IN THE COURT OF APPEALS OF IOWA

No. 0-111 / 09-0144
Filed April 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENT ALLEN HELBLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Cedar County, Mark D. Cleve, Judge.

The defendant appeals his conviction of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2007). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Sterling L. Benz, County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Kent Allen Helble appeals from the judgment and sentence entered on his conviction for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2007). On appeal, he raises an ineffective-assistance-of-counsel claim. We review claims of ineffective assistance of counsel de novo. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). While we often preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient to do so. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006); *see also State v. Martinez*, 679 N.W.2d 620, 625–26 (Iowa 2004) ("If the record on appeal shows . . . that the defendant cannot prevail on such a claim as a matter of law, we will 'affirm the defendant's conviction without preserving the ineffective-assistance-of-counsel claims.'"). The record is sufficient to address Helble's claim.

Helble specifically claims his trial counsel was ineffective in failing to move to suppress two VCR tapes—one made during the stop of his vehicle (Exhibit 1) and one made during the booking procedure at the Cedar County jail (Exhibit 3). Helble asserts some statements captured on the tapes were made after he had invoked his Fifth Amendment right to remain silent.[1] Following Helble's arrest,

[1] *See* U.S. Const. amend. V (providing that no "person . . . shall be compelled in any criminal case to be a witness against himself"); *Malloy v. Hogan*, 378 U.S. 1, 6, 84

and while in the patrol car, Trooper Smith read Helble his *Miranda* rights.[2] When told of the likely charge of operating while intoxicated, Helble said, "Then we'll have to call my attorney." At the Cedar County Law Enforcement Center, Trooper Smith again informed Helble of his *Miranda* rights. When asked whether he wished to talk with Smith, Helble answered, "No." Following this exchange, implied consent was invoked and Helble refused to take the breath test and to sign the implied consent form. Captured on the videotape was Trooper Smith's subsequent questioning of Helble of issues not associated with "routine booking." *See Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S. Ct. 2638, 2650, 110 L. Ed. 2d 528, 552 (1990) (discussing the "'routine booking question' exception [that] exempts from *Miranda's* coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'"). The State does not dispute these facts nor the clear violation of Helble's Fifth Amendment rights. However, the State asserts Helble cannot demonstrate any prejudice by his counsel's failure to object to the admission of the two videotapes and urges us to affirm the convictions.

Helble waived his right to a jury trial and was tried to the court, during which Helble took the stand to testify in his own defense.[3] The district court's findings recount the series of events after Helble was arrested and read his *Miranda* rights,

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S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (holding the privilege against self-incrimination is applicable to the States through the Fourteenth Amendment).

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] The State points out that after Helble testified, the district court viewed the video tapes.

> [T]he Defendant refused the Trooper's request for a breath test and refused to sign the request form, as evidenced by State's Exhibit No. 2. Trooper Smith asked the Defendant why he had refused the breath test, and the Defendant responded that he had refused in order to maintain his "deniability" that he was intoxicated. In answering additional processing questions at the jail, the Defendant retracted the admissions made during the traffic stop that he had been drinking and driving, and instead claimed that he was not drinking and that his mother had been driving.

Helble complains that some questions asked of him at the Law Enforcement Center violated his right to remain silent and could have influenced the district court's decision. He does not cite to any specific answer he gave that would have provided the State with evidence to prove he was operating his car while intoxicated. The video does capture his explanation why he refused the chemical test (to maintain his "deniability" that he was intoxicated), and his retraction of admissions he had earlier made (that he had been drinking and that he had been driving). He does not state how these statements and retractions may have prejudiced him. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (stating a defendant must show there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (discussing that a defendant must "identify how competent representation probably would have changed the outcome").

The State asserts that because Helble testified, it was permitted to use otherwise inadmissible evidence for impeachment purposes. *See Oregon v. Hass*, 420 U.S. 714, 720–23, 95 S. Ct. 1215, 1220–21, 43 L. Ed. 2d 570, 576–78 (1975) (holding that where the *Miranda* warnings were properly given, but the officers questioned the defendant and obtained inculpatory information after the

defendant asked for an attorney, the information was admissible pursuant to *Harris v. New York* for impeachment purposes); *Harris v. New York*, 401 U.S. 222, 226, 91 S. Ct. 643, 646, 28 L. Ed. 2d 1, 5 (1971) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."); *see also Kansas v. Ventris*, ___ U.S. ___, ___, 129 S. Ct. 1841, 1847, 173 L. Ed. 2d 801, 809 (2009) ("We have held in every other context that tainted evidence—evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid—is admissible for impeachment."). At trial Helble testified that he was driving the car, contrary to what he claimed at the time of his arrest. He also testified that he was not intoxicated when he was arrested, but admitted he had "probably three [beers] all together." When questioned why he had told Trooper Smith repeatedly, as recorded on the video, that he had too much to drink, he testified that it was just "smartass" comments. He also testified, his characterization of "too much" to drink could have resulted from his confusion as to what the legal limit of blood alcohol was for purposes of his commercial driver's license. We agree with the State that because Helble testified that he had been drinking and admitted to having driven the car, those statements on the videotape that contradict his trial testimony would have been admitted for impeachment purposes had defense counsel objected. *See Hass*, 420 U.S. at 723, 95 S. Ct. at 1221, 43 L. Ed. 2d at 578.

Further, even if counsel would have successfully objected to the admission of the videotapes, Helble cannot prove the result of the trial would

have been different. Trooper Smith testified as to detecting a strong odor of alcohol on Helble and that his balance appeared poor as Smith was escorting Helble to the patrol car. Helble repeatedly stated to Smith that he had been drinking and "had had too much to drink." On the horizontal gaze nystagmus test, Helble displayed all six clues of impairment and an even higher indication of alcohol concentration on the vertical nystagmus test. Any error in the district court in admitting the two videotapes would not have changed the result of the trial. Therefore, we find Helble was not prejudiced by any failure of his trial counsel to object to the admission of the two videotapes. We affirm Helble's conviction and sentence.

AFFIRMED.