

FILED

AUG 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

VINSON J. CARPENTER,

)

Defendant-Appellant.

)

Filed August 29, 1985

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5-245
84-1584

Appeal from the Iowa District Court for Clinton County - A. J. Van Zee,
District Associate Judge.

Defendant appeals his conviction and sentence for operating a motor vehicle
while under the influence. **AFFIRMED.**

James D. Bruhn, of Shaff, Farwell & Senneff, Clinton, for the defendant-
appellant.

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant
Attorney General, for the plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel, and Sackett, JJ.

Defendant was arrested for OWI, and the booking procedure was taped. However, the policeman doing the taping, Officer Flood, inadvertently failed to set the camera to record defendant performing certain dexterity tests. All that was photographed at that time was a portion of defendant's head.

Defendant was tried before a jury and the entire videotape was admitted as evidence. During the jury deliberations, the foreman advised the bailiff they had been unable to reach a verdict and the bailiff relayed the information to the court. Without contacting either the state or defense attorneys, the judge sent a written question entitled "Order" to the jury. The statement asked: "Do you think if given more time the jury might reach a verdict, it being your duty to do so if at all possible? Response to be put in writing." The jury replied "yes" and subsequently returned a verdict of guilty to operating a motor vehicle while under the influence.

Defendant was sentenced to thirty days in jail, twenty-five were suspended, and credit was given for one day previously served. A fine of \$600 was also imposed.

Defendant appeals contending (1) the videotape should not have been admitted, (2) the jury should not have been given instructions out of the presence of defendant and his counsel, and (3) a more severe sentence was imposed on defendant because he exercised his right to a jury trial. We affirm both the conviction and sentencing.

(1) Admission of the Videotape. Defendant argues the videotape taken at the time of defendant's booking should not have been admitted because certain portions were omitted thus denying defendant potentially exculpatory evidence. Defendant also contends if the tape is admitted, he has a right to have the entire tape admitted, and if it is not, his due process right to a fair trial is violated.

Denial of potentially exculpatory evidence is only grounds for reversal of defendant's conviction where the prosecution knows of the information prior to trial and fails to provide it to the defense. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, 349 (1976); Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 32 (Iowa 1979). The information must be in existence and possessed by the state. Stanford, 279 N.W.2d at 32. The evidence defendant claims he was denied did not exist, and therefore could not be produced.

We must, however, consider whether defendant's due process rights were violated by admitting the videotape showing only portions of the booking process. Several officers testified defendant could not perform the sobriety tests and appeared to be under the influence of alcohol. Defendant claims the unrecorded portion of the tests would have contradicted the officers' testimony and thus exclusion was highly prejudicial. This presents a question that has not been specifically addressed by Iowa courts.

The use of new methodology for preservation of evidence, while providing obvious advantages, also presents unique problems.

Improved methods of obtaining, preserving and presenting competent evidence, of whatever type, should not only be sanctioned but encouraged as well. In the process, we may not lose sight of fundamental safeguards, but neither should we sacrifice the advantages available to us through scientific and technological progress to the preservation of traditional rules that may have outlived their usefulness.

Lamar v. State, 282 N.E.2d 795, 797 (Ind. 1972). See generally Annot., 62 A.L.R.2d 686 (1958). Ordinarily all that is required for admission of a film or videotape is to establish by witness testimony that it accurately depicts what was filmed. See State v. Deering, 291 N.W.2d 38, 39 (Iowa 1980). Officer Flood testified the videotape was a fair and accurate representation of what occurred during the booking procedure. A proper foundation was established.

Other courts have admitted videotapes or motion pictures, even where portions were omitted or unclear, provided certain safeguards were met. See e.g. McGoorty v. Benhart, 305 Ill. App. 458, ___, 27 N.E.2d 289, 294 (Ill. 1940) (not error to admit motion picture where testimony explained why film did not show continuous action and jury not misled); Smith v. State, 397 N.E.2d 959, 962-63 (Ind. 1979) (admitted videotape although portions were unclear because of background noise and picture faded away at times)¹; State v. Wilson, 552 P.2d 931, 937 (Kan. 1976) (allowed admission of videotape even though portions not first quality reproductions of what was said and done); State v. Newman, 4 Wash. App. 588, 593, 484 P.2d 473, 477 (1971) (proper authentication of audio tape recordings requiring proponent to show no changes, additions or deletions have been made does not extend to videotapes).

Once the foundation is established, it is within the discretion of the trial court to determine whether or not to admit the evidence. The trial court obviously determined the videotape did not unduly prejudice defendant. Three police officers testified to defendant's physical condition and performance of the sobriety tests. Officer Flood testified that bookings were filmed with the use of two cameras, one focused lower than the other. Only one could record at a time. When defendant was performing the physical dexterity tests, Flood neglected to switch to the camera which would film defendant's entire body.

We are aware of the potential for abuse where the police have sole access to and control of the videotaping equipment. In certain instances, they would have the option of videotaping only portions of the booking procedure which appear to be the most incriminating and avoiding taping portions which might be exculpatory. However, under the circumstances of the case where defendant does

¹ The Indiana Supreme Court has determined the admissibility test to be applied is "whether the recording taken as a whole, or a crucial segment thereof, is of such poor quality that it is likely to lead to jury speculation as to its contents." Smith, 397 N.E.2d at 962-63.

not allege a deliberate attempt by the police to misalign the camera or an intent to conceal evidence, the trial court did not abuse its discretion in admitting the videotape.

(2) Communication with Jury. Defendant claims the court gave additional instructions to the jury without the presence of defendant and his counsel, and these instructions pressured them to reach a verdict. The state argues because defendant's motion for new trial was untimely, this issue was not preserved for appeal. Because we determine if defendant's argument is valid, he would be denied his constitutional right to a fair trial, we review this claim de novo.

Iowa Rule of Criminal Procedure 18(5)(g) provides in part:

Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

In State v. Dreessen, 305 N.W.2d 438, 440 (Iowa 1981), the supreme court determined that the court's communication to the jury was not an additional instruction. After deliberating for a time, the jury sent a note saying they had been unable to reach a unanimous verdict. Id. at 439. The judge responded orally outside the presence of the parties and their attorneys, specifically stating ". . . you will have to deliberate further and try to reach a verdict." Id.

Dreessen is controlling. There is no difference in the facts here except the message from the court was written. We see nothing in the communication which might prejudice defendant. It is always the jury's duty to render a verdict if possible. See Iowa R. Civ. P. 187(i). While the better procedure is to always have counsel and defendant present, defendant was not prejudiced by what amounted to harmless error. See Dreessen, 305 N.W.2d at 441.

(3) Sentencing. Following defendant's conviction, the court imposed a sentence of thirty days, twenty-five were suspended and credit was given for one

day served. Also, a fine of \$600 was imposed. Defendant contends this was a more severe penalty than usually imposed on first time offense and resulted because he exercised his right to a jury trial.

A pre-sentence investigation report contained information favorable to defendant. However, a deferred judgment was denied by the court. When imposing sentence, the trial court stated:

Well, this matter, as indicated, did proceed to trial and the Court had the opportunity to hear the testimony and as I think it's clear, Mr. Carpenter's attitude and language left a lot to be desired, but as explained during the trial he has a tendency to lose his temper and to use profanity, which he does; but again, these are all facts that the Court can take into consideration. The Court has had the opportunity to hear the full testimony in this case, and the jury, after deliberating, correct, some time, did, nevertheless, conclude unanimously that Mr. Carpenter was guilty of the offense of operating while intoxicated.

After hearing testimony at trial and seeing defendant's attitude, the court concluded that a sentence and fine rather than a deferred judgment would best rehabilitate defendant. That decision is entrusted to the discretion of the court. The court gave sufficient reasons to satisfy the requirements of State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979).

The county attorney had apparently offered a deferred judgment prior to trial during plea bargaining negotiations. Plea bargaining is permitted by both court rule and case law. "It is entirely proper to grant concessions to defendant who enters a plea of guilty when the public is served thereby." State v. Whitehead, 163 N.W.2d 899, 902 (Iowa 1969). See also Iowa R. Crim. P. 9(1).

The sentence imposed did not exceed the maximum penalty for a serious misdemeanor. See Iowa Code § 903.1 (1985). Where the sentence is within the statutory limits, we will not interfere unless an abuse of discretion is shown. Luedtke, 279 N.W.2d at 8. Defendant has failed to show the trial court abused its discretion during defendant's sentencing.

AFFIRMED.