IN THE COURT OF APPEALS OF IOWA

No. 2-630 / 11-1471
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINCENT REIS SCHAWL,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Phillip J. Tabor, District Associate Judge.

Vincent Schawl appeals his judgment and sentence after a jury found him guilty of operating while intoxicated. **AFFIRMED.**

Matthew L. Noel of The Noel Law Firm, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Michael L. Wolf, County Attorney, and Robin L. Strausser, Assistant County Attorney, for appellee.

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

DANILSON, J.

Vincent Schawl appeals his judgment and sentence after a jury found him guilty of operating while intoxicated.[1] He asserts a claim of ineffective assistance based on trial counsel's failure to make a motion to exclude opinion testimony and failure to object to admission of prejudicial facts. Upon our de novo review, we find the record is inadequate to resolve these issues on direct appeal. Accordingly, we affirm and preserve Schawl's arguments for postconviction relief proceedings.

I. Background Facts and Proceedings.

Deputy Owens of the Clinton County Sheriff's Department observed a vehicle driven by Vincent Schawl crossing the center line on March 15, 2011. The vehicle's license plate light was not functioning and the plates were expired. Owens stopped the vehicle. He detected a strong odor of marijuana coming from the vehicle.

Schawl moved some items in the center dash console and Deputy Owens observed what he believed to be a blue pipe for smoking marijuana. Deputy Owens requested and received consent to search the vehicle, and discovered a blue marijuana pipe. Schawl admitted the pipe was his.

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[1] Schawl was charged by trial information with "operating while intoxicated" so we rely on that nomenclature throughout our opinion. The charge was premised upon the allegation that Schawl was operating a vehicle while under the influence of a drug, in violation of Iowa code section 321J.2(1)(a) (2011) which provides that a "person commits the offense of operating while intoxicated if the person operates a motor vehicle . . . [w]hile under the influence of an alcoholic beverage or other drug or a combination of such substances."

Officer Schmitz and canine police unit arrived at the scene. Officer Schmitz also smelled an odor of burnt marijuana. After Officer Schmitz told Schawl's girlfriend that the canine would attack her if it smelled drugs on her person, she produced a bag of marijuana and a pipe for smoking marijuana. The canine alerted to the dash and trunk of Schawl's car. The officers searched the trunk and discovered a marijuana bong or hookah pipe containing water and marijuana residue. Schawl denied that the bong was his.

Deputy Owens observed that Schawl "had watery, bloodshot eyes" with very small pupils, smelled of burnt marijuana, and exhibited "very nervous" behavior. Deputy Owens then required Schawl to perform three field sobriety tests, which collectively indicated that Schawl was intoxicated. Deputy Owens requested that Schawl stick out his tongue. The deputy observed a green color "on the very top of his tongue towards the back."[2] Schawl took a preliminary breath test which registered zero blood alcohol content.

Deputy Owens arrested Schawl for operating while intoxicated and possession of drug paraphernalia. The arrest was based upon the deputy's belief that Schawl was under the influence of drugs.

At the police station, Deputy Owens requested Schawl provide a urine sample. After consulting his mother, who subsequently sought advice of counsel, Schawl refused to provide a urine sample. In the telephone calls to his mother, Schawl stated, "I'm completely sober." However, he acknowledged that if he took the urine test he would "still have it in [his] system," noting that he

[2] Owens testified the green color "only occurs for people that smoke marijuana" and indicated that Schawl had smoked marijuana "very recently" meaning "[w]ithin the day."

would fail the test if he had smoked that morning or in the remote past, as he believed that marijuana would remain in his system for thirty days. Schawl testified that in those exchanges he was simply giving his mother an example of how the urine test worked.

Officer Ketelsen inventoried Schawl's property and assisted another officer in obtaining information for a medical questionnaire. She observed that Schawl had lighters but no cigarettes. She testified that Schawl admitted to using marijuana a couple of times per week, and that he was "giggly" and distracted.

Schawl denied smoking marijuana the day of the incident and denied telling the jailers that he smoked multiple times per week, but admitted he used marijuana once every couple of weeks. He explained that he and his friends had smoked tobacco cigarettes in the car, his girlfriend had the cigarettes and he happened to retain a lighter. He further explained that he was laughing with a sarcastic tone at the jail because he was upset about the situation, as he was not under the influence of marijuana. Finally, he either denied poor performance on the field sobriety tests or explained his imperfections were a result of anxiety.

II. Standard of Review.

We review ineffective-assistance-of-counsel claims de novo. *State v*. *Maxwell*, 743 N.W.2d 185, 189 (Iowa 2008); *see also State v*. *Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules."). We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings.

State v. *Utter*, 803 N.W.2d 647, 651 (Iowa 2011).[3] "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v*. *Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such claims for development of the record and to allow trial counsel to defend against the charge. *Id*. If the record is inadequate to address the claim on direct appeal, we must preserve the claim for a postconviction-relief proceeding, regardless of the potential viability of the claim. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Discussion.

On appeal, Schawl contends his trial counsel was ineffective for the following reasons: (1) counsel did not object to Deputy Owens' testimony that the green color of Schawl's tongue indicated he had recently smoked marijuana (2) counsel did not object to evidence that Schawl failed the vertical gaze nystagmus (VGN) test, and (3) counsel did not challenge the admissibility of the bong or hookah on relevance grounds.

Schawl contends that Deputy Owens' testimony regarding his observation of green discoloration on Schawl's tongue was inadmissible; thus, his counsel had a duty to object to the admission of the evidence and Owens' qualification as an expert witness. On appeal, Schawl asserts a "quick 'Google Search' will reveal a plethora of reasons why a person could have a green tongue." However, the record does not contain evidence contradicting Owens' testimony.

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[3] *See also* Iowa Code § 814.7(3), which provides, "If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822."

Next, Schawl asserts trial counsel was ineffective in his failure to challenge the validity of the VGN test or its admissibility. Again, he asserts on appeal that brief internet research reveals that the test administered was not recommended by the National Highway Traffic Safety Administration (NHTSA) and that VGN is not present in someone who is intoxicated due to consumption of cannabis. However, evidence disputing the scientific validity of the VGN test or its applicability to an evaluation of intoxication by cannabis is not present in the record.

Finally, Schawl claims his counsel had a duty to challenge the admissibility of the "hookah pipe" or "marijuana bong" found in Schawl's trunk on relevance grounds, because there was no evidence of record that Schawl used the device that evening or any other time. Schawl denied the bong was his and claimed it had never been used.

Schawl's trial attorney has been given no opportunity to explain the lack of objections to any of this evidence. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (holding a lawyer is entitled to "his day in court, especially when his professional reputation is impugned"). We thus conclude that Schawl's claims should be preserved for postcoviction relief.

IV. Conclusion.

Upon our de novo review, we find the record is inadequate to resolve these issues on direct appeal. Accordingly, we affirm and preserve Schawl's arguments for postconviction relief proceedings.

AFFIRMED.