FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed April 28, 1978
vs.) 485
PETER E. MIOVER,) 60829
Appellant.)

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Defendant claims the trial court committed reversible error when a deputy sheriff was allowed to testify that at the time of arrest the defendant refused to answer any questions. - Affirmed.

John C. Wellman, Des Moines, for Appellant.

Richard C. Turner, Attorney General of Iowa, Ray Sullins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Peter E. Miover claims reversible error because a deputy sheriff testified that Miover, at the time of arrest on a concealed weapons charge, refused to answer any questions. We affirm.

The court in State v. Canada, 212 N.W.2d 430, 434 (Iowa 1973) held that a police officer testifying to the defendant's refusal to answer his questions at the time of the arrest does not violate the prohibition against prosecutorial comment on the accused's failure to testify.

Defendant's reliance on State v. Kyseth, 240 N.W.2d 671 (Iowa 1976) is misplaced. In Kyseth the policeman testified he had persisted in asking questions after the defendant requested to see counsel and stated he didn't want to answer questions. In answering a subsequent question the Kyseth defendant stated he had been out drinking but refused to state where he was going, where he had been or what he had been doing. The Kyseth court ruled the persistence of the policeman in the face of the defendant's claim of his Fifth and Sixth Amendment rights was error.

We view Kyseth as inapposite to the decision of this case; it's focus was upon police conduct which directly interfered with the defendant's exercise of his 5th and 6th amendment rights. The court did not address the issue of prosecutorial comment upon a defendant's silence as applied to the policeman's account of the Kyseth defendant's refusal to answer questions. Canada, decided prior to Kyseth, addressed the issue in a factual situation indistinguishable from the instant case. Under Canada the challenged testimony was admissible to show the conduct of Miover when first accused of the crime if "a fair reading of the record would indicate that the questions put to, and the answers of the witness were designed only to relate the actions of the defendant at the time of his arrest, and there was no further reference to his refusal to make any statement at the trial." Canada, supra. We find the testimony was so limited; accordingly, we must affirm.

AFFIRMED.

All judges concur, except Allbee, C.J., who concurs specially.

ALLBEE, C.J. (specially concurring)

I am concerned about the continued vitality of State v. Canada, 212 N.W.2d 430, 434 (Iowa 1973) after the decision in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), but the motion to strike appears to have been made in an untimely fashion. State v. King, 225 N.W.2d 337, 341 (Iowa 1975); State v. Canada, 212 N.W.2d at 436 (Rawlings, J., concurring specially). I therefore concur in the result.