IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1999-344 (9-597) / 98-1671
Filed December 13, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE FREDERICK BOES,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Peter A. Keller, Judge.

Dale Frederick Boes appeals from the judgment and sentence entered upon his conviction of operating while intoxicated (first offense). **AFFIRMED.**

Bruce L. Cook of Cook & Brown, P.L.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, William R. Byers, County Attorney, Matthew Kristufek and Deborah Shelby, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

Boes's vehicle was stopped because a police officer noticed a headlight was not working. After officers observed signs of intoxication, Boes was subjected to field sobriety testing and a preliminary breath test. Officers, based on these tests, determined Boes was intoxicated and arrested him for operating while intoxicated.

At trial the arresting officer was asked:

> Q. During that time did you form an opinion as to whether he was under the influence of alcohol? A. Yes.
> Q. And what is your opinion based on? A. That he was under the influence of alcohol.
> Q. And do you base that on what? A. I based that upon the training I received in the Iowa Law Enforcement Academy and my own personal experience with other OWI arrests that I've made.
> MR. SPELLMAN [defense counsel]: Objection, asked and answered. Invades the province of the jury.
> THE COURT: Overruled. Go ahead.
> A. No, there is no doubt in my mind.

The officer was also asked:

> Q. At the conclusion of the standardized field sobriety tests, the horizontal gaze nystagmus test, the one leg stand and the walk and turn test, what did you do next? A. I administered a PBT.
> Q. Based on your observations at the scene--Strike that. Sir, what is a PBT? A. Preliminary breath test.
> Q. Then based on your observations at the scene and the tests, the field sobriety tests that you performed, what did you do next? A. I then placed the defendant into custody by placing his hands behind his back and securing him with handcuffs, placed him in the back of my patrol car.

A jury convicted Boes as charged, and he was sentenced accordingly.

On appeal, Boes argues his trial counsel was ineffective in: (1) failing to object to improper opinion testimony by the arresting officer and (2) failing to object to testimony concerning the administration of a preliminary breath test.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charges. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). However, if the claim is based on the failure to object to the admission of certain evidence, we can ordinarily adjudicate the claim on direct appeal if the evidence was admissible. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

III. Ineffective Assistance of Counsel.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceedings whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the

totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

Expert testimony is admissible if it is reliable and "will assist the trier of fact in resolving an issue." *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991). There is no logic in limiting the admissibility of such testimony when the witness is specially trained to recognize the characteristics of intoxicated persons. *State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1990). However, determining guilt or innocence is the exclusive function of the finder of fact, and consequently is an improper subject of expert testimony. *State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975). The proponent of expert testimony bears the burden of showing it will aid the trier of fact. *State v. Nelson*, 480 N.W.2d 900, 903 (Iowa App. 1991).

The Iowa Supreme Court has held that a police officer did not impermissibly offer a direct opinion regarding guilt or innocence when the officer testified "[i]t was my belief that he [Murphy] was under the influence and impaired." *Murphy*, 451 N.W.2d at 155. The supreme court has, however, held testimony about a legal standard of proof, combined with a recitation of the elements of the offense, clearly invaded the province of the jury. *State v. Maurer*, 409 N.W.2d 196, 197-98 (Iowa App. 1987) (holding officer's testimony that "it is my opinion beyond any reasonable doubt that the defendant was operating a motor vehicle upon a public highway while

he was under the influence of an alcoholic beverage" was an unequivocal comment about the defendant's guilt, therefore not admissible.)

In this case, the opinion testimony of the arresting officers was admissible because it did not include application of a legal standard to the facts of this case. The officer simply stated his opinion regarding Boes's intoxication. Boes's counsel breached no duty by failing to assert this meritless claim. *See State v. Jackson*, 387 N.W.2d 623, 632 (Iowa App. 1986).

Preliminary breath test results are inadmissible. Iowa Code § 321J.5. Statements concerning administration of such tests are, however, admissible. *Gavlock v. Coleman*, 493 N.W.2d 94, 96-97 (Iowa App. 1992) (holding that overruling defendant's objection was proper because the statement made no reference to the results of the P.B.T.) Here, the officer did not refer to the results of Boes's preliminary breath test. The testimony was limited to the administration of the test. Because the testimony was admis ible, Boes's counsel breached no duty by failing to interpose an objection. We affirm.

AFFIRMED.