FILED
FEB 24 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

BARBARA JANE PRUGH,)

Defendant-Appellant.)

Filed February 24, 1982

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Appeal from Bremer District Court, John F. Stone, Judge.

Defendant appeals from the judgment entered upon her conviction of OMVUI in violation of section 321.281, The Code. She asserts on appeal that she had ineffective counsel and that she was incapable of consenting to or refusing to give a blood or urine sample so the police should have taken a sample from her under the procedures of section 321B.5, instead of obtaining a refusal from her and using it in evidence against her under section 321B.11. AFFIRMED.

Charles L. Harrington, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Defendant appeals from the judgment entered upon her conviction of OMVUI in violation of section 321.281, The Code. She asserts on appeal that she had ineffective counsel and that she was incapable of consenting to or refusing to give a blood or urine sample so the police should have taken a sample from her under the procedures of section 321B.5, instead of obtaining a refusal from her and using it in evidence against her under section 321B.11. We affirm.

I. Effectiveness of Counsel. Defendant's defense centered around the theory that she had received head injuries in the auto accident and was not intoxicated as the State claimed she was. Defendant asserts it was essential that the person who talked with her immediately before the accident testify about her condition at that time. Counsel did not call that person, her children's babysitter, to testify and did not ask for a continuance until he could secure her presence. Neither did counsel call any medical expert to testify on defendant's behalf. It is the lack of these two "key" witnesses and counsel's failure to request a continuance until they could come that defendant alleges shows she was denied effective assistance of counsel.

Defense counsel failed to take the steps necessary to ensure that Brenda Alcorn, the babysitter of defendant's children, was present to testify about defendant's condition. However, defendant's employer, Mr. Biemann, who talked to her just before the accident, did testify that she sounded normal before the accident. Therefore, though Alcorn's testimony would have bolstered the defense's theory, Biemann's testimony was sufficient to present the idea that defendant was acting normally before the accident. Defendant did not suffer prejudice because of her counsel's failure to call Alcorn to testify.

The second key witness, a favorable medical expert, was not sought until after the trial. Failure to secure such an expert, defendant alleges, is proof of

ineffective counsel. We disagree and believe it was a matter of trial strategy and tactics not to call a medical expert. The medical expert would have been able to offer only speculative testimony since defendant was not examined after the accident by anyone but the officers.

Defense counsel repeatedly admits he was unprepared for trial, yet under the standard developed in Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980), we think the claim of ineffective counsel must fail. Counsel's action, under all the circumstances, was "within the range of normal competency." Id.

II. Motion in Limine. Defendant's motion in limine was filed more than forty days after her arraignment, thus not meeting the time requirement of Iowa R. Crim. P. 10(4). Yet the court heard the motion and ruled on the merits. Defendant contends the ruling is error. The State defends the ruling both on the merits and on the ground it was untimely. We acknowledge the untimeliness of defendant's motion but because the trial court waived that issue by going to the merits, we do so likewise.

Defendant argues that she was incapable of consenting to or refusing to give a blood or urine sample because of her alleged head injury so the police should have taken a sample from her under the procedures of section 321B.5. Instead the police obtained a refusal from her and used it in evidence against her under section 321B.11. She sought to keep this evidence of her refusal out through the motion in limine.

Section 321B.5 requires that a sample may be withdrawn only after a physician certifies that the person is incapable of consent or refusal. In this case there was no such physician certification. There was substantial testimony regarding defendant's intoxicated condition and the absence of signs of head trauma. She comprehended and responded to the officers' questions and sought no medical attention for her head injuries. The defendant did not fall under the purview of section 321B.5. She was capable of either refusing or consenting to give blood or urine samples. She refused to give such samples, and the trial court correctly refused to grant her motion to keep the evidence of her refusal out of court.