FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

CLIFFORD EDWARD MICKENS,)

Defendant-Appellant.)

Filed January 29, 1986

355

5-532
85-113

Appeal from the Iowa District Court for Johnson County, Ansel J. Chapman, Judge.

The defendant appeals from his conviction, following a jury trial, for operating a motor vehicle while intoxicated, third offense. **AFFIRMED.**

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General; David Tiffany, Assistant Johnson County Attorney, for the plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Schlegel, JJ.

The defendant, Clifford Mickens, has appealed from his conviction for operating a motor vehicle while intoxicated, third offense. During his trial to a jury, information was revealed regarding the results of a preliminary breath screening test administered by the arresting officer. Such evidence is not admissible pursuant to the Code, and Mickens says his counsel was ineffective in failing to object to the presentation of the evidence. We affirm his conviction.

While driving on Interstate 80, Mickens was stopped for suspicion of drunk driving. A preliminary breath screening test was administered which yielded positive results. Additional field sobriety tests were performed. Mickens was arrested, and refused to take any further chemical tests.

Prior to trial, his attorney asked the court to excise from the record that part of the implied consent form which referred to the preliminary screening tests. The court granted this request, ruling that the results of the test were inadmissible under Iowa Code Section 321B.3. That section of the Code specifically prohibits admission into evidence of the results of the preliminary screening breath test.

During trial the following testimony was given by the arresting officer, Trooper Gary Bird of the Iowa State Patrol testified:

> Q. What tests did you ask the defendant to take first? A. I believe I had him give me a preliminary breath test first before the actual field sobriety test.
>
> Q. What is a preliminary breath test? A. It is a device we have, an Alco Sensor II which we have the subject blow into which indicates to us — possibly indicates if he had been drinking.
>
> Q. Did you receive any indication? A. Yes.
>
> Q. What was the indication? A. The indication was positive.

No objection was made by counsel to this line of questioning.

In order to prevail upon his claim, Mickens must show that error occurred through failure of counsel to perform an essential duty and that prejudice resulted from the error. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In demonstrating the necessary prejudice to him, defendant must prove there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, U.S. , , 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). It is not necessary for the reviewing court to determine whether counsel performed ineffectively if it is shown that sufficient prejudice has not been proven by the defendant. Id. at , 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 (1984).

While we agree with the defendant that the testimony contained evidence clearly inadmissible, we do not determine whether counsel was ineffective because we hold sufficient prejudice to the defendant has not been shown. The evidence of his guilt was overwhelming and it cannot be demonstrated that omission of the improper testimony would have probably yielded a different result.

When Mickens was stopped, he had been traveling on the interstate at thirty-five miles per hour and then increased his speed to about sixty miles per hour. The vehicle was traveling side to side in its own lane according to Officer Bird. Although Mickens claims he has front end alignment problems with the car, he was asked at jail if he had any car problems. He replied that he did not know of any problems with the car.

Bird is an experienced law enforcement official trained in detecting persons who were driving under the influence of alcohol. Bird detected the odor of alcohol on Micken's breath and noted his eyes were watery, dilated, and bloodshot. The defendant's speech was slow, mumbled, and slurred. Bird said it was necessary to ask the defendant to repeat his responses at times in order to understand what the defendant had said. During the field sobriety tests, Mickens

was asked to recite the alphabet but was unable to. After several tries, the defendant stopped and told Bird he didn't know the alphabet.

Mickens was not able to perform other field sobriety tests, including the finger dexterity test, the finger-to-nose test and leg balance test. Mickens had trouble distinguishing left from right and weaved and swayed.

Considering the overwhelming evidence of Mickens' guilt, we find the alleged error was not sufficiently prejudicial to warrant reversal of his conviction.

AFFIRMED.