IN THE COURT OF APPEALS OF IOWA

No. 7-739 / 06-1130
Filed November 15, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH FRANCIS ORR,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Randal J. Nigg, District Associate Judge.

Defendant appeals his conviction for the offense of driving while revoked. **AFFIRMED.**

Mark C. Smith, Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Ralph Potter, County Attorney, and Michael J. Whalen, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.

I. Background Facts & Proceedings

On November 14, 2004, deputy David Riniker of the Dubuque County Sheriff's Office stopped a vehicle for speeding. The driver displayed a Wisconsin driver's license in the name of Michael Paul Orr. Deputy Riniker ultimately arrested the driver and administered a breath test, which the driver failed. Deputy Riniker personally served the driver with notice his driver's license would be revoked for one year, effective ten days from that date.[1]

The notice of revocation was made out in the name of Michael Paul Orr. The driver signed the implied consent advisory as Michael or Mike Orr. Deputy Riniker subsequently learned the name of the person he had stopped on November 14, 2004, was Kenneth Francis Orr (Orr), the brother of Michael Paul Orr.

On March 15, 2005, Deputy Riniker observed Orr driving in Cascade, Iowa, and stopped him because he was aware Orr's driver's license had been revoked due to the November 14, 2004 notice of revocation. Orr had an Iowa driver's license in his correct name that had been issued in February 2005. The records of the Iowa Department of Transportation (DOT) showed the driver's license of Michael Paul Orr was revoked from November 25, 2004, until November 25, 2005. DOT records did not show Orr's driver's license was revoked on March 15, 2005.

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[1] Iowa Code section 321J.12(1)(b) (2005) provides that upon certification by a peace office that there exists reasonable grounds to believe a person has violated section 321J.2, "the department shall revoke the person's driver's license" for "[o]ne year if the person has had a previous revocation under this chapter."

Orr was charged with operating while revoked, in violation of Iowa Code section 321J.21 (2005). The State alleged that because Orr personally received notice of revocation on November 14, 2004, his driver's license was revoked on March 15, 2005, when he was stopped by Deputy Riniker. Orr claimed that the notice of revocation did not operate to revoke his license, and further action should have been taken by the DOT to revoke his license using his correct name. The district court ruled:

> [I]f, in fact, the Defendant was the one that was driving on November 14th of '04, then I'm going to be instructing the jury that there was a revocation of his privileges in effect for a year from the ten days after he received the notice. I think that's the law of Iowa.

The case proceeded to a jury trial. Deputy Riniker identified defendant as the person he stopped on November 14, 2004, and personally served with the notice of revocation. He also identified defendant as the person he observed driving on March 15, 2005. A jury found Orr guilty of driving while revoked. The district court denied Orr's motion for a new trial. Orr was fined $1000. He appeals his conviction for driving while revoked.

II. Sufficiency of the Evidence

Orr contends there is not sufficient evidence in the record to support his conviction. He points out that DOT records show the driver's license of Kenneth Orr was not revoked on March 15, 2005. He claims he cannot be convicted based on the revocation of another person's driver's license, even in circumstances involving deception.

We review challenges to the sufficiency of evidence for the correction of errors at law. *State v. Schmidt*, 480 N.W.2d 886, 887 (Iowa 1992). A guilty

verdict is binding on appeal, unless there is not substantial evidence in the record to support it, or the verdict is clearly against the weight of the evidence. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

Orr was charged with driving while revoked under section 321J.21(1). For a defendant to be convicted under this section, the State must prove beyond a reasonable doubt (1) defendant's license was revoked, and (2) defendant operated a motor vehicle during the period of revocation. *State v. Thompson*, 357 N.W.2d 591, 594 (Iowa 1984). The State is not required to prove the defendant had knowledge of the revocation. *See State v. Carmer*, 465 N.W.2d 303, 304 (Iowa Ct. App. 1990).

Furthermore, in a criminal prosecution, the State is not required to retry the elements of the administrative revocation proceedings. *Thompson*, 357 N.W.2d at 594. The revocation of a person's driver's license is an administrative action of the DOT. *See* Iowa Code §§ 321J.12-.14. A person wishing to challenge the revocation must exhaust administrative remedies. *Thompson*, 357 N.W.2d at 594.

Orr claims the notice of revocation given on November 14, 2004, was not effective against him because it was in the name of Michael Paul Orr. Orr was served personal notice of the revocation, as permitted by section 321J.12(3), which provides, "[t]he peace officer who requested or directed the administration of the chemical test may, on behalf of the department, serve immediate notice of

revocation on a person."[2] *See State v. Vargason*, 607 N.W.2d 691, 693 (Iowa 2000). Orr was the person who had been administered a chemical test, not Michael Paul Orr, and the notice of revocation was directed to Orr. If Orr felt the notice of revocation had been given to him in error, he could have sought administrative remedies under sections 321J.13 and 321J.14. Orr cannot now, however, collaterally attack the revocation of his driver's license. *See Thompson*, 357 N.W.2d at 594.

We conclude there is sufficient evidence in the record to support defendant's conviction for driving while revoked.

III. Evidentiary Rulings

Orr contends the district court should have permitted him to present evidence that DOT records showed Kenneth Orr had a valid driver's license on March 15, 2005. The court found the evidence was not relevant, stating "I don't think the technicalities of the notices from the DOT can be used in essence as a sword to avoid liability for criminal behavior." Orr made an offer of proof of the evidence.

We review the district court's evidentiary rulings for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003). An abuse of discretion arises when the court's discretion is exercised on grounds clearly untenable or to

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[2] In *State v. Finger*, 324 S.E.2d 894, 897 (N.C. Ct. App. 1985), the defendant's proper name was Robert H. Finger. The North Carolina Division of Motor Vehicles had records for Fred Robert Leo Finger. *Finger*, 324 S.E.2d at 898. The North Carolina Court of Appeals found a notice of revocation that was personally served on defendant was sufficient to revoke his driver's license. *Id.* The court did not discuss, however, whether the personal notice was in the name of Robert H. Finger or Fred Robert Leo Finger. Whether the notice of revocation matched defendant's proper name, or the official motor vehicle records, the notice given to the defendant was sufficient to revoke his driver's license. *See id.*

an extent clearly unreasonable. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005).

Generally, relevant evidence is admissible in judicial proceedings. Iowa R. Evid. 5.402; *State v. Taylor*, 689 N.W.2d 116, 123 (Iowa 2004). Evidence is relevant when it has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401.

We note that it was due to Orr's actions that the revocation was issued in the name of Michael Paul Orr, resulting in his ability to obtain a license in the name of Kenneth Orr. In *People v. Turner*, 354 N.E.2d 897, 898 (Ill. 1976), defendant Frank Turner's driver's license was revoked, but he obtained a new license under the name Kerry Sharp. The court concluded Turner's "privilege to drive was not restored through his fraudulently obtaining a license under the name 'Kerry Sharp.'" *Turner*, 354 N.E.2d at 899.

A fraudulently obtained driver's license is not a valid defense to a charge of driving while revoked. *People v. Waldron*, 566 N.E.2d 976, 977 (Ill. App. Ct. 1991). We determine the fact Orr was able to obtain a driver's license in his own name is not relevant. We conclude Orr has failed to show the district court abused its discretion by finding the evidence in question was not relevant to the criminal charge of driving while revoked. Furthermore, to the extent the issue is raised, we find Orr was not denied his constitutional right to present a defense.

IV. Ineffective Assistance

Orr asserts he received ineffective assistance of counsel during his criminal trial. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Orr claims he received ineffective assistance due to defense counsel's failure to request a jury instruction on the lesser included offense of operation of a motor vehicle without a valid license, under section 321.174. As the State points out, Orr's defense at trial was that he had a valid driver's license on March 15, 2005, and therefore could not be found guilty of driving while revoked. Defense counsel made a strategic decision not to raise a claim that Orr's license was not revoked, but he did not have a valid license at the time of the stop. *See State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995) (noting we generally will not second-guess reasonable trial strategy).

Even if defense counsel breached an essential duty, Orr has not shown he was prejudiced by counsel's conduct. The evidence clearly showed Orr personally received notice of revocation of his driver's license on November 14, 2004, and he was observed driving a motor vehicle on March 15, 2005, within the

period of revocation. Orr has not shown that but for counsel's action he would have been convicted of operating a motor vehicle without a valid license.

B. Orr also claims defense counsel should have objected to evidence relating to the November 14, 2004, stop because the evidence was unduly prejudicial and presented improper references to prior bad acts. As discussed above, the State was required to prove defendant's license was revoked. *See Thompson*, 357 N.W.2d at 594. To this end, Deputy Riniker testified briefly about the circumstances which gave rise to the revocation. In this case, the State also needed to prove identity, and Deputy Riniker testified to the circumstances of the November 14, 2004, stop, including the fact defendant presented a driver's license in the name of Michael Paul Orr.

The evidence was relevant to the prosecution of the present case, and was not an attempt to show defendant was guilty of the present crime because he had committed previous crimes. *See State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (noting evidence of other crimes is not admissible to show a general propensity to commit crimes). Moreover, "[e]vidence immediately surrounding an offense is admissible in order to show the complete story of a crime, even when it shows commission of another crime." *Shortridge*, 589 N.W.2d at 83. We conclude defense counsel had no duty to raise a meritless objection to the evidence in question. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

We conclude Orr has failed to show he received ineffective assistance of counsel.

We affirm Orr's conviction for driving while revoked, in violation of section 321J.21.

AFFIRMED.