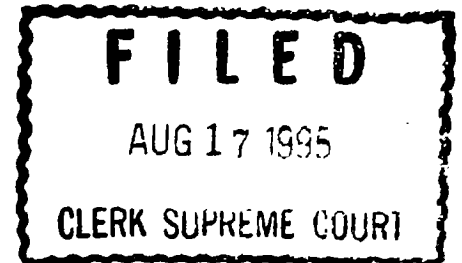


IN THE COURT OF APPEALS OF IOWA

No. 5-281/94-1196



STATE OF IOWA,

Appellee,

vs.

RANDY LEE RETTENMAIER,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Richard R. Gleason,
District Associate Judge.

Defendant appeals judgment and sentence, following a jury trial, entered upon
his conviction of operating while intoxicated, in violation of Iowa Code section
321J.2 (1993). **AFFIRMED.**

Charles H. Jacobs of Jacobs & Peters, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, Fred H. McCaw, County Attorney, and Michael Whalen, Assistant County
Attorney, for appellee.

Heard by Donielson, C.J., and Sackett and Huitink, JJ.

DONIELSON, C.J.

The defendant, Randy Rettenmaier, appeals his conviction for operating a vehicle while intoxicated ("OWI"). He contends the trial court erred in: 1) not allowing him to admit evidence of a favorable ruling in a Department of Transportation ("DOT") license revocation hearing; and 2) not giving a jury instruction which would allow an inference of innocence from a defendant's consent to a chemical test. We affirm.

I. DOT RULING.

Prior to the beginning of the trial, the State made a motion in limine. The State wished to prevent the defendant from telling the jury the results of a favorable DOT license revocation hearing. The trial judge ruled the State and the defendant could each put on evidence regarding whether the defendant had consented or refused to take the chemical test, but it would not admit evidence as to whether the administrative law judge had found the defendant had consented to the test. The judge noted such evidence would be hearsay, was not relevant, and would invade the province of the jury.

In his brief the defendant concedes "[t]here is no dispute that the Trial Court allowed both sides to testify as to the Defendant's and the arresting officer's versions as to whether or not the Defendant agreed to take the test." The defendant contends the jury was entitled to know the findings of the administrative law judge and give

them whatever weight it chose. However, nothing in the record indicates the defendant intended to introduce a transcript of the DOT hearing or a copy of the ruling. Instead, the defendant apparently intended to provide only his own testimony as to the administrative law judge's findings.

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Hunt*, 512 N.W.2d 285, 290 (Iowa 1994). The evidence at issue was hearsay and conclusory in nature. The factual evidence underlying the administrative law judge's findings was admissible in the OWI trial. However, the administrative law judge's ultimate legal conclusion did not tend to make more or less probable any fact of consequence relevant to the OWI proceedings. The defendant concedes the administrative finding was not preclusive of any issue in the OWI criminal trial. We find no abuse of discretion in the exclusion of this evidence.

II. JURY INSTRUCTION.

The defendant argues the jury should have been instructed it could consider his consent to a chemical test in reaching its verdict. Under Iowa law proof of a defendant's refusal to submit to a chemical test is admissible in an action in which a defendant is alleged to have operated a motor vehicle while intoxicated. *See* Iowa Code § 321J.16 (1995). The trial court gave the jury the following instruction:

The defendant was asked to give a breath sample so it could be analyzed to determine the percent of alcohol in his blood. The State alleges and the defendant denies that he refused.

A person is not required to give a sample of any bodily substance; however, if you find the defendant refused, you may consider a refusal in reaching your verdict.

The defendant argues this instruction unduly emphasized that the jury could consider his alleged refusal to take the chemical test. He contends the jury should have been instructed it could consider his alleged consent to the test in reaching its determination as to whether he was intoxicated.

"The trial court's decision on instructions will not be disturbed absent an abuse of the trial court's discretion." *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The burden of proving an abuse of discretion lies with the defendant. *Id.*

We reject the defendant's argument that the instruction over-emphasized the effect a jury could give to a refusal to submit to a chemical test. Consistent with the law, the instruction merely told the jury it could consider the refusal in reaching its verdict--a neutral and nonspecific factual direction. *See State v. Massick*, 511 N.W.2d 384, 387 (Iowa 1994); Iowa Code § 321J.16 (1995). The instruction given by the court specifically informed the jury the issue of consent was disputed, and it did not unduly emphasize the consideration a jury could accord a finding of refusal to consent. There was no abuse of discretion in giving the instruction.

AFFIRMED.