IN THE COURT OF APPEALS OF IOWA

No. 6-571 / 95-0696

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBIN LEIGH SNODGRASS,

Defendant-Appellant.

FILED
NOV 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, Associate District Judge.

Defendant appeals his conviction and sentence for operating a motor vehicle while intoxicated, second offense. **AFFIRMED.**

Robin Leigh Snodgrass, Iowa City, pro se.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, J. Patrick White, County Attorney, and Richard D. Westphal, Assistant County Attorney, for appellee State.

Considered by Habhab, P.J., and Huitink and Vogel, JJ.

PER CURIAM

This is an appeal by a defendant challenging his conviction and sentence for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On September 12, 1994, police officer Douglas Carden stopped a vehicle driven by Robin Snodgrass after he observed the vehicle straddling two lanes of traffic. Officer Carden noted Snodgrass appeared intoxicated and had an odor of alcohol. Snodgrass admitted he had a few beers that evening. Snodgrass failed the horizontal gaze nystagmus test. He refused to take a breath or urine test. Snodgrass was charged with operating while intoxicated.

At the trial, Snodgrass testified his eye doctor had told him that he had a sensitivity to light which would cause his eyes to involuntarily jerk around. In rebuttal, the State presented a stipulation in which the doctor stated Snodgrass' eye condition would not cause nystagmus. Snodgrass was convicted of operating while intoxicated. He was sentenced to a term of imprisonment not to exceed two years. He has filed a pro se appeal.

I. Snodgrass claims there is insufficient evidence in the record to support his conviction. A jury's verdict is binding on us if there is substantial evidence to support it. *State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). When defendant was stopped

in his vehicle, he appeared intoxicated, admitted he had a few beers, and failed the horizontal gaze nystagmus test. We find this is sufficient to support his conviction for operating while intoxicated.

II. Snodgrass contends the prosecutor engaged in misconduct by telling the jury during closing argument that defendant had lied about what his eye doctor told him about his eye condition. No record was made of the closing arguments. We note defendant does not allege he moved for a mistrial due to the prosecutor's statement. We conclude defendant waived the right to object to any alleged misconduct. *See State v. Radeke,* 444 N.W.2d 476, 479 (Iowa 1989).

III. Snodgrass claims his sentence constituted cruel and unusual punishment. He believes the sentence was an abuse of the court's discretion. We find no abuse of discretion in the sentence imposed. Defendant had a lengthy legal history which included four previous OWI convictions, four previous convictions for public intoxication, and four previous convictions for driving while suspended. Also, he failed to obtain a substance abuse evaluation as required by a court order. The court noted defendant had placed himself and others at risk by driving while intoxicated.

We affirm defendant's conviction and sentence for the crime of operating while intoxicated. Costs of this appeal are assessed to defendant.

AFFIRMED.