IN THE COURT OF APPEALS OF IOWA

No. 8-984 / 08-0500
Filed February 4, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHASE BRENTON SLATER,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull, Judge.

Chase Brenton Slater appeals his conviction for operating while intoxicated, first offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Chase Brenton Slater appeals following conviction and sentence for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2007). He contends the district court erred in failing to suppress evidence obtained as a result of an arrest in violation of Iowa Code section 804.9(1). Slater further asserts his trial counsel was ineffective in failing to assure that Slater's jury-trial waiver was knowing, voluntary, and intelligent. We affirm.

I. Background Facts and Proceedings.

On August 17, 2007, at approximately 1:55 a.m., Le Mars police officer Bob Bendlin observed Slater walking on the right-hand side of a gravel road just outside the city limits of Le Mars.[1] Officer Bendlin pulled up next to Slater and spoke to him through the window of his squad car. Slater informed Officer Bendlin that his car was in the ditch a short distance away and that he had been a passenger in the car when someone had driven it into the ditch. However, Slater would not say who was driving his car or where that person was. Officer Bendlin did not notice anyone else in the area. As Slater spoke, Officer Bendlin noted that his eyes were bloodshot and watery and he appeared intoxicated. He also noticed Slater had a "slight slurriness" to his speech.

Concerned there might be other injured people who had been in Slater's car and that an accident report would need to be filed, Officer Bendlin asked Slater to have a seat in the squad car so they could drive the short distance to Slater's car. As they rode to where Slater's car was in the ditch, Officer Bendlin

[1] Officer Bendlin was searching the area for a missing youth who had fled from a local hospital. The youth's parents lived just outside Le Mars, and Officer Bendlin was en route from the hospital to the parents' home.

observed that the previous indications of Slater's intoxication were "even more pronounced" within the confines of the squad car. As Officer Bendlin investigated Slater's car, he noticed a smell of a warm engine or spinning tires, felt that the hood was still warm, and concluded the car had not been in the ditch long. Slater explained that just before Officer Bendlin had arrived, Slater had attempted to get his car out of the ditch but the tires had just spun.

Because Officer Bendlin's shift was just ending and Slater's car was outside of city limits, he contacted Plymouth County deputy sheriff Paul Betsworth to continue the investigation. As Deputy Betsworth questioned Slater about what had happened, he noticed a strong odor of alcoholic beverages and saw that Slater's eyes were bloodshot and glassy.[2] Slater said he had consumed two drinks, but had not had anything to drink since his car went in the ditch. Believing Slater may be under the influence, Deputy Bentsworth asked Slater to perform a horizontal gaze nystagmus test. Slater agreed and the test indicated he was intoxicated. Deputy Bentsworth transported Slater to the Plymouth County law enforcement center to conduct further testing. Slater failed sobriety tests, and his breath test indicated an alcohol concentration of .158.

On September 5, 2007, the State charged Slater by trial information with operating while intoxicated, first offense. On September 24, 2007, Slater moved to suppress all evidence obtained by police on the date of his arrest, arguing the evidence was product of an "unlawful extra-territorial arrest" because Officer

[2] As he had told Officer Bendlin, Slater informed Deputy Bentsworth a friend had driven his car into the ditch, but he would not tell Deputy Bentsworth who had driven the car or where that person was. Slater also said he had tried to drive the car out of the ditch, but it was stuck.

Bendlin arrested Slater in his official capacity outside of his jurisdiction. The court denied the motion on November 7, 2007. On November 21, 2007, Slater filed a written waiver of jury trial and on January 10, 2008, his case was tried to the bench.[3] The court found him guilty of operating while intoxicated, first offense. He was sentenced to thirty days in jail, with all but two days suspended, probation, and a $1250 fine, plus related surcharges and court costs. Slater now appeals.

II. Scope and Standard of Review.

Slater's claim of unlawful arrest is based upon Iowa statutes. Where an issue presents a question of statutory interpretation, our review is for correction of errors at law. *State v. Garcia*, 756 N.W.2d 216, 219 (Iowa 2008). We will uphold the district court's ruling on a motion to suppress if the court properly applied the law and there is substantial evidence to support its finding of fact. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). Evidence is substantial when a reasonable mind would recognize it sufficient to reach the same findings. *Id*.

The adequacy of a jury-trial waiver is a mixed question of law and fact, which we decide de novo. *State v. Feregrino*, 756 N.W.2d 700, 703 (Iowa 2008). We also conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Unless the record on direct appeal is adequate to address these issues, a claim of ineffective assistance of

[3] A brief in-court colloquy regarding Slater's jury-trial waiver took place on the day of the bench trial.

counsel is generally preserved for postconviction proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

III. Merits.

A. Motion to Suppress.

Slater contends the district court erred in failing to suppress evidence obtained as a result of an unlawful extra-territorial arrest. Slater claims that pursuant to Iowa Code section 804.9(1) Officer Bendlin could have only arrested Slater for "a public offense committed or attempted in [his] presence" because Officer Bendlin was acting as a private person when he spotted Slater outside of Le Mars city limits. We need not resolve the question, however, because Slater has not preserved the issue for our review. This issue was not raised or determined by the district court. "We may not consider an issue that is raised for the first time on appeal, even if it is of constitutional dimension." *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal. *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000).

Although Slater did argue in his motion to suppress that the arrest was unlawful because Officer Bendlin was outside his jurisdiction, the district court, in ruling on the motion and conviction, did not address this issue. When the court fails to rule on an issue properly raised, the party raising the issue must file a motion asking the court for a ruling in order to preserve the issue for appeal. *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995); *see*

Iowa R. Civ. P. 1.904(2). Because Slater did not request a ruling from the court on the jurisdiction question, that issue is not properly before us for decision.

B. Ineffective Assistance of Counsel.

The right to a jury trial is a fundamental constitutional right. *Feregrino*, 756 N.W.2d at 705. Slater argues the court failed to engage in an adequate colloquy to ensure that Slater's jury waiver was knowing, voluntary, and intelligent, and his trial counsel was ineffective in failing to challenge the colloquy. To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Maxwell*, 743 N.W.2d at 195. The State concedes that the colloquy was inadequate and that counsel failed to perform an essential duty. Therefore, the only issue before us is whether prejudice resulted to the extent it denied Slater a fair trial. A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See Bearse*, 748 N.W.2d at 214; *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001).

In support of his argument, Slater relies on *State v. Stallings*, 658 N.W.2d 106, 112 (Iowa 2003), in which our supreme court ruled that trial counsel's failure to assure compliance with both the written and oral waivers of the right to trial by

jury required by Iowa Rule of Criminal Procedure 2.17(1) constituted a breach of duty. Under *Stallings*, a violation of the requirement for both a written waiver and an oral colloquy amounted to a "structural defect" in which prejudice would be presumed. *Stallings*, 658 N.W.2d at 112. However, our supreme court recently overruled *Stallings* and held that a defendant is required to show actual prejudice in order to prevail on a claim of ineffective assistance of counsel for failure to insist on both an adequate written and oral waiver regarding the defendant's understanding of the right waived by proceeding to a nonjury trial. *Feregrino*, 756 N.W.2d at 705-09.

Considering this recent change in law, the record before us is not sufficient to allow us to determine whether Slater was actually prejudiced by his counsel's failure to obtain a jury trial waiver that complied with the requirements of Iowa Rule of Criminal Procedure 2.17(1). We therefore decline to rule on the issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding. *See Bearse*, 748 N.W.2d at 214; *DeCamp*, 622 N.W.2d at 296.

IV. Conclusion.

We affirm Slater's conviction and preserve his claim of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.