

IN THE COURT OF APPEALS OF IOWA

No. 3-287 / 11-0962
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM MARTIN JOSEPH LOEHR,
Defendant-Appellant.

Appeal from the Iowa District Court for Kossuth County, Donald J. Bormann, District Associate Judge.

Defendant appeals his conviction for operating while intoxicated, first offense. **AFFIRMED.**

Christopher A. Cooklin of Cooklin Law Office, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Todd Holmes, County Attorney, and Stephanie Nielsen, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., Tabor, J., and Mahan, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.**I. Background Facts& Proceedings.**

In the early morning hours of June 29, 2009, a police officer in Algona, Iowa, noticed a vehicle that did not have a front license plate. The officer followed the vehicle and saw it fail to stop at a red light before making a right-hand turn. The vehicle, which was driven by William Loehr, stopped in a parking lot, and the officer pulled in beside it.

The officer noticed Loehr had a moderate odor of alcoholic beverage, bloodshot eyes, and slurred speech. The officer administered the horizontal gaze nystagmus test, and Loehr scored five out of six clues, which indicated impairment.¹

Loehr was arrested and taken to the Kossuth County Jail. The officer observed Loehr for fifteen minutes to make sure he did not drink, eat, or smoke before a breath test. The test showed Loehr had a blood alcohol level of .171. Loehr was charged with operating while intoxicated (OWI), first offense, in violation of Iowa Code section 321J.2 (2009).

At the jury trial, Loehr testified that in a suicide attempt several years earlier he drank muriatic acid, which had damaged his esophagus and caused problems with regurgitation. He stated he had regurgitated into his mouth before the breath test and believed this had affected the results of the test. Loehr also presented a deposition of Dr. Kenneth Adams, who had treated him for damage to his esophagus.

¹ The officer did not administer other field sobriety tests because of problems with Loehr's legs.

The jury returned a verdict finding Loehr guilty of OWI. The court sentenced him to thirty days in jail, with all but twenty-eight days suspended and ordered him to pay a fine. Loehr appeals his conviction, claiming he received ineffective assistance of counsel.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). “In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy.” *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, a defendant must show that, but for counsel’s breach of duty, the result of the proceeding would have been different. *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011).

III. Ineffective Assistance.

During the trial, the officer testified that after he obtained Loehr’s driver’s license he ran it through the computer. The following exchange then occurred:

Q. And what did you determine with that check? A. I determined two things. One, that it was a valid driver’s license, and, two, that the computer system listed the driver as having an arrest warrant.

Q. Did you advise the defendant that he had an arrest warrant? A. Yes, I did.

Q. And what was his response? A. He told me that he had been making payments for some time to that county, and actually knew it was a newly issued warrant, it wasn’t an old issue. And he did not seem to be concerned about having an arrest warrant out for him.

Q. Did that surprise you? A. Absolutely.

Loehr contends he received ineffective assistance because defense counsel did not object to the officer's testimony about the arrest warrant on the ground it was inadmissible as evidence of prior bad acts under Iowa Rule of Evidence 5.404(b). He claims if the jury had not heard he was a person who had an outstanding arrest warrant they would have been more likely to believe his testimony that the breath test result was affected by regurgitation, and the result of the proceeding would have been different.

We bypass the issue of whether defense counsel breached an essential duty by failing to object to the testimony about the outstanding arrest warrant against defendant, and instead focus on the issue of whether Loehr has shown he was prejudiced by counsel's performance. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

After examining the record, we conclude Loehr has not shown that even if defense counsel had objected to the evidence about the arrest warrant the result of the proceeding would have been different. The record contains abundant evidence that Loehr was operating a motor vehicle while intoxicated.

The vehicle he was driving did not have a front license plate. The evidence further showed Loehr made a right-hand turn at a red light without stopping. The officer noticed he had an odor of alcoholic beverage, bloodshot eyes, and slurred speech. On the horizontal gaze nystagmus test, Loehr showed five out of six clues, which indicates impairment. Loehr admitted he had been drinking. He told the officer that he hoped his body weight would offset the

amount of alcohol he had drunk so that he would pass the test. Additionally, when the officer asked Loehr if he lived at a certain address, Loehr agreed, even though that was not his actual address. Also, Loehr told the officer, "I can't believe I committed suicide over a lousy box of ice cream."²

Furthermore, Loehr's breath test showed an alcohol level of .171, more than twice the legal limit. The jury may well have disregarded Loehr's theory that the results of the test had been skewed because he had regurgitated alcohol back up into his mouth shortly before the breath test. First, the officer observed Loehr for fifteen minutes before the test and did not observe him regurgitating. Second, James Bleskacek, a criminalist with the Iowa Division of Criminal Investigation, testified that mouth alcohol is at a different concentration than alcohol in the lungs. He stated that the DataMaster used for the breath test in this case analyzed the complete breath sample, and if the alcohol concentration blown through the mouth was at a different concentration than that at the end of the sample from the lungs, the machine would recognize that difference and flag it as an invalid sample. Third, Bleskacek testified that it was not possible for a person to have enough mouth alcohol to register .171 on the breath test and yet actually be below the legal limit of .08.

Taking all of these factors into consideration, we conclude Loehr has not shown he was prejudiced by counsel's performance such that he received ineffective assistance of counsel. We affirm his conviction for OWI.

AFFIRMED.

² The State argues this statement shows Loehr recognized he had consumed alcohol to excess. Loehr had testified his wife was pregnant and he had gone out at about 1:00 a.m. to buy her some ice cream.