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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 31, 1987
vs.	)	
JOHN JOSEPH HARTVIGSEN,	)	6-524 85-1482
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County (No. 119744) J. Hobart Darbyshire, Judge.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of operating a motor vehicle while intoxicated, third offense, asserting that he was denied his constitutional right to the effective assistance of counsel. **AFFIRMED.**

Harlan H. Giese, Jr., Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark Hunacek, Assistant Attorney General; and Henry C. Filseth and Virginia D. Barchman, Assistant County Attorneys, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

SNELL, J. 350

On May 1, 1985, the appellant, John Joseph Hartvigsen, was charged by trial information with operating a motor vehicle while under the influence of an alcoholic beverage, third offense, and with driving while his license was under suspension. On August 26, 1985, trial commenced to a jury which subsequently found Hartvigsen guilty only of driving while under the influence of alcohol. Hartvigsen then stipulated that this was his third offense. On October 3, 1985, the district court sentenced Hartvigsen to an indeterminate term not to exceed five years, assessed him costs, and suspended his privilege to operate a motor vehicle for six years. This appeal followed.

Hartvigsen's sole claim on this appeal is that he was denied effective assistance of counsel as secured by the sixth amendment to the federal constitution. Specifically, Hartvigsen contends his trial counsel was ineffective in failing to properly prepare and present Hartvigsen's physician who allegedly could have testified to Hartvigsen's emphysema, medication, and its effect on his condition at the time of arrest.

Ordinarily, our appellate courts will not decide an ineffective assistance of counsel claim on direct appeal, as we prefer to reserve such questions for postconviction proceedings where counsel can defend the charge. State v. Taylor, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference, however, in cases where the record is adequate to evaluate an appellant's claim. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982); State v. Oglivie, 310 N.W.2d 192, 195 (Iowa 1981). We think the record in the present case is sufficient for our review of Hartvigsen's appeal. We therefore proceed to the merits of his claim. Our review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

In order to succeed on a claim that he was denied effective assistance of counsel, Hartvigsen must show that his counsel failed to perform an essential

duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Hartvigsen has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Appellants must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Appellants must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsels' performances were within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, appellants must show that counsels' failure to perform an essential duty worked to their actual and substantial disadvantage. State v. Mills, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, appellants

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. at 699; Taylor, 352 N.W.2d at 685.

In analyzing this claim, we note first that we need not determine whether counsels' performances were deficient before examining the prejudice component of an ineffectiveness claim. Taylor, 352 N.W.2d at 685 (Iowa 1984). We accept the counsel of the United States Supreme Court in this regard that

> *[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that* ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700; Taylor, 352 N.W.2d at 685.

We decline the opportunity to grade counsel's performance in the present case because we believe Hartvigsen has fallen short of demonstrating the necessary prejudice. Hartvigsen claims that his physician's testimony could have demonstrated two things: (1) how his diminished lung capacity due to emphysema made it impossible for him to complete the intoxilyzer test that the arresting officer testified Hartvigsen refused to take, and (2) how his emphysema and the medication he was taking for that condition could account for the behavior that led the arresting officer to believe Hartvigsen intoxicated. The difficulty with Hartvigsen's argument is that, even assuming his physician's testimony supported Hartvigsen's explanation of certain incriminating conduct, those explanations account for relatively little of the evidence against him. The only conduct that Hartvigsen maintained at trial was explainable by reference to his emphysematous condition was his unsteady stance and his refusal to submit to an intoxilyzer breath test. Assuming, for the sake of argument, that his physician would have testified favorably to Hartvigsen with respect to this conduct, the record would still contain the following evidence against him that he, at no time, testified was affected by his condition: he was driving at a speed of fifty-one miles an hour in a thirty-five mile per hour zone; an odor of alcohol was emitted from his car; he was slow to understand the arresting officer and generally stared blankly at him; he appeared to be confused and in a daze; his speech was slurred;

he had trouble with his pronunciation; he admitted to the arresting officer that he had been drinking; when asked to recite the alphabet, he repeated the letter "n" and finished with "s, t, u, u, x, y, z"; when asked to count backwards from thirty, he repeated "19"; he failed a fingertip counting test because he was unable to successfully touch his fingertips with the index finger of his opposite hand; he refused to take a finger-to-nose test; he refused to take a heel-to-toe walking test; he had difficulty finding his driver's license; he did not know what street he had been driving on; his eyes were bloodshot; and he was argumentative. Although Hartvigsen disputed much of this evidence, he did not argue the evidence was explainable by virtue of his emphysema.

Hartvigsen has failed to persuade us there is a reasonable probability that, were his physician to testify, the result of his trial would have been different. The district court is affirmed.

AFFIRMED.