IN THE COURT OF APPEALS OF IOWA

No. 2-447 / 11-2056
Filed July 11, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THEODORE BRUCE TINLIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Theodore Tinlin appeals from his conviction for operating while intoxicated. **AFFIRMED.**

Patrick W. O'Bryan of O'Bryan Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, David Porter, Assistant County Attorney, and Calynn M. Walters, Student Legal Intern, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Theodore Tinlin appeals from the district court judgment finding him guilty of operating while under the influence of alcohol, first offense. He first contends the judgment was not supported by sufficient evidence regarding his intoxication. He next contends his counsel was ineffective in failing to ensure an adequate jury-trial waiver. We find sufficient evidence exists to support the conviction and preserve the ineffective-assistance-of-counsel claim for postconviction relief proceedings.

I. Background Facts and Proceedings

On March 11, 2011 at 5:30 p.m., a Pleasant Hill police officer, searching for a reported erratic driver, located a vehicle matching the description at a red light. This vehicle was driven by Theodore Tinlin. The officer observed the vehicle taking a wider-than-normal right-hand turn, pushing another vehicle next to it off into the gravel shoulder. The red vehicle touched the center yellow line three more times before the officer pulled the driver over to the side of the road. Because the officer suspected Tinlin of driving while intoxicated, he called for backup.

Once backup arrived, Tinlin was requested to sit in the back of the second patrol car while the officer ran his information through the system. While seated in the patrol car, Tinlin became increasingly agitated, using profanity and vulgar language with the officer. The officer requested he step out of the car and speak in a civil manner, and Tinlin complied. Once out, the officer requested Tinlin take a field sobriety test or give a breath sample. Tinlin declined, demanding he be taken to jail.

Tinlin pleaded not guilty and waived his right to a jury trial through a written waiver, which was accepted on the record at trial. No in-court colloquy regarding the waiver was made. A bench trial was held on November 8, 2011. Tinlin was convicted of operating while under the influence of alcohol, first offense.

II. Analysis

A. Sufficiency of Evidence

> We review sufficiency-of-evidence challenges for correction of errors at law. The trial court's findings of guilt are binding on appeal if supported by substantial evidence. The evidence is substantial if a rational fact finder could find the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record.

State v. Lane, 743 N.W.2d 178, 181 (Iowa 2007) (citations and quotation marks omitted). Tinlin challenges the sufficiency of the State's evidence of his intoxication. "[A] person is 'under the influence' when the consumption of alcohol affects the person's reasoning or mental ability, impairs a person's judgment, visibly excites a person's emotions, or causes a person to lose control of bodily actions." *State v. Price*, 692 N.W.2d 1, 3 (Iowa 2005) (citations omitted). The district court found Tinlin clearly exhibited poor emotional control, judgment, and reasoning in his choice of language and behavior toward the officers. The court also noted that while Tinlin was not noticeably staggering, he did not appear entirely in control of his body during the stop. Though Tinlin claims he was sleep-deprived, he also admits to consuming alcohol that afternoon. Viewing the

evidence in the light most favorable to the State, we agree with the district court. Substantial evidence supports a finding of guilt beyond a reasonable doubt.

B. In-Court Colloquy

Tinlin next challenges the sufficiency of his jury-trial waiver.[1] Based on the content of his argument and authorities cited, we understand this to be a claim for ineffective assistance of counsel. Whether a jury-trial waiver is adequate is a mixed question of law and fact which we decide de novo. *State v. Feregrino*, 756 N.W.2d 700, 703 (Iowa 2008). We review claims of ineffective assistance of counsel de novo. *Id*.

Iowa Rule of Criminal Procedure 2.17(1) protects a defendant's constitutional right to a jury trial, providing that criminal "[c]ases required to be tried to a jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record." Our state supreme court has held the procedural requirements include a written waiver as well as an in-court colloquy. *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009). This colloquy should assess the defendant's understanding of the difference between jury and nonjury trials. *Id*. at 452 n.4. Failure to conduct such a colloquy will not constitute reversible error unless actual prejudice results. *Id*. at 453; *Ferengrino*, 756 N.W.2d at 705–06.

On the record before us, there is no in-court colloquy. However, Tinlin offers no support for his assertion that actual prejudice resulted from this lack of colloquy. Rather, he argues only that "had this matter been tried to a jury, the

[1] The State contends Tinlin failed to brief the issue in the context of ineffective assistance of counsel. We find the issue was sufficiently raised and address it in the following paragraphs.

result would have been different." Where the present record is insufficient to determine whether actual prejudice resulted from failure to obtain a jury-trial waiver meeting the procedural requirements of the rule, the issue is best left for postconviction relief proceedings. *Ferengrino*, 756 N.W.2d at 708. We therefore preserve Tinlin's ineffective-assistance-of-counsel claim for possible postconviction relief.

AFFIRMED.