FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 20, 1984 207
vs.)
GENE RAYMOND CLARK,) 4-359 / 83-1352
Defendant-Appellant.)

Appeal from the Iowa District Court for Linn County - Ansel J. Chapman, Judge.

Defendant appeals from his conviction for OWI, third offense, in violation of Iowa Code section 321.281 (1983) asserting that the trial court erred by allowing the State to admit into evidence an implied consent form for the purpose of proving the defendant's refusal to submit to a breath test. AFFIRMED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM

The defendant, Gene Clark, appeals from his conviction for Operating While Intoxicated, third offense. He asserts that the trial court erred in admitting an implied consent form for the purpose of showing his refusal to submit to a breath test.

The defendant was initially stopped by Officer Norma Taylor for equipment violations and was subsequently arrested. Officer Taylor testified that the defendant smelled of alcohol, had bloodshot eyes, and stumbled when exiting the car. Taylor summoned Officer Gary Clark to the scene. Officer Clark arrested the defendant and took him to the station where he was interviewed by Mary Lou Pazour, a processor for the Alcohol Safety Action Program in Linn County.

Officer Clark was unavailable to testify at trial. Pazour testified that Clark brought the defendant to her office. She testified that the defendant's eyes were bloodshot, that he smelled strongly of alcohol, and that he refused to take the field sobriety test. She also testified, over an objection by the defense counsel, that Officer Clark read the implied consent form to the defendant, that the defendant declined to take the breath test, and that Officer Clark filled out the implied consent form. Following the testimony, the court admitted the form into evidence.

The defendant argues that the trial court erred in admitting the form because it is hearsay and that the admission was prejudicial.

Hearsay is a statement, made by an out-of-court declarant, which is offered to prove the truth of the matter asserted. Ruden v. Hansen, 206 N.W.2d 713, 717 (Iowa 1983). Officer Clark, who filled out the form, is an out-of-court declarant. Since the form is offered to prove the truth of whether the defendant refused to take the breath test, it is hearsay. We must determine if it comes within an exception.

The State claims that it falls within the business records exception or that it is an admission. We find that it does not fall within either of these.

An out-of-court statement by a party is admissible. See Iowa R. of Evid. 801(d)(2)(A). The State's reliance on State v. Kennedy and State v. Welsch to support the admissions claim is misplaced. In State v. Kennedy, 224 N.W.2d 223 (Iowa 1974), the court allowed an odometer certificate filled out by the previous owner to be admitted in a case charging the defendant with odometer fraud. This document was admitted under the hearsay exception of admissions by privies in title. Id. at 227. State v. Welsch, 245 N.W.2d 290 (Iowa 1976) dealt with the admissibility of records which were not in the defendant's own handwriting under the business records exception. Id. at 295. There is nothing on the form that in any way connects it to the defendant. It was filled out entirely by Officer Clark and the defendant did not sign it. Therefore, it is not admissible under the admissions exception.

Similarly, it is not admissible under the business records exception. Investigative reports by police and other law enforcement officials are explicitly excluded from this exception. Iowa R. of Evid. 803(8).

The sole remaining issue is whether the admission of the report was prejudicial. The Iowa Supreme Court has stated: "Any evidence indicating the defendant refused to submit to a blood test undoubtedly damaged him at trial." State v. Jensen, 216 N.W.2d 369, 372 (Iowa 1974). While this is true, we find that the report in this case was cumulative to testimony by Pazour that the defendant orally refused to take the test. This is admissible as an admission by the defendant. We conclude that the admission of the form did not prejudice the defendant.

The findings of the trial court are affirmed.

AFFIRMED.