

IN THE COURT OF APPEALS OF IOWA

No. 2-336 / 91-1214

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

BRIAN BRAUN,

Appellant.

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

Defendant appeals his conviction by jury of operating a motor vehicle while intoxicated. REVERSED.

David Scieszinski, Wilton, for appellant.

Bonnie J. Campbell, Attorney General, Bridget Chambers, Assistant Attorney General, William F. Creasey, County Attorney, and Suzanne E. Elwell, Assistant County Attorney, for appellee.

Considered en banc.

HAYDEN, J.

At approximately 5:30 a.m. on March 23, 1991, a sheriff's deputy approached a car parked in the middle of a two-lane highway. The vehicle's engine was not running, and the lights were not on. Inside the car the defendant was sleeping while leaning against the driver's door. The defendant was the sole occupant, and no other person was in proximity to the car. The deputy testified when the defendant awakened his speech was slurred, he seemed somewhat confused, and his eyes were bloodshot. No liquor or liquor containers were found in or near the car. The deputy also testified that on the way to the patrol car for a preliminary breath test the defendant was unsteady, smelled of alcohol, and responded "yes" when asked if he had driven the car to that point.

The defendant was then taken to the county's public safety building where the deputy invoked implied consent, and the defendant agreed to take an Intoxilyzer breath test. The result was .146.

Trial was held on July 10, 1991. Five minutes before the start of the trial, the defendant asked permission to call a witness which was not included on his witness list. The defendant conceded notice of this witness had not been provided to the State. The witness was to allegedly testify he drove the vehicle to the place it was parked at the time of Braun's arrest. The trial court refused to allow the defendant to present the witness due to the tardy notice of his identity to the State.

At trial the defendant objected to the introduction of the results of his Intoxilyzer breath test. The defendant argued, at the time the deputy requested the test, reasonable grounds did not exist to believe the defendant had been operating his vehicle while intoxicated.

The State called a witness, Michael L. Rehberg, to testify as to alcohol and its effect on the human body. The defendant made a standing objection to this line of testimony on the ground it was outside the minutes of testimony.

The jury convicted the defendant of operating while intoxicated, and the trial court entered judgment and imposed sentence. The defendant appeals.

The defendant raises three issues on appeal: (1) The court erred in admitting the results of the Intoxilyzer breath test because the State had failed to establish the deputy had reasonable grounds to believe the defendant was operating the vehicle in violation of Iowa Code section 321J.2, (2) the court erred in allowing testimony relating to alcohol and its effects because it was beyond the minutes of testimony, and (3) the court erred in excluding testimony of the defendant's witness on the basis of tardy notice of the witness's identity.

Our review is for abuse of discretion. "[A]bsent a showing 'that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly

unreasonable,'" we will not interfere. Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, 243 (Iowa 1984) (quoting State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982)).

I. Operation of motor vehicle while intoxicated. The defendant contends the deputy lacked reasonable grounds to invoke the implied consent procedure, and thus the trial court erred in admitting the results of the Intoxilyzer breath test. Iowa Code section 321J.6(1) sets forth the conditions under which a police officer may request chemical testing:

Implied consent to test.

A person who operates a motor vehicle [while intoxicated] under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 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 alcohol concentration or presence of drugs 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, 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.

* * *

d. The preliminary breath screening test was administered and it indicated an alcohol concentration as defined in section 321J.1 of .10 or more.

Iowa Code § 321J.6(1) (1991) (emphasis added). The facts of this case satisfied both subsections (a) and (d) of

321J.6 because the deputy had arrested the defendant and the results of the intoxilyzer had indicated an alcohol concentration of .10 or more.

The offense of OWI, however, requires two elements: intoxication of the operator and his act of operating the vehicle while so intoxicated. State v. Hines, 478 N.W.2d 888, 890 (Iowa App. 1991) (citing State v. Miller, 204 N.W.2d 834, 837 (Iowa 1973)). Evidence shows the defendant was intoxicated because his alcohol concentration was greater than .10, thus we address whether the officer had reasonable grounds to believe the defendant was operating the vehicle while intoxicated. Iowa Code section 321J.2 provides:

Operating while under the influence of alcohol or drug while having alcohol concentration of more than .10 or more (OWI)

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:

a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.

b. While having an alcohol concentration as defined in section 321J.1 of .10 or more.

Iowa Code § 321J.2 (1991) (emphasis added). Section 321.1(42) defines "operator" as "every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway." Iowa Code § 321.1(42) (1991) (emphasis added). Thus the issue focuses on whether the defendant had "actual physical control" of the vehicle.

The Iowa Supreme Court has held vehicle movement or capability of the vehicle to move is not necessary for a person to be in actual physical control and therefore operating pursuant to section 321J.2. State v. Weaver, 405 N.W.2d 852, 854 (Iowa 1987). Although our legislature has not defined actual physical control, the Iowa Supreme Court has addressed what constitutes actual physical control of a motor vehicle. The following cases provide us with the guidelines within which we must decide this case. In State v. Fox the court upheld a drunk driving conviction where defendant was found in driver's seat with one foot pressing on brake, engine running, and transmission in drive. Fox, 248 Iowa 1394, 1399-400, 85 N.W.2d 608, 611 (1957). In State v. Webb the court affirmed a drunk driving conviction where defendant was stopped by police after starting the engine but before moving. State v. Webb, 202 Iowa 633, 637, 210 N.W. 751, 752 (1926). The court stated "the starting of the engine is the first step in the operation of a car" and "is one of the necessary elements in [its] operation" Id.; see also State v. Hines, 478 N.W.2d 888, 890 (Iowa App. 1991). In State v. Overbay the court upheld a drunk driving conviction where defendant was found behind the steering wheel of the car and operating the engine while his companion pushed the car from behind in an attempt to move it from a ditch. State v. Overbay, 201 Iowa 758, 759, 206 N.W. 634, 634 (1925).

The above-cited cases involved situations in which some mechanism in the vehicle was on or the defendant was controlling or attempting to control the vehicle. The facts of the instant case, however, differ from those cases in which the Iowa Supreme Court has held the defendant was in actual physical control of the vehicle. In the instant case there was no evidence to show any mechanism of the vehicle was on or the defendant was attempting to move the vehicle. Evidence shows the vehicle's engine was not running and its lights and ignition switch were not on. The record is void of evidence any mechanism was in operation. The record shows the defendant was asleep when the deputy approached him. There is no evidence to show the defendant attempted to start the engine or if the defendant even possessed the keys to the car. Although the Intoxilyzer breath test showed defendant "had an impermissible level of alcohol in his blood, that test cannot serve as a basis for finding reasonable grounds. The test results and the finding of reasonable grounds are two separate criteria; both must be satisfied." Nieman v. Iowa Dep't of Transp., 452 N.W.2d 203, 204 (Iowa App. 1989).

We hold there was not sufficient evidence, direct or circumstantial, in the record from which a jury could infer the defendant was operating his motor vehicle while under the influence of intoxicating liquor. We hold reasonable grounds did not exist to support the belief the defendant

was operating while intoxicated. The trial court abused its discretion by admitting the results of the Intoxilyzer breath test.

We reverse the conviction.

II. As a result of our reversal of the conviction, we need not address the other issues.

Costs of appeal are assessed to the State.

REVERSED.

Schlegel, Sackett, and Habhab, JJ., concur; Donielson, J., and Oxberger, C.J., dissent.

DONIELSON, J. (dissenting)

I respectfully dissent to the majority's reversal of Braun's conviction of operating a motor vehicle while intoxicated. The deputy did not lack reasonable grounds to invoke the implied consent procedure. Therefore, I do not agree the district court erred in admitting the results of the Intoxilyzer breath test.

I agree with the majority's finding that there was no evidence to show any mechanism of the vehicle was on, or the defendant was attempting to move the vehicle. However, these facts do not necessarily preclude finding the defendant had actual physical control of the vehicle.

Direct evidence of actual physical control is not necessary, as direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). In a prosecution for operating a motor vehicle while intoxicated, circumstantial evidence may be used to show the guilt of the defendant. State v. Hiatt, 231 Iowa 499, 507, 1 N.W.2d 664, 668 (Iowa 1942) (citing State v. Lorey, 197 Iowa 552, 197 N.W. 446 (1924)). Thus, actual physical control by the defendant may be established by circumstantial evidence. State v. Schuler, 243 N.W.2d 367, 370 (N.D. 1976).

In the instant case, evidence existed from which a trier of fact could infer the defendant had driven to the location at which the officer found him. The arresting officer testified Braun had been drinking earlier. The

State contends Braun admitted he had driven the vehicle to the area where it was found by the deputy. No liquor or liquor containers were found in or near the car. The facts show the defendant was sitting in the driver's seat and leaning against the driver's window asleep. Although Braun was leaning over, the vehicle controls were within his reach. When Braun was awakened by the deputy, the defendant's breath smelled of alcohol, his speech was slurred, and his eyes were bloodshot. The deputy also testified the defendant was unsteady and unstable when he got out of the car, and the defendant performed poorly on part of the field sobriety tests.

Braun was the sole occupant, and no other person was in proximity to the car. The deputy had driven to the location from the direction of Muscatine and had seen no one walking. Although the vehicle's engine was not running and its lights and ignition switch were not on, the vehicle was positioned in the middle of two traffic lanes. Parking a vehicle in the dark of night in the middle of a two-lane highway was not only an operation, but a dangerous operation, of a motor vehicle. I find there was sufficient circumstantial evidence in the record from which a jury could infer the defendant was operating his motor vehicle while under the influence of alcohol.

I also note the evidence included the defendant's admissions to drinking and operating the car and conclude "[i]t was proper and sufficient to establish the identity

of appellant as the driver of the car by his admissions made out of court, exactly as it is proper and sufficient to establish the identity of any defendant as the perpetrator of a proved act by such admissions." State v. Sharpshair, 215 Iowa 399, 401, 245 N.W. 350 (1932).

I find reasonable grounds existed to support the belief the defendant was operating while intoxicated. Our standard of review is not to substitute our judgment as if we were sitting as the trial judge. Rather, our review is to find if the judge's discretion, regardless of whether we would have similarly ruled or not, was abused. I find the trial judge did not abuse his discretion in admitting the results of the Intoxilyzer breath test. I would affirm the district court.

Oxberger, C.J., joins this dissent.