

IN THE COURT OF APPEALS OF IOWA

No. 1-194 / 10-0777
Filed May 25, 2011

CINDY C. HEBRON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Cindy Hebron appeals from the district court order denying her application
for postconviction relief. **AFFIRMED.**

Alyssa A. Kenville, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, John P. Sarcone, County Attorney, and Jessica Tucker,
Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

EISENHAUER, J.

Cindy Hebron appeals from the district court order denying her application for postconviction relief. She contends her trial counsel was ineffective in failing to adequately investigate her case and in failing to inform her of her right to waive a jury trial. We review her claims de novo. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

On the night of March 4, 2007, Hebron drove her vehicle into the rear end of another vehicle, causing damage. The officer who responded to the collision noticed Hebron's eyes were watery and red or pink in color, her speech was slurred, her breath smelled of the odor of an alcoholic beverage, and she had difficulty with walking and balance. Hebron admitted she had been drinking. The officer requested assistance to investigate whether Hebron was intoxicated.

Officer Boone arrived on the scene to conduct the investigation of Hebron. He noticed her eyes were bloodshot and watery, she mumbled and her speech was slurred, she smelled of the odor of an alcoholic beverage, and she had difficulty with walking and balance. Hebron admitted to Officer Boone she had been drinking. The officer performed field sobriety tests, which Hebron failed. He then administered a preliminary breath test, which registered a reading of .119, above the legal limit of .080. Officer Boone arrested Hebron and transported her to the police station where a breath test was administered. A first test was inconclusive and a second test showed a reading of .120.

At some point, an altercation took place between Hebron and Officer Boone, in which Hebron was injured. The facts are in dispute, although Hebron

claims the officer was hostile to her and assaulted her when she requested to see the test results. Officer Boone testified Hebron became hostile and began to fight the officers when she was informed she failed the test. Officer Boone also testified he properly invoked implied consent and administered the tests according to procedure. After the testing at the Des Moines police station, Hebron was taken to the Polk County Jail where her booking was videotaped.

Hebron's counsel filed a motion to suppress the results of the breath test, arguing the test results were invalid because the mouthpiece was not changed, the results were unreliable, and Officer Boone coerced Hebron into taking the test. The court found the officer did not change the mouthpiece on the machine between the two tests. The court also expressed concerns about Officer Boone's behavior but was unable to find he coerced Hebron. The court denied the motion. Hebron was tried to a jury and was convicted of operating while intoxicated.

Hebron filed an application for postconviction relief. Among other things, she claimed her trial counsel was ineffective in failing to discover a videotape of her booking at the jail—which contradicts Officer Boone's testimony he was not present when she was booked—and pictures of her injuries. She also claimed trial counsel was ineffective in failing to inform her she could waive a jury trial and proceed with a trial to the bench. Following a hearing, the district court denied her application. Hebron appeals.

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted

therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must show counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark*, 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

Additionally, our courts have ruled that trial strategy, miscalculated tactics, mistake or inexperience do not constitute ineffective assistance. *Id.* at 143. We may dispose of the defendant's ineffective assistance claims under either prong. *Id.* In order to prove the prejudice prong, the defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Hebron first claims his counsel was ineffective in failing to adequately investigate her case and secure exculpatory evidence. In particular, she argues her counsel was ineffective in failing to obtain (1) a videotape of her booking that shows Officer Boone was present and (2) photographs of her injuries taken after her release from jail. With regard to this evidence, Hebron's trial counsel testified

he requested any videotapes or photographs from both the police department and the jail, and was informed there was no videotape of Hebron being booked. In a follow-up email, counsel asked about any photographs and was told they would not be released because they were confidential and part of an arrest incident report and personnel complaint. Counsel sought to compel any photographs or video prior to the suppression hearing and then renewed the motion at the suppression hearing. The motion was again raised at the commencement of trial. In lieu of the photographs, the parties stipulated the supplemental police report detailing Hebron's injuries would be entered. The district court found counsel's testimony in regard to these matters credible.

We find Hebron has failed to show counsel breached an essential duty with regard to investigating her case. Although Hebron states counsel "could have done more" to discover the evidence in question, she does not state what steps counsel could have taken. The steps counsel took to discover the evidence were reasonable. Although the actual photographs of Hebron's injuries were not entered at trial, they were accurately described in the police report.

Hebron next contends counsel was ineffective in failing to inform her of her right to waive a jury trial and proceed with a trial to the bench. She claims if the case had been presented to a judge instead of a jury, it would have been possible for counsel to ask the court to take judicial notice of the suppression court's finding the mouthpiece used in the breath test was not changed between the two tests administered rather than re-litigating the issue at trial.

Like the district court, we find counsel should have discussed with Hebron her ability to waive her right to a jury trial. However, even if we assume this failure amounted to breach of an essential duty, Hebron cannot show she was prejudiced. A finding the mouthpiece was not changed on the breath test may have undermined the credibility of the results, but there was ample evidence Hebron was intoxicated even without the breath test results. Both officers who responded to the accident scene made the following observations of Hebron: her eyes were bloodshot and watery, her speech was slurred, she smelled of the odor of alcoholic beverage, and her balance and ability to walk were impaired. In addition, Hebron admitted she had been drinking and she failed the field sobriety tests.

Because Hebron cannot prove both prongs of the ineffective assistance of counsel test, we affirm the denial of her application for postconviction relief.

AFFIRMED.