IN THE COURT OF APPEALS OF IOWA

No. 0-37 / 99-548
Filed February 23, 2000

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JUSTIN RAYE BONNETT,

Defendant-Appellant.

Appeal from the Iowa District Court for Jefferson County, Lucy J. Gamon, District Associate Judge.

Justin Raye Bonnett appeals from the judgment and sentence following his conviction for first-offense operating while intoxicated. **REVERSED AND REMANDED.**

Thomas M. Walter of Johnson, Hester, Walter & Breckenridge, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, and Timothy W. Dille, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

There is a golden moment of silence at trial if a person invokes his constitutional right against self-incrimination during questioning by police authorities. Justin Bonnett's constitutional rights under the Fifth and Sixth Amendments were violated when, during his trial for operation of a motor vehicle while intoxicated, evidence of his invocation of his right to remain silent was admitted into evidence. Because we cannot find this constitutional error harmless beyond a reasonable doubt, we reverse his conviction and remand for new trial.

I. Background Facts & Proceedings.

A Jefferson County deputy sheriff stopped the eighteen-year–old defendant, Justin Bonnett, after he coasted through a stop sign in Fairfield, Iowa. Upon approaching Bonnett's stopped car, the deputy smelled a strong odor of alcoholic beverages emanating from within the vehicle. The deputy asked Bonnett if had been drinking, which he denied. Nevertheless, the skeptical deputy asked Bonnett to complete a series of field sobriety tests, which he summarily failed. When confronted with his failing scores, Bonnett admitted to taking a few nips. After administering a preliminary breath test which indicated a rather low blood alcohol concentration of .023; the deputy told Bonnett that although it did not appear he was intoxicated, persons under the age of twenty-one were not permitted to drive if their blood alcohol concentration was in excess of .02. *See* Iowa Code § 321J.2A (1997). The deputy took Bonnett to the Fairfield Law Center and administered a statutorily-approved breath test that indicated Bonnett's blood alcohol concentration to be .151. He was arrested and

charged with operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321J.2 (1997).

Bonnett sought to suppress the breath test results, claiming because the deputy did not have reasonable grounds to believe he was operating a motor vehicle in violation of Iowa Code section 321J.2A, he impermissibly requested and administered the breath tests. The court denied Bonnett's motion because the officer reasonably believed Bonnett was operating a motor vehicle while under the age of twenty-one with a blood alcohol concentration exceeding .02. At trial, over the objections of defense counsel, the court admitted into evidence the deputy's police report detailing the events of the incident, as well as a card indicating Bonnett had invoked his constitutional right to remain silent under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, L. Ed. 2d 694 (1966). Bonnett was found guilty and sentenced.

Bonnett appeals, claiming the trial court erred in: (1) admitting into evidence the *Miranda* card indicating he wished to invoke his constitutional right to remain silent, (2) denying his motion to suppress, and (3) admitting into evidence the deputy's police report into evidence.

II. The Constitutional Right to Remain Silent.

Bonnett's first claim of error concerns the trial court's admission of the *Miranda* card. He argues the admission violated his constitutional rights under the Fifth and Sixth Amendments to the United States Constitution.

A. Standard of Review. Normally, we review a district court's admission of evidence for an abuse of discretion. *State v. Shortridge*, 589 N.W.2d 76, 81

(Iowa App. 1998). When, however, an evidentiary admission implicates a constitutional right, our review is de novo. *State v. Baccam*, 476 N.W.2d 884, 885 (Iowa App. 1991).

B. The Merits. It is well established that a defendant has a fundamental right to remain silent under the Fifth and Sixth Amendments to the United States Constitution. *See State v. Porter*, 283 N.W.2d 351, 352 (Iowa 1979). Equally rooted in constitutional jurisprudence is the State may not use at trial a defendant's invocation of his constitutional protections as indicia of his guilt. *Id.* Therefore, admitting into evidence the *Miranda* card whereby Bonnett asserted his right to remain silent was in clear violation of his constitutional rights.

An error of constitutional magnitude, however, does not necessarily demand reversal. If the introduction of the evidence was harmless beyond a reasonable doubt, a new trial is not warranted. *See State v. Cole*, 295 N.W.2d 29, 40 (Iowa 1980) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 711 (1967)). The burden to establish the constitutional violation harmless beyond a reasonable doubt rests on the State. *State v. Canas*, ___ N.W.2d ___, ___ (Iowa 1999).

Our inquiry is not whether Bonnett's guilt, absent the constitutional error, was proved beyond a reasonable doubt. *See id.* Rather, our inquiry is whether the State proved the violation did not affect Bonnett's right to a fair trial beyond a reasonable doubt. *See id.* In making this determination, we weigh the probative force of the evidence considered by the jury against the probative force of the evidence improperly admitted. *State v. Hensley*, 534 N.W.2d 379, 383 (Iowa

1995). It is only when the effect of the incorrectly admitted evidence is so minimal when compared to the properly admitted evidence that we can comfortably conclude "there is no reasonable possibility that such evidence might have contributed to the conviction." *Id.*

The State has failed to prove the constitutional violation harmless beyond a reasonable doubt. The admission of the *Miranda* card served no purpose other than to show Bonnett invoked his right to silence. When the trial court inquired as to the relevance of the *Miranda* card, the State responded in front of the jury, "The relevance is that Deputy Lewis properly *Mirandized* Mr. Bonnett before asking any questions and *Mr. Bonnett refused to answer any questions.*" (Emphasis added.) Such a remark cannot be construed to infer anything other than Bonnett's guilt due to his silence. Furthermore, we cannot find the evidence supporting the conviction overwhelming. In the trial information the State charged Bonnett with operating a motor vehicle under the influence of alcohol and with operating a motor vehicle with a blood alcohol concentration of at least .10. *See* Iowa Code §§ 321J.2(1)(a)-(b). Because there was not a special verdict form, it is unclear under which alternative the jury found Bonnett guilty. While there was strong evidence supporting a conviction for operating a motor vehicle with a blood alcohol concentration at least .10, the same cannot be said if the jury rejected the intoxilyzer results and relied only on the defendant's objective manifestations of impairment under the "under the influence" alternative. The probative value of the evidence supporting the "under the influence" alternative was relatively weak. There was evidence offered of

Bonnett's stop sign violation, the smell of alcohol, and Bonnett's performance on the field sobriety tests. When weighing that evidence against the deputy's statement that he did not believe Bonnett was intoxicated and the constitutionally-flawed admission of the *Miranda* card, the evidence cannot be construed as overwhelming. The State has not shown the error harmless beyond a reasonable doubt. The only appropriate remedy is reversal of the conviction.

III. Words of Advisement.

Because Bonnett's other assignments of error will likely resurface on retrial, we briefly discuss his additional claims.

A. The Motion to Suppress. Under Iowa Code section 321J.2A, an individual under the age of twenty-one may not operate a motor vehicle with a blood alcohol concentration of .02 or more. Where a law enforcement officer has reasonable grounds to believe an individual is in violation of section 321J.2A, the officer may request a preliminary breath test. Iowa Code § 321J.5. If the results of the preliminary breath test indicate the blood alcohol concentration of the underage driver was between .02 and .10, the officer may request an additional breath specimen for more accurate analysis. Iowa Code § 321J.6. "In determining whether the officer had reasonable grounds, the question is whether, looking at the facts and circumstances known to the deputy at the time, a prudent person would believe [the defendant] was under the influence." *Zenor v. Iowa Dep't of Transp.*, 558 N.W.2d 427, 430 (Iowa App. 1996) (citations omitted).

We find a prudent person would believe Bonnett was under the influence. Bonnett drove through a stop sign, failed a number of field sobriety tests, and later admitted to drinking. The deputy also noticed a strong odor of alcoholic beverages emanating from Bonnett's vehicle. The deputy had ample evidence that Bonnett violated Iowa Code section 321J.2A. The trial court properly denied his motion to suppress.

B. Admission of the Police Report. Hearsay is an inadmissible statement, other than one made by the declarant while testifying at trial or a hearing, offered to prove the truth of the matter asserted. Iowa R. Evid. 801, 802. Iowa Rule of Evidence 803(8)(A) provides for an exception to the general rule of inadmissibility if the statement is a record or report of a public agency kept in the normal course of that agency's activities. Specifically exempted from the exception in rule 803(8)(A), however, are investigative reports by police and other law enforcement personnel. *See* Iowa R. Evid. 803(8)(B)(i). The purpose for exempting police reports from the exception in rule 803(8)(A) is

> in criminal cases like this, the State ought not be allowed to introduce substantive evidence tending to prove commission of the charged offenses without calling as witnesses, subject to cross-examination, the persons who have specially investigated particular incidents and reported in writing on those investigations. The better policy is to require the prosecution to call its investigators as witnesses rather than allowing the State to satisfy its burden of proof with written reports bearing a certain facial authenticity which a jury might attribute to public records.

State v. Reitenbaugh, 392 N.W.2d 486, 490 (Iowa 1986). Iowa Rule of Evidence 803(8)(B)(i) makes the police report inadmissible hearsay.

Because of the constitutional error in admitting evidence of Bonnett's silence, the judgment of the trial court is reversed, and the case is remanded for a new trial.

REVERSED AND REMANDED.