

IN THE COURT OF APPEALS OF IOWA

No. 6-655 / 96-0218

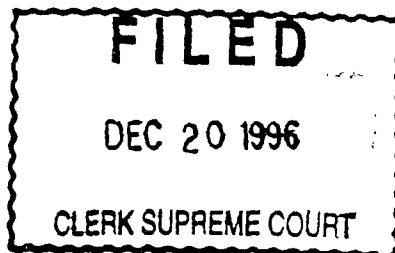
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MONTE RAY MANSER,

Defendant-Appellant.



Appeal from the Iowa District Court for Warren County, John P. Crouch,
Associate District Judge.

Monte Manser appeals his conviction and sentence for operating while
intoxicated, second offense, in violation of Iowa Code section 321.2 (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, Kevin A. Parker, County Attorney, and Douglas D. Hammerand, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Cady and Huitink, JJ.

HUITINK, J.

Defendant Monte Ray Manser appeals his conviction for Operating While Intoxicated, Second Offense, an Aggravated Misdemeanor, in violation of Iowa Code Section 321.2 (1993). We affirm.

Manser was convicted based on the following evidence: On April 2, 1995, Officer Chris Marsh of the Indianola Police Department observed a vehicle drive to an exit of a private parking lot, stop, pause, and then “accelerate rapidly back into the parking lot.” The officer testified that the tires “barked” in violation of a city ordinance. He signaled the vehicle to stop. When Manser exited the vehicle, the officer smelled alcohol and noticed that Manser had bloodshot, watery eyes and swayed slightly. Manser’s preliminary breath test (PBT) showed a blood-alcohol concentration of .10 or more. The officer conducted three field sobriety tests which Manser failed. He then arrested Manser and transported him to the Warren County Sheriff’s Office where he administered an intoxilyzer test.

Manser filed a Motion to Suppress all the evidence relating to the arrest arguing that the officer did not have reasonable cause for the stop or reasonable cause to administer the tests. After a hearing, the district court denied the motion.

Manser appeals the denial of his Motion to Suppress. He also appeals the district court’s failure to order a substance abuse evaluation prior to sentencing and its failure to properly state its reason for the sentence.

I. Motion to Suppress.

Manser asserts he was subjected to an illegal stop, search, and seizure by Officer Marsh. He argues the officer did not have specific and articulable cause to stop Manser based on his observations the night of April 2, 1995.

Manser's challenge to the stop made by the arresting officer implicates his protection against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution. U.S. Constitution, Amendment IV. Our review of these constitutional issues is *de novo*. *State v. Riley*, 501 N.W.2d 487, 488 (Iowa 1993); *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993). We consider the entire record including evidence presented at the suppression hearing as well as evidence presented at the trial. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

The Fourth Amendment requires reasonable cause to stop a vehicle for investigatory purposes. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 899, 906 (1968). When a stop is challenged on the basis that reasonable cause did not exist, the State must show that the stopping officer had "specific and articulable cause to support a reasonable belief that criminal activity may have occurred." *State v. Lamp*, 322 N.W.2d 48, 51 (Iowa 1982) (quoting *State v. Aschenbrenner*, 289 N.W.2d 618, 619 (Iowa 1980)). The officer is bound by the true reason or reasons for making the stop; the officer may not rely on reasons that he or she could have had but did not actually have. *Aschenbrenner*, 289 N.W.2d at 619. The constitutionality of the stop is judged by balancing the degree of the intrusion against its promotion of

legitimate governmental interests. *State v. Hilleshiem*, 291 N.W.2d 314, 317 (Iowa 1980).

At the suppression hearing, the officer testified the vehicle “barked” its tires when it accelerated in reverse thus providing him with reasonable cause to make the stop. In support of his argument, Manser emphasizes that the officer’s Certificate of Probable Cause did not indicate why he stopped Manser’s vehicle nor did he refer to any “barking” tires. Manser urges that it is not a crime to drive a properly registered vehicle in reverse in a parking lot. He also argues the alleged “barking” of the tires did not constitute an offense under the applicable city ordinance.¹ Manser also contends that the testimony about the “barking” tires is in direct conflict with the officer’s testimony that he did not know at the time of the stop if any crime had been committed.

We find that the “barking” of the tires heard by the officer provided him with reasonable cause to make the investigatory stop. The fact that the officer failed to specifically note the “barking” tires in the certificate of probable cause does not negate his later assertion at trial regarding the reasons for the stop. The certificate

¹ The applicable city ordinance, Indianola Code Section 19-227, reads as follows:

No person shall drive any vehicle in such a manner as to cause the repeated or prolonged squealing of tires through too rapid acceleration, too rapid deceleration or too high speed on turning such vehicle . . .

reads “Accelerated rapidly back into the parking lot.” This statement sufficiently reflects the grounds for the stop as described by the officer at the suppression hearing. Furthermore, we conclude this description falls within the scope of the city ordinance relied upon by the officer. *See* Indianola Code Section 19-227. Accordingly, we reject Manser’s argument and affirm on this issue.

Manser also argues that the admission of the preliminary breath test (PBT) was reversible error. *See State v. Denshaw*, 404 N.W.2d 156, 157 (Iowa 1987) (to guard against unreliability of preliminary breath screening test, evidence concerning the results are inadmissible in evidence). He further asserts that because there was little reliable evidence to demonstrate that he was intoxicated, the officer did not have reasonable grounds to administer the test. Manser also contends the results of the PBT cannot support a finding of reasonable cause to believe that he was operating while intoxicated for purposes of the implied consent law. *See State v. Braun*, 495 N.W.2d 735, 738 (Iowa 1993). Accordingly, Manser urges the PBT, sobriety tests, and the intoxilyzer results should have been suppressed.

We find Manser’s arguments without merit. The record reveals Manser waived his right to a jury trial and stipulated to the minutes of testimony, which included the PBT results and a copy of the certification for the Intoxilyzer model 4011A used by the officer. Therefore, the authorities cited by Manser holding that preliminary breath test results are inadmissible in a jury trial do not apply here. *See State v. Denshaw*, 404 N.W.2d 156, 158 (Iowa 1987); *see also State v. Zell*, 491

N.W.2d 196, 197 (Iowa App. 1992). Furthermore, Officer Marsh administered the PBT test based on reliable observations including the manner in which Manser rapidly accelerated the vehicle in reverse upon spotting the police vehicle, the odor of alcohol on Manser's breath, his watery and bloodshot eyes, and the manner in which he swayed upon exiting the car. The results of the PBT and the officer's observations provided reasonable cause for administering the sobriety tests and for ultimately arresting Manser. The evidence was sufficient to support the officer's belief that reasonable grounds existed to conclude Manser was intoxicated. *See State v. Braun*, 495 N.W.2d 735, 737 (Iowa 1993).

II. Sentencing.

Manser challenges the court's failure to obtain a substance abuse evaluation or equivalent information prior to sentencing.

Iowa Code section 321J.3(1) (1995) requires the sentencing court to order a substance abuse evaluation upon the defendant's conviction of Operating While Intoxicated, Second Offense.² In *State v. Moyer*, 382 N.W.2d 133 (Iowa 1986), the

² Section 321J.3(1) provides in pertinent part:

... If the defendant submitted to a chemical test on arrest for the violation of section 321J.2 and the test indicated an alcohol concentration of .20 or higher, or if the defendant is charged with a second or subsequent offense, the court shall order the defendant, on conviction, to undergo a substance abuse evaluation and the court shall order the defendant to follow the recommendations proposed in the substance abuse evaluation for appropriate substance abuse treatment for the defendant.

Iowa Supreme Court held it is mandatory that the district court order a pre-sentence substance abuse evaluation. *Id.* at 135.³ The *Moyer* court vacated the sentence noting that the sentencing court ordered no evaluation and *had not received equivalent information before imposing sentence.* *Id.* at 136 (emphasis added). (*Cf. State v. Ludley*, 465 N.W.2d 912 (Iowa App. 1990) (substance abuse evaluation ordered as condition of pretrial release substantially complied with requirement for presentencing evaluation)).

The record reflects that the sentencing court was apprised of Manser's intention to attend an inpatient weekend program at the Howard Hughes facility. Furthermore, the court relied upon this information in granting Manser credit, in lieu of serving the seven day minimum jail sentence, for each day of inpatient participation in the Hughes program. The parties also stipulated that the Hughes program included a drinking driver's program. Finally, as part of the sentence, the court ordered a substance abuse evaluation and ordered Manser to follow the recommendations of those evaluations. We now conclude that although it appears from the record a substance abuse evaluation may have not been obtained prior to the hearing, the trial court substantially complied with the requirements of section 321J.3 (1995) by receiving equivalent information before imposing sentence. Manser's concession at trial that he was in need of inpatient treatment for substance abuse

³ *State v. Moyer* interpreted a 1984 amendment to Iowa Code section 321.281(2)(c) (1983) which is virtually identical to section 321J.3 (1995)

fulfills the substantial compliance requirement. No further objective intended by the statute would have been served by a pre-hearing substance abuse evaluation. *See State v. Rutter*, 547 N.W.2d 226, 227 (Iowa 1996) (court held public interest in securing substance abuse evaluation had been fully served where at sentencing defendant requested court to order substance abuse treatment).

Manser also contends he received an illegal sentence based on the district court's alleged failure to state its reasons for the sentence.

We review a sentence for an abuse of discretion based on the entire record, and look to see if the reasons articulated by the trial court are sufficient to enable us to determine if an abuse of discretion occurred. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa App. 1995). Even a succinct and terse statement of reasons may be sufficient as long as the brevity displayed does not prevent us from reviewing the exercise of the trial court's discretion. *Id.* However, the sentencing court fails to exercise discretion when it only cites a single, nonspecific factor. *Id.* (citations omitted).

We find the information exchanged at the sentencing proceeding is sufficient to review the court's exercise of discretion. The record reveals the prosecutor recommended sixty days in jail with all but seven days suspended and with credit for time served. Eighteen months of probation were also proposed with a condition of probation being that Manser complete a substance abuse evaluation and follow through with any recommendations. Finally, drinking driver's school and a minimum fine of \$750 plus 30 percent surcharge and costs were suggested by the State.

Counsel for Manser urged the court to consider “in-house” participation in the Harold Hughes program in lieu of jail time based on Manser’s “good appearance” record and his on-going search for employment. The State and the court concurred and the sentence was entered stipulating credit for time spent in the Hughes program. Finally, counsel for Manser also informed the court that Manser would be requesting extra time to pay the fine. The dialogue between the parties and the court supports the sentence imposed. *See Boltz*, 542 N.W.2d at 11 (entire sentencing colloquy forms adequate basis for sentencing court’s exercise of discretion.).

Moreover, we note the trial court imposed the minimum sentence for the offense. *See* § 321J.2(2)(b). Therefore, any alleged failure by the trial court to state its reasons for the sentence imposed was harmless error. *See State v. Matlock*, 304 N.W.2d 226, 227 (Iowa 1981). We therefore reject Manser’s arguments and affirm on this issue.

We affirm the conviction and sentence imposed in its entirety.

AFFIRMED.