FILED
AUG 17 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-280 / 94-1192

STATE OF IOWA,

Appellee,

vs.

MICHAEL W. FOSSEN,

Appellant.

Appeal from the Iowa District Court for Dallas County, Darrell Goodhue, Judge.

Fossen appeals the judgment and sentence entered upon his conviction, following a jury trial, of operating while intoxicated, third offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens and James G. Tomka, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William Byers, County Attorney, and James Ballard, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Sackett and Huitink, JJ.

HUITINK, J.

Michael Fossen appeals the judgment and sentence entered upon his conviction, following a jury trial, of operating while intoxicated, third offense.

At Fossen's jury trial Deputy Woody testified that at approximately 2 a.m. on December 7, 1993, Woody was traveling east on County Road F90. He observed a van weaving between the road's center line and shoulder. The second time the van's wheels dropped off the shoulder Woody activated his lights. The van stopped, and Fossen exited. Woody thought Fossen appeared intoxicated and asked for his driver's license. Fossen fumbled through his wallet and handed Woody his license as well as several other credit cards. Woody detected a strong smell of alcohol on Fossen and observed Fossen's eyes were red and watery. Woody asked Fossen to walk back to his car and noticed Fossen was stumbling as he walked. Woody asked Fossen to perform the horizontal gaze nystagmus (HGN) test.

Woody explained that the HGN test involves moving an object in front of the subject's eyes while the subject keeps his or her head perfectly still. Each eye tested can score a possible three points. If a person scores four out of the possible six points, there is a likelihood the person is intoxicated. Woody stated that the HGN is the most reliable of the three field sobriety tests police administer because it scores an involuntary jerking of the eye and cannot be practiced.

Fossen told Woody he had a bad eye; however, Woody tested both eyes. Fossen received a score of three points in each eye for a total of six points. Woody stated that he would have arrested Fossen if Fossen had scored three points in one eye.

Woody asked Fossen to perform the walk-and-turn test and the one-leg-stand test, but Fossen refused claiming his bad eye caused him to lose balance. Fossen also refused to take a breath test. Woody arrested Fossen and drove him to the county jail. On the way, Fossen talked nonstop and repetitiously.

Fossen testified that he had had three glasses of beer the night he was arrested and was not intoxicated. He stated he is blind in his right eye and wears an artificial right eye. Fossen explained that being blind in one eye causes balance problems for him and affects his ability to keep his van on the road.

On appeal Fossen argues his lawyer was ineffective because counsel failed to object to Woody's testimony regarding the HGN test. Specifically, Fossen asserts there was a lack of foundation for the testimony because the test was improperly performed on Fossen's artificial eye. Moreover, Fossen urges Woody's testimony regarding the reliability of the HGN test was improper lay opinion.

Ordinarily ineffective assistance of counsel claims are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). They may be resolved on direct appeal, however, when the record is adequate to address the

contentions asserted. *Id.* We conclude the record is sufficient to address Fossen's claimed ineffective assistance of counsel.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32. It is not necessary to determine whether counsel failed to perform an essential duty before examining the prejudice prong of an ineffectiveness claim. *State v. McKettrick*, 580 N.W.2d 52, 56 (Iowa 1982).

We find it unnecessary to determine whether Fossen's lawyer breached an essential duty because Fossen has failed to establish the necessary prejudice. Even if the HGN evidence is excluded, the record still contains sufficient evidence of intoxication to support his conviction.

Fossen admitted he had been drinking. Officer Woody observed the classic signs of intoxication, including slurred speech and the odor of an alcoholic beverage. Fossen had difficulty producing his identification and presented several credit cards

along with his driver's license. Moreover, Fossen fell backwards as he got out of his vehicle, and he stumbled as he walked towards Woody's parked car.

Based on our de novo review, we cannot say the result of Fossen's trial would have been different without the HGN evidence. Fossen's claim his lawyer was ineffective must accordingly fail. The district court's judgment is affirmed.

AFFIRMED.