IN THE COURT OF APPEALS OF IOWA

No. 6-065 / 05-0200
Filed May 10, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH ALAN ORVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan, District Associate Judge.

Keith Orvis appeals from his conviction for operating while intoxicated, third offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Charity McDowell, Assistant County Attorney, for appellee-State.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

VOGEL, J.

Keith Orvis appeals from his conviction for operating while intoxicated, third offense. We affirm.

Background Facts and Proceedings.

On August 30, 2003, Keith Orvis was operating a motorcycle that crashed into the side of a semi tractor-trailer in Waterloo. Sherry Spooner, passenger on the motorcycle, was thrown from the motorcycle and suffered a serious head injury. After Orvis was transported to a hospital, a blood sample was taken that revealed a blood alcohol level of .14. At his subsequent trial, Orvis maintained that, while officers and others attended to Spooner at the accident scene, he sat on the curb and drank at least one-half pint of vodka. He testified that he kept a small bottle of vodka, attached with bungee cords to the fender of his motorcycle, in case he needed to medicate himself following just such an accident. Orvis claimed he had not consumed any alcohol until after the accident, which then caused his blood alcohol level to exceed the legal limit.

On appeal from his conviction for third-offense operating while intoxicated (OWI), in violation of Iowa Code section 321J.2 (2003), Orvis argues he received ineffective assistance by virtue of his trial counsel's failure to (1) make a more specific motion for judgment of acquittal and (2) introduce into evidence a photo which purportedly showed where on the motorcycle the vodka bottle had been stored. He further claims the court erred in admitting evidence of his uncounseled guilty plea in 1992 to OWI.

Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *State v. Philo,* 697 N.W.2d 481, 485 (Iowa 2005). To prevail, Orvis must show that his trial counsel failed to perform an essential duty and that prejudice resulted from this failure. *State v. McCoy,* 692 N.W.2d 6, 14 (Iowa 2005). We prefer to preserve ineffective assistance of counsel claims for possible postconviction relief proceedings but will consider them in a direct appeal if the record is adequate. *State v. Casady,* 597 N.W.2d 801, 807 (Iowa 1999). We find the record sufficient to address the first claim, but believe a further development of the record is necessary on the claim regarding the introduction of the photograph,[1] and therefore preserve it for a possible postconviction relief application.

In his motion for judgment of acquittal, counsel argued generally that "the State has [not] brought adequate evidence to support a conviction." He now asserts counsel should have specifically argued the evidence was insufficient to establish that he did not become intoxicated solely due to his post-accident consumption of alcohol. While the defense motion was vague, the ruling issued by the district court was specific. Therefore, Orvis suffered no prejudice for his counsel's less-than-specific motion. *State v. Williams,* 695 N.W.2d 23, 27 (Iowa 2005) (noting prejudice is shown where "it is reasonably probable that the result of the proceeding would have been different."). Furthermore, upon our de novo review of the record, we find that substantial evidence supports the jury's verdict.

[1] While the photograph depicting where Orvis allegedly kept the bottle on his motorcycle may have been cumulative of his testimony, the jury did ask to see the photograph. The request was denied as the photograph had not been offered and admitted into evidence.

We begin from the premise that when the evidence is in conflict, the fact finder may resolve those conflicts in accordance with its own views as to the credibility of the witnesses. *State v. Allen,* 348 N.W.2d 243, 247 (Iowa 1984). Further, we recognize that the jury was free to reject certain evidence, and credit other evidence. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). When first approached by a civilian witness, Orvis was lying in the street and denied that he had been driving the motorcycle. The witness stayed with Orvis for fifteen to twenty minutes. When the police officers arrived, Orvis continued to deny that he had been driving. He eventually got up, walked around for a bit and then sat down on the curb. From the many witnesses who testified, it does not appear that Orvis was sitting alone for any length of time, if at all. At least five neutral observers testified they did not see Orvis consume anything following the accident, and none saw a bottle at the scene. Only one defense witness, Sheri Frost, claimed to have seen Orvis take one drink from what could have been a liquor bottle. When the accident scene was later cleaned up, no bottle was found. Moreover, at the time when Frost claimed to have seen Orvis take one drink, she testified that several other people were standing around Orvis, none of which testified to seeing Orvis taking a drink. Based on the eyewitness accounts, this appears to have been an avoidable accident, one likely caused by an impaired driver who simply ran straight into the truck without even attempting an evasive maneuver. A jury reasonably could have concluded that Orvis had been intoxicated prior to the accident, and that any alleged post-accident alcohol consumption either did not occur or that it did not substantially affect his blood-

alcohol content. Accordingly, because a more detailed motion for judgment of acquittal would not have been successful in light of the substantial evidence supporting the verdict, we find no prejudice to Orvis.

Uncounseled Guilty Plea.

Lastly, Orvis claims that his uncounseled 1992 guilty plea to OWI, for which there was an allegedly invalid waiver of counsel, was improperly considered in elevating his crime to third-offense OWI.[2] We review this claim for correction of errors at law. *State v. Tovar,* 656 N.W.2d 112, 114 (Iowa 2003), *rev'd on other grounds by Iowa v. Tovar,* 541 U.S. 77, 94, 124 S. Ct. 1379, 1390, 158 L. Ed. 2d 209, 224 (2004).

Regarding his 1992 OWI guilty plea, no transcript was available for the court's review in the current case. Moreover, while Orvis now maintains there was a near wholesale failure to inform him of any rights during the 1992 plea proceedings, the available record does show that he did apply for court-appointed counsel,[3] thus indicating he was in fact aware of his right to counsel. Following the hearing in which this issue was raised, the court found Orvis's claims to be "suspect," and thus less than credible.

In a collateral attack on an uncounseled conviction, it is the defendant's burden to prove he did not competently and intelligently waive his right to the assistance of counsel. *Tovar,* 541 U.S. at 92, 124 S. Ct. at 1390, 158 L. Ed. 2d at 223; *Watts v. State,* 257 N.W.2d 70, 71 (Iowa 1977). The actions of a trial

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[2] We note a court may use a prior uncounseled misdemeanor conviction for enhancement purposes, if the prior did not result in incarceration. *See State v. Allen,* 690 N.W.2d 684, 687 (Iowa 2005).

[3] This request was denied due to Ovris's income level.

court are cloaked with a strong presumption in their favor. *State v. Pappas,* 337 N.W.2d 490, 494 (Iowa 1983). To overcome the presumption of regularity requires an affirmative showing of abuse, and the burden of so showing rests upon the party complaining. *State v. Stanley*, 344 N.W.2d 564, 568 (Iowa Ct. App. 1983). Considering these principles in conjunction with the district court's credibility findings, we affirm the court's conclusion that Orvis failed to prove that he did not knowingly, intelligently, and voluntarily waive his right to counsel during the 1992 OWI case.

AFFIRMED.