

IN THE COURT OF APPEALS OF IOWA

No. 6-820 / 05-1689
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY LANE MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, Steven J. Oeth,
District Associate Judge.

Defendant appeals from his judgment and sentence for operating while
intoxicated. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis Hendrickson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Guddall, Assistant Attorney
General, Jim P. Robbins, County Attorney, and Courtney E. Spellman, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Timothy Lane Miller appeals his judgment and sentence for operating while intoxicated. Miller asserts his counsel was ineffective for failing to request Iowa Criminal Jury Instruction 200.37 regarding expert witnesses. We find no merit to this appeal.

On April 30, 2005, employees of the Git-N-Go store contacted police with a concern that Miller was intoxicated and was operating a vehicle. Officer Paul Parizek investigated the complaint and encountered Miller's vehicle traveling west. Officer Parizek observed Miller's vehicle cross the center line. Parizek activated his police car's overhead lights, but Miller did not respond. Parizek then observed Miller's vehicle on the wrong side of the road and he nearly hit a tree. Miller again did not respond to Parizek activating his horn or siren. Once Miller stopped his vehicle in his driveway, Parizek observed Miller exit the vehicle. Miller was stumbling, staggering and swaying, he smelled of an alcoholic beverage, his eyes were red and watery, and his speech was mumbled and slurred. Miller failed the field sobriety tests. Parizek concluded Miller was intoxicated and arrested him for operating while intoxicated. A breath test revealed Miller's blood alcohol content (BAC) to be .240, well above the legal limit of .08.

We review an allegation of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). An ineffective

assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Although ineffective assistance of counsel claims are typically reserved for postconviction proceedings, we will resolve these claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We find this record adequate.

Miller claims his counsel was ineffective for not requesting Iowa Criminal Jury Instruction 200.37, instructing the jury to consider expert testimony just like any other testimony. At trial, a DCI criminalist testified concerning the DataMaster test and intoxication. He opined that a person who has trouble walking and speaking, smells like an alcoholic beverage, has bloodshot and watery eyes, and registers a .240 BAC on the DataMaster test would be impaired. Miller's complaint goes to this testimony, as he argues this testimony should not receive "special regard." However, Miller did not dispute that he was intoxicated at the time Parizek approached him and when he took the breath test. In fact, Miller testified that from the time he "hit" his driveway to the time he reached his door, he "downed a pint of whiskey . . . so [he] could hopefully get . . . drunk enough to where [he] could get some sleep that night or that afternoon." And, he admitted the affects of the alcohol "didn't take long." Therefore, given his theory of defense, he fails to show how counsel's failure to request instruction 200.37 establishes any prejudice. Moreover, there was overwhelming evidence without the criminalist's testimony from which the jury could have found Miller guilty of operating while intoxicated.

AFFIRMED.