IN THE COURT OF APPEALS OF IOWA

No. 3-717 / 12-1869
Filed September 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JOSEPH WURTZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles Fagan, District Associate Judge.

Defendant was convicted by a jury of operating while intoxicated (OWI) and he appeals. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Michael J. Wurtz was convicted by a jury of operating while intoxicated (OWI) in violation of Iowa Code section 321J.2 (2011), and he appeals. On appeal, he maintains that he received ineffective assistance of counsel at trial. He asks that we reverse his conviction and grant him a new trial. Because Wurtz was not prejudiced by any alleged errors of counsel, we affirm.

I. Background Facts and Proceedings.

At about midnight, on January 28, 2012, Wurtz met his girlfriend at a local bar after completing a fourteen-hour shift as a truck driver. At the bar, they shared a couple of pitchers of beer before leaving the establishment about 2:00 a.m. Wurtz then drove to a friend's house. While there, Wurtz and his friend split a quart jar of hard liquor containing peppermint sticks and pineapple. Between 3:00 a.m. and 3:30 a.m., Wurtz got into his car and drove towards home.

Just before 7:00 a.m., the dispatch center received a 911 call claiming that a car was parked in an intersection with the driver slumped over the wheel. Firemen and medical responders were the first to arrive on the scene and found Wurtz's vehicle as it had been described. At trial, Fireman McKeon testfied that Wurtz's vehicle was running when they arrived. He further testified that the car was in drive with the keys in the ignition when they opened the car door to check on Wurtz. When asked if he had any medical issues or needed help, Wurtz stated he wanted to move his car. Both Fireman McKeon and the State's rebuttal witness, Fireman Hoevet, testified that Wurtz then drove his car forward

one to two car lengths. The medical responders removed Wurtz from his vehicle and had him sit in the back of the ambulance until the police officers arrived.

Wurtz contradicted the firemen's testimony. He testified that the car was not running, was not in drive, and that he did not move the vehicle at any time after pulling over to sleep. He also contested that he was ever asked to sit in the ambulance and instead maintained that he stayed in his vehicle until the police officers arrived on scene.

After the police officers arrived to the scene, Officer Archibald administered a horizontal gaze nystagamus test. The results indicated that Wurtz was under the influence. Officer Archibald also observed that Wurtz's eyes were red, bloodshot, and watery. After administering a preliminary breath test (PBT), he arrested Wurtz and transferred him to the station. At the station, Wurtz submitted to a breath test. The results showed that his blood alcohol content was .124.

Wurtz was charged with operating while intoxicated and his jury trial took place in June 2012. After deliberation, the jury returned a guilty verdict.

At sentencing, in September 2012, Wurtz filed a motion in arrest of judgment and a motion for a new trial. In support of the motions, counsel cited issues with a transcript that had been ordered from the Department of Transportation hearing, which did not arrive before trial; Wurtz believed the transcript would have allowed him to impeach Officer Archibald's testimony. Counsel also cited a belief that the trial was not held within ninety days, even though Wurtz did not waive his right to a speedy trial, and further cited her own

failure to enter a hearsay objection to a document entered into evidence by the State. The court overruled both motions. Wurtz was then sentenced to ninety days in the county jail, with all but two days suspended. He was also placed on unsupervised probation for one year, fined $1250, and assessed costs and attorney fees. He appeals.

II. Standard of Review.

A defendant may raise an ineffective assistance claim on direct appeal if he has reasonable grounds to believe the record is adequate for us to address the claim on direct appeal. *State v. Straw*, 709 N.W. 2d 128, 133 (Iowa 2006). If we determine the record is adequate, we may decide the claim. *Id*. We review claims for ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). This is our standard because such claims have their basis in the Sixth Amendment to the United States Constitution. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

III. Discussion.

On appeal, Wurtz raised several issues supporting his ineffective assistance of counsel claim. He maintains that counsel was ineffective for (1) allowing him to be impeached with his prior burglary conviction which was over thirty years old at the time of trial; (2) failing to object to the testimony related to his Fifth Amendment right to remain silent; (3) failing to object to prosecutorial misconduct when the prosecutor asked him if the State's witness was being untruthful; and (4) failing to object to the results of his PBT being admitted. The

State concedes, and we agree, the record is sufficient to allow us to address these claims.

To succeed on his claim, Wurtz must show by a preponderance of the evidence that (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To prove that counsel failed to perform an essential duty, Wurtz must show "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In doing so, he must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See id*. at 689. Prejudice has resulted when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). We can affirm if either prong is absent and need not engage in both prongs of the analysis if one is lacking. *See Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010).

In this case, Wurtz is unable to prove prejudice resulted from any errors allegedly made by counsel. The main issue at trial was whether Wurtz operated the vehicle. The evidence of his guilt was overwhelming. A fireman testified that the engine was running with Wurtz behind the wheel when they arrived at the scene. Both he and another fireman observed Wurtz move the vehicle a short distance. Even if the jury did not believe the accuracy of their testimony, Wurtz personally testified that he shared a couple pitchers of beer and a quart jar of

hard liquor before he attempted to drive home about 3:30 a.m. Specifically, he stated:

> Yeah, I'm not used to hard liquor. I drank—he had like a quart jar of it, and we split it. I chugged it down and then talked to him about the job for a while and then decided to leave. . . . Like I said, I'm not used to the hard liquor, and it started to hit me, and I just looked for a place to pull over and go to sleep.

The distance between Wurtz's friend's home and the location where he was found was approximately four blocks. Wurtz was still asleep in his vehicle when the fireman and emergency responders arrived at approximately 7:00 a.m. He had not ingested any additional alcohol since leaving his friend's house. When his blood alcohol content was tested at 8:01 a.m., he was still well over the legal limit with the result of .124.

After considering each issue raised by the defendant and finding no prejudice was proven, we affirm.

AFFIRMED.