

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1985

CLERK SUPREME COURT

STATE OF IOWA,

514

Plaintiff-Appellee,

Filed May 28, 1985

vs.

JOHN THOMAS SHELTON, III,

5-213

84-1073

Defendant-Appellant.

Appeal from the Iowa District Court for Marion County - Richard D. Morr,
Judge.

Defendant appeals from his conviction for OWI (second offense) in violation
of Iowa Code section 321.281. AFFIRMED.

Charles Harrington, Appellate Defender, and John P. Messina, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Rebecca L. Claypool,
Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Defendant appeals from his conviction for OWI (second offense) in violation of Iowa Code section 321.281.¹ He asserts that it was error for the State to introduce testimony concerning the results of a preliminary breath test.

Our review of this proceeding is on assigned error. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). We affirm the conviction.

At trial the arresting officer testified concerning the reason he stopped defendant's vehicle and the basis for his decision to request a specimen sample from defendant. On cross-examination defense counsel challenged the officer's opinion that defendant was intoxicated. The following question was the last of a series of questions on this subject:

Q. I guess the only thing I'm confused about is, if you didn't do any of the field tests or have Mr. Shelton do any of the field tests at the time of the arrest in the "field," the only thing that was any indication to you that there was any alcohol involved at all was what you smelled, and the bloodshot eyes?

A. Personal observation. After a certain number of years a person can detect.

Immediately following this the prosecuting attorney began redirect with the following questions:

Q. I believe as far as your basis at the time before the arrest, you do have a field meter or Alkasensor or something like that you carry in the car?

A. Yes, we do have that.

Q. And this is a small portable breath analysis machine?

A. Yes, it is.

Q. And you did ask the defendant to blow in that on this occasion?

A. I requested him to, yes.

Q. And did he do that?

¹ Defendant was also convicted of possession of a schedule I controlled substance (marijuana) in violation of Iowa Code section 204.401(3), but has not appealed from this conviction.

A. Yes, he did that.

Q. And did the results of that test support your opinion that you testified to that he was under the influence?

A. Yes.

At that point defense counsel objected on the grounds that the results of preliminary breath screening tests are inadmissible. The trial court overruled the objection "in view of the cross-examination."

Iowa Code section 321B.3 provides in part:

The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

In view of the defendant's challenge to the propriety of the officer's arrest of defendant and request for a chemical test, we find that the prosecuting attorney's limited reference to the preliminary breath test was proper. Furthermore, even if it was error for the trial court to allow this into evidence, the error was harmless. The State had already introduced into evidence without objection Exhibit 1 which contained the information that defendant "submitted to a preliminary breath screening test which indicated ten hundredths (.10) or more of one percent by weight of alcohol in the blood." Prejudice will not be found in the reception of evidence which has already been admitted into the record without objection. State v. Johnson, 272 N.W.2d 480, 482 (Iowa 1978).

AFFIRMED.