

IN THE COURT OF APPEALS OF IOWA

No. 2-502 / 11-1276
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMANDA ST. JUDE SWAIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt,
District Associate Judge.

A defendant appeals from her conviction of operating while intoxicated,
second offense. **AFFIRMED.**

Catherine K. Levine, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John Sarcone, County Attorney, and Brendan E. Griener and James
Hathaway, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Amanda St. Jude Swain appeals from her conviction for operating while intoxicated (OWI), second offense. She contends there is insufficient evidence to show she was under the influence of alcohol at the time of her arrest. She also contends her counsel was ineffective in failing to move to recuse the trial judge or, in the alternative, in failing to seek a withdrawal of her waiver of jury trial.

We conclude ample evidence supports Swain's conviction. Because she is unable to show she was prejudiced by any alleged error by her counsel, we also deny her ineffective-assistance-of-counsel claim.

I. Background Facts and Proceedings.

On the afternoon of November 9, 2010, Jenny Brown was leaving work to pick her children up from daycare when she noticed a vehicle being driven erratically. The vehicle was swerving between lanes and driving at an inconsistent speed. Brown witnessed the vehicle cross over the curb, run over a traffic sign, swerve off of the curb, and come to a stop on the wrong side of the road. Brown called 911 to report her observations and remained at the scene watching the vehicle until Des Moines Police Officer Mike Delaney arrived. She restated her observations to the officer.

When Officer Delaney approached the vehicle, he saw the only occupant was a female driver, who had her head back against the headrest with her eyes closed. The officer tapped on the window and awakened the woman, later identified as Swain. Her eyes appeared watery and her speech was dull. Officer Delaney observed Swain to be sleepy. When asked, she stated she had not had

anything to drink, but Officer Delaney detected the odor of an alcoholic beverage. He believed Swain was impaired.

Des Moines Police Officer Ryan King was called to the scene to perform an OWI investigation. As Swain exited the vehicle, Officer King observed she was having “issues with her balance and the placement of her feet.” He noticed her eyes were bloodshot and watery, and smelled the strong odor of alcoholic beverages coming from her.

Officer King began to perform standardized field sobriety tests with Swain, beginning with the horizontal gaze nystagmus test. Because Swain reported she was legally blind in her left eye, Officer King only performed the test on her right eye. He observed three out of a possible three clues that Swain was intoxicated. Officer King then asked Swain if she would like to move on to the walk-and-turn test, and was informed that Swain had some medical issues that could prevent her from taking the test. Swain also did not take the one-leg-stand test because she stated she had issues with her back and knees.

Swain asked Officer King to let her go home, but believing she was impaired, he refused. At one point, Officer King told Swain he was only trying to determine if she was able to safely drive and Swain replied, “Probably not.” Officer King placed Swain under arrest for suspicion of OWI. Swain was very argumentative and had to be told several times to get into the squad car. While en route to the police department, Swain began to experience anxiety and reported to the officer that it felt like her heart was pounding out of her chest and that she felt nauseated.

At 5:08 p.m., Officer King read Swain the implied consent advisory and offered her a breath test. He allowed Swain to make phone calls to determine whether she should consent to the breath test. Swain informed Officer King that she had a two-hour-limit from the time of the arrest “to sit here and do nothing” before deciding whether to take the test. At one point, she requested a blood test. Officer King informed her that if she wished to have an independent blood test, it could be performed after she provided a breath sample.

Fifteen minutes before the two-hour time period expired, Swain consented to the breath test. Swain stated she was asthmatic and could potentially have difficulty blowing into the machine, although Officer King did not observe her to be having an asthma attack at the time. When the machine indicated Swain was not providing an adequate breath sample, Swain became argumentative and stated she was blowing into the machine. Officer King opined Swain was attempting to make it appear that she was providing a breath sample. After two failed attempts to provide a breath sample, Officer King marked Swain down as refusing the test.

On December 20, 2010, Swain was charged with OWI, second offense. On March 1, 2011, she pleaded guilty to OWI, first offense. She filed a motion in arrest of judgment on March 23, 2011, which the district court granted because the guilty plea had not been reported.

A bench trial was held on August 2, 2011. Swain’s physician testified that she does suffer from asthma. Although he was not familiar with the DataMaster machine the breath sample was requested on, he testified that an asthmatic

would be able to provide a breath sample when his or her asthma was under control. However, when under stress, lung capacity diminishes, which could aggravate asthmatic conditions.

Following the trial, the district court entered its findings of fact and conclusions of law. The court found Swain guilty of OWI, second offense. On August 15, 2011, she was sentenced to two years' imprisonment with all but seven days suspended and two years of probation. Swain was also ordered to attend the OWI second offense program, to complete a substance abuse evaluation, and to comply with treatment recommendations.

II. Sufficiency of the Evidence.

Swain first contends the district court erred in denying her motion for acquittal because the State failed to prove beyond a reasonable doubt that she was under the influence of alcohol at the time of her arrest. We will uphold the denial of a motion for judgment of acquittal if there is substantial evidence to support a defendant's conviction. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa 2001). Substantial evidence is that which would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Id.* We review challenges to the sufficiency of the evidence for the correction of errors at law. *Id.* We give consideration to all of the evidence in the record, not just the evidence that supports the verdict. *Id.* However, we view the evidence in the light most favorable to the State. *Id.*

In order to convict Swain of OWI, the State was required to prove beyond a reasonable doubt that Swain (1) operated a motor vehicle (2) while under the

influence of an alcoholic beverage or other drug or combination of such substances. Iowa Code § 321J.2(1)(a) (2009). 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. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004).

When viewing the evidence in the light most favorable to the State, we find the record establishes substantial evidence by which a fact finder could determine Swain was under the influence at the time of her arrest. Jenny Brown witnessed Swain swerving her vehicle and crossing the center line while driving on the afternoon in question. Concerned about the erratic driving, Brown continued to watch as Swain drove over a curb, ran over a traffic sign, and then crossed the road to stop her vehicle on the opposite side of the street. Although Brown did not know what had caused Swain to drive in such a manner, Officers Delaney and King both witnessed signs of impairment: bloodshot, watery eyes, “dull” speech, issues with balance, and the odor of an alcoholic beverage. Although Officer King was only able to perform one field sobriety test, Swain showed all three clues of intoxication. When Officer King told Swain he was just attempting to determine if she was safe to drive, she replied, “Probably not.”

The district court found Swain’s mental ability had been affected, her judgment was impaired, and she lost control of her bodily actions when she decided “to drive in light of the erratic and dangerous manner in which she was operating her motor vehicle.” The court also found her emotions were visibly

excited several times during her encounter with law enforcement. We find no error. Accordingly, we affirm Swain's conviction for OWI, second offense.

III. Ineffective Assistance of Counsel.

Swain also contends her counsel was ineffective in failing to move for recusal of the judge that presided over her trial or, in the alternative, in failing to seek a withdrawal of her waiver. She argues recusal or withdrawal of her waiver was necessary because the same judge presided over the hearing on her motion in arrest of judgment, wherein her first counsel testified to attorney-client communications.

We review ineffective-assistance-of-counsel claims de novo. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006). Ordinarily, such claims are not decided on direct appeal, but are reserved for postconviction proceedings where the defendant's trial counsel can defend against the charge. *Id.* at 240. We depart from this preference only in cases where the record is adequate to evaluate the appellant's claim. *Id.*

In order to succeed on her ineffective-assistance-of-counsel claim, Swain must prove by a preponderance of evidence that (1) her trial counsel failed to perform an essential duty, and (2) prejudice resulted. *See id.* We need not determine whether trial counsel's performance was deficient before examining the prejudice component. *Id.* Because we can resolve Swain's claim on the question of prejudice, we focus our analysis on that prong. *See id.*

Here, there is overwhelming evidence of Swain's guilt without considering any privileged communications. Swain cannot demonstrate that the outcome of

her trial would have been any different if a different judge had presided over her trial or if her case had been submitted to a jury rather than tried to the bench. Because she is unable to show prejudice, her ineffective-assistance-of-counsel claim fails.

AFFIRMED.