IN THE COURT OF APPEALS OF IOWA

No. 7-017 / 96-0049

FILED
MAR 28 1997
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TAWNEY L. LUCK,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, Judge.

Luck appeals from judgment and sentence entered, following jury trial, for operating while intoxicated in violation of Iowa Code section 321J.2 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Steven G. Norby, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Tawny Luck appeals her conviction for operating while intoxicated, contending her trial counsel was ineffective for failing to present the foundational testimony required for admission of a toxicology report. The report contained test results indicating Luck's blood alcohol content was below .100. Therefore, she alleges counsel's failure to present that evidence was highly prejudicial.

Scope of review. Luck alleges a violation of her sixth amendment right to counsel. Our review of this constitutional issue is de novo; we make an independent evaluation of the totality of the circumstances. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989); *Origer v. State*, 495 N.W.2d 132, 135 (Iowa App. 1992).

Generally, claims of ineffective assistance of counsel are preserved for postconviction relief. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). However, they can be resolved on direct appeal when the record is sufficient to resolve the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994) (citing *Buck*, 510 N.W.2d at 853).

The seminal case of *Strickland v. Washington*, 466 U.S. 668, 194 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) sets forth a two-prong test for ineffective assistance of counsel: 1) counsel failed to perform an essential duty and 2) prejudice resulted. *Id.* We may dispose of an ineffective assistance claim by first examining either prong of the test. *Strickland*, 466 U.S. at 697, 104 S Ct. At 2069-70, 80 L. Ed. 2d at 699-700.

Under the second prong, the defendant must show there is reasonable probability that, but for counsel's substantial errors, the result of the proceeding would have been different, and prejudice would not have resulted. *Id.*

Background facts. At approximately 1:45 a.m. on June 26, 1995, police officers stopped Luck as a possible suspect in an accident. Officer Snyder noted a strong odor of alcoholic beverage about Luck, her balance was poor, and her speech was slurred. Officer Warkentin asked Luck to perform field sobriety tests, but she refused claiming she was "smashed" and/or "drunk." She told him to arrest her.

Officer Warkentin arrested Luck and transported her to the jail, but when he arrived at the jail, he was unable to awaken her. After assistance from jail staff proved unsuccessful, Officer Warkentin transported her to the hospital. Due to Luck's apparent unconsciousness, Officer Warkentin requested a doctor to withdraw a blood specimen pursuant to the implied consent law. The doctor refused officer Warkentin's request. At approximately 5 a.m., Officer Warkentin read Luck the implied consent advisory and she refused to submit to chemical testing. After obtaining a medical release, the officers and Luck left the hospital. Luck did not have any apparent difficulty walking or speaking; however, she did ask Officer Warkentin what had occurred over the previous four hours.

Ineffective assistance of counsel. The State charged Luck with operating while intoxicated, first offense.[1] On November 1, 1995, two weeks prior to trial, defense counsel learned hospital personnel had taken a blood sample from Luck on June 26, at approximately 3:35 a.m. and the blood alcohol test result was .097. Defense counsel requested medical reports from the hospital, but by November 14, the day of trial, he had not received the requested reports. The court denied his motion to continue filed the morning of trial, but it allowed defense counsel until the next day to obtain evidence and issue subpoenas.

Defense counsel was only able to procure the appearance of the custodian of the hospital records and planned to admit the toxicology report through that witness. The State moved in limine to exclude the toxicology report for lack of foundation. Defense counsel argued the report was admissible both under Iowa Rule of Evidence 803(b), (business records exception), and because he claimed it was exculpatory evidence. The court granted the State's motion on the grounds of inadequate foundation for the test result. The jury returned a guilty verdict and Luck's motion for a new trial was denied.

Luck was charged by trial information under both alternatives of Iowa Code section 321J.2(1), which includes a person operating a motor vehicle, (a) "[w]hile under the influence of an alcoholic beverage or other drug . . . " and (b) "[w]hile

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[1] She was also charged with possession of methamphetamine, but this charge is not at issue on appeal.

having an alcohol concentration . . . of .10 or more." The marshaling instruction No. 9, however, only included subsection (a), to wit:

> You must find the defendant not guilty in Count I of Operating a Motor Vehicle While Intoxicated unless you find that the State has proved by evidence beyond a reasonable doubt each of the following elements:
>
> 1. That on or about the 26th day of June, 1995, the defendant, Tawny Lynn Luck, operated a motor vehicle.
>
> 2. That at the time the defendant was **under the influence of an alcoholic beverage.**

(Emphasis added.) We assume that juries follow the instructions they are given. *Schwennen v. Abell*, 471 N.W.2d 880 (Iowa 1991); *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100 (Iowa 1986).

The jury returned a verdict of "guilty of the crime of Operating a Motor Vehicle While Intoxicated as charged in Count I of the Trial Information." The testimony from both officers was Luck demonstrated symptoms of intoxication, strong odor of alcohol, slurred speech and poor balance. For her part, Luck refused to take the field sobriety test stating, "I'm drunk." This was testimony on which the jury could have based its verdict. Furthermore, there was no showing that a blood alcohol content of .97 is exculpatory in any fashion merely because if falls short of the per se level of intoxication of .10. As such, Luck can show no prejudice to her because of trial counsel's failure to provide a proper foundation for the admission into evidence of the toxicology report. We accordingly affirm the trial court and uphold Luck's conviction.

AFFIRMED.