IN THE COURT OF APPEALS OF IOWA

No. 4-114 / 93-681

FILED
MAY 26 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ORDELL THOMAS KJOS,

Appellant.

Appeal from the Iowa District Court for Warren County, Bruce Graham and John P. Crouch, Judges.

Ordell Thomas Kjos appeals his conviction, following a jury trial, for OWI, in violation of Iowa Code section 321J.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Robert P. Ewald, Assistant Attorney General; Kevin Parker, County Attorney; and Patricia Notch, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ.

DONIELSON, C.J.

Officer Hill observed Ordell Thomas Kjos driving his motorcycle erratically about 4:00 a.m. one morning. Kjos crossed the center line several times. Hill turned on his flashing lights and siren but Kjos failed to stop immediately. Officer Hill followed Kjos at speeds up to ninety-five m.p.h. After stopping Kjos, Hill detected the odor of alcohol and noticed his eyes were bloodshot and speech was slow. Kjos failed various field sobriety tests and was arrested at 4:30 a.m. Hill took Kjos to the county jail where a request for a breath specimen was made at 6:43 a.m. An intoxilyzer breath test was administered revealing Kjos had a blood alcohol concentration of .131.

Prior to trial, Kjos moved to suppress the results of the intoxilyzer breath test, contending the intoxilyzer machine had been repaired without recertification prior to his test. See 661 Iowa Admin. Code 7.2(1) (1992). After a hearing, the district court denied the motion stating the "repairs" to the intoxilyzer machine were completely unrelated to its chemical function. The court found the technician merely replaced the breath and air hoses and put new transistors in the power supply. He then checked the filters and calibration to verify the machine was operating according to standards.

At trial, during Officer Hill's testimony, Kjos again moved to suppress the results of his intoxilyzer test arguing Hill read the implied consent form to him more than

two hours after his arrest. See Iowa Code section 321J.6(2) (1993) (If test not offered within two hours of arrest, it is not required and there shall be no revocation under section 321J.9). Kjos asserts this lapse in time rendered his consent involuntary because it was made under compulsion of the implied consent procedure. The court overruled the motion.

During Officer Hill's cross-examination, Kjos moved for a continuance arguing Hill's testimony concerning his initial observation of Kjos appeared to differ from the testimony he gave at the suppression hearing. Kjos stated he needed to obtain a transcript of the suppression hearing to cross-examine Hill adequately. This motion was overruled but Kjos was allowed to argue to the jury Hill's trial testimony was inconsistent with his prior testimony.

Kjos was found guilty of OWI pursuant to Iowa Code section 321J.2 (1991), and was sentenced to seven days in jail and a $500 fine. He was credited for time already served in jail and the remainder of the seven day sentence was suspended.

Kjos appeals, contending the district court erred in denying his motions for a continuance and to suppress the results of the intoxilyzer test. We address each issue in turn.

Kjos first argues the district court should have granted his motion for a continuance to permit him to obtain a transcript of the suppression hearing. The

district court has discretion in granting or denying continuances. Steinkuehler v. State, 507 N.W.2d 716, 723 (Iowa App. 1993). We will reverse the trial court's decision only upon a showing the court abused its discretion. State v. Teeters, 487 N.W.2d 346, 348 (Iowa 1992). This requires we find the discretion "was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

The suppression hearing was held in October 1992. The trial began in late March 1993. There was ample time to have the hearing transcribed before trial. That defense counsel did not request a transcript before trial is not sufficient reason to grant a continuance such that denial of the continuance would constitute abuse of discretion. Nor do we conclude denying the continuance prevented substantial justice from being obtained. See Iowa R. Civ. P. 183(a). The differences in Officer Hill's testimony between the hearing and trial were minor and did not pertain to material issues relating to the charges. We cannot conclude Kjos suffered any prejudice from the denial of his motion for a continuance.

Kjos also argues the results of his breathalyzer test should have been suppressed. He raises two issues. Kjos asserts the machine was not recertified after repairs. He also claims his consent was not voluntary.

In order to provide a foundation for admitting the intoxilyzer test results the State must show the requirements of Iowa Code section 321J.15 (1991) have been met. The section requires the test be "performed by a certified operator using a device and methods approved by the commissioner of public safety, no further foundation is necessary for introduction of the evidence." Id. Iowa Administrative Code rule 661-7.2(3) (1991) lists Intoxilyzer model 4011A as one approved for use in Iowa because it meets the performance standards of the National Highway Traffic Safety Administration. Rule 661-7.2(1) requires devices "be certified to be in proper working order within a period of one year immediately preceding use." Kjos asserts the repairs made to the intoxilyzer required its recertification before being used to test his breath sample. The machine was certified in September 1991. The breath test on Kjos was performed on August 30, 1992. On August 12, 1992 a criminalist and forensic scientist replaced the breath and air hoses and transistors in the power supply. He also checked the filters, standards, and calibration. He did not recertify the machine since the calibration was valid and the recertification was due in September. The district court found, and we agree, the "repairs" done on the intoxilyzer were not the type that affect the testing performance. We cannot agree rule 661-7.2(1) require recertification when nothing is done to the intoxilyzer which would call its

accuracy into question. "The purpose of procedural standards is not to provide drunken drivers with a technical defense, but to ensure the accuracy of the test for use in judicial proceedings against them." Anson v. Iowa Dep't of Transp., 477 N.W.2d 695, 697 (Iowa App. 1991). The intoxilyzer printout card from the test was introduced into evidence, and carries a presumption of reliability. State v. Geinzer, 406 N.W.2d 457, 459 (Iowa App. 1987). It shows the air blanks before and after the breath test and indicates the machine was performing properly. The deputy who operated the machine testified about the procedures he followed and the lack of any indication the machine was not testing accurately. We conclude the statutory requirements providing a proper foundation for admitting the test results were met. The court did not err in admitting the results of the test over appellant's foundation objections.

Kjos finally argues the results of the breath test should have been suppressed because his consent to the test was not voluntary. We review the district court's evidentiary rulings for an abuse of discretion. State v. Stoneking, 379 N.W.2d 352, 353-54 (Iowa 1985). Both Kjos and the State cite State v. Kelly, 430 N.W.2d 427 (Iowa 1988) as supporting their position. The State argues the two-hour limitation in Iowa Code section 321J.6(2) relates to license revocation, not admissibility of the test results. Id. at 431. Kjos responds the implied consent

form used is coercive in nature since it threatens license revocation if the test is refused. See Id. at 432 (Schultz, J., dissenting). Since the implied consent form was not given until more than two hours after arrest, refusal could not result in revocation. Reed v. Iowa Dep't of Transp., 478 N.W.2d 844, 848 (Iowa 1991). Therefore, Kjos argues, his consent was coerced. We disagree. We determine use of the implied consent form after the two-hour period did not render his consent involuntary. Consequently, the district court did not abuse its discretion in admitting the test results over objections by Kjos.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. For the reasons stated, we affirm the decision of the district court in all respects.

AFFIRMED.