



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DAVID WILLIAM CARLIN,

Defendant-Appellant.

Filed June 30, 1981

1-157
65309

Appeal from Linn District Court. Lynne E. Brady, Judge.

Defendant appeals his jury conviction of OMVUI in violation of section 321.281, The Code 1979, alleging that the trial court abused its discretion in overruling defendant's motion to have the jury view the scene of the incident. AFFIRMED.

Jerald W. Kinnamon and Richard Klausner, of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, David Carlin, appeals his jury conviction of OMVUI in violation of section 321.281, The Code 1979, alleging that the trial court abused its discretion in overruling defendant's motion to have the jury view the scene of the incident. We affirm.

In the early morning hours of March 15, 1980, defendant was arrested for OMVUI on First Avenue in Cedar Rapids. Prior to trial defendant and the State entered into a stipulation which provided in part that defendant was intoxicated at the time of his arrest. The stipulation left a single issue before the jury: whether defendant had been operating a motor vehicle shortly prior to his arrest.

Sergeant Michael Birmingham, the arresting officer, gave the following testimony. Birmingham was driving west on the 600 block of Second Avenue in Cedar Rapids at approximately 2:15 a.m. on March 15, 1980. Second Avenue is a one-way street, and Birmingham saw a vehicle approaching him from the east. As the vehicle approached, Birmingham turned on his emergency flashing headlights and the top red light of his squad car, and he observed that the approaching vehicle was a silver pickup truck and occupied by a male. Birmingham swerved to avoid a head-on collision with the oncoming vehicle, and he executed a U-turn. Birmingham pursued the vehicle, saw its license number and jotted it down. The vehicle turned onto Tenth Street and Birmingham chased it to First Avenue, where the vehicle stopped and Birmingham made the arrest. The license number of defendant's silver pickup corresponded to the number Birmingham had earlier jotted down. Birmingham stated that the only time he lost sight of the fleeing vehicle was for a moment while making the U-turn.

Defendant gave the following testimony. Defendant was at a nearby Maid Rite until approximately 2:00 a.m., when he proceeded to walk to his pickup. Defendant had left his pickup on First Avenue two hours earlier after having had problems starting it. As defendant was fumbling with the keys in his pocket, Birmingham pulled up behind him. Then defendant emerged from the pickup and Birmingham arrested him. As of the time of defendant's arrest he had not operated his vehicle for at least two hours. Defendant testified that since Birmingham (according to Birmingham's testimony) was one and one-half blocks behind the vehicle after Birmingham made the U-turn, an incline in the road would have made it impossible for Birmingham to keep the fleeing

vehicle in view. Defendant stated that there were about twenty-five access points on Second Avenue between Seventh Street and Tenth Street into which the vehicle chased by Birmingham could have dissappeared while it was outside of his vision due to the incline in the road.

Defendant contends the trial court erred in overruling defendant's motion for a jury view of Second Avenue. Defendant hoped to show by the jury view that Birmingham could not have had the fleeing vehicle in sight after he executed the U-turn.

The decision to grant or deny a jury view request rests within the sound discretion of the trial court. State v. Hicks, 277 N.W.2d 889, 893 (Iowa 1979). A trial court's decision is reversible only upon a showing of abuse of discretion. Id. In order to show abuse of discretion, the defendant must prove that the judge's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. The purpose of permitting the jurors to view premises in controversy, or the place where any material fact occurred, is to enable them to better understand and apply the testimony of the witnesses, and not to make them silent witnesses in the case. State v. Ling, 198 Iowa 598, 601, 199 N.W. 285, 287 (1924). A jury view is not intended to permit jurors to give weight to their own observations, instead of using them for the more intelligent application and understanding of the evidence. Morrison v. Burlington, Cedar Rapids & Northern Railway Co., 84 Iowa 663, 667-69, 51 N.W. 75, 75-76 (1892). The verdict must be based on the evidence, and not the juror's personal examination. Ling, 198 Iowa 601, 199 N.W. at 287.

In overruling defendant's motion for a jury view the trial court correctly stated that there was sufficient evidence in the record from which the jury could decide the issue of defendant's guilt. The jury could perfectly well understand and apply the evidence adduced without a jury view. Defendant contends that the jury view was necessary for jurors to assess Birmingham's credibility and to decide if the incline on Second Avenue did cause a significant lapse in Birmingham's perception of the fleeing vehicle. To authorize a jury to view the scene for this purpose would enable jurors to act as silent witnesses by giving evidentiary weight to their own observations. The trial court did not abuse its exercise of discretion in overruling defendant's motion.

AFFIRMED.