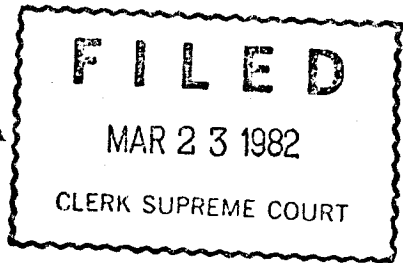


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DAVID MAX SMOTHERS,)
Defendant-Appellant.)

Filed March 23, 1982 574
2-08
66131

Appeal from Des Moines District Court, Thomas R. Brown, Judge.

Defendant appeals from the judgment entered upon his conviction by a jury of driving while his license was revoked, under the habitual traffic offender provision of section 321.561, The Code 1979, contending the trial court erroneously precluded admission of alibi testimony of defense witnesses. AFFIRMED.

Douglas F. Staskal, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals from the judgment entered upon his conviction by a jury of driving while his license was revoked, under the habitual traffic offender provision of section 321.561, The Code 1979, contending the trial court erroneously precluded admission of alibi testimony of defense witnesses. We affirm defendant's conviction.

On September 5, 1980, Officer Terry Klassen of the Burlington police observed a person he believed to be the defendant, David Max Smothers, operating a motor vehicle without a valid license. Since he was off-duty, Officer Klassen flagged down a police car and informed the driver, Detective Behne, he had just seen defendant operating a vehicle without a license. Apparently enough time had elapsed between the time Officer Klassen saw defendant and the time Detective Behne was apprised of the situation that Detective Behne could not locate defendant.

When Officer Klassen reported for his shift later that same day, he obtained a warrant for the arrest of defendant and defendant was arrested. At trial, defendant's opening statement indicated the defense intended to introduce testimony establishing that at the time Officer Klassen saw defendant in the car, defendant was at home with his wife and another person was operating defendant's car. When defense counsel attempted to introduce the testimony at trial, the prosecutor objected, contending defendant was precluded from introducing evidence on the issue of alibi defense by Iowa R. Crim. P. 10(10)(2), since defendant failed to file written notice of intent to rely upon an alibi defense as required by Iowa R. Crim. P. 10(10)(1). The trial court sustained the objection and precluded introduction of testimony of any defense witness that placed defendant in a place different from the location testified to by Officer Klassen at the time in question. The jury then returned a verdict of guilty and defendant was sentenced to confinement for two years.

On appeal, defendant claims (a) the State waived objection to defendant's use of the alibi defense since the State failed to object to the defendant's opening statement indicating their intention to rely upon the alibi defense and (b) the court abused its discretion in precluding admission of the testimony since less drastic remedies were available and would have been effective. We see no merit in defendant's arguments.

L. Notice of Alibi and Waiver

Iowa R. Crim. P. 10(10)(a)(1), provides in part:

A defendant who intends to offer evidence of an alibi defense shall, within the time provided for the making of pretrial motions or at such later time as the court shall direct, file written notice of such intention. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

Defendant contends the statements made by his counsel during opening arguments either satisfy the notice requirement of Iowa R. Crim. P. 10(10)(a)(1) or, in the alternative, the State's failure to object to the statements when they were made constituted a waiver of the notice requirement.

A. We see no merit in defendant's argument that the notice requirement of Iowa R. Crim. P. 10(10)(a)(1) was satisfied by defense counsel's opening argument. Under rules 10(10)(a)(1) and 10(4) written notice of intent to offer evidence of alibi defense must be filed within thirty days after arraignment or prior to the impaneling of the jury, whichever occurs earlier. There was never any written notice of intent to use the alibi defense filed. Not until after the State concluded its case in chief did defense counsel make his opening statement and indicate his intention to produce alibi witnesses for defendant. In State v. Rourick, 245 Iowa 319, 323-24, 60 N.W.2d 529, 531 (Iowa 1953), the supreme court, construing a statute similar to Iowa R. Crim. P. 10(10)(a), held evidence of alibi was properly excluded since defendant did not file written notice of his intention to rely upon

alibi evidence until after the State had presented its evidence and rested. In this case, the notice was defective in two aspects. First, the notice was not written. Second, the notice came long after the time for filing notice had expired. We think the rule is clear and defendant failed to satisfy its requirements. See State v. Lanphear, 220 N.W.2d 618, 620 (Iowa 1974); State v. Stump, 254 Iowa 1181, 1193-95, 119 N.W.2d 210, 218, cert. denied, 375 U.S. 853, 11 L. Ed. 2d 80, 84 S. Ct. 113 (Iowa 1963).

Defense counsel counters by arguing the testimony of the witnesses was not really an attempt to present an alibi defense. We are unimpressed with defendant's argument. A defense under which "defendant is attempting to prove not only that he was not present but that he was at another place so remote or under such circumstances that he could not have been present" is an alibi defense. State v. Dunne, 234 Iowa 1185, 1191, 15 N.W.2d 296, 300 (Iowa 1944). The essential question under an alibi defense is "whether if the defendant's evidence is believed the practical impossibility of his presence at the scene of the crime is thereby established." Id. There is no question defendant attempted to assert the impossibility of his presence in the car at the time in question. Consequently, notice under Iowa R. Crim. P. 10(10)(a)(1) had to have been filed.

B. Defendant also claims the State waived objection to the failure to timely file notice. Since there is no evidentiary effect to opening arguments, the prosecutor could have at most objected to the statements as being made in bad faith. Defendant was precluded by Iowa R. Crim. P. 10(10)(a)(1) from introducing alibi evidence and thus could not support those statements with factual proof. The State's failure to object to the opening statement of defense counsel merely waived its right to object to any error there might have been in the statement. We fail to see how the State waived its right to object to the introduction of alibi testimony by waiting until defense counsel first attempted to introduce it.

II. Preclusion of Alibi Evidence

Defendant claims the trial court abused its discretion in precluding admission of testimony regarding alibi evidence. Defendant contends since there were less onerous remedies the trial court abused its discretion in electing the most severe remedy of exclusion. We disagree.

Iowa R. Crim. P. 10(10)(a)(2) provides in part: If either party shall fail to abide by the time periods heretofore described, such party may not offer evidence on the issue of alibi without leave of court for good cause shown. Defendant offered no evidence on good cause for the court to waive the notice requirement or to grant a continuance. Since the court was presented with no evidence of good cause, the court acted within the bounds of the rule in precluding introduction of alibi testimony. We have long said a decision committed to the sound discretion of the court will be upheld if supported by the record. State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). The record supports the court's decision and is therefore affirmed.

We also note defendant was not totally precluded from introducing alibi evidence. Defendant was not prevented from testifying to his presence at home when the officer indicated he saw defendant driving the car. Defendant was only precluded from going one step further and calling witnesses to support his alibi contention. See State v. Lanphear, 220 N.W.2d 618, 620 (Iowa 1974).

AFFIRMED.