

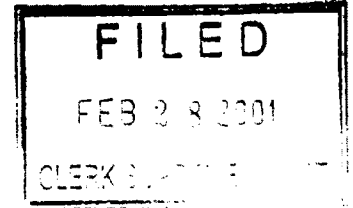
IN THE COURT OF APPEALS OF IOWA

No. 0-726 / 99-2065
Filed February 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN CHARLES FIFER,
Defendant-Appellant.



Appeal from the Iowa District Court for Cedar County, Nancy S. Tabor,
Judge.

John Fifer appeals his conviction and sentence for operating while intoxicated third offense in violation of Iowa Code section 321J.2 (1999). Fifer contends his counsel was ineffective in failing to object to evidence of his prior operating while intoxicated revocations. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Lee W. Beine, County Attorney, and Sterling L. Benz, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

MILLER, J.

John Charles Fifer appeals his conviction and sentence for operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2 (1999). Fifer contends his counsel was ineffective in failing to object to evidence of his prior operating while intoxicated revocations. We affirm.

I. BACKGROUND FACTS

On July 8, 1999 Harlen Bland was traveling east on Highway 927 in Durant when the back of his vehicle was struck as he slowed and signaled to turn left. Both vehicles stopped and Harlen got out of his car. As he did so he looked at the driver of the car that had struck him. Harlen was only approximately twenty feet away from the other driver. The other driver was a white male whom Harlen later identified as the defendant, Fifer. As Harlen started to walk around his car to look at the damage the other car drove away eastbound on Highway 927. Harlen then got into his car and followed the car to get the license plate number. The plate number was 728ETQ. Harlen testified that he observed the car swerving on the road and only one person in the car throughout the duration of the encounter. He followed the car for about a mile and a half and then discontinued the pursuit because he felt it was unsafe as he had his wife and grandchildren in the car with him.

Prior to the incident Harlen had been following a van driven by his son Gary Bland. Gary had completed his left turn when he observed the collision in his rearview mirror. Gary described the car as a light blue late 1980's Oldsmobile. He pulled off the road when he observed the accident in case his father needed assistance. However, after seeing the other vehicle leave the

scene he went around the block and got back on the highway behind his father. When Harlen discontinued his pursuit Gary continued to follow the car to get the license plate number. Gary was able to get the number, observed the car swerving across the road, and could see only one person in it. Gary then observed the car strike the rear end of a second car. The Oldsmobile did not stop after this second collision.

Marci Carpenter was also driving east on Highway 927 when she saw a vehicle behind her driving erratically. The car got directly behind her and bumped the back end of her car. She pulled off the road but the other car did not stop. She observed only one person in the car.

After observing the second accident Gary Bland decided to find a telephone and call the police. While his wife called the police from a convenience store Gary decided to go back to the second accident scene to offer assistance. When he arrived Marci Carpenter had already left. He continued east on Highway 927 and had traveled only a short way when he observed the blue car that had been involved in the accidents in the ditch. Gary parked his vehicle and approached the blue car. He observed a twelve pack of beer on the passenger side with several open cans lying around it, and that the car smelled of beer. However, there was no one in the car. Gary then noticed a white male in the cornfield but could not identify the person. Several law enforcement officers began to arrive shortly thereafter to investigate the accidents. A passerby subsequently stopped to notify officers that a man had come out of the cornfield about a half mile away and looked like he was trying to catch a ride.

The officers proceeded up the highway approximately one half mile when they encountered Fifer on the side of the road. He appeared extremely intoxicated when the officers encountered him. Fifer had trouble standing, his speech was slurred, his eyes were bloodshot, and he had urinated on himself. One of the officers on the scene was Trooper Corey Keeney. Keeney observed Fifer sitting on the side of the road with corn stalks on his shirt and pants. Fifer told Keeney that he had been run off the road by some men that were firing shots at him. He further stated to Keeney that he had thrown his keys in the cornfield. An in-car camera in Trooper Keeney's patrol car recorded the majority of the encounter. At one point during this encounter Keeney called in to the dispatcher requesting a driver's check on Fifer. The dispatcher informed Keeney that records showed Fifer had an expired non-driver ID and a pending action on an unserved suspension. The dispatcher later called back and informed Keeney that Fifer had five prior OWI revocations, with dates from mid 1984 to early 1996.

Fifer was charged with third-offense OWI. Following jury trial he was found guilty and sentenced to an indeterminate five-year term of incarceration and a \$2500 fine. Fifer filed timely notice of appeal asserting he received ineffective assistance of counsel due to trial counsel's failure to object to evidence of his prior OWI revocations. Specifically, he contends his counsel was ineffective for failing to object to the introduction of the videotape recorded by the camera in Trooper Keeney's patrol car, which referred to his prior OWI revocations. Fifer argues the reference on the tape to his prior OWI revocations constituted inadmissible prior bad acts evidence which did not fall within any of the purposes listed in Iowa Rule of Evidence 404(b). He further asserts that the

statement was not relevant and he suffered substantial prejudice from the admission of the evidence.

II. MERITS

A defendant is entitled to the assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 10 of the Iowa Constitution. A claimed violation of the right to effective assistance of counsel requires an appellate court to review de novo the totality of the circumstances surrounding counsel's representation of the defendant. See *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

To establish an ineffective assistance of counsel claim, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Wenmark*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *Wenmark*, 602 N.W.2d at 814.

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect

representation, but rather only that which is within the range of normal competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981).

While we often preserve ineffective assistance of counsel claims for a possible postconviction proceeding, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). Neither party suggests we should preserve Fifer's ineffective assistance claim for postconviction proceedings and we believe the record is adequate to address his claim.

An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997); *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). Therefore, we need not determine whether counsel's performance was deficient before examining the prejudice prong of an ineffectiveness claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984), *State v. Nebinger*, 412 N.W. 2d 180, 192 (Iowa Ct. App. 1987). We believe Fifer's claim can readily be resolved by focusing on the prejudice prong of his ineffectiveness claim.

To establish prejudice under the second prong, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Query*, 594 N.W.2d at 445. A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

In testimony at trial Fifer acknowledged that at the time of the events in question he had been "pretty intoxicated." The fighting issue at trial was whether he had been driving the blue Oldsmobile. Fifer testified that he had been drinking in a tavern, had met a person who he did not know but believed to be named "Jim," had sold the Oldsmobile to Jim, had gone drinking and riding with Jim, and was asleep in the back seat while Jim drove at the time of the events in question.

There was, however, overwhelming evidence, both direct and circumstantial, that Fifer was the driver of the Oldsmobile. Harlen Bland positively identified Fifer as the driver. Several eyewitnesses described the driver as a white male, and none of the eyewitnesses saw a second person in the Oldsmobile. After the Oldsmobile went in the ditch Fifer was the only person seen or found afoot in the area. There is no evidence, other than Fifer's somewhat improbable testimony, of the existence or identity of "Jim." Fifer told officers he had been "run off the road." This statement can readily be seen as acknowledging that he was driving. He told officers he had thrown the keys into the field. From this statement it can clearly be inferred that he had control of the car and its keys. Trooper Keeney transported Fifer to the county jail. In pressing his claim that he had been run off the road, Fifer asked Keeney if Keeney thought Fifer would just drive off into the ditch for no apparent reason. Fifer's question implicitly asserts that he was driving. Finally, according to Deputy Johnson, who booked Fifer into the county jail, Fifer "did mention to me, [although] not in so many words, that he had been driving and he had been involved in an accident."

The overwhelming direct and circumstantial evidence indicating Fifer was driving so outweighs any unfairly prejudicial effect from the evidence of his earlier OWI revocations that we can say with assurance the admission of such evidence did not affect the outcome of the proceeding, which would have been no different had the evidence not been admitted. Fifer has failed to show that he was prejudiced by counsel's failure to object to the evidence in question and has thus failed to prove his claim of ineffective assistance of counsel.

AFFIRMED.