

IN THE COURT OF APPEALS OF IOWA

No. 1-072 / 10-0031
Filed March 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL GENE HODGES,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon and Joel D. Yates, Judges.

Defendant appeals his conviction alleging the district court erred in denying his motion to continue the trial and asserting he was denied the effective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Barbara A. Edmondson, County Attorney, and Wyatt P. Peterson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J. and Mahan, S.J.* Mansfield and Tabor, JJ., take no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, C.J.

The defendant, Michael Gene Hodges, appeals from the judgment and sentence following his convictions of operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2 (2007), unlawful possession of a prescription drug, in violation of section 155A.21, and possession of a schedule I controlled substance, to wit: marijuana, third offense, in violation of section 124.401(5). He contends the district court should have granted his request to continue the trial because his expert witness was unexpectedly unavailable. In addition, he contends his trial counsel rendered ineffective assistance in failing to challenge the constitutionality of Iowa Code section 321J.2(1)(c). We affirm.

I. BACKGROUND AND PROCEEDINGS. On August 25, 2007 at approximately 10:30 a.m., Hodges was stopped by a State trooper for driving approximately eleven miles per hour over the speed limit and for driving erratically. While speaking with Hodges, the trooper noticed the smell of fresh marijuana coming from the vehicle, the smell of burnt marijuana on Hodges's clothing, and the smell of alcohol on Hodges's breath. Hodges informed the trooper he was at a party the night before consuming alcohol and smoking marijuana. Hodges asserted he stopped drinking and smoking marijuana around 2:00 a.m. that morning. Hodges consented to a search of his vehicle. During the search, the trooper found a bag of marijuana beside the driver's seat, a bottle of gin beneath the passenger seat, and another bag of marijuana and prescription pills in Hodges's bag in the trunk. Hodges was placed under arrest and transported to the Washington county jail.

At the jail Hodges failed two of three field sobriety tests. The trooper invoked implied consent and Hodges provided a urine sample for testing. The testing showed Hodges had marijuana in his system and a blood alcohol concentration of .062.

On September 20, 2007, the State filed a trial information charging Hodges with possession of a controlled substance and alleging Hodges had twice before been convicted of possession of marijuana. Hodges filed a written arraignment and pleaded not guilty on September 28, 2007. The State filed a second trial information on February 7, 2008, arising out of this same incident, charging Hodges with OWI, third offense, and unlawful possession of prescription drugs. Hodges filed a written arraignment and pleaded not guilty to the second trial information on February 26, 2008.

On March 5, 2008, Hodges filed a waiver of right to trial within one year of arraignment. Hodges then, on March 19, 2008, sought an expert witness at State's expense so he could assess the manner and method of testing the urine sample. Hodges was granted the expert witness on March 26, 2008. Trial was initially set for April 8, 2008, but due to Hodges filing a motion to suppress and a motion to continue, the trial date was moved to June 3, 2008. Hodges filed a second motion to continue the trial date asserting he had insufficient time to depose the State's witnesses. This motion was granted and trial was set for July 29, 2008. Hodges filed a third motion to continue the trial date as he had a conflict with another case set for trial. The court granted this motion and continued the trial until August 26, 2008.

The State moved to consolidate the two cases on July 9, 2008. Hodges filed another motion to continue the trial asserting his expert was unavailable to testify at the August trial date. On August 20, 2008 the court granted both the motion to consolidate and the motion to continue setting the trial for October 28, 2008. On September 17, 2008, Hodges filed a fifth motion to continue the October trial date asserting his expert was unavailable to testify. The court granted this motion setting the trial date for November 4, 2008. On October 22, 2008, this time the State moved to continue the trial because one of its witnesses was unavailable; however, the State conferred with Hodges and informed the court Hodges's expert was available for trial in December. Thus, the court granted the motion to continue setting the trial date for December 9, 2008.

Just days before the trial, Hodges filed a "Bench Memo" in which he asserted his expert witness was available to testify on the first day of trial only and requested he be allowed to call his expert witness out of order during the State's case-in-chief. The State resisted this motion and the court once again continued the trial until March 10, 2009 based on the understanding Hodges's expert witness would be available on the second day of trial.

The trial did not occur on March 10, 2009 for unknown reasons. The case was continued by the court three more times in the spring and early summer of 2009, ultimately being set for August 18, 2009. Hodges then filed a motion to continue the trial date citing his expert witness's unavailability. The court continued the trial until October 27, 2009 expecting Hodges's expert to be available to testify on the second day of trial. On the day of trial, Hodges moved

for a continuance because his expert witness had an emergency and was unable to attend. The court denied this motion and the case proceeded as scheduled.

The jury returned guilty verdicts on all charges. Hodges denied having two previous convictions for OWI and possession of marijuana, so the jury was asked to render a verdict as to Hodges's previous convictions. The jury found Hodges guilty of two prior OWI convictions and two prior possession of marijuana convictions. Hodges filed a motion in arrest of judgment alleging in part he was prejudiced by the court's failure to grant a continuance when his expert witness was unavailable to testify. The district court denied his motion and sentenced Hodges to a term not to exceed five years for the OWI conviction and a term of thirty days for both the possession of marijuana and possession of prescription drug convictions. The sentences are to run concurrently.

Hodges filed a notice of appeal December 28, 2009. On appeal he alleges the district court erred when it denied his final motion for a continuance due to his expert witness's unavailability. In addition, he asserts he was denied the effective assistance of counsel when his trial counsel failed to challenge the constitutionality of Iowa Code section 321J.2(1)(c).

II. SCOPE OF REVIEW. The court's decision to grant or deny a motion to continue lies in the very broad discretion of the trial court. *State v. Melk*, 543 N.W.2d 297, 300 (Iowa Ct. App. 1995). We will reverse on appeal only where we find the trial court abused its discretion and injustice resulted. *Id.* Hodges's ineffective-assistance-of-counsel claim is reviewed de novo because of the

constitutional nature of the claim. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

III. MOTION TO CONTINUE. Iowa Rule of Criminal Procedure 2.9(2) states, “The date assigned for trial shall be considered firm. Motions for continuance are discouraged. A motion for continuance shall not be granted except upon a showing of good and compelling cause.” This rule reflects not only the interests of the parties involved in a speedy and fair trial, but also the orderly administration of the courts in moving cases toward resolution. *State v. LaGrange*, 541 N.W.2d 562, 564 (Iowa Ct. App. 1995). We recognize that “[i]n spite of careful plans and diligent preparations, an unanticipated event will on occasion necessarily precipitate a continuance motion.” *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992).

In this case, a review of the court file reveals this case had twelve different trial dates over the course of eighteen months. While three of these trial dates were on the court’s own motion, Hodges filed eight motions to continue. Of these eight motions, five of the motions were because his expert witness was unavailable to attend the trial. The trial court showed remarkable accommodation to Hodges to reschedule the trial on four occasions so he could present his expert witness.

Hodges asserts without his expert witness, he was not able to mount a defense against the operating while intoxicated charge because his expert was to testify as to the flaws and problems inherent in the State’s procedures and testing protocols. He asserts this evidence would not have been cumulative and

there would have been no prejudice to the State if the trial was once again continued. We recognize Hodges's final motion to continue was not the result of his fault or negligence, as the expert who was initially available for trial had an emergency. See *LaGrange*, 541 N.W.2d at 564–65. However, the expert's availability for trial had been an issue multiple times, and the court still had a duty to move this case toward a speedy resolution. *Id.* We find no abuse of discretion in the trial court's denial of Hodges's final motion to continue.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. Hodges also claims his trial counsel rendered ineffective assistance by failing to challenge the constitutionality of Iowa Code section 321J.2(1)(c). In order to establish a claim for ineffective assistance of counsel, Hodges must demonstrate his trial counsel (1) failed to perform an essential duty, and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). If either element is not met, the claim will fail. *Id.* There is a strong presumption counsel's representation fell within the wide range of reasonable professional assistance and Hodges is not denied effective assistance by counsel's failure to raise a meritless issue. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003).

To demonstrate prejudice, the defendant must show that “but for the counsel's unprofessional errors, the result of the proceeding would have been different.” *Anfinson*, 758 N.W.2d at 499. Ineffective-assistance-of-counsel claims are normally preserved for postconviction relief proceedings to afford trial counsel an opportunity to explain her conduct and performance. *State v.*

Slayton, 417 N.W.2d 432, 436 (Iowa 1987). However, some claims “may be determined on direct appeal when the record adequately presents them.” *State v. Glaus*, 455 N.W.2d 274, 276 (Iowa Ct. App. 1990).

Iowa Code section 321J.2(1) provides:

A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions:

- a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
- b. While having an alcohol concentration of .08 or more.
- c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

Hodges claims subsection (1)(c) violates his substantive due process rights as there is no rational relationship between the stated purpose of the statute and the prohibition against operating a motor vehicle with “any amount” of a controlled substance in one’s system. Hodges fails to assert whether he is making his substantive due process claim under the federal constitution, the state constitution, or both. However, because the Fourteenth Amendment of the United State Constitution and the article I, section 9 of the Iowa Constitution are “nearly identical in scope, import, and purpose,” the court typically interprets both provisions in a similar fashion in the absence of an argument to the contrary. *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005).

The first step in a substantive due process analysis is to identify “the nature of the right involved.” *Id.* If the right is fundamental, strict scrutiny analysis is employed, but if the right is not fundamental, the statute needs to survive only a rational basis analysis. *Id.* In this case, Hodges acknowledges the right at issue—the ability to operate a motor vehicle—is not a fundamental

right. See *State v. Hartog*, 440 N.W.2d 852, 855 (Iowa 1989) (asserting the authority to drive “does not rise to the level of a right”). Thus, the statute is only required to survive a rational basis analysis to be deemed constitutional. Under the rational basis test, there must be “a reasonable fit between the government interest and the means utilized to advance that interest.” *Seering*, 701 N.W.2d at 662.

It has been well established that the purpose of Iowa Code section 321J is to reduce highway accidents and injuries caused by impaired drivers. *State v. Comried*, 693 N.W.2d 773, 775 (Iowa 2005). In 1998 the statute was expanded to include subsection (1)(c) prohibiting operating a vehicle with any amount of controlled substance. *Id.* The Iowa Supreme Court interpreted this “any amount” language to create a per se ban whether or not a driver is under the influence. *Id.* at 776.

Hodges claims, because traces of controlled substances can remain in the body long after the impairment caused by the substance wears off, prohibiting a person from driving with “any amount” of controlled substance in his body has no reasonable fit with the statute’s purpose to protect the public on the roadways from impaired drivers. However, this court and the Iowa Supreme Court have already determined Iowa Code section 321J.2(1)(c) is reasonably related to the legislative purpose.

In *Comried*, the Iowa Supreme Court held “the legislature could reasonably have imposed such a ban because the effects of drugs, as contrasted to the effects of alcohol, can vary greatly among those who use them.” *Id.* The

court went on to cite with approval the Arizona Court of Appeals case *State v. Phillips*, 873 P.2d 706, 708 (Ariz. Ct. App. 1994), which stated,

since the manufacture and distribution of illicit drugs are unregulated and because the drugs' potency varies, the effects are unpredictable. Therefore, . . . there is no level of use above which people can be presumed impaired or below which they can be presumed unimpaired.

Comried, 693 N.W.2d at 776. In addition this court in *Loder v. Iowa Dep't of Transportation*, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000) asserted,

The lack of any numerical correlation or direct relationship between the amount of marijuana metabolites in a person's system and the impairment of that person's ability to drive does not foreclose the finding that the statute is rationally related to protecting the public. The statute is aimed at keeping drivers who are impaired because of the use of illegal drugs off the highways. Unlike the blood alcohol concentration test used to measure alcohol impairment there is no similar test to measure marijuana impairment. There is, though, as was used here, a test to measure the use of marijuana, a drug illegal in the State of Iowa, in a person's body. There being no reliable indicator of impairment, the legislature could rationally decide that the public is best protected by prohibiting one from driving who has a measurable amount of marijuana metabolites.

(Emphasis added.) Thus, we find here Iowa Code section 321J.2(1)(c) has a reasonable fit with the legislature's purpose of protecting those on the highway from drivers who are impaired by controlled substances. Because there is no reliable test to measure whether or not a person is impaired from the use of illicit drugs, it is reasonable for the legislature to decide a per se ban would best protect the motoring public.

We find Hodges's substantive due process rights were not violated by Iowa Code section 321J.2(1)(c), and thus, his trial counsel did not render ineffective assistance by failing to challenge the constitutionality of this section.

See *Graves*, 668 N.W.2d at 881 (“[T]rial counsel has no duty to raise an issue that has no merit.”).

AFFIRMED.