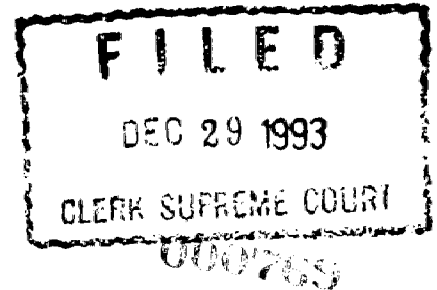


IN THE COURT OF APPEALS OF IOWA

No. 3-424 / 92-1574



STATE OF IOWA,

Appellee,

vs.

ROLANDA LEE FORQUER,

Appellant.

Appeal from the Iowa District Court for Des Moines County, Gary J. Snyder, District Associate Judge.

The defendant appeals her conviction, following a jury trial, of operating while intoxicated and driving while under suspension. **AFFIRMED IN PART AND REVERSED IN PART.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown, Assistant Attorney General, Patrick J. Jackson, County Attorney, and Matthew Shupe, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab,
JJ.

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SCHLEGEL, J.

The defendant, Rolanda Lee Forquer, appeals her conviction, following a jury trial, of operating while intoxicated (OWI) and driving while under suspension (DUS) in violation of Iowa Code sections 321J.2(2)(a) and 321J.21 (1991). She contends the district court erred in: (1) failing to instruct the jury regarding her decision not to testify; and (2) overruling her objection to being charged with DUS under section 321J.21.

The State charged Forquer with OWI and DUS pursuant to Iowa Code sections 321J.2(2)(a) and 321J.21 (1991). At the start of trial, Forquer proposed a jury instruction informing jurors not to draw any inferences about her guilt based on her election not to testify. Later, Forquer's request to include this instruction was denied. The district court stated Jury Instruction No. 4 was sufficient, which stated in part: "keep in mind the presumption of innocence and the fact the defendant need not produce evidence as to her innocence or guilt."

During trial, and while objecting to the admissibility of a State exhibit, Forquer argued that: (1) revocation under 321J.21 only suspends operating privileges for 180 days; (2) after this time, a license may remain revoked pursuant to 321A.17(2) for failure to post proof of financial responsibility; and (3) the State's evidence supported a violation of 321A, but not 321J.2 as alleged. Forquer's objection was overruled.

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Forquer was found guilty and fined \$700, sentenced to 120 days in jail on the OWI charge, and fined \$300 on the DUS charge. Forquer appeals. We affirm in part and reverse in part. Forquer argues that Jury Instruction No. 4 did not adequately minimize the danger of the jury giving evidentiary weight to her failure to testify. Forquer also contends that State v. Webb, 493 N.W.2d 868 (Iowa App. 1992), supports her argument that the State failed to present evidence showing a violation of Iowa Code section 321J.21 and that her conviction must be reversed.

The State argues, among other things, that the court, on appeal, should overrule Webb because its holding rests on erroneous statutory interpretations. The State asserts that Iowa Code sections 321J.12, 321J.21, and 321J.17, read together, revoke Forquer's license for 180 days pursuant to section 321J.21 and continue that revocation until Forquer pays the \$100 reinstatement fee pursuant to section 321J.17. Forquer had not paid this fee at the time of her arrest. Finally, the State argues Forquer has not preserved error on the jury instruction issue.

The refusal to include the defendant's proposed jury instruction regarding the impropriety of drawing inferences about the defendant's guilt based upon the fact she elected not to testify during trial rests largely in the sound discretion of the trial court. State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970) (citing State v. Shephard, 255 Iowa 1218, 1231, 124 N.W.2d 712, 719-20 (1964)). We review

for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

However, having reviewed the record with respect to this issue, we agree with the State that the defendant has failed to preserve this issue for appellate review. In State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978), the court stated, "[O]ur adversary system imposes the burden upon counsel to make a proper record to preserve error, if any, . . . by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in event they are refused." (Emphasis added.) The defendant failed to do so after the trial court denied her requested instruction. Furthermore, we agree with the trial court that Jury Instruction No. 4 adequately informed the jury that the defendant's election not to testify created no presumption of guilt against her.

Next, Forquer contends the district court erred by overruling her objection with regard to the driving while under suspension charge in violation of Iowa Code section 321J.21 (1991). Our scope of review on this issue is for the correction of errors at law. Iowa R. App. P. 4. The question before us on appeal is whether the defendant's license was "revoked" within the meaning of section 321J.21

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at the time she was arrested for the present offense. We hold it was not. We have previously addressed this question in State v. Webb, 493 N.W.2d 868 (Iowa App. 1992).

In Webb, we held that the failure to pay the \$100 civil penalty imposed by section 321J.17 does not continue a period of motor vehicle license revocation past the 180-day period imposed by section 321J.12. Id. at 871. We stated:

We conclude the trial court correctly interpreted sections 321J.17 and 321J.21. Section 321J.17 does not specifically provide that a revocation of a person's driver's license continues until the \$100 penalty has been paid. Instead, section 321J.17 provides that a driver's license will not be "reinstated" until the penalty is paid. We note that in section 321A.17(2) the legislature specifically provided that a license revocation shall remain in effect until proof of financial responsibility is shown. If the legislature had intended to continue the revocation of a person's driver's license until the \$100 penalty had been paid, the legislature could have used the same language in section 321J.17 as that used in section 321A.17(2).

* * *

Therefore, we conclude the proper penalty for persons who continue to drive a motor vehicle without paying the \$100 penalty required by section 321J.17 for reinstatement of their driver's license is that provided by section 321.174, which makes it a simple misdemeanor for a person to operate a motor vehicle upon a state highway unless the person has a valid motor vehicle license.

Id.

In the present case, the parties concede the defendant's driver's license was revoked on December 12, 1986 due to an OWI test failure. The 180-day revocation or suspension period had clearly expired prior to the

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defendant's action of driving a pickup on August 25, 1991--the event giving rise to the current charges. The parties further agree that the defendant had not paid the \$100 victim-reparation penalty required following the revocation or the \$100 reinstatement fee as of the date of her arrest in the present case.

In accordance with our holding in Webb, we reject the State's assertion here that Iowa Code sections 321J.12, 321J.21, and 321J.17, read together, revoke Forquer's license for 180 days pursuant to section 321J.21 and continue that revocation until Forquer pays the \$100 reinstatement fee pursuant to 321J.17. Under Webb, Forquer's conviction for driving while suspended in violation of section 321J.21 must be reversed.

In conformity with the above discussion, we affirm the defendant's conviction for operating while intoxicated in violation of Iowa Code section 321J.2(2)(a), and we reverse the defendant's conviction for driving while under suspension in violation of Iowa Code section 321J.21.

AFFIRMED IN PART AND REVERSED IN PART.

Donielson, P.J., concurs; Habhab, J., dissents without opinion.