

IN THE COURT OF APPEALS OF IOWA

No. 9-538 / 08-1613
Filed August 19, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TODD MICHAEL WEBER,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt Stoebe,
District Associate Judge.

Todd Michael Weber appeals from the judgment and sentence entered upon his conviction of operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2007), a class "D" felony. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Timothy N. Schott, County Attorney, and Jennifer Bronzer, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Mansfield, JJ.

MANSFIELD, J.

Todd Michael Weber appeals from the judgment and sentence entered upon his conviction of operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2007), a class “D” felony. The subject of this appeal is whether Weber’s counsel rendered ineffective assistance either by failing to challenge the applicability of section 321J.6 to snowmobiling on a frozen river or by failing to challenge adequately the sufficiency of evidence under sections 321J.2(1)(a) or 321J.2(1)(b). We find that counsel’s assistance was not ineffective and therefore affirm the decision of the district court.

I. Background Facts and Proceedings

On February 23, 2008, Conservation Officer Matthew Bruner of the Iowa Department of Natural Resources saw Weber riding a snowmobile on the frozen Des Moines River and approaching a low dam on the river near Fort Dodge. Weber first turned toward Officer Bruner but then turned away sharply, accelerated toward the dam and drove over it. The river was frozen solid except for the area just below the dam. Weber landed on the water but was able to “power out of it,” drive back onto the ice, and continue downstream. However, two other snowmobiles unsuccessfully followed Weber over the dam, and sank.

Weber returned to help, and after the sinking snowmobilers were rescued, Officer Bruner spoke further with Weber because he detected an odor of an alcoholic beverage. Weber admitted to drinking five or six beers while snowmobiling that afternoon. Officer Bruner perceived his eyes to be bloodshot and watery and his speech to be slow and slightly slurred.

Soon after, Officer Donald McLaren of the Fort Dodge Police Department administered three field sobriety tests to Weber. He noted that Weber smelled of an alcoholic beverage and that his eyes were somewhat bloodshot. Weber “did fairly well” on both the walk-and-turn and one-leg-stand tests, but his counting pace on the latter was significantly slower than the officer’s baseline. Weber explained to McLaren that he was blind in his left eye. However, Weber actually failed the horizontal gaze test by showing nystagmus (involuntary rapid shaking) in both eyes. Officer McLaren concluded that Weber was under the influence of alcohol, although he was responsive to questions and his speech did not seem slurred.

Weber was taken to the Webster County Law Enforcement Center where Officer Bruner invoked implied consent. Weber’s chemical breath test revealed a blood alcohol concentration of .095, exceeding the legal limit of .08. However, the jailer who booked Weber two hours after the initial incident did not perceive signs of intoxication and was surprised by the OWI charge.

Weber was charged with operating when intoxicated, third offense, a class “D” felony, in violation of Iowa Code section 321J.2. He went to trial and, on May 30, 2008, was found guilty by a jury. On July 28, 2008, Weber was sentenced to five years in prison and fined \$3125, both pursuant to Iowa Code section 321J.2(2)(c). His driver’s license was revoked for six years pursuant to section 321J.4(4).

Weber now appeals. He contends that his trial counsel was ineffective in failing to challenge (1) the applicability of section 321J.6 to snowmobiling on ice and (2) the sufficiency of the evidence of his intoxication under the specific

alcohol-related prongs of the OWI statute, i.e., sections 321J.2(1)(a) and 321J.2(1)(b).¹

II. Scope and Standard of Review

Claims of ineffective assistance of counsel have their basis in the Sixth Amendment to the United States Constitution, and we therefore conduct a de novo review. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). “In assessing alleged violations of constitutional rights, we make an independent evaluation of the totality of the circumstances as shown by the entire record.” *State v. Boley*, 456 N.W.2d 674, 677 (Iowa 1990); *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

III. Analysis

A. Ineffective Assistance of Counsel Standards. To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and

¹ Iowa Code section 321J.2(1) provides:

- (a) A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions: While under the influence of an alcoholic beverage or other drug or a combination of such substances.
- (b) While having an alcohol concentration of .08 or more.

Section 321J.6 provides:

A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 or 321J.2A is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration or presence of a controlled substance or other drugs, subject to this section. The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer having reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A, and if any of the following conditions exist:

- a. A peace officer has lawfully placed the person under arrest for violation of section 321J.2

(2) prejudice resulted. *Maxwell*, 743 N.W. 2d at 195. A defendant's failure to prove either element is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Ordinarily, we preserve ineffective-assistance claims for postconviction relief proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). However, where, as here, we find the record adequate to address Weber's ineffective-assistance-of-counsel claims, we may do so on direct appeal. See *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999).

Our task is to determine whether defense counsel breached an essential duty by failing to raise these issues and, if so, whether Weber was prejudiced by the failure. *Maxwell*, 743 N.W.2d at 195. We start with a presumption that counsel acted competently. *Westeen*, 591 N.W.2d at 210. In general, trial counsel is not incompetent for failing to pursue an issue that is without merit. See *id.* at 207. Thus, our first step is to consider whether there is any merit to the issues Weber claims his counsel should have raised. *Id.* If there is no merit, then Weber's trial counsel was not ineffective.

B. Applicability of Iowa's Implied Consent Law to Snowmobiling on an Icy River. Weber's first claim of ineffective assistance is that his counsel should have objected to the application of Iowa's implied consent statute to procure chemical evidence of intoxication, because Weber was operating a snowmobile on a frozen river, not a car, truck, or bus on a public highway. Weber maintains that the policies that underlie implied consent do not apply to snowmobiling on a river. Weber concedes, as he must, that the prohibition on operating a motor vehicle while intoxicated under Iowa Code section 321J.2 (the prohibition on operating a motor vehicle while intoxicated) applies to

snowmobiles. See *State v. Peters*, 525 N.W. 2d 854, 857 (Iowa 1994) (holding that a snowmobile is a motor vehicle for the purposes of section 321J.2). However, Weber argues that the implied consent statute that enabled the State to obtain evidence of his alcohol concentration, section 321J.6, does not apply to off-road snowmobiling. Weber cites *State v. Palmer*, which observes that “the premise underlying implied consent is that ‘a driver impliedly agrees to submit to a test in return for the privilege of using the public highways.’” *State v. Palmer*, 554 N.W.2d 859, 860-61 (Iowa 1996) (quoting *State v. Hitchens* 294 N.W.2d 686, 697 (Iowa 1980)). Weber maintains that since he was not driving on a public highway, there was no basis for invoking implied consent against him. He further maintains that without implied consent, there was no basis to charge him under section 321J.2(1)(b) (alcohol concentration in excess of .08).

However, section 321J.6 is not limited to operation on public highways. All that is required is that a person have been operating a “motor vehicle in this state under circumstances which give reasonable grounds to believe the person has been operating a motor vehicle in violation of section 321J.2 or 321J.2A” Weber was operating a motor vehicle, namely a snowmobile. Weber’s case law argument is not convincing because the term “highway” in the cases cited is used to describe the justification for, not limit the scope of, section 321.6.

In any event, rivers and public waterways are commonly included in the legal definition of “highways.” A highway is defined as any main route on land, on water, or in the air. Black’s Law Dictionary 747 (8th ed. 2007). The general

legal use of the term includes navigable rivers. *Summerhill v. Shannon*, 361 S.W.2d 271, 272 (Ark. 1962).

Furthermore, the policy justification for implied consent applies just as strongly to the public “rivers” as it does to the public “highways.” Taxpayers pay for those rivers to be maintained, and indeed taxpayers paid for the assistance that Officer Bruner rendered to the two companions of Weber whose snowmobiles sank in the water.

Therefore, we conclude section 321J.6 applies to Weber’s snowmobile operation on the Des Moines River, and that evidence gathered under that statute may be used to support an OWI charge under section 321J.2(1)(b). We also conclude that Weber’s counsel was not ineffective in failing to object to the valid application of these statutes.²

C. Sufficiency of Evidence Under Sections 321J.2(1)(a) and (b).

Weber’s second claim of ineffective assistance is that his counsel should have specifically and separately challenged the sufficiency of the evidence under *either* section 321J.2(1)(a) (operating a motor vehicle while under the influence of an alcoholic beverage), *or* section 321J.2(1)(b) (operating while having an alcohol concentration of .08 or more). Weber does not dispute that his counsel filed a general motion for judgment of acquittal based on insufficiency of the

² Additionally, Weber states that instead of being charged with a violation of Iowa Code section 321J.2, he “should have been charged, if at all, with a violation of section 321G.13(1)(c).” However, this same argument was addressed and rejected in *Peters*, 525 N.W.2d at 860 (holding that the prosecutor had discretion to charge the defendant under either section 321J.2 or section 321G.13). We find *Peters* controlling in the present case.

evidence, which the district court denied, but he believes that this motion was inadequate.³

Since we have concluded that an implied consent challenge to the .095 results of the DataMaster breath test would have been unsuccessful, this alone is sufficient to uphold a conviction under section 321J.2(1)(b), and counsel would not have been ineffective for failing to object to the sufficiency of the evidence thereunder. Moreover, there was sufficient evidence for a jury to conclude that Weber violated section 321J.2(1)(a), and the asserted lack of specific objection by Weber's attorney concerning the sufficiency of the evidence under this section also does not amount to ineffective assistance.

Although Weber offers evidence that he was not intoxicated, the State offers substantial evidence that he was "under the influence" according to section 321J.2(1)(a), even excluding the breath test results. The jury had the duty of assessing the credibility of the differing accounts of the incident and weighing the testimony of the witnesses. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). Substantial evidence may exist to uphold a verdict even if substantial evidence to the contrary also exists. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990).

³ Weber's line of reasoning appears to be that if trial counsel had objected to the validity of the implied consent to the DataMaster breath test, there would have been no evidence to support a conviction under section 321J.2(1)(b), and that if trial counsel had separately objected to the sufficiency of evidence under section 321J.2(1)(a), this part of the case would have been thrown out, leaving no case for the jury. In Iowa, if a general verdict of guilty is returned, and only one of two theories was supported by the evidence, reversal is required because "we have no way of determining which theory the jury accepted." *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004) (quoting *State v. Hogrefe*, 557 N.W.2d 871, 880-81 (Iowa 1996)). However, in *State v. Crone*, the supreme court held that when the motion for judgment of acquittal did not make reference to the specific elements of the crime on which the evidence was claimed to be insufficient, it did not preserve the sufficiency of the evidence issue for review. 545 N.W.2d 267, 270 (Iowa 1996).

The jury could rationally have concluded that Weber was intoxicated based on his arguably impaired judgment in jumping the dam, the testimony of officers Bruner and McClaren regarding the smell of his breath, Weber's failure to pass the nystagmus field test on his good eye, and his admission to consuming five to six beers that afternoon. Therefore, substantial evidence supports the verdict of guilt under both alcohol-related prongs of section 321J.2. Weber's trial counsel was not ineffective.

IV. Conclusion

For the reasons set forth herein, we find that Weber's trial counsel was not ineffective. Consequently, Weber's claim of ineffective assistance of counsel fails, and we therefore affirm his conviction and sentence.

AFFIRMED.