FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed October 21, 1980
vs.)
AMY SCONYERS, JR.,) 0-250
63062
Defendant-Appellant.)

Appeal from Jasper District Court - A. C. Omer, Judge.

Defendant appeals conviction and sentence on charge of OMVUI, section 321.281, The Code 1977. He contends that the trial court erred 1) by refusing to admit deposition of oral surgeon who had treated defendant and prescribed medication he allegedly took just prior to his arrest; 2) by incorrectly instructing the jury on meaning of "under the influence" in Iowa law; 3) by refusing to strike rebuttal testimony of the arresting officer; and 4) by declining to grant a deferred sentence at least in part because defendant had refused to submit to a chemical analysis at time of arrest. CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.

Robert F. Wilson, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and R. Steven Johnson, Assistant Jasper County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant, Amy Sconyers, appeals his conviction and sentence on charge of operating a motor vehicle while under the influence of an intoxicant (OMVUI) in violation of section 321.281, The Code 1977. On appeal, defendant asserts that the trial court erred 1) by refusing to admit the deposition of an oral surgeon who had treated defendant and prescribed medication that defendant had allegedly taken shortly before his arrest; 2) by incorrectly instructing the jury on the definition of "under the influence" as used in section 321.281, The Code 1977; 3) by refusing to strike testimony to the effect that beer cans in the same six-pack appear to bear the same serial number, and 4) by refusing to grant a deferred sentence and by basing that decision in part on the fact that defendant had refused to submit to a chemical analysis at the time of his arrest. We find no merit in defendant's first three contentions, but on the basis of defendant's fourth point we remand to the trial court for resentencing.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In April, 1978, defendant was arrested on Interstate 80 in Jasper County for OMVUI. At the time of his arrest, he refused to take a breath test or to give a blood sample and he failed to pass several dexterity tests. He was later charged by information with OMVUI and was convicted by a jury. The trial court denied defendant's request for a deferred sentence and sentenced him to 48 hours in the county jail, a $600 fine, and suspension of driving privileges.

At trial, defendant testified that he had had some teeth pulled several days before his arrest, that he had been prescribed pain medication by his oral surgeon, and that he had taken some of it shortly before he was stopped by the state trooper. The surgeon was not present at trial and when defendant attempted to introduce a deposition of his testimony, the trial court ruled it inadmissible on the basis of the State's objection that it was hearsay and that defendant had failed to show that the surgeon was unavailable to testify. Defendant admitted that he had drunk two or three cans of beer prior to leaving his home in Cedar Rapids and that he had beer in his car. He stated that several of the empty beer cans in his car had been there since the previous week. Further testimony showed that in 1972, defendant had been burned over 40 percent of his body and as a result had permanently bloodshot eyes and some difficulty in walking.

The officer who made the arrest testified that he had seen an open, cold can of beer in the car when he approached defendant's car. On rebuttal, the officer testified that the same serial number appeared on all of the cans in a six-pack of beer he had bought during an interim in the trial and that several of the beer cans found in defendant's car likewise bore the same serial number. After cross-examining the officer, defendant moved to strike the rebuttal testimony as irrelevant, but his objection was overruled.

II.

Defendant first contends on appeal that the trial court erred in refusing to admit the deposition of the oral surgeon who removed his teeth and prescribed the medication that defendant allegedly took shortly before his arrest. We agree with the trial court that defendant was not entitled to use the deposition.

In Iowa, the use of depositions in criminal trials is governed by Iowa R. Crim. P. 12 and in civil trials by Iowa R. Civ. P. 144. However, Rule 12 provides that the rules of civil procedure generally cover the use of depositions in criminal trials unless otherwise provided by statute or the rules of criminal procedure. Iowa R. Crim. P. 12(1). Applying Iowa R. Crim. P. 12 and Iowa R. Civ. P. 144 to the instant case, it is evident that defendant was not entitled to use the doctor's deposition at trial.

Under Rule 12, defendant can use the deposition if he can show just cause. Iowa R. Crim. P. 12(2)(b). Rule 144 requires him to show that he was unable to obtain the doctor's presence at trial by subpoena, that the doctor is outside the state or more than one hundred miles from the trial site and that defendant has not caused the absence, or that the doctor is dead or unable to testify because of age, sickness, infirmity, or imprisonment. Iowa R. Civ. P. 144(c). Under exceptional circumstances, a deposition may be used if required by the interests of justice. Iowa R. Civ. P. 144(d). However, defendant has failed to show any circumstances sufficient to satisfy the requirements of Rule 12(2)(b) or Rules 144(c) and (d). In fact, the record shows only that the doctor was not present at trial when defendant offered the deposition. Rules 12 and 144 reflect a strong preference for live testimony. Cf § 624.1, The Code 1979. These rules also make it clear that the witness' absence at trial is not in itself sufficient to justify use of the deposition. There is the additional fact in this case that the parties had stipulated the prosecution would reserve all rights under the Iowa Rules to require the doctor to

appear at trial should defendant offer the deposition. For these reasons, we hold that the trial court did not err in refusing to allow use of the deposition.

III.

Defendant next contends that the trial court incorrectly instructed the jury on the meaning of "under the influence" as that term is used in section 321.281, The Code 1977. We find no basis for error.

Defendant objects to that part of the jury instructions that define "under the influence" as "whenever the use [of any intoxicating liquor, including beer or other drugs] has caused [defendant] to lose control in any manner, or to any extent, of the actions or motions of his person or body." He contends that such a definition is too broad and does not accurately reflect Iowa law. Defendant's argument is incorrect, however, because the instruction given in the instant case is virtually identical to an instruction approved in State v. Stout, 247 Iowa 453, 456-57, 74 N.W.2d 208, 210 (1956). See also State v. Davis, 196 N.W.2d 885, 890 (1972). The Stout definition has consistently been used in Iowa with only minor and insignificant variations. State v. Finnegan, 237 N.W.2d 459, 460 (Iowa 1976). We therefore uphold the instruction as given by the trial court.

IV.

Defendant also alleges error on the ground that the trial court erred in refusing to strike the rebuttal testimony given by the state trooper who arrested him. The officer testified to his observation that, at least in the case of the brand of beer found in defendant's car at the time of his arrest, beer cans in the same six-pack all bear the same serial number. He also testified that five of the eight beer cans found in defendant's car had the same serial number and that the remaining three each bore a different number. The officer admitted on cross-examination that he did not understand the significance of the numbers. Defendant objects to this rebuttal testimony as being irrelevant, but that objection is not well-founded.

The test for relevancy is whether the offered evidence makes the desired inference more probable than it would be without it. McCormick on Evidence § 85, at 437 (2d ed. E. Cleary 1972). The officer's testimony satisfies this standard because it tends to disprove defendant's statement that he took with him in the car only two full cans of beer and one half-full one, all from the same six-pack, and that he drank none of the beer from the three cans he took with him. Because these three cans bore the same

serial number as two other cans found in the car and because two of those five cans were still in a six-ring holder, the testimony given by the officer tends to indicate that defendant took with him not three but five cans from the same six-pack, and that since of those five cans two cans were found unopened and another half full, defendant must have drunk the remaining two cans of beer between the time he left home and the time he was arrested. This contradicts defendant's statement that he had two or three cans of beer at home and had no more to drink that evening. We think the trial court correctly refused to strike the rebuttal testimony of the arresting officer.

V.

Defendant further alleges that the trial court erred by refusing to grant a deferred sentence and by basing that decision at least in part on defendant's refusal to submit to a chemical analysis. On the basis of this contention, we remand to the trial court for resentencing.

In ruling on a motion for deferred sentence, the sentencing court should attempt to provide maximum opportunity for the defendant's rehabilitation as well as maximum protection of the public from further offenses by the defendant. § 907.5, The Code 1979. Factors to be considered in granting a deferred sentence are the defendant's age, prior convictions, employment and family circumstances, the nature of the offense, and such other considerations as are appropriate. Id. The decision to grant or deny a deferred sentence must be made on an individual basis, with no single factor being determinative. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979).

In denying defendant's motion for deferred sentence, the trial court noted that "the defendant did apparently at the time prefer to have his driving privileges revoked or suspended in lieu of submitting to a chemical analysis" and that "that attitude fails to show that a deferred sentence would, in effect, be an effective deterrent to prevent this defendant or the public at large from committing a similar offense." It would thus appear that the trial court declined to grant defendant a deferred sentence at least in part because of his refusal to submit to a chemical analysis, a factor not included among those legitimately to be considered under section 907.5, The Code 1979, in ruling on a motion for deferred sentence. We therefore affirm defendant's conviction but remand to the trial court for resentencing.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.