IN THE COURT OF APPEALS OF IOWA

No. 0-017 / 99-0043
Filed February 23, 2000

FILED
FEB 23 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHERRY RENEE DAVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Michael R. Stewart, District Associate Judge.

Defendant Appellant, Sherry Renee Davis, appeals from the judgment and sentence entered after her conviction by a jury of operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321J.2 (1997). She contends (1) her trial attorney was not effective, and (2) the trial court erred in not stating reasons for her sentence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Charles A. Stream, County Attorney, and Vernon G. Stejskal, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Hecht, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

SACKETT, C.J.

Defendant Appellant, Sherry Renee Davis, appeals from the judgment and sentence entered after her conviction by a jury of operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321J.2 (1997). She contends (1) her trial attorney was not effective, and (2) the trial court erred in not stating reasons for her sentence. We affirm.

During the evening of October 20, 1997, defendant and her children had been at Dr. Salami's restaurant in Oskaloosa, Iowa. At about 7:20 p.m. after they had been in the restaurant about an hour, a waitress called the police because she was concerned about defendant's children. The waitress had seen defendant drink two glasses of wine, and had observed her in the bar while the children sat in the car. The waitress later testified she was concerned about the children because at other times defendant left her children in her car while she sat at the bar drinking.

At 7:27 p.m. Officers VanWilligen and Ruskowski arrived at the restaurant and talked to the waitress. Defendant had just driven away. At about 7:34 the officers went to defendant's home and found her sitting on her front step. VanWilligen noticed defendant had glassy, bloodshot eyes and the odor of alcohol was on her breath. He also noted her speech was slurred and she was wobbling back and forth occasionally having to grab the step for support even though she was sitting down.

VanWilligen told defendant why they were there and asked if she drank alcohol after she came home. She said she had not been drinking since she got out of her car.

Ruskowski testified defendant said she hadn't had anything to drink since she got home but she had two glasses of wine at the restaurant. VanWilligen asked defendant to take a preliminary breath test. He said at that point defendant appeared to be panicky and backed up like she was going into her house. VanWilligen said he told her to stop and she then changed her story and said she might have had something to drink after she got home. Defendant then invited the officers into her house to show them that she had had a drink since she got home. She explained to them that she drank a mixture of Canadian Mist whiskey and coffee. The officers noticed her coffee pot was turned off and was cold to the touch. Defendant said she mixed the coffee and whiskey before leaving for Dr. Salami's. She said she drank about a third before she left and the rest after she got home. She showed the officers the cup she used. It had only evaporation marks on the bottom.

Defendant completed three field sobriety tests. VanWilligen determined from these tests that defendant was intoxicated and she was arrested and taken to jail.

After conferring with an attorney defendant agreed to give a breath specimen. The test was given about 8:15 p.m. and showed her breath alcohol content to be .170. At this point defendant was advised of her Miranda rights. She repeated she drank a third of the whiskey and coffee mixture before she left the restaurant and two-thirds after she returned home.

Several weeks later at a driver's license revocation hearing defendant testified after she got home and before the police arrived she had two or three stiff drinks. Defendant was tried on the driving while intoxicated charges twice.

The first time the jury hung. The second time the jury found her guilty. She was sentenced to two days in jail and fined $1000. $500 of the fine was waived.

Defendant claims her trial counsel was not effective because he should have filed a motion to suppress incriminating statements she made before she was advised of her Miranda rights. Defendant first argues the police conducted an unreasonable search in violation of her Fourth Amendment rights in approaching her on her porch and talking to her without first obtaining a warrant. She advances she has a reasonable expectation of privacy on the steps because they are an appurtenance to her home. She also contends her Fifth Amendment rights were violated when she was questioned without being advised of her Miranda rights.

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 on this claim defendant must prove 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 her 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.

Counsel is not ineffective when the issue counsel failed to raise has no merit. *State v. Westeem,* 591 N.W.2d 203, 207 (Iowa 1999). Accordingly, we first consider the merits of defendant's Fourth Amendment claim.

In assessing alleged violations of constitutional rights, our standard of review is de novo; we make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Breuer,* 577 N.W.2d 41, 44-45 (Iowa 1998); *State v. Howard,* 509 N.W.2d 764, 767 (Iowa 1993).

A two-step approach has been established in analyzing the constitutionality of a search under the Fourth Amendment. *Breuer,* 577 N.W.2d at 45. First, the person challenging the search must show that he or she had a legitimate expectation of privacy in the area searched. *Id.* If it is concluded a person has a legitimate expectation of privacy with respect to a certain area, whether the State unreasonably invaded that protected interest must be considered. *Id.*

The determination of whether a person has a legitimate expectation of privacy with respect to a certain area is made on a case-by-case basis, considering the unique facts of each particular situation. *Id.* at 46. The expectation of privacy must be one that society considers reasonable. *Id. see Katz v. United States,* 389 U.S. 347,361, 88 S. Ct. 507, 516, 19 L.Ed.2d 576, 588 (1967) (Harlan, J., concurring).

The State's interests can outweigh a minimal intrusion upon the defendant's expectations of privacy. *See id.* at 467. The defendant's expectation of privacy and the right to be free from unreasonable search and seizures is balanced against the State's interest in its ability to gather information relating to law enforcement violations. *See State v. Dickerson*, 313 N.W.2d 526, 532 (Iowa 1991) (court held officers did not invade defendant's reasonable expectation of privacy by going to his door).

Assuming without deciding defendant had some expectation of privacy in the area of her front steps, the officer's actions in entering defendant's yard and approaching her porch were minimal intrusions outweighed by the state's interests in enforcing its laws. *See Breuer*, 577 N.W.2d at 48. Had defendant's trial counsel made a motion to suppress it would not have been sustained.

Defendant's second contention is statements she made before being given her Miranda warnings at the police station should have been suppressed. She also contends the results of the field sobriety and intoxilyzer test that police obtained before she was given a Miranda warning should have been suppressed. There is no basis to suppress the sobriety and intoxilyzer tests. Miranda protection only applies to a defendant's admissions and inconsistent statements. It does not apply to requests for blood alcohol tests or for the performance of field sobriety tests, since these requests do not constitute interrogations. *State v. Mannion*, 414 N.W.2d 119, 122 (Iowa 1987). Defendant's trial counsel did not breach a duty in failing to move to suppress the intoxilyzer and field sobriety tests.

The next question is whether or not trial counsel breached a duty in failing to move to suppress certain portions of defendant's admissions and inconsistent statements.

There must be custody and interrogation to invoke *Miranda*. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 707 (1966); *State v. Jennett*, 574 N.W.2d 361, 363 (Iowa 1997). Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any way. *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989). The State advances defendant was never taken into custody or deprived of her freedom. The custody determination depends on the objective circumstances of the interrogation, not subjective views harbored either by the officer or the person being questioned. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997); *Salisbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293, 298 (1984). In determining whether a person is in custody, a court must consider the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning. *Bradley v. State*, 473 N.W.2d 224, 228 (Iowa 1991). However, the ultimate inquiry is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Countryman*, 572 N.W.2d at 557-58; *See also, State v. Scott*, 518 N.W.2d 347, 350 (Iowa 1994). The appropriate test for this determination is "whether a reasonable person in the [defendant's] position would assert himself [or herself] to be in custody." *Countryman*, 572 N.W.2d at 558; *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994). A four-factor test is used in making this

decision. These factors include (1) the language used to summon the individual; (2) the purpose, place and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of her guilt; and (4) whether defendant is free to leave the place of questioning. *Id.*

Defendant argues that when VanWilligen asked her to stop as she went to her house, she was in custody, because a reasonable person in her position would believe she was not free to leave. Although defendant was asked to stop, she went into her house. Nothing was done to restrict her movements in any way. *See State v. Brown*, 341 N.W.2d 10, 16 (Iowa 1983).

In addition the general rule is in-home interrogations are not custodial for purposes of *Miranda*. *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993). This is because the compelling atmosphere giving rise to the rule is not present. *Id.* The warning mandated by *Miranda* was meant to preserve the Fifth Amendment privilege against self-incrimination during incommunicado interrogations of individuals in a police-dominated atmosphere. *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 2397, 110 L. Ed.2d 243, 250 (1990). Defense counsel had no duty to file a motion to suppress on this ground.

Defendant next contends her trial counsel was ineffective in failing to object to certain statements made by State's witnesses. She advances her attorney should have objected to the waitress's testimony that defendant was drinking with her children. She asserts the waitress's reference to previous instances where she left her children in the car while she drank in the restaurant were excludable. She contends VanWilligen's testimony repeating the waitress's statements was excludable. She also contends Van Willigen's assertions she

was panicky when asked to take a preliminary breath test and his intimation she failed the test were excludable.

We agree with defendant that certain portions of this testimony, particularly evidence she drank earlier while her children waited in the car, would have been deemed inadmissible with the proper objection. She has failed to show, however, the prejudice necessary to succeed.

The police arrived at defendant's home within forty minutes after she left the restaurant. The officers conducted field sobriety tests and were of the opinion she failed the tests and was intoxicated. Any evidence she drank after she returned home is contradicted and not supported by the physical facts. Her breath alcohol concentration shortly after her arrest was well above the legal limit. Defendant cannot show but for the admitted evidence the results of the trial would be different. *See State v. Crone*, 545 N.W.2d 267, 274 (Iowa 1996).

Defendant's last contention is that the district court erred in failing to state reasons for her sentence and her sentence must be vacated and the case should be remanded for resentencing.

Iowa Rule of Criminal Procedure 22(3)(d) requires the district court to state the reasons for selecting a particular sentence. We review the record to determine if the district court abused its discretion in failing to state reasons for the sentence imposed. *State v. Mudra*, 532 N.W.2d 765, 766 (Iowa 1995). The written sentencing order gives no reason for the sentence imposed. There is no transcript of the sentencing hearing. Defendant is required to provide the court with a record to affirmatively disclose the errors she claims were made. *See Mudra*, 532 N.W.2d at 767.

There being neither a transcript, a supplemental statement of proceedings under Iowa R. App. P. 10(c), or a bill of exceptions under Iowa R. Crim. P. 23.1, there is no record. We find that defendant in failing to provide some record has waived her claim. *See Murda*, 532 N.W.2d at 767. We find no reason to reverse on this issue. The defendant's conviction and sentence is affirmed.

AFFIRMED.