hodoway was observed driving in an erratic manner. The policeman, Officer Larson, asked for Hodoway's license, and when Hodoway said he did not have it, the officer asked him to step out of the car. As he got out of the car, Hodoway staggered and the officer asked if he had been drinking. Hodoway replied "yes" and when asked how much, said, "I don't know, I've really been chugging them down." Hodoway then was asked to perform several field sobriety tests which he failed. When the officer asked Hodoway to perform several more tests Hodoway said, "Well, you know I'm drunk. I'm drunker than hell." He refused to perform any more tests, and when Officer Larson asked him to count and repeat the alphabet, Larson answered, "What for? You know I'm drunk. And I know I'm drunk. And I'm sure glad it was you, instead of some other officer." After this, Hodoway was arrested, read his Miranda rights, and transported to the hospital. At the hospital, Hodoway made a number of statements addressed to no one in particular indicating he believed he was drunk.

Hodoway claims on appeal his counsel was ineffective because he should have objected to the admission of statements he made before and after his arrest. He claims the statements before arrest were inadmissible because they were made before he was given warnings of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1974). Hodoway claims the officer visited with him as a friend and he did not expect the statements could be used against him. Statements made after the Miranda warning should also have been excluded through his attorney's efforts, he says, because he was incapable of understanding the Miranda rights or executing a waiver of those rights.

It is undisputed that the sixth amendment guarantees a defendant the right to effective assistance of counsel. Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977). A defendant's constitutional right is denied when the attorney's performance falls outside the range of normal competency. Sims v. State, 295 N.W.2d 420, 424 (Iowa 1980). Failure of the attorney to move for suppression of evidence may constitute ineffective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983).

When the defendant claims a specific error was made by his counsel, it must appear the counsel failed to perform an essential duty and that prejudice resulted from that failure. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The prejudice must further constitute a denial of the defendant's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

It was not necessary for the officer to give Hodoway his Miranda warning while making an investigatory stop of a suspected intoxicated driver. State v. Heisdorffer, 164 N.W.2d 173, 175 (Iowa 1969). In a recent case involving a fact situation substantially similar to those facts presented here, the Supreme Court held admissible statements made by the accused during such an investigatory stop. Berkemer v. McCarty, 52 U.S.L.W. 5023, ____ S. Ct. ____, ____ L. Ed. 2d ____ (1984). There, the court held that when a motorist is stopped for questioning because the officer suspects he may be intoxicated, routine questioning prior to arrest does not constitute "custodial interrogation." Id. at 5027-29, ____ S. Ct. at ____, ____ L. Ed. 2d at _____. The statements made by the defendant in that case were found to be admissible despite the fact they were made prior to being advised of Miranda rights. Id. The holding of the Supreme Court is applicable here, and we find his counsel did not provide ineffective assistance by not attempting to protest statements which would have been inevitably admissible.

Hodoway contends that he felt his statements would not be used because Officer Larson was a friend. Officer Larson at no time indicated he would not fulfill his duties as a police officer, and any conclusions on Hodoway's part merely reflect his own hopes in this matter.

Trial counsel was also not ineffective for failure to attempt to exclude the statements made after Hodoway's arrest. The statements made at the hospital were not made during any questioning by police, but appeared to be directed to anyone who would listen. Volunteered statements are not excluded because the individual was not properly advised of his rights under Miranda. State v. Matlock, 289 N.W.2d 625, 628 (Iowa 1980).

The State points out that even if Hodoway's counsel had pressed the issue and attempted to keep the evidence out, other evidence showing Hodoway's intoxication was overwhelming. He drove erratically, stumbled, could not perform the field sobriety tests, had slurred speech, and displayed his intoxication at the hospital through aberrant behavior such as spitting water in a police officer's face. We find his counsel was not ineffective, but even if it was shown the statements should have been suppressed, the defendant has not shown he was prejudiced by failure to do so.

AFFIRMED.