IN THE COURT OF APPEALS OF IOWA

No. 1-274 / 10-1442
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LELAND BRENT SAUL,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, James B. Malloy, District Associate Judge.

A defendant appeals from his conviction for public intoxication, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Stephen Holmes, County Attorney, and Keisha Cretsinger, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.* Tabor, J., takes no part.

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

HUITINK, S.J.

Leland Saul appeals from his conviction for public intoxication, third offense, in violation of Iowa Code sections 123.46(2) and 123.91 (2009). He claims his trial counsel was ineffective for failing to argue the public intoxication statute was void for vagueness because it did not define the term "intoxication." Because we find section 123.46 is not unconstitutionally vague, Saul's ineffective-assistance-of-counsel claim must fail. We affirm.

I. Background.

On July 4, 2010, Ames police officers responded to a complaint of an intoxicated man, who officers identified as Saul. Saul had bloodshot and watery eyes, slurred speech, poor balance, and an odor of alcoholic beverage emitting from his breath. The officers administered three field sobriety tests, all of which indicated that Saul was intoxicated. Saul was placed under arrest for public intoxication, and during a subsequent search of his person, officers found two grams of marijuana in his front pants pocket. After being transported to the jail, officers found an additional two grams of marijuana in Saul's property. Saul was charged with public intoxication, third offense, in violation of sections 123.46(2) and 123.91 and possession of marijuana in violation of section 124.401(5).

On August 12, 2010, pursuant to a plea agreement, Saul pleaded guilty to the public intoxication charge, and the possession of marijuana charge was dismissed. Saul appeals and asserts his trial counsel was ineffective for failing to argue that section 123.46 was void for vagueness because it does not define the term "intoxication."

II. Ineffective Assistance of Counsel.

Our review is de novo. *State v. Boggs*, 741 N.W.2d 492, 508 (Iowa 2007). Although we generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, we will resolve a claim on direct appeal if the record is adequate to do so. *State v. Johnson*, 784 N.W.2d 192,197 (Iowa 2010); *Boggs*, 741 N.W.2d at 508. We find the record is adequate to address Saul's claim.

In order to succeed on a claim that counsel was ineffective, a defendant must show by a preponderance of the evidence 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); *see also Castro v. State*, ___ N.W.2d ___, ___ (Iowa 2011) ("[I]neffective-assistance-of-counsel claims survive the guilty plea when a postconviction relief applicant can show trial counsel breached a duty in advance of the guilty plea that rendered the plea involuntary or unintelligent."). To prove the first prong, a defendant must show the attorney's performance fell outside the normal range of competency. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To prove the second prong, a defendant must show there is a reasonable probability the result of the proceeding would have been different. *Id.*; *State v. Straw*, 709 N.W.2d 128, 136 (Iowa 2006) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d. 203, 210 (1985))).

A defendant's inability to prove either element is fatal, and therefore, we may resolve the defendant's claim on either prong. *Dudley*, 766 N.W.2d at 620.

Because counsel has no duty to raise a meritless issue, we will first determine whether Saul's underlying void-for-vagueness claim has any validity. *See id.* (explaining that counsel is not required to predict changes in the law—if an issue has merit, we then determine whether reasonably competent counsel have raised the issue). A person challenging the constitutionality of a statute must overcome the presumption the statute is constitutional and prove it is unconstitutional beyond a reasonable doubt by refuting every reasonable basis upon which the statute could be found constitutional. *State v. Baker*, 688 N.W.2d 250, 252-53 (Iowa 2004). At issue in the present case is Iowa Code section 123.46(2), which provides in relevant part: "A person shall not be intoxicated or simulate intoxication in a public place." Saul argues that this statue is unconstitutionally vague because the term "intoxication" is not defined.

A criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Anspach*, 627 N.W.2d 227, 232 (Iowa 2001). However, the "specificity required by the Due Process Clause does not mandate that every statutory term be defined in the statute." *Baker*, 688 N.W.2d at 255. "Due process merely requires that a standard of conduct be reasonably ascertainable by reference to prior judicial decisions, similar statutes, the dictionary, or common generally accepted usage." *Id.*

The dictionary defines "intoxicate" as "to excite or stupefy by alcoholic drinks or a narcotic esp[ecially] to the point where physical and mental control is markedly diminished . . . ." *Webster's Third New International Dictionary* 1185 (unabr. ed. 2002). "Intoxicated" is defined as "being under the marked influence of an intoxicant . . . ." *Id.* "Intoxicated" has also been defined when one or more of the following are true:

> (1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.

Garcia v. Naylor Concrete Co., 650 N.W.2d 87, 90 (Iowa 2002).

Based on the officer's report, Saul "had bloodshot and watery eyes, slurred speech, poor balance[,] and a strong odor of an alcoholic beverage emitting from his breath." All three field sobriety tests completed by Saul indicated he was intoxicated. The plain meaning of intoxicated in Iowa Code section 123.46 clearly applies to Saul's physical state on July 4, 2010. We further find a reasonable person is provided with fair notice of the meaning of the term "intoxicated" through "common generally accepted usage," *Baker*, 688 N.W.2d at 255, and therefore, Iowa's public intoxication statute is not unconstitutionally vague.[1]

Saul's main argument is that other states have decriminalized public intoxication, recognizing the crime as a public health problem rather than a criminal one. This, however, is not an argument to be made to the courts. If public intoxication is to be decriminalized, it must be done by the legislature. *See*

[1] The State argues that Saul lacked standing to argue section 123.46 was facially vague. We need not reach this issue because, regardless, his claim would fail.

State v. Monroe, 236 N.W.2d 24, 36 (Iowa 1975) ("If changes in a law are desirable from a standpoint of policy or mere practicality, it is for the legislature to enact them, not for the court to incorporate them by interpretation.").

We find Saul's trial counsel was not ineffective for failing to raise a meritless issue. Saul's conviction and sentence is affirmed.

AFFIRMED.