

IN THE COURT OF APPEALS OF IOWA

FILED

APR 24 1984

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ALAN LEE WAGNER,

Defendant-Appellant.

Filed April 24, 1984

354

4-50
83-590

Appeal from the Iowa District Court for Floyd District Court on change of venue from Mitchell District Court - B. C. Sullivan and Ray E. Clough, Judges.

Defendant appeals his conviction of involuntary manslaughter in violation of Iowa Code section 707.5(2) (1981). AFFIRMED.

Melodie Hanes of Scalise, Scism, Sandre & Uhl, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

Defendant appeals his conviction, by bench trial, of involuntary manslaughter in violation of Iowa Code section 707.5(2) (1981). Defendant was also convicted of the crime of leaving the scene of a personal injury accident in violation of Iowa Code section 321.261 (1981), and although he has appealed from the judgment and sentence on both charges, his appeal is directed solely to issues concerning his conviction on the charge of involuntary manslaughter. There is no claim that the court's finding that defendant left the scene of a personal injury accident was error, or that the court was not justified in finding him guilty of that charge. We affirm defendant's convictions on both charges.

I. Defendant claims the court erred in failing to suppress evidence of tests which were conducted with defendant's vehicle the day after the accident from which these charges were brought. Defendant asserts that the tests were the result of a warrantless search and seizure without valid consent. The State contends that the tests were made with defendant's consent, and that such consent provides an exception to the otherwise improper search and seizure.

The evidence in this case showed that on August 1, 1982, there was an accident between a pickup truck driven by defendant and a motorcycle being ridden by Daniel and Debra Houdek. Daniel Houdek died as a result of the injuries he received in the accident, and his wife, Debra, sustained severe injuries. The defendant left the scene of the accident, but returned approximately thirty minutes later when the injured parties were being removed and the sheriff was present investigating the accident. Defendant was transported to the sheriff's office. There, defendant submitted to a breath test which showed a .124 level of alcohol in his blood.

On the day after the accident, the evidence shows that the sheriff called the defendant by telephone to advise him that he and a state trooper, Mike Adams, wanted to use his pickup truck to make some tests, and that they would come to

his house to get the truck to use for the tests. Approximately ten minutes later, the sheriff and Trooper Adams arrived and requested permission to use the truck. As a result of the conversation, defendant permitted his truck to be used for the tests. Defendant drove the truck to the scene of the accident and sat in it while the tests were conducted by the sheriff and Trooper Adams.

On the basis of the tests performed, Trooper Adams concluded and submitted testimony to the effect that the speed of the pickup at the time of the accident was eighty miles per hour. Adams' testimony, also based upon his investigation of the scene of the accident, stated that defendant's pickup truck was across the centerline of the highway and in the lane of travel of the motorcycle at the time of the collision.

Defendant moved to suppress Trooper Adams' testimony concerning the tests carried out by the use of his pickup truck.

A. Warrantless searches are per se unreasonable unless one of three exceptions is present: (1) the search is incident to an arrest; (2) the search is consented to; or (3) exigent circumstances require an immediate search. State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979).

B. The burden of demonstrating that evidence has been illegally procured normally devolves upon an accused in a motion to suppress such evidence. When, however, the State relies upon the consent of the accused as an exception to the rule that a warrantless search is per se unreasonable, the State has the burden to prove, by a preponderance of the evidence, that the consent was voluntary and free from duress and coercion. State v. Hall, 297 N.W.2d 80, 89 (Iowa 1980), cert. denied, 450 U.S. 927, 101 S. Ct. 1384, 67 L. Ed. 2d 359 (1981). In view of the presumption of unreasonableness of a warrantless search, the accused satisfies the burden of demonstrating the illegality of such evidence by raising the issue of its having been obtained by warrantless search. The burden of proving that it was properly obtained by virtue of one of the exceptions then devolves

upon the State. State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979), cert. denied, 445 U.S. 921, 100 S. Ct. 1859, 64 L. Ed. 2d 277 (1980). In this case, the State does not dispute defendant's claim that the evidence was obtained by a warrantless search. Consequently, the burden is upon the State to prove, by a preponderance of the evidence, that the claimed consent by the defendant was voluntary and free from duress. State v. Hall, 297 N.W.2d at 89.

Because we are dealing with a right of constitutional dimension, "[o]ur review is *de novo* consisting of an independent evaluation of the relevant circumstances in their entirety." State v. Jones, 274 N.W.2d 273, 275 (Iowa 1979), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980); State v. Ege, 274 N.W.2d 350, 352 (Iowa 1979).

C. It is the claim of defendant that his consent amounted, as stated in State v. Peterson, 219 N.W.2d 665, 670 (Iowa 1974), "only to a capitulation to authority." Defendant claims that because he was already in trouble, he had no choice but to agree to the use of his pickup truck for the tests the officers wanted to conduct. He claims that he didn't know he could refuse. However, he didn't protest the use, and he doesn't claim there was any threat made by any law enforcement officer. The defendant had ten minutes from the time the sheriff called until the two officers arrived at his premises. He agreed to their use of his pickup and he drove it to the scene of the accident for their use. The trial court found that defendant consented to the use of the truck, and that his constitutional rights were not violated in the use of the pickup truck for the tests. We agree that the State sustained its burden of proof to show that defendant consented to the search and seizure of his pickup truck.

Since the seizure and testing was not unlawful, the evidence based upon the tests made was admissible upon proper foundation. We hold that there was no error in the receipt of that evidence.

II. Defendant alleges that the trial court erred in overruling his motion in limine, and in allowing evidence referred to in that motion to be considered in the trial of this case.

The evidence in this bench trial was submitted under a stipulation which was stated by counsel for defendant as follows:

MR. SCALISE: Your Honor, if it please the court. It is stipulated and agreed by and between the parties hereto that if the witnesses were called who are listed as witnesses on the Minutes of Testimony attached to the Grand Jury Indictment, that, in fact, they would testify substantially the same as indicated in those Minutes.

Defendant filed a motion in limine concerning certain of the evidence contained in the minutes of testimony. At the time of submission of the case to the court, defendant sought a ruling upon that motion. The court, while indicating that the criticized testimony would not be taken into consideration unless there was a "necessary connection to avoid your objection of remoteness," overruled the motion in limine.

The State contends that nothing was preserved by defendant for appeal, and that, therefore, there is nothing before the reviewing court. It is the State's contention that, objection not having been made by defendant at the time of submission of the evidence, there was no error in failing to exclude the evidence covered by the motion in limine.

A. The general rule is that the granting or rejecting of a motion in limine is not reversible error. The error occurs, if at all, when the matter is presented at trial. An objection should then be made in order to preserve error. State v. Langley, 265 N.W.2d 718, 720-21 (Iowa 1978). However, as stated in State v. Harlow, 325 N.W.2d 90, 91 (1982):

We have recognized an exception to this rule, however, and have said a defendant need not renew his objections at trial if the prior ruling amounts to an unequivocal holding concerning the issue raised. State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979); State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979); State v. Miller, 229 N.W.2d 762, 768 (Iowa 1975).

The circumstances here bring the case within the exception to the general rule. A hearing was held, counsel presented legal arguments, and the trial court overruled the motion in limine with the admonition that it would consider the testimony only if it would avoid defendant's objection as to remoteness. We hold, therefore, that the court's ruling upon defendant's motion in limine is preserved for consideration on this appeal.

B. Defendant's motion in limine was directed to the testimony of eight witnesses whose testimony was summarized in the minutes of testimony. Defendant objected to the testimony of six of those witnesses on the grounds that their observations of the operation of defendant's pickup truck were so remote as to be irrelevant and immaterial to any issues presented in this case. Additionally, the motion was directed to the testimony of two witnesses who were prepared to testify to the certification of the breath taking device, the qualifications of the officer who administered the test to defendant, their opinion as to the defendant's blood-alcohol level, and the effects of alcohol as it related to this case.

1. As to the claim that the testimony of the six witnesses was so remote as to be irrelevant and immaterial to any issues presented in this case, the State claims that defendant's actions were a part of a continuous course of conduct of the afternoon involving drinking and fast and reckless driving. The State contends that the acts testified to by the witnesses, to which defendant objects, were not so removed in time or place from the locus of the accident to have been irrelevant as to defendant's state of mind at the time of the crash.

An objection based on remoteness essentially raises an issue of relevancy. State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974). While remoteness in point of time does not necessarily render evidence irrelevant, it may do so where the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof. Id. The basic test of relevancy is whether the evidence offered would make the

desired inference more probable than it would be without the evidence. As the Iowa Supreme Court said in State v. Schlak, 253 Iowa 113, 117, 111 N.W.2d 289, 292 (1961): "And depending upon the circumstances shown in the evidence remoteness in time is committed to the discretion of the trial court, and the length of time affects the weight rather than the admissibility." Further, the supreme court noted the distinction between relevancy and materiality in State v. Mark, 286 N.W.2d 396, 412 (Iowa 1979).

Even though the objections "irrelevant" and "immaterial" are often used interchangeably, we have said many times, "'immaterial' more precisely denotes evidence which is offered to prove a proposition not at issue, while 'irrelevant' denotes evidence which does not logically tend to establish any material proposition. . . ."

A determination as to relevancy and materiality of evidence rests largely in the trial court's discretion.

Id. (citations omitted).

In this case, the evidence offered, to which defendant objects, is offered to prove a proposition at issue, namely, defendant's driving and drinking leading up to the occurrence of the accident involved in this matter. There is no question as to the materiality of the evidence offered. As stated above, its relevancy rests largely in the trial court's discretion, and the length of time affects the weight rather than the admissibility of the evidence. Therefore, the trial court did not abuse its discretion in allowing the evidence to be received.

As to the specific testimony of Cecil Martin, while he was unable to identify the defendant as the driver of the pickup truck he observed and to identify the defendant's truck, his testimony was cumulative only and its receipt was, in this case, without prejudice. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982).

2. Defendant claims that even if the evidence referred to in his motion in limine could be found to be relevant, its prejudicial effect far outweighs its probative value requiring it to be excluded.

A trial court should exclude evidence upon proper objection when its probative value is substantially outweighed by the danger of unfair prejudice. State v. Webb, 309 N.W.2d 404, 412 (Iowa 1981). Whether the probative value of proffered evidence is outweighed by the danger of unfair prejudice to the defendant is a determination committed to the discretion of the trial court. The court's ruling will be reversed on appeal only when a clear and prejudicial abuse of that discretion is shown. Id. at 412.

There was other evidence of the same or similar conduct by the defendant from witnesses whose testimony is not objected to by the defendant. The evidence claimed to be remote is, for the most part, cumulative, and corroborated by other admissible evidence. We find no abuse of the trial court's discretion in refusing to determine that the prejudice of the evidence outweighed its probative value.

3. Moreover, we do not believe that the trial court considered the testimony to which defendant objected by motion in limine. The trial court's findings were based upon the testimony concerning defendant's speed at the time of the accident, and that he was, at that time, under the influence of alcohol. Based upon those findings, the court concluded that:

2. Defendant knowingly drove his vehicle in such manner, namely, (a) at a speed of not less than 80 miles per hour, and (b) on his left or wrong side of the centerline of the highway, and (c) while under the influence of intoxicating beverage consisting of beer, as is likely to cause serious injury or death.

Assuming arguendo that it was error to admit the evidence objected to by the defendant, the record affirmatively shows that it was discarded by the court and not relied upon in reaching its decision. See Bellew v. Iowa State Highway Commission, 171 N.W.2d 284, 291 (Iowa 1969).

III. Defendant's final complaint is that the court erred in overruling defendant's motion to suppress the evidence concerning the results of a bodily substance alcohol content test. His motion to suppress claimed that the test was requested without probable cause and in violation of the fifth and fourteenth amendments of the Constitution of the United States and in violation of Iowa Code chapters 321A and 321B (1981).

A. The record reveals that the sheriff and the defendant had some conversation at the scene of the accident, and that the sheriff realized defendant had been involved in the accident. Sheriff Jahnel testified that ". . . I explained to him the -- now in this deal somebody gets killed in an accident, we can request a blood sample or breath sample for alcohol." Later, after the sheriff had defendant get into his car, he smelled alcohol on the defendant, and transported him to the sheriff's office. En route, the sheriff advised the defendant of his rights. Thereafter, a breath test was taken.

After a hearing on defendant's motion to suppress the evidence from the breath test administered to him at the time of his processing for OWI, the trial court concluded that the test had been made with the full protection of defendant's constitutional rights and that the results were admissible.

Defendant argued at trial that the record showed no probable cause for the sheriff to believe that the defendant was under the influence of alcohol or was arrested and charged with that offense. Conceding that the sheriff may have considered a chemical test without a showing of probable cause, the sheriff was correct in his assumption that, because a serious injury had occurred in the accident, he had a right to request a chemical test to determine the alcohol content of defendant's blood at any time he had reasonable grounds to believe that defendant had been in violation of Iowa Code section 321.281. Iowa Code section 321B.4 (1983), the code section applicable at the time of this arrest, provides as follows:

Any person who operates a motor vehicle in this state upon a public highway under circumstances which give reasonable grounds to believe the person to have been operating a motor vehicle in violation of section 321.281, is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, saliva, or urine, and to a chemical test or tests of the specimens for the purpose of determining the alcoholic content of the blood. . . . the test or tests shall be administered at the written request of a peace officer having reasonable grounds to believe the person to have been operating a motor vehicle in violation of section 321.281, and if any of the following conditions exist:

a. . . .

b. The person has been involved in a motor vehicle accident or collision resulting in personal injury or death

Following defendant's entry into the sheriff's car, he acquired reasonable cause to believe defendant had been operating his truck in violation of section 321.281.

It is clear from this record that defendant claimed, in an effort to obtain the suppression of the results of the breath test, that the police officers had violated the provisions of Iowa Code section 321B.3 (1981). Defendant correctly quotes portions of that section, including that portion which requires that the tests be administered "only after the peace officer has placed such person under arrest for the offense" That section, however, was amended substantially, and at the time of the conduct here involved, Iowa Code section 321B.4 (1983), was the applicable law. Defendant, in his reply brief, acknowledges that the discussion of section 321B.3 in his appellate brief was out of place, and that he referred to the wrong statute in that argument. In his reply brief, he complains that either the test is inadmissible because it was a "screening test" under Iowa Code section 321B.3 (1983), or that it is inadmissible because there is no evidence that the test was carried out in compliance with the requirements of Iowa Code section 321B.4 (1983). Specifically, there was no showing the test was administered at the written request of a police officer.

Neither in his motion to suppress, nor in his brief and argument has defendant previously alerted the State to the claim now made for the first time in his reply brief and argument. Matters not raised at the trial court level cannot be raised for the first time on appeal. State v. Morehouse, 316 N.W.2d 884, 886 (Iowa 1982); State v. Hamilton, 309 N.W.2d 471, 476 (Iowa 1981). As stated in State v. Pardock, 215 N.W.2d 344, 348 (Iowa 1974):

One attempting to exclude evidence whether the attempted exclusion is by objection or motion, has a duty to indicate the specific grounds to the court so as to alert him to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible. State v. Williams, 207 N.W.2d 98, 109-110 (Iowa 1973).

In this case, defendant cannot rely upon issues or specific grounds not raised below. That the issue was not raised below is evidenced by the fact that the motion in the trial court was brought on the basis of a statute that no longer stated the law with respect to such tests. Defendant cannot raise here for the first time, the issue discussed in State v. Richards, 229 N.W.2d 229, 231-34 (Iowa 1975), without giving the state the opportunity to meet that issue after being alerted by defendant's motion to suppress.

B. Defendant also claims that the taking of the breath test in this case violated his constitutional rights under the fourth, fifth, and fourteenth amendments to the Constitution of the United States.

Upon our *de novo* review of the totality of the circumstances in this case, we find that defendant's claim of violation of his constitutional rights is without merit. He was advised of his constitutional rights before any test was administered, and waived his right to counsel before such test was carried out. The sheriff had probable cause to suspect him of the offense of OWI prior to requesting the test. We agree with the trial court that defendant's constitutional rights were fully protected.

The final claim that the evidence was inadmissible because it was the fruit of a poisonous tree needs no comment in view of our holdings above.

We find that defendant's arguments are without merit, and we accordingly affirm his convictions upon both charges.

AFFIRMED.