

IN THE COURT OF APPEALS OF IOWA

No. 3-145 / 12-1346
Filed March 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE BRIGANCE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph M. Moothart, District Associate Judge.

David Lee Brigance appeals from his guilty plea and conviction for operating while intoxicated, third offense. **AFFIRMED.**

Daniel M. Northfield, Clive, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeremy Westendorf, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

David Lee Brigance appeals from his conviction for operating while intoxicated, third offense. He argues he was provided with ineffective assistance of counsel in two ways: his counsel allowed him to plead guilty without reviewing a recording of the stop of his vehicle, and his counsel failed to investigate the possibility that using mouthwash within an hour of the stop affected the alcohol breath test. We affirm the conviction and preserve the ineffective-assistance claim for possible postconviction proceedings.

I. Facts and Proceedings

On December 21, 2011, Brigance was arrested for operating his vehicle while intoxicated and for driving with a revoked license. He pleaded guilty to operating while intoxicated—third offense on June 28, 2012.¹ The remaining charges against him were dropped pursuant to a plea agreement. Brigance was fined \$3125 along with costs and fees, sentenced to a term of imprisonment not to exceed five years, ordered to participate in a substance evaluation, and ordered to submit a DNA sample, and his license was revoked for six years.

II. Analysis

We review claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). A claim of ineffective assistance of counsel is considered for the first time on appeal only where the record below is

¹ On appeal, Brigance offers an affidavit regarding, among other things, whether his attorney looked at a police video of the stop of his vehicle and whether he had used mouthwash before the stop. “The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket and court calendar entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.” Iowa App. P. R. 6.801. We therefore will not consider that affidavit for the first time here. See *Cross v. Lightolier Inc.*, 395 N.W.2d 844, 849 (Iowa 1986) (finding the court could not consider an improperly submitted affidavit on appeal).

sufficient for our review. *State v. Fountain*, 786 N.W.2d 260, 267 (Iowa 2010). The record below provides no information regarding Brigance's alleged use of mouthwash, nor does it answer whether Brigance's counsel actually reviewed the police video. Absent this information, we cannot begin to address whether Brigance's counsel was effective. We therefore affirm Brigance's conviction and preserve his claim for further possible postconviction relief proceedings. *See id.*

AFFIRMED.