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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed February 22, 1979
vs.)
PAUL TERRENCE BENDER,) 781/61834
Appellant.)

Appeal from Webster District Court - Francis E. Tierney, Judge.

Defendant appeals his O.M.V.U.I. conviction contending error in overruling his motion to suppress a videotape recording and in instructions on his refusal to submit to analysis of a bodily substance. -Affirmed.

Tito Trevino, Fort Dodge, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Ann Fitzgibbons, Assistant Attorney General, and William J. Thatcher, Webster County Attorney, for Appellee.

Heard by Oxberger, C. J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

Defendant appeals from a conviction for operating a motor vehicle while under the influence in violation of § 321.281, The Code 1977. Defendant contends the trial court erred in overruling his motion to suppress a videotape recording of his O.M.V.U.I. arrest and in submitting Instruction 7A to the jury regarding the defendant's alleged refusal to submit to a body specimen. We affirm the trial court on both issues.

I. Defendant asserts that his motion to suppress was improperly overruled for the reason that the State failed to prove that the defendant had been read his Miranda rights. Defendant seems to contend that before a piece of evidence possibly incriminating may be admitted, the State has an affirmative duty to prove that Miranda warnings were given and waived. This contention is without merit.

It is true that when a confession or similar incriminating statement by a criminal defendant is challenged at a pre-trial suppression hearing as involuntary, the State must prove by a preponderance of the evidence that the statement is voluntary. State v. Rank, 214 N.W.2d 136, 138 (Iowa 1974). However, the State is obligated to assume this burden of proof only when the statement has been challenged as involuntary. State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977), cert. denied, 435 U.S. 1008 (1978). Without a proper objection by defendant on the ground of voluntariness, a hearing on this issue is not constitutionally required. Washington, supra, citing Wainright v. Sykes, 433 U.S. 72, 86, 97 S. Ct. 2497, 2505, 53 L.Ed.2d 594, 606 (1977).

In this case, defendant failed to raise the issue of voluntariness. Defendant, in his motion, clearly admits that he was advised of his Miranda rights but contends that the videotape should be suppressed because defendant had not consented to the videotaping itself. This issue is separate and distinct from the issue of whether defendant's videotaped statements were made pursuant to a voluntary waiver of Miranda rights. Because defendant admitted that Miranda rights were stated to him and because he failed to raise the issue of voluntariness, the State carried no burden of proof on this matter and defendant effectively waived his right to raise this issue on appeal. Washington, supra.

Defendant further asserts that the trial court erred in overruling his motion to suppress without first previewing the tape to determine if defendant would be unduly prejudiced by its contents. Defendant also states that it was error to overrule the motion when the State had failed to produce foundational proof that the tape was a fair and accurate representation of the acts that took place. Neither issue was raised in the original motion itself. In making a motion, it is the obligation of defendant to assert specific defects and every ground of exception which is not particularly specified is considered abandoned. Washington, supra. Furthermore, the trial court correctly stated that videotapes are generally admissible at criminal proceedings, e.g., Hendricks v. Swenson, 456 F.2d 503, 505-06 (8th Cir. 1972); State v. Lindsey, 507 S.W.2d 1, 3 (Mo. 1974); People v. Ardella, 49 Ill.2d 517, 276 N.E.2d 302, 305 (1971), and ruled that this videotape would be admissible subject to the laying of proper foundation at trial. State v. Russell, 261 N.W.2d 490, 495 (Iowa 1978); State v. Jackson, 259 N.W.2d 796, 799 (Iowa 1977). Finally, since we are not directed to any statements in the audio portion of the tape objected to by defendant, there is nothing therein to review. The motion to suppress was properly overruled.

II. Defendant maintains that the trial court erred in giving Instruction 7A to the jury. Defendant contends the instruction erroneously created a fact question on whether defendant's actions constituted a refusal of consent. He further contends that the instruction was irrelevant and improper since consent as contemplated by § 321B.11, The Code 1977, had been rendered by the defendant. We affirm the trial court.

Proof of refusal to submit to chemical tests pursuant to § 321B.3, The Code 1977, is admissible in any civil or criminal proceeding arising from acts committed while driving under the influence. Section 321B.11, The Code 1977; State v. Vietor, 261 N.W.2d 828, 830 (Iowa 1978); State v. Young, 232 N.W.2d 535, 538 (Iowa 1975). In this case, the defendant agreed in writing to submit to a urine test and did so submit. After the specimen was given, it was dropped and lost. The State contends that the defendant intentionally dropped the specimen and that this action constituted a refusal of the test. The defendant contends that the specimen was

accidentally dropped, that the State failed to produce evidence sufficient to generate a jury question on this issue, and that the trial court should have found as a matter of law that the defendant had consented to the test and that such consent had not been withdrawn.

Where the facts are not in dispute but where reasonable minds may draw different inferences from these facts, a jury question is engendered. State v. Blyth, 226 N.W.2d 250, 267 (Iowa 1975). Testimony from Trooper Foughty and the defendant, Paul Bender, shows substantial agreement concerning the facts, but the defendant's perception of the incident differs from Trooper Foughty's. Defendant testified:

> Well, I turned around, and I thought he was standing there next to me. I went to hand it to him, and he reached out for it -- he just — you know, between the two of us, we just oh -- missed.

On the other hand, Foughty testified that while he was standing in the doorway of the restroom, "Mr. Bender turned, held out the cup, and said, 'Oh, I dropped it.'" Defendant's testimony indicates an unintentional dropping; Foughty's testimony indicates a deliberate action on the part of defendant. As a result, a fact question was created and was correctly submitted to the jury by the trial court.

Defendant's contention that because he had consented in writing and had submitted to the test, he had, as a matter of law, rendered the consent contemplated by § 321B.3 is without merit. Failure to cooperate under certain circumstances is tantamount to a refusal. Buda v. Fulton, 261 Iowa 981, 991, 157 N.W.2d 336, 342 (1968). To hold that written consent and submission to a test without regard to any subsequent actions on the part of the defendant constitutes conclusive evidence of consent would, in effect, serve to defeat the self evident intent, purpose and policy of chapter 321B. See Buda, supra at 990, 157 N.W.2d at 341; Krueger v. Fulton, 169 N.W.2d 875, 878 (Iowa 1969).

Furthermore, defendant's argument that proof of his refusal was not possible without a request from the trooper that the test be retaken and a subsequent refusal from the defendant to take the test is without merit. One refusal is determinative. Morgan v. Iowa Department of Public Safety, 227 N.W.2d 155, 157 (Iowa 1975).

The trial court's Instruction 7A informed the jury that it was for them to determine whether defendant, by his actions, had refused the test and that, if such a refusal was found, evidence of the refusal could be considered in deciding whether the defendant was guilty of operating a motor vehicle while under the influence. Instruction 7A properly submits the question of refusal to the jury and properly instructs concerning the law.

AFFIRMED.