

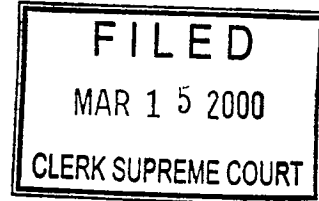
IN THE COURT OF APPEALS OF IOWA

No. 1999-595 (9-856) / 99-0760
Filed March 15, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

L.V. KNIGHTEN,
Defendant-Appellant.



Appeal from the Iowa District Court, Des Moines County, Thomas R.

Brown, Judge.

Defendant appeals from a judgment and sentence entered following a jury verdict finding him guilty of OWI, third-offense, in violation of Iowa Code section 321J.2(1)(a) and 312J.2(2)(c) (1998), and driving while barred, in violation of Iowa Code sections 321.560 and 321.561 (1998). He contends on appeal he was denied effective assistance of trial counsel by his counsel's failure to file a motion to suppress his refusal to submit to sobriety and intoxilyzer tests.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Scott Schroeder, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, J.J.

SACKETT, C.J.

Defendant, L.V. Knighten, appeals from a judgment and sentence entered following a jury verdict finding him guilty of OWI, third offense, in violation of Iowa Code sections 321J.2(1)(a), and 321J.2(2)(c) (1998), and driving while barred, in violation of Iowa Code sections 321.560 and 321.561 (1998). He contends on appeal he was denied effective assistance of counsel by his counsel's failure to file a motion to suppress his refusal to submit to sobriety and intoxilyzer tests. We affirm.

On August 14, 1998, Officer Zahn of the Burlington police stopped defendant's car because defendant was not wearing a seat belt. After Zahn activated the emergency light on his unmarked car, defendant pulled over to the curb. As he did so, he made a wide turn, and when he pulled into the curb, his car hit the curb so hard he caused the car to shake and the right front tire to jump up onto the curb. He then turned his wheels to the left and his car slammed back to the ground. Zahn asked defendant to see his driver's license. As he spoke with defendant, Zahn smelled a strong odor of alcohol on defendant's breath and saw that defendant's eyes were bloodshot and watery and his speech was slurred and sluggish. Defendant admitted to Zahn he had consumed alcohol. Zahn observed when defendant got out of the vehicle, he had trouble getting out the door; his movements were very exaggerated when he swung his feet out of the car like he had to think about it before he did it. Zahn also noticed that once he got out of the car, he began staggering around and swaying and used the car to steady himself. A check of defendant's driver's license through dispatch

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revealed defendant was barred from driving. Zahn arrested defendant for driving while barred.

At the police station, Zahn testified he offered defendant a standardized field sobriety test. Defendant responded, "I'm not doing anything without my attorney present." He then read defendant the Implied Consent Advisory and defendant again stated he was not going to do anything without his attorney present. On the Burlington Police Department OWI report defendant wrote "wanted lawyer" as the reason he refused the chemical test.

At this point there was conflicting testimony. Defendant testified he asked to make a phone call to his attorney and was not allowed to do so. He also said he told the jailer who his attorney was. Zahn stated defendant never made a request to call an attorney, but merely refused to take the field sobriety or intoxilyzer tests without an attorney.

On August 24, 1998, defendant was charged by trial information with OWI, third offence, in violation of Iowa Code sections 321J.2(1)(a) and 321J.2(2)(c) and driving while barred in violation of Iowa Code sections 521.560 and 321.561. At trial, the State submitted into evidence defendant's refusals to take the field sobriety and intoxilyzer tests. On February 9, 1999, a jury found him guilty as charged. He was sentenced to consecutive terms of five and two years.

Defendant contends on appeal he was denied effective assistance of counsel because trial counsel failed to move to suppress evidence of his refusal to take the field sobriety and intoxilyzer tests pursuant to Iowa Code section 804.20.

Ineffective-assistance of counsel claims are reviewed under a de novo standard. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). In order to prevail, defendant must prove his or her counsel failed in an essential duty and prejudice resulted. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). A claimant must also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.* The court can affirm on appeal if either element is absent. *McPhillips*, 580 N.W.2d at 754.

Due to other strong evidence supporting defendant's conviction, he was not prejudiced by his trial counsel's failure to move to suppress evidence of his refusal to take field sobriety and intoxilyzer tests. Zahn observed defendant driving erratically as he pulled his car over to the curb. In addition, Zahn and another officer, John Stim, testified they observed defendant exhibit typical indicia of intoxication at the time of the stop: the smell of alcohol on his breath; bloodshot, watery eyes; exaggerated body movements; staggering and swaying when he walked; and leaning on the car for support. In light of this evidence,

there is not a reasonable probability that but for the admission of defendant's refusal to take the tests, the outcome of the trial would have been different.

AFFIRMED.