



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 23, 1983
vs.	)	<u>2-345</u>
RONALD EUGENE SOY,	)	67755
Defendant-Appellant.	)	

Appeal from Black Hawk District Court, George L. Stigler, Judge.

Defendant appeals from his conviction of operating a motor vehicle while under the influence of alcohol or drugs, a violation of Iowa Code section 321.281 (1981). AFFIRMED.

John W. Ackerman, Cedar Falls, for defendant-appellant.

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

Considered en banc.

PER CURIAM

Defendant Ronald Eugene Soy appeals from his conviction of operating a motor vehicle while under the influence of alcohol or drugs, a violation of Iowa Code section 321.281 (1981). Defendant's various assertions of error relate to the admission into evidence of intoxilyzer test results, the admission of testimony that a person with a particular blood level would be considered "under the influence of... alcohol," and the joinder of speeding charge with defendant's OMVUI charge.

Our scope of review in criminal matters is on assigned error, except with regard to allegations of constitutional violations, which we review de novo, making an independent evaluation of the totality of circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

Defendant asserts that the State failed to present a sufficient foundation for the admission of intoxilyzer results, and that the trial court therefore erred in overruling his pretrial motion to suppress and motion in limine regarding the results, and in allowing the State to introduce evidence of the results at trial. We agree with the trial court that the requisite foundational facts were met.

Iowa Code section 321B.4, which regulates the taking of body samples of intoxicated drivers for testing purposes, provides, in material part, "any peace officer, using devices and methods approved by the commissioner of public safety, may take a specimen of a person's breath or urine for the purpose of determining the alcoholic content of the person's blood." This provision has been construed by the Iowa Supreme Court as requiring two things: First, the commissioner of public safety must have approved "devices and methods" for administering the tests, and second, the evidence must demonstrate that these devices and methods were utilized in administering the test. State v. Hansen, 203 N.W.2d 216, 223 (Iowa 1972).

In the instant case the State has demonstrated that the particular intoxilyzer machine which was used to test defendant was certified by the Iowa Department of Public Safety and the DCI Criminalistics Laboratory. The device was operated in accordance with the required checklist of procedures and each item on the checklist was initialed by the operator. The operator was trained on the intoxilyzer machine, and was certified by the Iowa Department of Public Safety and the DCI. We think that this evidence illustrates compliance with § 321B.4, and that the trial court properly overruled the pretrial motion to suppress and motion in limine, and properly admitted the test results.

Defendant also asserts that the trial court erred in allowing the State to introduce evidence of the breath test when, because of defendant's failure to properly perform the breath test, the State took the position that defendant had refused to submit to testing in an administrative proceeding under Iowa Code section 321B.7 (refusal to submit to testing as basis for revocation of license). In support of his argument defendant cites State v. Hitchens, 294 N.W.2d 686 (Iowa 1980). In that case the officers obtained a search warrant and had a blood sample taken from defendant after he refused to submit to chemical testing. The Iowa Supreme Court affirmed the trial court's exclusion of the blood test results at defendant's trial for involuntary manslaughter. Id. at 689. We fail to see the relevance of Hitchens to defendant's argument, which apparently is that the State espoused inconsistent assertions at the OMVUI hearing and at the license revocation proceeding. The Iowa Supreme Court has stated: "The criminal, judicial prosecution for driving while under the influence of intoxicants and the civil, administrative proceeding for license revocation are separate and distinct." Carroll v. Iowa Department of Public Safety, 231 N.W.2d 19, 21 (Iowa 1975); see State Department of Transportation v. Marvin, 307 N.W.2d 10, 11 (Iowa 1981)(no conflict between statute governing sentence for operating motor vehicle while

intoxicated and statute governing revocation of driver's license). We conclude that this reasoning applies to the instant case and that the breath test results were properly admitted over defendant's objection.

Defendant's objections to two instructions given at trial are likewise without merit. First, we find no error or hostility in the judge's instruction which joined defendant's speeding charge with the OMVUI charge, or in his warning to defendant that the consequence of withdrawing the speeding charge from the jury would be his arrest for failure to appear on the speeding charge. Second, we find sufficient evidence in the record that defendant's "blood alcohol level" was .190 to support the instruction given by the judge which referred to a standard of "ten one-hundredths of one percentum by weight of alcohol in his or her blood." See State v. Janssen, 239 N.W.2d 564, 567 (Iowa 1976).

Because we find that defendant's general objection failed to preserve error on his contention that the State's expert witness gave an impermissible opinion on a mixed question of law and fact, we do not address this issue on appeal. The trial court's decision is affirmed.

AFFIRMED.