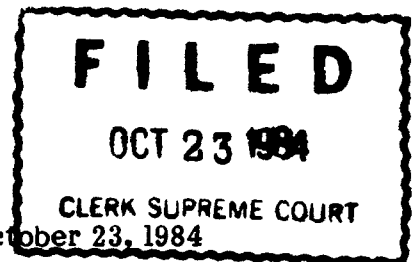


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Filed October 23, 1984

Plaintiff-Appellant,

)

vs.

)

4-385
84-388

390

PAUL JAY LOVIG,

Defendant-Appellee.

)

Appeal from the Iowa District Court for Marshall County—Sandra J. Holien, Judge.

The State appeals from an order granting a new trial in a prosecution for OWI in violation of Iowa Code 321.281. We reverse the order granting a new trial and affirm the defendant's conviction. REVERSED.

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

Pat W. Brooks of Brooks, Ward & Trout, Marshalltown, for defendant-appellee.

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

Applicable Facts

The defendant was arrested for operating a motor vehicle under the influence of an intoxicating substance in violation of Iowa Code 321.281 (1983). Defendant refused to take a proffered Chapter 321B breath test following arrest. No blood, breath, saliva or urine sample was taken from defendant.

Defendant was tried to a jury and convicted. At the time of trial there was testimony that defendant had consumed three to four beers in a two-hour period. The defendant introduced expert testimony through a hypothetical question that a man of defendant's weight who consumed three and one-half eight ounce beers in a two-hour period would have a blood alcohol content of .025 percent. If the same quantity were consumed in a one-hour period his blood alcohol content would have been .050. Based upon this testimony the defendant requested the following instruction.

"Blood-Alcohol Level. The law provides that if a person operating a motor vehicle had, at the time of said operation, more than ten one-hundredths of one percentum by weight of alcohol in his or her blood, the same shall be presumptive evidence that such person was under the influence of an alcoholic beverage. If you find that the evidence in this case establishes the defendant did not have ten one-hundredths of one percentum by weight of alcohol in his blood, then you may find the defendant innocent, but are not required to do so."¹

¹Defendant's requested jury instruction no. 5 is an adaption of II Uniform Jury Instructions No. 3106 Ann. (1983). The uniform instruction provides:

No. 3106 PRESUMPTION FROM BLOOD TEST

The law provides that if there is evidence that a person operating a motor vehicle had, at the time of said operation, more than ten one-hundredths of one percentum by weight of alcohol in his or her blood, the same shall be presumptive evidence that such person was then under the influence of an alcoholic beverage.

This law permits, but does not require, the jury to infer that the defendant was under the influence of an alcoholic beverage, if it is found by the jury that at the time defendant was operating a motor vehicle, his blood contained more than ten one-hundredths of one percentum by weight of alcohol.

The trial court denied the defendant's request.

The defendant was convicted and filed a motion for new trial, alleging that the trial court erred in failing to give the requested instruction. The trial court sustained the motion, finding that the jury should have been so instructed and failure to do so was prejudicial to the defendant and constituted reversible error.

The State appeals, contending the trial court erred in granting defendant's motion for new trial.

I.

The sole question here is whether or not the jury was properly instructed. The trial court based its motion for new trial on its error in failing to give the requested instruction. The determination was based solely upon a question of law. The trial court was not in a better position than an appellate court to determine whether or not the requested instruction should have been given. We must therefore determine whether the trial court erred rather than determine whether the trial court abused its discretion. See State v. Lindsey, 302 N.W.2d 98, 102(Iowa 1981).

II.

The state contends the court erred in granting the motion for new trial because she had failed to give defendant's requested instruction. The defendant contends that the court has a duty to instruct the jury on the law applicable to the facts as disclosed by the evidence and the requested instruction should have been given. The law of this case does not support the giving of the proposed instruction. Section 321.281 provides in part:

"1. A person shall not operate a motor vehicle upon the public highways of this state in either of the following conditions.

(a) While under the influence of an alcoholic beverage, . . ."

The presumption referred to in the requested instruction arises from Iowa Code section 321.281(8)(1983) governing foundation requirements for the admission

of the results of chemical tests performed under Iowa Code chapter 321B (Implied consent law)(1983). Section 321.281(8) provides:

In any prosecution under this section, evidence of the results of analysis of a specimen of the defendant's blood, breath, saliva, or urine is admissible upon proof of a proper foundation. In an action in which a violation of subsection 1, paragraph "a" of this section is alleged, evidence that there was, at the time, ten hundredths or more of one percent by weight of alcohol in the defendant's blood is presumptive evidence that the defendant was under the influence of an alcoholic beverage.

The section 321.281(8) presumption is to permit a case to go to the jury upon nothing more than a showing of the required blood alcohol content. The statute is not the exclusive and only method of proving the defendant's condition at the time in question. See State v. Boner, 203 N.W.2d 198, 200 (Iowa 1972). Section 321.281(8) does not address the facts disclosed by the evidence in this case. The statute was passed for the limited purpose of establishing a blood alcohol count at which a presumption would rise and nothing more.

To the extent that a court is permitted or required to instruct that a given set of facts precludes a finding of guilt as to the crime charged, that set of facts must indeed be incompatible with one or more essential elements of a crime. State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984).

It was not error for the trial court to refuse to give the instruction. The trial court erred in holding its failure to give the required instruction was prejudicial and constituted error.

The order granting a new trial is reversed and the defendant's conviction is affirmed.

REVERSED.