

IN THE COURT OF APPEALS OF IOWA

No. 5-437 / 94-1567

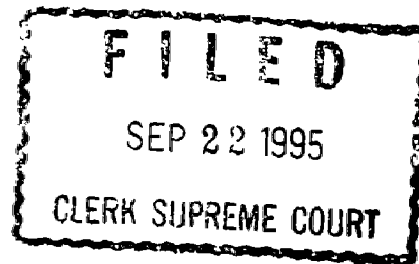
STATE OF IOWA,

Plaintiff-Appellee,

vs.

TIMOTHY ALAN MARTINDALE,

Defendant-Appellant.



Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

The defendant appeals from his conviction for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2. **AFFIRMED.**

Larry Johnson, of Walters & Johnson, Iowa Falls, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Richard Dunn, County Attorney, and Bradley J. Armstrong, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

PER CURIAM

In February 1994, the vehicle in which the defendant, Timothy Martindale, was a passenger slid off an icy road into a snowdrift. Martindale and the other passengers failed at an attempt to push the vehicle free of the snowdrift. They then found someone to pull their automobile out with a pickup truck. Martindale was asked by the driver to take her place behind the steering wheel of the automobile while the pickup pulled it out of the snowdrift. The pickup was successful in pulling them out of the snowdrift.

Police officers arrived when the vehicle was being pulled by the pickup truck. The arriving officers determined Martindale was under the influence of alcohol and invoked the implied consent law. After Martindale's arrest, he was transported to the police station. The booking procedures were videotaped prior to the officers informing Martindale of his *Miranda* rights.

Martindale was charged with operating a motor vehicle while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2. One day prior to the trial, Martindale filed a motion in limine seeking to exclude the introduction of the videotape of the booking process. The motion was never ruled upon.

During the trial, the videotape was admitted without objection. The trial court denied Martindale's motion for judgment of acquittal. The jury found the defendant guilty of operating a motor vehicle while intoxicated as a second offense.

Martindale appeals.

I. Sufficiency of the Evidence. Martindale's first contention on appeal is there was insufficient evidence to support a finding of the element of operating a motor vehicle. For Martindale to be convicted of OWI under the relevant portion of Iowa Code section 321J.2(1) (1993), it must be shown that (1) Martindale operated a motor vehicle; and (2) while operating the vehicle, Martindale had an alcohol concentration of .10 or more. Martindale does not dispute the finding of intoxication; rather, his contention is he could not have been found to have been operating the automobile.

A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

"Operator" and "driver" are defined as "every person who is in actual physical control of a motor vehicle upon a highway." Iowa Code § 321.1(48) (1993). In Iowa,

our courts have required only minimal acts of control in order for there to be operation of the motor vehicle. See, e.g., *State v. Weaver*, 405 N.W.2d 852 (Iowa 1987) (sitting behind a steering wheel of a pickup truck parked in the middle of a roadway with the engine running and the lights on); *State v. Fox*, 248 Iowa 1394, 85 N.W.2d 608 (1957) (slumped over the steering wheel with the engine running and the foot on the brake pedal); *State v. Webb*, 202 Iowa 633, 210 N.W. 751 (1926) (starting an engine); *State v. Overbay*, 201 Iowa 758, 206 N.W. 634 (1925) (seated behind the steering wheel with the engine running while a companion pushed the vehicle from behind in an attempt to move the car from a ditch); *State v. Hines*, 478 N.W.2d 888 (Iowa App. 1991) (starting the car's engine).

In this case, Martindale was behind the steering wheel of the automobile. The automobile's engine was running. The tires were spinning and the car was fishtailing as he made an effort to free the car from the drift. Finally, once the automobile was free from the drift, the vehicle kept moving before the chain was unhooked. We find these circumstances fall within the definition of operating as defined by the Iowa Code and previous case law.

II. Admission of the Videotape. Martindale contends the district court erred in admitting a videotape of the booking process. Martindale fails to set out how error

was preserved on this issue.¹ We have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974). Therefore, we find error was not preserved on this issue. Consequently, we decline to consider it on appeal.

Martindale makes an alternative claim that his trial counsel was ineffective for failing to object to the admission of the videotape at trial. The entirety of Martindale's ineffective assistance of counsel argument is set out below.

Error comes, if at all, in the matters presented at trial and the evidence that was admitted or refused as the case may be. In this case, the videotape in question was offered at trial. Defendant's counsel did not raise objection to its offer on 5th Amendment grounds. He should have. His failure to raise that objection constitutes ineffective assistance of counsel. The effect has been to deny the defendant a fair trial.

In order for a claim of ineffective assistance of counsel to be considered on direct appeal or to be preserved for postconviction proceedings, the claim must be specific.

Dunbar v. State, 515 N.W.2d 12, 15 (Iowa 1994) (ineffective assistance claims which

¹ Martindale does state a motion in limine was filed to preclude the prosecution from offering the videotape. Although he did not do so, even if Martindale had argued this motion preserved his issue, we would still find error was not preserved. The motion was untimely filed one day prior to trial. See Iowa R. Crim. P. 10(4). In addition, the defense did not press for ruling on this motion. Furthermore, the function of a motion in limine is to exclude reference to potentially inadmissible evidence, not to exclude the evidence itself which is what Martindale now claims he wanted. No motion to suppress was timely filed.

are too general in nature will not be addressed on direct appeal or preserved for postconviction proceedings).

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome.

Id. (Citations omitted.)

Martindale provides us with very little on appeal other than the bald statements that an objection should have been made and there was a denial of a fair trial as a result. Martindale's argument is clearly insufficient in light of *Dunbar*.

In addition, we were provided with no authority in the general area of ineffective assistance of counsel as required by Iowa Rule of Appellate Procedure 14(a)(3). This failure may be deemed a waiver of the issue. *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992); *Johnson v. State Farm Auto. Ins. Co.*, 504 N.W.2d 135, 139 (Iowa App. 1993). As a result, Martindale's claim of ineffective assistance of counsel must fail on direct appeal and will not be preserved for possible postconviction relief.

Upon consideration of all issues raised by the parties on appeal, we affirm Martindale's conviction.

AFFIRMED.