IN THE COURT OF APPEALS OF IOWA

No. 4-022 / 93-455

FILED
FEB 25 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

BARBARA MAURER,

Appellant.

Appeal from the Iowa District Court for Muscatine County, James A. Weaver, Judge.

Barbara Maurer appeals her conviction and sentence following a jury trial for the crime of operating while intoxicated, second offense, in violation of section 321J.2 of the Iowa Code. **AFFIRMED.**

David Scieszinski, Wilton, for appellant.

Bonnie J. Campbell, Attorney General; Thomas S. Tauber, Assistant Attorney General; Richard R. Phillips, County Attorney; and Christine A. Dalton, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

At about 2 a.m. on July 26, 1992, police officer Michael Schmidt pulled Barbara Maurer's vehicle over after observing her driving erratically. Officer Schmidt noticed Maurer had trouble rolling down her window and detected the smell of alcohol. Maurer admitted drinking two beers.

Officer Schmidt had Maurer get into his squad car and again noticed a strong smell of alcohol. Maurer refused to take a preliminary breath test. Officer Schmidt then told Maurer he was taking her to the police station to conduct field sobriety tests. The officer later testified he did not want to conduct the tests on the spot because the road was wet, busy, and crowned in the middle.

Officer Schmidt told Maurer she could not go home. He later testified she was in custody and not free to leave at that point. The officer informed Maurer's boyfriend he would drive her home or release her to the boyfriend if she passed the tests. Maurer allegedly failed the walk and turn, one leg stand/count to thirty, and horizontal gaze nystagmus tests. The officer observed Maurer's speech was slurred, her eyes were bloodshot and watery, and she was staggering.

Officer Schmidt arrested Maurer for OWI. She refused the breath test. At Maurer's jury trial, she objected to the officer's testimony about her "actions and mannerisms" observed during the field sobriety tests prior to Miranda warnings being given. The district court overruled the

objection due to Maurer's failure to raise the issue prior to trial. The jury convicted Maurer.

Maurer filed a motion for new trial, objecting to admissibility of the officer's testimony concerning "his observations, conversations with and descriptions of the words, acts or mannerisms of the defendant." (emphasis added). The district court reached the merits and denied the motion, ruling that although Maurer was in custody, there was no interrogation until Miranda warnings were given. The district court then imposed judgment and sentence.

Maurer appeals. The State argues Maurer waived error by failing to file a motion to suppress and failing to provide an adequate objection at trial. The State further asserts most of the evidence objected to was not testimonial in nature and could not be suppressed. Finally, the State maintains any error was harmless beyond a reasonable doubt.

When a defendant alleges error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jefferies, 417 N.W.2d 237, 239 (Iowa App. 1987).

This is a one-issue appeal. After the OWI stop, Barbara Maurer was transported to the City of Wilton Police

Department, which is inside City Hall. She was required to perform certain sobriety tests.

First of all, following an evidentiary hearing on defendant's motion for new trial, the trial court overruled the motion. It also found that Maurer was in custody when she was administered the sobriety tests.

There is no question that she was not advised of her Miranda rights until after the tests were administered and after she was formally arrested.[1]

Was it unconstitutionally improper to allow the police officer to comment at her trial concerning her performance on the administered tests?

"The Fifth Amendment privilege against self incrimination extends only to evidence of a testimonial nature. It does not protect an accused from the compulsory display of measurable or identifiable physical characteristics." State v. Rauhauser, 272 N.W.2d 432, 436 (Iowa 1978).

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1. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). From syllabus:

> (d) In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 467-473.

"The observations of the defendant's movements constitute real evidence rather than communicative evidence that did not call for the application of the Miranda warnings." State v. Heisdorffer, 164 N.W.2d 173, 175 (Iowa 1969).

Officer Michael Schmidt administered three tests to Maurer. The first was a "walk and turn" test. The third was a horizontal gaze nystagmus test where he watched her eyes as they followed a pen he was holding up.

These two tests do not require the defendant to say anything, to orally comment about anything. They have been held to be outside the protection of Miranda. They are only observations of movements and are real evidence rather than communicative evidence. Johnson v. Bennett, 291 F. Supp. 421, 423-24 (S.D. Iowa 1968); Heisdorffer, 164 N.W.2d at 175-76. Schmidt was properly allowed to comment on Maurer's performance of these tests.

The second test administered to Maurer required her to count from one to thirty by thousands while standing on one leg. The counting would be like "one one-thousand, two one-thousand" and on up to "thirty one-thousand." Maurer was instructed by Schmidt concerning what was expected of her in this test.

Over defendant's objection, Schmidt testified concerning this test and Maurer's performance of same. He testified as follows:

> Q. Do you recall how she did on that test? A. She flunked it.
>
> Q. Could you tell us why she flunked it or what she did that you scored it as a flunk? A. Well, okay. During the instructions she's supposed to stand still, not move around. That's part of the test. And she continually stepped off the side to maintain her balance. When she did begin to do the test she only counted to seven. The way she counted was not the way I told her to, which is -- I said one one-thousand, two one-thousand. She was saying one one-thousand, two two-thousand, three three-thousand; like that. Her foot was about 12 to 15 feet -- or feet -- inches off the ground.
>
> Q. And she only made it to seven? A. Seven.
>
> Q. What happened when she hit seven? A. She put her foot down and said, "I'm done."

All verbal communications under these circumstances are not protected by Miranda. The protection is only available regarding those utterances that deal, at least in part, with the content of the answers. Testimony or answers that relate to physical characteristics of the defendant, such as slurring, halted speech, unintelligible words, are not protected. Likewise, answers to booking information such as name, address, height, weight, eye color, date of birth, and current age, even if knowingly videotaped, are not protected, and the observations of the police officer are admissible, even though the defendant has not been given the Miranda warnings. Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990).

In Muniz, while being administered sobriety tests, the defendant was asked if he knew the date of his sixth birthday. Id. at 568. At first, there was an inaudible reply. He then stated, "No, I don't know." Id.

The court held that Muniz's response to the question was testimonial and should have been suppressed because no Miranda warnings had been given to him. Id. at 605.

He was left with the choice of answering untruthfully or of admitting he didn't know. Id. at 599. His admission of ignorance was different from the assertion that might reasonably be expected from a lucid person, from a sober person. Id. He was forced to give evidence against himself, to incriminate himself. Id. at 600.

In Allred v. State and DiAndrea v. State, 622 So.2d 984 (Fla. 1993), the court reviewed sobriety tests and the possible protection offered by Miranda.

These tests were both administered "roadside" but after arrest. Id. at 985. Both Allred and DiAndrea were administered a one-leg stand/counting test and were also required to recite the alphabet, but not from "A to Z" but rather from "C to W." Id.

Relying on the logic and teaching of Muniz, the court held that these tests did involve content and did require the defendants to give incriminating evidence against themselves. Id. at 987.

The court stated:

> Failure to accurately recite the alphabet "discloses information" beyond possible slurred speech; it is the content (incorrect recitation) of the speech that is being introduced rather than merely the manner (slurring) of speech.

Id.

Did any part of Schmidt's allowed testimony include observations or comments that relate to protected "content?"

Clearly, at least part of Schmidt's testimony quoted above consisted of repetition and comment of those parts of the counting test given to defendant. Defendant was required to give content evidence against herself without prior advice of the Miranda rights. That part of Schmidt's testimony should not have been admitted into evidence or considered by the jury.

Following the jury trial, defendant was afforded a full hearing on her motion for new trial. The court overruled her motion for new trial which was based on the alleged improper admission of a part of Schmidt's trial testimony.

Was the ruling wrong and is defendant entitled to a new trial? We think not. The improperly admitted testimony is only a small part of the total evidence the jury had to consider on the issue of defendant's intoxicated condition.

Schmidt observed defendant's erratic operation of her motor vehicle. Both she and her vehicle had a strong odor of alcohol. She had bloodshot and watery eyes, and she was staggering. She had difficulty rolling down the window of her car. She admitted drinking two beers. Her speech was slurred. She failed parts or all of three sobriety tests administered to her.

An error of constitutional magnitude does not mandate a new trial if the State can show that the error was harmless

beyond a reasonable doubt. State v. Boley, 456 N.W.2d 674, 678 (Iowa 1990) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710-11 (1967)).

We hold that the defendant was not prejudiced by the admission of Officer Schmidt's full testimony concerning the one-leg stand/count to thirty test. The trial court did not err in overruling defendant's motion for new trial because the full record supports defendant's conviction, and reversible error was not committed.

We pass the question of the timeliness of defendant's motion to suppress as she did receive a full hearing on that same matter in the hearing on her motion for new trial.

The judgment is affirmed.

AFFIRMED.