

IN THE COURT OF APPEALS OF IOWA

No. 5-542 / 94-1478

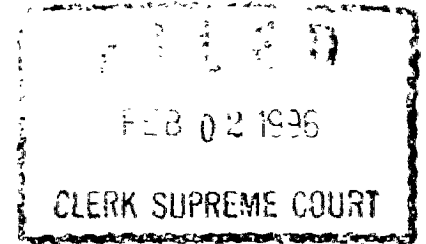
STATE OF IOWA,

Appellee,

vs.

RICHARD JOHN FOLEY,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, J.G. Johnson and Joseph Moothart. Judges.

Richard John Foley appeals his conviction, following a jury trial, of operating a motor vehicle while intoxicated. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Anthony Janney, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

CADY, J.

Richard Foley was convicted of the crime of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1993). He now appeals his conviction.

On May 17, 1993, at about 2:30 in the morning, police officer James O'Hara received a report someone was parked in the intersection of Summit and Moir Streets in Waterloo. Officer O'Hara responded to the report, and saw a car illegally parked in the middle of the street, with the front part of the car on Moir Street and the back on Summit Street. The car was parked so that it was impossible for other vehicles to travel their normal path through the intersection without circumventing the car.

Officer O'Hara looked in the car, and saw defendant Richard Foley behind the wheel asleep. The ignition of the car was turned on, so the headlights and dashboard lights were on, but the engine of the car was not running. O'Hara knocked on the window, and Foley woke up. O'Hara asked him to exit the car. O'Hara testified he smelled alcohol, and Foley's speech was slurred. O'Hara asked Foley if he knew where he was. Foley answered Harper's Ferry, which is a town about two hours away from Waterloo.

O'Hara then administered field sobriety tests, and Foley failed these tests. O'Hara placed Foley under arrest for operating while intoxicated. Officer Darwin Cunningham searched the car, and did not find any containers of alcohol. Officer O'Hara took Foley to the police station, where he explained the implied consent law.

Foley consented to a breath test. The test results showed a blood alcohol level of .169, which is over the legal limit.

Prior to trial, Foley filed a motion to suppress claiming police officers lacked probable cause to arrest him or to invoke the implied consent law. The district court denied the motion to suppress. The court found the initial stop was proper because Foley's car was improperly parked in the middle of an intersection. The court also found there was reasonable cause to make an arrest and invoke implied consent.

During jury selection, Foley challenged jurors Brummel, Allen, Davis, Bingley, Samek, and MacLennan for cause. The court agreed jurors Brummel and Allen would be discharged for cause, but overruled Foley's challenges to the other jurors. Foley then used peremptory strikes against Davis, Bingley, and Samek, and another juror, Zacharias. MacLennan remained on the jury.

As noted above, Foley was convicted of operating while intoxicated. He was sentenced to a term of imprisonment not to exceed two years. Foley appeals.

I. Foley contends the district court abused its discretion in failing to grant his challenge to prospective jurors MacLennan and Bingley. He moved to strike Bingley because her co-worker had been killed by a drunk driver. He challenged MacLennan because she appeared to be biased in favor of police officers. Foley believes these two jurors had formed opinions which precluded the possibility of judging impartially in this case.

The test to be applied in ruling on challenges for cause under Iowa Rule of Criminal Procedure 17(5)(k) is whether the jurors holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant. *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993). In ruling on a challenge for cause, the district court is vested with broad discretion. *State v. Tillman*, 514 N.W.2d 106, 107 (Iowa 1994).

Under prior law, if a challenge for cause had been erroneously overruled, prejudice was presumed if the defendant used all of his peremptory challenges. *State v. Beckwith*, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951). Now, however, the partiality of a juror may not be made the basis for reversal in instances in which that juror has been removed through exercise of a peremptory challenge. *Neuendorf*, 509 N.W.2d at 747. In order for there to be a Sixth or Fourteenth Amendment violation it must be shown that after the complaining party's peremptory challenges have been exercised, the jury that remained was not impartial. *Id.* (citing *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273, 2277, 101 L.Ed. 80, 88 (1988)).

In the present case, Foley removed juror Bingley through the exercise of a peremptory challenge. We are, therefore, unable to find any prejudice regarding Bingley. Furthermore, Foley chose to remove Zacharias by a peremptory challenge, who he had not challenged for cause, and he did not use a peremptory challenge to remove MacLennan. MacLennan remained on the jury due to Foley's choices in

using his peremptory challenges. We are reluctant to find prejudice under the circumstances based on MacLennan's presence on the jury.

In addition, we determine the district court did not abuse its discretion in refusing to remove MacLennan for cause. Although MacLennan stated she hoped police officers would tell the truth and she would probably assume they were telling the truth, she also stated she would not assume something happened just because police officers testified to it. She stated she would want to see the facts. MacLennan stated that if she were called as a witness in a case she would tell the truth, and stated she hoped the witnesses here would do the same. She also stated that if faced with conflicting testimony, she would evaluate what the various witnesses had said.

We affirm the district court's conclusion that MacLennan's answers did show she had a fixed opinion about defendant's guilt or innocence. We note the district court was able to observe MacLennan's demeanor, and the district court concluded her statements did not indicate she would give undue weight to the testimony of officers.

II. Foley claims the district court erred in admitting evidence obtained as a result of the officers' invocation of implied consent without reasonable grounds to believe he had been operating a motor vehicle while intoxicated. Foley relies on the case of *Munson v. Iowa Dept. of Transportation*, 513 N.W.2d 722, 723 (Iowa 1994), which concerns the department's revocation of Munson's license after he failed to pass a chemical test under Iowa's implied consent statute. In that case, police officers

found Munson asleep in his vehicle in a private parking lot. *Id.* There were beer cans in the vehicle. *Id.* at 724. The court found there was no evidence to show Munson had not drunk anything after parking his vehicle. *Id.* at 725. There was no evidence as to how long Munson had been in the parking lot or how he had gotten there. *Id.* The supreme court concluded the officers did not have reasonable grounds to believe that Munson had been operating while intoxicated and therefore the agency's findings were not supported by substantial evidence. *Id.*

We determine the present case can be distinguished from *Munson*. In the present case there is no evidence of alcohol containers in the car. Also, Foley was dangerously and illegally parked in an intersection. This makes it unlikely Foley became intoxicated after parking his vehicle.

Operation of a motor vehicle by a defendant may be established by circumstantial, as well as direct, evidence. *State v. Braun*, 495 N.W.2d 735, 739 (Iowa 1993). The police officers could reasonably assume only an impaired or intoxicated person would have parked in the middle of an intersection and fallen asleep. We conclude the officers had reasonable grounds to believe Foley had been operating a motor vehicle while intoxicated.

We affirm Foley's conviction for operating while intoxicated. Costs of this appeal are assessed to Foley.

AFFIRMED.