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NOV 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 26, 1980
vs.	)	
WILLIAM D. HAGLUND,	)	0-222 62937
Defendant-Appellant.	)	

Appeal from Tama District Court - Clinton E. Shaeffer, Judge.

Defendant appeals conviction on charge of OMVUI in violation of section 321.281, The Code 1977, contending 1) that the arresting officer was not qualified to invoke implied consent procedures as provided for in section 321B.3, The Code 1977; 2) that the warrantless search of his car was unconstitutional; 3) that admission of beer cans found during the search was error; 4) that admission of evidence concerning exercise of his Miranda rights was error; and 5) that there was insufficient foundation for admission of a certified mail return receipt showing receipt of his blood sample at the BCI lab. AFFIRMED.

Morris Eckhart of Milroy and Eckhart, Vinton, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Douglas F. Staskal, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant, William Haglund, appeals his conviction on charge of operating a motor vehicle while under the influence of an intoxicant (OMVUI) in violation of section 321.281, The Code 1977. He contends 1) that the arresting officer was not a peace officer qualified to invoke implied consent procedures under section 321B.3, The Code 1977; 2) that the warrantless search of his car at the time of his arrest was unconstitutional; 3) that the beer cans found during the search should not have been admitted into evidence because they were irrelevant, immaterial, and highly prejudicial; 4) that his constitutional rights were violated by the admission of evidence about the exercise of his Miranda rights; and 5) that there was insufficient foundation to introduce a certified mail return receipt showing that a sample of his blood had been received by the BCI lab for analysis. We affirm defendant's conviction.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In September, 1978, defendant was convicted of OMVUI following a jury trial. The arresting officer testified that he stopped defendant's car because defendant's erratic driving had attracted his attention. The officer saw beer cans in the car and asked defendant to take some sobriety tests, which he failed to pass. Defendant was then arrested for OMVUI and locked in the back seat of the patrol car. The officer proceeded to search defendant's car without consent or a warrant and seized sixteen beer cans, ten of which were found under the front seat. One of the sixteen cans was open and half-full; the others were either empty or full. Defendant testified that the cans were part of his collection of over one hundred beer cans, most of which he kept in the trunk of his car. A blood test administered to the defendant revealed a blood alcohol level of .171 per cent.

Defendant initially declined to answer any questions or to sign anything before consulting an attorney, and the arresting officer was allowed to testify to this fact at trial. Defendant moved to suppress this testimony on the grounds that it was irrelevant, immaterial, and highly prejudicial. Additionally, a Miranda warning card that the defendant refused to sign was admitted into evidence over defendant's objection that it was irrelevant, immaterial, highly prejudicial, and an improper reference to the exercise of a constitutional right.

II.

On appeal, defendant first contends that the results of his blood analysis were inadmissible because the arresting officer was not a peace officer qualified to invoke the implied consent procedures provided for by section 321B.3, The Code 1977. Defendant maintains that the arresting officer was not a peace officer for the purposes of section 321B.3 because section 321B.2(4) defines "peace officer" as "[r]egular deputy sheriffs who have had formal police training" and the arresting officer had not yet graduated from the Iowa Law Enforcement Academy at the time of the arrest. We think defendant's argument is without merit.

Whether one must be a graduate of the state law enforcement academy to fit within the definition of "peace officer" under section 321B.2(4) is apparently an issue of first impression in Iowa. On its face, the statute does not specify that the required "formal police training" be obtained at the state law enforcement academy. This fact is particularly striking when section 321B.2(4) is compared with section 321B.2(5), which provides specifically that satisfactory completion of an approved course of training at the Iowa law enforcement agency will qualify certain types of law enforcement officers as "peace officers" for the purpose of invoking implied consent procedures. Additionally, section 321B.2(4), unlike section 321B.2(5), does not on its face require completion of the training program; instead, section 321B.2(4) requires only that the officer have had formal police training. At the time of defendant's arrest, the arresting officer had had such training, although he didn't complete his program at the law enforcement academy until approximately one month later. We therefore hold that the officer who arrested defendant was a peace officer within the meaning of section 321B.2(4) and thus qualified to invoke the implied consent procedures provided for in section 321B.3. Accordingly, the results of the blood analysis were properly admitted into evidence.

III.

Defendant next contends that the warrantless search of his car violated the fourth amendment and that evidence obtained as a result of that search should be suppressed. The search led to the seizure of sixteen beer cans, some of which were visible from outside the car and others that were not readily visible because they were under the front seat. The trial court upheld the search as being incident to a lawful arrest and we agree, noting that the plain view doctrine may provide an alternative justification for

seizure of those cans that were visible from the outside of the car.

It is widely acknowledged that warrantless searches are per se unreasonable unless they come within a few carefully defined exceptions. State v. Schlenker, 234 N.W.2d 142, 144 (Iowa 1975); State v. Ahern, 227 N.W.2d 164, 165 (Iowa 1975); State v. Shea, 218 N.W.2d 610, 613 (Iowa 1974). Iowa recognizes that a search incident to lawful arrest, if within prescribed limits, is an exception to the warrant requirement. Schlenker, 234 N.W.2d at 144; Shea, 218 N.W.2d at 613. Since a search of this type is justified by the need to seize weapons that might be used in an escape or in an assault on an officer and by the need to preserve destructible evidence, Preston v. United States, 376 U.S. 364, 367, 84 S. Ct. 881, 883, 11 L. Ed. 2d 777, 780 (1964), a search incident to lawful arrest must be limited to the area within defendant's immediate control. Id. The area within defendant's immediate control consists of that area from within which the defendant might gain possession of a weapon or destructible evidence. Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969).

Defendant contends that the warrantless search of his car cannot be justified as a search incident to lawful arrest because defendant was locked in the back seat of a patrol car approximately 20 feet away from his own car at the time it was searched, and therefore the area searched was not within defendant's immediate control. Defendant cannot prevail on this point for two reasons. First, the circumstances that justify a search incident to lawful arrest—the need to seize weapons or destructible evidence—are those circumstances that exist at the time of the arrest. See Preston, 376 U.S. at 367, 84 S. Ct. at 883, 11 L. Ed. 2d at 780. Since defendant was standing next to his car at the time of his arrest, the car and its contents were conceivably within his immediate control. Furthermore, it has been held in Iowa that an arresting officer may place the suspect safely in custody before beginning to make the limited search permitted by the particular circumstances of the case. State v. Shane, 255 N.W.2d 324, 328 (Iowa 1977). The Iowa Supreme Court observed in Shane that:

> It would be impractical and unrealistic to say the purposes for which an arrest-related search may be made can be satisfied only if the officer first exposes himself to the very dangers he is supposed to guard against. There is no rule which demands the suspect be given a sporting chance to get the destructible evidence or deadly weapons before the officer is able to find them.

Id. Thus, we think that the arresting officer in the instant case was justified in locking defendant in the patrol car before he proceeded to search defendant's car without a

warrant and we affirm the trial court's ruling that this search was incident to a lawful arrest and therefore valid.

We note additionally that seizure of the cans that were visible from outside the car may also be justified by the plain view doctrine. There are three prerequisites to a valid plain view seizure: 1) there must be a prior justification for the intrusion into an otherwise constitutionally protected area; 2) the incriminating nature of the object seized must be immediately apparent; and 3) the discovery of the plain view evidence must be inadvertent. Coolidge v. New Hampshire, 403 U.S. 443, 466-69, 91 S. Ct. 2022, 2038-40, 29 L. Ed. 2d 564, 583-85 (1971); State v. Davis, 228 N.W.2d 67, 70-71 (Iowa 1975). Applying this analysis to the instant case, we find that, in the words of State v. King, 191 N.W.2d 650, 651 (Iowa 1971), the beer cans were "in the plain view of an officer in a place where he has a legal right to be," since he had just placed the defendant under lawful arrest. Furthermore, the incriminating nature of the beer cans was immediately apparent and their discovery was inadvertent. Thus, while we feel that the search incident to lawful arrest exception adequately justifies seizure of all the beer cans found in defendant's car, we note that seizure of some of the cans may also be justified on the basis of a plain view analysis.

IV.

Defendant objects to admission of the beer cans seized from his car on the grounds that the evidence is irrelevant, immaterial, and highly prejudicial. We disagree.

Relevance is determined by the extent to which the offered evidence makes the desired inference more probable than it would be without it. McCormick on Evidence, § 185, at 437 (2d ed. E. Cleary 1972). Relevant evidence may nonetheless be excluded if it is determined that the relevance is substantially outweighed by the prejudicial effect of the evidence. Kalianov v. Darland, 252 N.W.2d 732, 735-36 (Iowa 1977); see State v. Wallace, 259 Iowa 765, 770, 145 N.W.2d 615, 619 (1966). We think that the challenged evidence is clearly relevant to the question of defendant's intoxication while driving. See State v. Collins, 260 Iowa 1366, 152 N.W.2d 612 (1967), where it was held that the presence of ten beer cans, one of which was empty and two of which were partly full, was relevant to the question of the driver's intoxication. Collins, 260 Iowa at 1371, 152 N.W.2d at 616. However, we are unable to conclude on this record that the probative value of the challenged evidence is substantially outweighed by the danger of unfair prejudice.

Defendant maintains that the probative value of this evidence is minimal because it has not been shown that the beer cans seized from his car were "fresh" and that therefore the jury could only speculate as to when the cans had been placed in the car and when, if ever, defendant had consumed any of the beer. We find the evidence significantly more probative than defendant does as to whether he had been drinking before his arrest. Of the sixteen cans found in the car, six were empty, nine were full and unopened, and one was opened and half-full. This fact, particularly when viewed in the context of defendant's erratic driving, his failure to pass field sobriety tests, and his high blood alcohol level, strongly suggests that defendant had been working on emptying the cans as he drove. Defendant also contends that the probative value of this evidence is minimal because it is merely circumstantial evidence. However, for the purposes of proving guilt beyond a reasonable doubt in Iowa, direct and circumstantial evidence are equally probative. State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979). In short, having balanced the probative value of this evidence against its possible prejudicial effect, we are unable to conclude that it should be excluded.

V.

Defendant further contends that admission of testimony concerning his initial refusal to answer questions without first consulting an attorney and his refusal to sign a Miranda warning card constituted an improper reference to the exercise of his constitutional rights and was therefore inadmissible.

With respect to admission of the evidence of defendant's refusal to answer questions before consulting an attorney, we hold that defendant has failed to preserve error. At trial, defendant objected to admission of this evidence solely on relevancy grounds. However, it is clear for the purposes of this appeal that defendant is now basing his objection on constitutional grounds. It is well settled that one must adhere to the grounds asserted below when the same issue is raised on appeal. See State v. Whiteside, 272 N.W.2d 468, 472 (1978). Defendant contends that even if he failed to raise the constitutional argument below as grounds for exclusion of the evidence, this court should consider that argument on appeal because of the importance of the rights involved. However, issues not raised in the trial court, even those of constitutional magnitude, will not be addressed for the first time on appeal. Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 311 (Iowa 1979); In re Staros, 280 N.W.2d 409, 411 (Iowa 1979); see Adams v. Bonacci, 287 N.W.2d 154, 155 (Iowa 1980).

While we agree with defendant that testimony concerning defendant's refusal to sign the Miranda warning card was an impermissible reference to the exercise of his constitutional rights, see State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976), we think that admission of the testimony was harmless error.

When a constitutional right is involved, error can be harmless only if the State shows beyond a reasonable doubt that the error did not affect the accused's right to a fair trial. State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979); State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975). We think the state has met this burden in the instant case. The only straight-forward and unambiguous reference to defendant's exercise of his Miranda rights was made during direct examination of the arresting officer, and in our estimation the prosecutor did nothing, either at that time or later in the trial, to encourage the jury to infer defendant's guilt from his reluctance to talk to the officer who arrested him. Additionally, the reference to defendant's exercise of his Miranda rights occurred in the context of the officer's description of what happened at the time of the arrest and might possibly have been intended as an attempt to show that defendant was aware of his rights, a factor particularly important since defendant later decided to talk without having consulted an attorney. In any event, the officer did not testify that the defendant had refused to answer any specific questions, such as whether he had been drinking while driving that evening; had he so testified, the jury might have thereby been encouraged to infer defendant's guilt from his refusal to answer. However, because the reference to defendant's exercise of his Miranda rights was made in a seemingly innocuous context and was not at any time elaborated upon by the prosecution, we find that its admission was harmless error.

VI.

Finally, defendant asserts that there was insufficient evidence to admit a certified mail return receipt indicating that a sample of his blood had been received for analysis at the BCI lab. Defendant raises this point apparently because he thinks that without the return receipt, the prosecution would be unable to lay the necessary foundation for admission of the lab report itself. Defendant is mistaken in this belief, however, because proper receipt is not a foundational requirement for admission of a BCI lab report under the provisions of chapter 749A, The Code 1977 (current version chapter 691, The Code 1979). Instead, the State must show that the specimen was properly delivered to the lab. State v. Smith, 272 N.W.2d 859, 863 (Iowa 1978). Thus,

because the certified mail return receipt was not necessary for admission of the lab report, we find that admission of the receipt did not in any way prejudice defendant's case.

We affirm defendant's conviction.

AFFIRMED.