IN THE COURT OF APPEALS OF IOWA

No. 8-446 / 07-1444
Filed July 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACLYN ROZ KELLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

Jaclyn Keller appeals her conviction for operating while intoxicated, contending the district court erred in denying her motion to suppress and that her trial counsel was ineffective. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Jason B. Shaw, Assistant State Appellate Defender, for appellee.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel Rothman, Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, J.

Jaclyn Keller appeals her conviction, following trial to the court on a stipulated record, for operating while intoxicated (OWI), first offense. She contends the district court erred in denying her motion to suppress evidence and that her trial counsel was ineffective for failing to assure her waiver of jury trial was knowing, voluntary, and intelligent. We affirm in part, reverse in part, and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. On March 25, 2007, at approximately 12:20 a.m. to 12:25 a.m., West Des Moines police officer Brent Kock stopped a vehicle operated by Keller for speeding. Officer Kock approached the car and asked Keller for her driver's license, registration, and proof of insurance. Kock watched Keller remove what appeared to be a driver's license from her wallet and quickly place it on the floor between her seat and door. She then handed the wallet to Kock. Keller ignored Officer Kock's request to hand him the license she had placed on the floor, so he had her step out of the car and he retrieved the license. That license belonged to a person other than Keller. She could not explain why she had the second license in her possession.

When questioned by Kock about where she and her passenger were coming from, Keller gave varying accounts. Initially she stated they were coming from Des Moines, but then changed her story and said Urbandale, then Clive, and then Sun Prairie apartments. Officer Kock smelled the odor of alcoholic beverage coming from Keller when she spoke. Kock asked Keller how much she

had to drink but could not understand her response because it was "mush mouthed." Eventually the passenger told Kock they were coming from Motel 6 on Jordan Creek Parkway and that they both had been drinking in one of the rooms there. Keller told Kock she was "really sorry" and "I really can't get in trouble for this." Officer Kock performed field sobriety tests on Keller and requested a preliminary breath test. She failed the field sobriety tests and refused the breath test. Keller was placed under arrest at 12:48 a.m.

At the police station, at approximately 1:14 a.m., Officer Kock read Keller the implied consent advisory and asked if she wanted to make any phone calls. Keller initially declined to make any phone calls, but changed her mind several minutes later, called her parents at 1:30 a.m., and spoke with someone on the phone at that time. When she finished with that call Keller told Kock she did not want to make any more calls, but asked if she could have more time to think about whether to provide a breath sample. At 1:55 a.m. Officer Kock informed Keller she could have another fifteen minutes to think about it, but she would have to decide by 2:10 a.m. whether to submit to the test because it would then be coming up on the two-hour deadline within which to take the test. Keller acknowledged this and Kock began the process of booking Keller.

At 2:10 a.m., as Keller and Kock were on their way toward the Datamaster machine on which the breath test is administered, Keller asked to call her parents again. Officer Kock denied her request, stating she had the last fifteen minutes in which she could have made a call and did not, but now it was within fifteen minutes of the allotted time frame to conduct the test and he needed a decision.

After brief discussion of licensing sanctions for refusing a test, Keller consented to the Datamaster breath test. The test, taken shortly before the two-hour deadline, indicated her alcohol concentration was .185.

The State charged Keller, by trial information, with OWI, first offense, in violation of Iowa Code section 321J.2 (2007). She filed a motion to suppress evidence, contending Officer Kock's denial of her request to make a second phone call prior to her breath test was in violation of Iowa Code section 804.20. Following hearing, the district court denied Keller's motion to suppress. The court found Keller had a reasonable opportunity for the better part of at least forty minutes, from approximately 1:30 a.m. to 2:10 a.m., to make any phone calls she wanted. Thus, the court concluded

> The denial of the phone call at that time in this case, after Ms. Keller had made one phone call and she had at least 40 minutes to make any other phone calls she wanted, was not a violation of Iowa Code section 804.20.

Keller subsequently filed a written waiver of jury trial and stipulation to a trial on the minutes of evidence. The case was tried to the district court on the stipulated record, the court found Keller guilty as charged, and on July 10, 2007, the court sentenced Keller to a largely suspended jail sentence and a fine.

On appeal Keller contends the district court erred in denying her motion to suppress evidence. More specifically, she contends she was distracted by the booking process going on during the last fifteen minutes she was given to make any additional calls and thus was denied her right under section 804.20 to make a reasonable number of calls. She also claims her trial counsel was ineffective for failing to assure her waiver of jury trial was knowing, voluntary, and intelligent.

II. MERITS.

A. Motion to Suppress.

This issue involves the court's findings of fact and its application of a statute to the facts. The findings of fact underlying the district court's ruling on a motion to suppress which does not involve constitutional issues are binding on appeal if supported by substantial evidence. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990); *see also State v. Turner*, 630 N.W.2d 601, 606 n. 2 (Iowa 2001) (distinguishing the standard by which we review trial court's findings of fact in rulings on motions to suppress involving constitutional issues (deference to the trial court's findings) from the standard by which we review findings in rulings on motions to suppress not involving constitutional issues (binding if supported by substantial evidence)). Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Frake*, 450 N.W.2d at 818. We review issues of statutory interpretation and application for errors at law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000).

Section 804.20 provides, in relevant part:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney.

This section "is to be applied in a pragmatic manner, balancing the rights of the arrestee and the goals of the chemical-testing statutes." *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005). Police have no duty to advise an arrestee of this

right. *State v. Meissner*, 315 N.W.2d 738, 740 (Iowa 1982). Under this provision a person has a limited statutory right to counsel before being required to take or refuse a chemical test. *State v. Vietor*, 261 N.W.2d 828, 831-32 (Iowa 1978). However, the statute does not provide an absolute right to counsel. *Bromeland v. Iowa Dep't of Transp*., 562 N.W.2d 624, 626 (Iowa 1997). Section 804.20 only requires a peace officer to provide the arrestee with a reasonable opportunity to contact a family member or attorney. *See, e.g., id*. (holding statute requires peace officer to provide a reasonable opportunity to contact an attorney). A peace officer reasonably invoked implied consent when the defendant tried unsuccessfully to contact his attorney of choice and declined the opportunity to call another attorney. *Id.* Furthermore, the "two-hour period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing." *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa Ct. App. 1991).

Here, Officer Kock informed Keller of her right to call a family member or attorney, even though he was not required to do so. Keller initially declined to call anyone but then changed her mind and did call, and apparently spoke to, her parents at approximately 1:30 a.m. When she hung up from that call she stated she did not want to make any more calls but asked for additional time to think about whether to take the breath test. At 1:55 a.m. Kock took Keller to begin booking procedures. At that time he informed her she could have another fifteen minutes to decide about the test but at 2:10 a.m. she would need to give him a decision because of the two-hour deadline he was working under. Keller

acknowledged she understood this and did not request to make any additional phone calls until 2:10 a.m. while being escorted to the Datamaster for a breath test.

We agree with the district court that it would have been better if Keller had been allowed to make one more phone call at 2:10 a.m., and it would have been better if she had not been undergoing booking procedures between 1:55 a.m. and 2:10 a.m. However, Keller in fact had a full forty minutes, from approximately 1:30 a.m. to 2:10 a.m., to request to make any additional calls, and failed to do so. We conclude Keller was allowed more than a reasonable opportunity to make any desired calls. Furthermore, it was reasonable for Officer Kock to be concerned, as he was, with allowing reasonable time to make sure the Datamaster was working and Keller provided an adequate sample before the statutory two-hour deadline. We, like the district court, conclude that the denial of the phone call, after Keller had made one phone call and had at least forty minutes to make any other calls she desired, did not deny Keller a reasonable opportunity to make a reasonable number of telephone calls. Officer Kock did not violate Keller's section 804.20 rights.

B. Ineffective Assistance of Counsel.

Keller next contends her trial counsel was ineffective for failing to assure that her waiver of jury trial was knowing, voluntary, and intelligent, in accordance with the procedures for such waiver required under Iowa Rule of Criminal procedure 2.17(1). Claims that raise constitutional questions, such as the

alleged ineffective assistance of counsel, are reviewed de novo. *State v. Watson*, 620 N.W.2d 233, 235 (Iowa 2000).

To establish an ineffective assistance claim, a defendant must typically show that (1) his counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). However, when the alleged failure of duty is a failure to assure compliance with rule 2.17(1), upon a demonstrated inadequacy of counsel's performance, prejudice is presumed. *State v. Stallings*, 658 N.W.2d 106, 112 (Iowa 2003) ("Because the right to a jury trial is so fundamental to our justice system, we conclude this is one of those rare cases of a 'structural' defect in which prejudice is presumed.").

A trial by jury is required unless the defendant "voluntarily and intelligently waives a jury trial in writing and on the record. . . ." Iowa R. Crim. P. 2.17(1). Rule 2.17(1) "requires the court to conduct an in-court colloquy with defendants who wish to waive their jury trial rights." *State v. Liddell*, 672 N.W.2d 805, 811-12 (Iowa 2003). The court in *Liddell* found that the "on the record" language from rule 2.17(1) requires some in-court colloquy or personal contact between the court and the defendant, to ensure the defendant's waiver is knowing, voluntary, and intelligent. *Id*. at 812.

Our supreme court has suggested a five-part inquiry that "constitute[s] a sound method by which a court in an in-court colloquy may determine whether a defendant's waiver of [her] right to a jury trial is knowing, voluntary, and intelligent." *Id.* at 811.

> [T]he court should inquire into the defendant's understanding of the difference between jury and nonjury trials by informing the defendant:
>
> 1. Twelve members of the community compose a jury,
> 2. the defendant may take part in jury selection,
> 3. jury verdicts must be unanimous, and
> 4. the court alone decides guilt or innocence if the defendant waives a jury trial.
>
> Importantly, ... we also urge[ ] judges to "ascertain whether [the] defendant is under [the] erroneous impression that he or she will be rewarded, by either court or prosecution, for waiving [a] jury trial."

Id. at 810-11 (quoting *Stallings*, 658 N.W.2d at 111) (third through fifth alterations in original). However, the court clarified that these "five subjects of inquiry are not 'black-letter rules' nor a 'checklist' by which all jury-trial waivers must be strictly judged. . . . The ultimate inquiry remains the same: whether the defendant's waiver is knowing, voluntary, and intelligent." *Id*. at 814. Thus, substantial compliance with the five-factor inquiry is acceptable. *Id*. Sufficient compliance with rule 2.17(1), and the voluntary and intelligent nature of the defendant's waiver, must appear in the present record. *See Stallings*, 658 N.W.2d at 111 (holding that "posttrial reconstruction of the record will not suffice to show a valid waiver").

On July 10, 2007, Keller filed a written waiver of jury trial and stipulation to a trial on the minutes of evidence. None of the aforementioned areas of inquiry suggested in *Liddell* and *Stallings* were included in her written waiver. More importantly, there is no record of any personal, in-court colloquy between Keller and the district court as would allow the court to ensure her waiver was knowing, voluntary, and intelligent as required by *Stallings* and *Liddell*. The only related

item that appears in the record is an after-the-fact "certification" of Keller's appellate counsel, dated September 4, 2007, stating that a court reporter has indicated that any "waiver of jury trial, stipulation to the minutes and sentencing proceedings were not reported." Because we have no record of any in-court colloquy we have no way of knowing that a proper colloquy in fact occurred. On the contrary, what the record does not demonstrate we must assume did not occur.

Accordingly, we conclude the record does not demonstrate a voluntary and intelligent waiver of jury trial by Keller. Thus, counsel failed to ensure substantial compliance with the requirements of rule 2.17(1) and breached an essential duty. Prejudice is presumed. *Stallings*, 658 N.W.2d at 112.[1]

The State suggests that due to the lack of a reported colloquy, we should preserve the claim of ineffective assistance of counsel for a postconviction proceeding in which it could be determined whether the trial court in fact engaged in an in-court colloquy with Keller regarding her waiver of the right to jury trial.

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[1] The State makes several arguments as to why *Stallings* should be overruled or limited, insofar as it holds that defense counsel's failure of duty in connection with defendant's waiver of a jury trial is presumptively prejudicial. We note in particular its argument that pursuant to Iowa Rule of Criminal Procedure 2.8(2)(*b*)(5), without any in-court colloquy a defendant charged with a serious or aggravated misdemeanor may enter a written plea of guilty, waiving not only a right to jury trial but also numerous other constitutional rights, and pursuant to *Hill v. Lockhart*, 474 U.S. 52, 57-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985) and *State v. Straw*, 709 N.W.2d 128, 137-38 (Iowa 2006) prejudice is not presumed if the defendant subsequently claims the guilty plea resulted from ineffective assistance of counsel. Although this argument, and perhaps others of the State's several arguments, may well have merit, this court must decline the invitation to overrule *Stallings*, heeding an earlier admonition of our supreme court. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). In so declining we do note that *Liddell*, which reaffirmed and expanded the holding of *Stallings* to require an in-court colloquy, itself involved an aggravated misdemeanor, credit card fraud. *See Liddell*, 672 N.W.2d at 808.

However, our supreme court has stated that posttrial reconstruction of the record will not suffice to show a valid waiver. *Stallings*, 658 N.W.2d at 111 (citing *United States v. Saadya*, 750 F.2d 1419, 1422 (9th Cir.1985) ("A defendant's waiver of his right to jury trial must appear on the record prior to the time the trial commences. The absence of a waiver on the record of the right to trial by jury cannot be remedied by subsequent proceedings on remand.")). We believe the request here to preserve this issue for postconviction proceedings is analogous to the requested limited remand for additional findings that was disapproved of in *Stallings*, where the court quoted with approval the following from *Saadya*, 750 F. 2d at 1422 n.3:

> "In [a previous case involving waiver of right to counsel] we said that the limited remand procedure is appropriate only in the exceptional case where other records are in existence which might establish that the waiver was valid. . . . Here, there is no suggestion that additional relevant records exist. More important, we are not concerned . . . with the limited question whether a waiver appearing on the record was knowing and intelligent. Here, there was no waiver on the record at all."

Stallings, 658 N.W.2d at 111. Accordingly, because a proper waiver of jury trial must appear on the present record and posttrial reconstruction of the record will not suffice to show a valid waiver, we conclude that preservation of this issue for a possible postconviction proceeding is inappropriate.

III. CONCLUSION.

For the reasons set forth above, we conclude the district court did not err in denying Keller's motion to suppress. We agree with the court that Keller was afforded a reasonable opportunity to make the phone calls she wanted in compliance with section 804.20 and thus Officer Kock did not violate her rights

under this Code provision. We further conclude Keller's counsel rendered ineffective assistance by not ensuring that her waiver of jury trial was a voluntary and intelligent waiver in accordance with rule 2.17(1). We therefore must reverse Keller's conviction and remand for trial to a jury unless Keller voluntarily and intelligently waives her right to a trial by jury. *See id.* at 112.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.