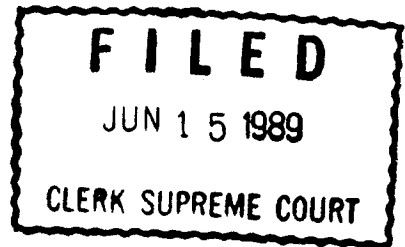


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
CHARLES ALLEN DESHAW,)
Defendant-Appellant.)

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Appeal from the Iowa District Court for Linn County
(No. AG 4219), Michael J. Newmeister, Judge.

Defendant appeals from his conviction by a jury of OWI,
second offense. **AFFIRMED.**

Edward N. McConnell of Marcucci, Wiggins & Anderson,
P.C., West Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark Hunacek,
Assistant Attorney General; and Scott Peterson, Assistant
County Attorney, for plaintiff-appellee.

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

DONIELSON, P.J.

A jury found Charles Deshaw guilty of driving while intoxicated, second offense, after hearing testimony that he failed several field sobriety tests, including a horizontal gaze nystagmus test, and tested .151 on an Intoxilyzer. Defendant appeals, asserting the district court erred in (1) denying defendant's motion to produce Intoxilyzer records; (2) denying defendant's motion in limine to exclude Intoxilyzer test results on foundational grounds and subsequently admitting the evidence; (3) admitting evidence on the horizontal gaze nystagmus test; (4) admitting testimony of the Intoxilyzer operator concerning his own certification to operate the Intoxilyzer; (5) denying defendant's motion to dismiss the OWI charge when the State failed to introduce evidence establishing defendant's blood alcohol content at the time he was driving; and (6) denying defendant's motion to dismiss after the State allegedly failed to preserve evidence favorable to the defendant. We affirm.

Course of Proceedings. Defendant was arrested October 5, 1985, and charged with operating while under the influence (OWI) in violation of Iowa Code section 321.281 (1985).¹ Defendant's first trial, held February 10, 1986, resulted in a verdict of guilty, OWI second offense. This

1. Section 321.281 was repealed by 1986 Iowa Acts Chapter 1220, section 347. The offense is now codified at Iowa Code Chapter 321J.

verdict was reversed on appeal and remanded. State v. DeShaw, 404 N.W.2d 156 (Iowa 1987).² Defendant's second trial, held September 14, 1987, ended in a mistrial after the jury failed to reach a unanimous verdict. Defendant's third trial, held January 11, 1988, resulted in a verdict of guilty, OWI second offense. It is from this verdict defendant now appeals.

I. Discretionary Discovery. During a deposition taken October 24, 1986, defendant learned of a memoranda from the Department of Public Safety regarding Radio Frequency Interference (RFI) and its effect on Intoxilyzer test results. Defendant filed a motion to produce records of repairs on the Intoxilyzer used to test him pursuant to Iowa Rule of Criminal Procedure 13(2)(b) on November 12, 1987. Defendant hoped to obtain information that would determine the integrity of the Intoxilyzer's shield and the Intoxilyzer's susceptibility to RFI. The trial court denied defendant's motion as untimely.

Discovery rulings are within the trial court's sound discretion, and our review of such rulings is limited to an abuse of discretion standard. State v. Wagner, 410 N.W.2d 207, 213 (Iowa 1987). Defendant learned of the basis for his discovery request nearly a year before his second

2. Reversed on the admission of evidence that a preliminary screening test, conducted pursuant to Iowa Code section 321B.3 (1985), indicated the presence of alcohol. State v. DeShaw, 404 N.W.2d at 158.

trial. However, defendant failed to file his request until after the second trial. The trial court found defendant was obligated to raise the grounds for his motion to produce timely and he failed to do so. We find no abuse of discretion in denying defendant's untimely request.

II. Admissibility of Intoxilyzer Test Results.

Defendant filed a motion in limine to exclude evidence of the Intoxilyzer test results based on lack of foundation. Defendant asserted that the State must show compliance with the RFI memorandum as a foundational element in admitting the test results. The RFI memorandum directed that "no portable radio units can be allowed in the room while a breath test is being conducted." Because two units were in the room, defendant argued, the State was unable to prove the accuracy and reliability of the test results. Defendant's motion in limine was denied, and defendant's objection to the admission of the test results at trial, on the same grounds, was also denied. Defendant claims the trial court erred on both rulings.

Foundational determinations concerning the admissibility of evidence are left to the sound discretion of the trial court. State v. Mary, 368 N.W.2d 166, 169 (Iowa 1985); Iowa R. Evid. 104. Our review is for abuse of discretion. State v. Hershey, 348 N.W.2d 1, 2 (Iowa 1984). We find no abuse of discretion here.

Questions regarding the admissibility of evidence are governed by the statute in effect at the time of the proceeding. State ex rel. Leas in Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981). The admission of Intoxilyzer (breath) test results in this case is governed by Iowa Code section 321J.15 (1987), which provides:

If it is established at trial that an analysis of a breath specimen was 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.

The applicable Department of Public Safety rule setting forth the device and methods provides: "The operator of the [Intoxilyzer Model 4011A] shall proceed in accordance with the instructions furnished by the Iowa department of public safety's criminalistic laboratory" 661 I.A.C. 7.2(1). (Emphasis added.) The "Operational Check List for the Direct Breath Testing Instrument Intoxilyzer Model #4011A" furnished by the criminalistics laboratory was followed and admitted into evidence in this case. The State was obliged to show compliance with the checklist procedures. State v. Hershey, 348 N.W.2d 1, 2 (Iowa 1984). These checklist procedures have the force and effect of statutory foundational requirements. State v. Steadman, 350 N.W.2d 172, 174 (Iowa 1984). Defendant asserts that in addition to the checklist, the State must prove the Intoxilyzer operator followed the instructions furnished by the crime laboratory in the RFI memorandum

that "[n]o portable radio units can be allowed in the room while a breath test is being conducted" in order to show the reliability and accuracy of the test.

One purpose of the foundational prerequisites in section 331J.15 is to guarantee the accuracy and reliability of the test results. State v. Geinzer, 406 N.W.2d 457, 457-58 (Iowa App. 1987). "In light of the legislative concern with reliability and accuracy, . . . mere following by rote of the [checklist procedures is insufficient] to render the test results admissible under Iowa Code section 321B.28 [now 321J.15]." Id. at 458. We held in State v. Geinzer that in order to admit the Intoxilyzer test results into evidence, the State must demonstrate compliance with the procedural requirements and the accuracy and reliability of the particular test results. Id. at 458, citing State v. Wolf, 369 N.W.2d 458, 459 (Iowa App. 1985). Thus, we have held that when the State fails to show the Intoxilyzer machine was functioning properly at the time defendant's breath was analyzed, the test results are inadmissible. See State v. Geinzer, 406 N.W.2d at 458; State v. Wolfe, 369 N.W.2d at 459. In both these cases, the Intoxilyzer was obviously malfunctioning.

The RFI memorandum states that "[t]he Intoxilyzer 4011A is shielded against Radio Frequency Interference (RFI). However, due to questions and publicity with regard to RFI, the following steps should be implemented." Michael

Rehberg, a forensic toxicologist employed as administrator of the crime laboratory and author of the RFI memorandum, testified the Intoxilyzer is shielded from RFI. He testified the memorandum was in response to publicity that some breath testing instruments were affected by RFI. He stated there was never a problem with RFI with the Intoxilyzer, but rather with the Breathalyzer.

Defendant's assertion that compliance with the RFI memorandum is an additional foundation requirement is without merit. However, the State must still demonstrate the accuracy and reliability of the Intoxilyzer test results. The State put on evidence that the Intoxilyzer used to test defendant was inspected by three crime laboratory employees on March 8, 1985, and again on October 10, 1985. The Intoxilyzer was certified as operating properly both before and after October 5, 1985, when defendant was tested. The State sufficiently upheld its burden to show the Intoxilyzer test results were accurate and reliable. Thus, the State met its foundational burden and the Intoxilyzer test results were properly admitted.

III. Horizontal Gaze Nystagmus Test. Defendant contends the trial court erred in admitting evidence of his performance on the horizontal gaze nystagmus (HGN) test. His objection is on foundational grounds: first, defendant asserts Dr. Larry Pipkin, a doctor of optometry, was not

qualified as an expert to testify about alcohol-induced nystagmus; and second, defendant asserts the State failed to show general scientific acceptance of the HGN test.

The trial court has considerable discretion in determining whether a witness has sufficient personal experience to render an expert opinion and we will not reverse the trial court's admission of expert testimony unless that discretion has been manifestly abused. State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983). Witnesses are qualified if they have knowledge, skill, experience, training, or education of the subject matter on which they wish to express an opinion. Iowa R. Evid. 702. The nature and complexity of the subject matter are important factors in determining the qualification of an expert witness.

Dr. Pipkin has been a practicing optometrist for nearly thirty years. He attended seminars for optometrists on alcohol-induced nystagmus and workshop sessions for training officers. Dr. Pipkin testified he had reviewed the literature on the relationship between alcohol and nystagmus. The HGN test is not complicated and does not require the use of any special testing procedures or equipment. The trial court did not abuse its discretion in ruling Dr. Pipkin was qualified to give an expert opinion on the HGN test.

Defendant asserts his HGN test result was not a proper subject for opinion evidence because it is scientific in

nature and the State failed to prove the foundational requirement of general acceptance in the scientific community. Defendant relies on Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923). Iowa rejected the Frye standard of admissibility in State v. Hall, 297 N.W.2d 80, 85 (Iowa 1980), U.S. cert. den. 450 U.S. 927, 101 S. Ct. 1384, 67 L. Ed. 2d 359. General scientific acceptance is not a prerequisite to admission of evidence, scientific or otherwise, if the reliability of the evidence is otherwise established. Id.

Nystagmus is an involuntary steady jerking motion of the eyes. Certain intoxicants, including alcohol, cause nystagmus. The HGN test involves asking a driver to focus on an object (usually a pen) held by the officer directly in front of the driver at or slightly above eye level. The officer observes the driver's eyeball for involuntary jerking as the object is moved outside the driver's field of vision, toward the ear and away from the nose. The test is repeated for both eyes. The officer observes (1) the driver's ability to follow the object smoothly, (2) the onset of nystagmus at an angle less than forty-five degrees in relation to the nose, and (3) the pronounced nystagmus at maximum deviation (ninety degrees, when the object is toward the ear). If nystagmus occurs at an angle less than forty-five degrees, the driver is likely to be intoxicated.

Dr. Pipkin testified the HGN test does not require any special testing procedures or equipment and a lay person can easily be trained to observe the onset of nystagmus. He also noted the test was seventy-six percent reliable alone and in conjunction with other field sobriety tests and the experience of the officer, the test's reliability as a predictor of intoxication is in the ninety percent range. Police officers are trained in the procedure, and the arresting officer testified he administers the test as part of the battery of field sobriety tests which also include the leg lift and heel-to-toe walk. Based on a driver's performance on all these tests, the driver's ability to follow instructions, and his demeanor, the officer determines whether or not to arrest the driver for OWI and take him in for further testing.

The State offered evidence to show the reliability of the test and its widespread use around the nation, as well as in Iowa, as a predictor of intoxication. The defendant did not offer contrary evidence of reliability. The complexity of the subject matter influences the extent of foundational showing of reliability required. State v. Hall, 297 N.W.2d at 85. The State offered evidence of the inherent understandability of the HGN test and its reliability, providing a sufficient basis for its admissibility. Id. at 86. We conclude the trial court did not abuse its discretion in admitting defendant's HGN test result.

IV. Qualification Testimony. The first foundational element for admission of Intoxilyzer test results is that the test was conducted by a certified operator. Iowa Code § 321J.15 (1987). In the minutes of testimony, the State indicated Dr. Rehberg would testify as to Officer Crawford's certification. At trial, Dr. Rehberg made no mention of Officer Crawford's certification. Instead, Officer Crawford was allowed to state that he was state certified. Defendant objects that such testimony violated Iowa Rule of Criminal Procedure 5(3), the hearsay rule, and the best evidence rule. We find Officer Crawford's testimony was properly admitted.

Iowa Rule of Criminal Procedure 5(3) requires the prosecutor to file the minutes of evidence, which must include "a full and fair statement of the witness' expected testimony." Whether testimony is within the scope of the minutes must be decided on a case-by-case basis. State v. Ellis, 350 N.W.2d 178, 181 (Iowa 1984). "The minutes . . . must provide defendant with a full and fair statement sufficient to alert him to the source and nature of the information against him." Id. The purpose of this rule is "to apprise an accused of the evidence in the prosecution's arsenal." State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987).

The minutes of evidence indicate Officer Crawford would testify as to the administration of the Intoxilyzer test to

defendant, the operation of the device, and the result of that test. Defendant was fairly apprised that the officer would testify as to his knowledge, experience, or expertise in operating the Intoxilyzer because such testimony was consistent with the overall nature of the witness's testimony. See State v. Musso, 398 N.W.2d at 868. Further, defendant was apprised that someone would testify as to Officer Crawford's certification. There was no surprise in this regard. Thus, there was no reversible error in allowing the evidence to be introduced despite the omission in the minutes of Officer Crawford's testimony. Id.

Officer Crawford's certification was a foundational element for admission of the Intoxilyzer test results. Foundation is a preliminary matter and the court is not bound by the rules of evidence, except with respect to privilege, in determining the preliminary admissibility of evidence. Iowa R. Evid. 104(a). Therefore, we reject defendant's evidentiary arguments and find Officer Crawford was properly allowed to testify as to his own certification.

V. Relation Back Evidence. Defendant asserts the State has the burden to relate the blood alcohol test result back and establish his blood alcohol content at the time of actual operation. Because the State failed to do so, defendant asserts, the charge against him should have

been dismissed. Further, defendant asserts the trial court erred in failing to instruct the jury the State had such a burden. We reject this argument.

Iowa law resolves this issue by specifically providing:

The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn within two hours after the defendant was driving or in physical control of a motor vehicle is presumed to be the alcohol concentration at the time of driving or being in physical control of the motor vehicle.

Iowa Code § 321J.2(7) (1987). This section was enacted in 1986. 1986 Iowa Acts Ch. 1220, § 2. This section does not create or divest a substantive right, but merely establishes a rule of evidence. Because evidentiary issues are governed by the statute in effect at the time of the proceeding, State ex rel. Leas in Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981), this statute applies here. This section establishes an evidentiary presumption that blood alcohol test results taken within two hours establish the blood alcohol concentration at the time of operation. No relation back testimony is required. Thus, the trial court did not err in denying defendant's motion to dismiss or in its instructions to the jury.

VI. Failure to Preserve Evidence. Deputy Crawford testified a video recording of an arrestee is made when the arrestee refuses or the officer assumes the arrestee will refuse testing. Standard procedure dictates the tape is reused, taped over, when an arrestee consents to a blood

alcohol test. Defendant alleges such a tape was made of him and destroyed. Defendant asserts the charges against him should have been dismissed because the State violated his due process rights in destroying such evidence. Our review of matters involving an assertion of violation of basic constitutional safeguards is de novo and we will make an independent evaluation of the totality of the circumstances. State v. Maniccia, 355 N.W.2d 256, 258 (Iowa App. 1984).

The record is unclear whether a video tape of defendant was in fact made. Assuming the evidence ever existed, we would ordinarily resolve the destruction of evidence issue by applying the three-part test for a due process violation set out in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). State v. Brown, 337 N.W.2d 507, 509 (Iowa 1983). We decline to apply the Brady rule in this case where the evidence contained in the destroyed evidence has otherwise been admitted into evidence.

Defendant claims the video tape would have revealed that he did not display the characteristics of a person with a blood alcohol content of .151. He contends such evidence would have allowed the jury to form an opinion as to the weight to be given the Intoxilyzer test results. While defendant's contention is credible, we find that the evidence he contends would have been established by the video tape was in fact admitted into evidence through the testimony of Officer Crawford.

Officer Crawford testified he processes individuals who are arrested. In the case of an OWI arrestee, he asks questions, observes the arrestee, and administers the Intoxilyzer test. Officer Crawford testified that he did not observe defendant swaying, that he did not have any difficulty understanding defendant, that defendant spoke in full and complete sentences, that defendant did not appear confused, that defendant appeared to understand the directions given him, that defendant responded appropriately to the questions asked of him, and that defendant was cooperative, excited, a little nervous, and polite. In fact, Officer Crawford testified that he had observed a thousand people who were intoxicated and he was unable to form an opinion that the defendant was intoxicated based on his observations.

Clearly, any evidence contained in the alleged video recording which might have exculpated defendant was introduced through the testimony of Officer Crawford. Although the presentation of the evidence through video tape might have been more interesting, it certainly would not have been more concise. Defendant is entitled to a fair trial, not a perfect trial. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985). The alleged destruction of video taped evidence could not have denied defendant of a fair trial. We find no error in denying his motion to dismiss the charges against him on this ground.

AFFIRMED.