FILED
DEC 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 30, 1981
vs.	)	
PETER CLARENCE MULLESCH,	)	1-284 65526
Defendant-Appellant.	)	

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals from his conviction and sentence for OMVUI in violation of section 321.281, The Code 1979, asserting: (1) that he was misled concerning his constitutional right to counsel and that results of breath tests subsequently administered should not have been admitted; (2) that two police officers should not have been permitted to testify that in their opinion defendant was intoxicated; (3) that he was given erroneous legal advice concerning the consequences of failure to take a field alcometer test and that results of the test should therefore not have been admitted; and (4) that in sentencing the trial court improperly relied on, and evaluated out of context, a portion of the pre-sentence report. AFFIRMED.

Thomas M. McIntee, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Jim Miller, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals from his conviction and sentence for OMVUI in violation of section 321.281, The Code 1979, asserting: (1) that he was misled concerning his constitutional right to counsel and that results of breath tests subsequently administered should not have been admitted; (2) that two police officers should not have been permitted to testify that in their opinion defendant was intoxicated; (3) that he was given erroneous legal advice concerning the consequences of failure to take a field alcometer test and that results of the test should therefore not have been admitted; and (4) that in sentencing the trial court improperly relied on, and evaluated out of context, a portion of the pre-sentence report. We affirm.

When a constitutional issue is presented, evidence relevant to that issue is reviewed de novo. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975). In other respects, our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Defendant was charged with OMVUI by information on April 1, 1980. Defendant filed a pretrial motion to suppress "any oral and written statements of an incriminating nature obtained in violation" of his constitutional rights. The arresting officer testified at the suppression hearing that he had twice advised defendant that he had a right to an attorney and that one would be appointed before any questioning if he could not afford one. The officer further testified that defendant neither requested an attorney nor did he state that he could not afford an attorney. Defendant testified that he did state he could not afford an attorney and that he was told the court would appoint an attorney. Defendant admits he never specifically requested an attorney during the arrest or the custodial procedures which followed. Defendant now asserts that had he known about the right to have an attorney present during questioning, he would have exercised that right. The trial court overruled defendant's motion to suppress and found that defendant had voluntarily waived his right to counsel.

During a trial to the court, two law enforcement officers were permitted to testify that in their opinion defendant was intoxicated. Defendant unsuccessfully objected to the testimony on the grounds that it improperly invaded the province of the trier of fact and was an improper subject of opinion testimony. The incriminating results of a field alcometer test were admitted into evidence over defendant's objection that they were obtained in violation of his constitutional right to counsel. Defendant

testified that the arresting officer told him that he would lose his driver's license for 120 days if he refused the alcometer test. The court did not mention either the alcometer test or test results when it entered the written order finding defendant guilty.

Before entering sentence, the trial court asked defendant whether the factual matters contained in the pre-sentence report were substantially true and correct so that they could be relied on for sentencing. Defendant said "yes." After hearing recommendations from the state, defendant's attorney, and defendant, the court indicated that it was bothered by a notation contained in the pre-sentence report on defendant's attitude about abuse of alcohol. The report stated that he did not feel he abused alcohol and that "this all did not seem like a big deal to him." The court then sentenced defendant to 120 days imprisonment with ninety days suspended and two years probation. Defendant was also ordered to make restitution for costs and his driver's license was revoked for at least 240 days. Defendant subsequently instituted this appeal.

II.

Defendant first argues that the trial court erred in overruling his motion to suppress. Defendant claims that since he was denied access to an attorney during custodial procedures, the results of a breath test and an intoxication report should have been suppressed and excluded from evidence. We disagree.

Our review of the totality of the circumstances surrounding defendant's arrest and custodial processing indicates that the trial court was correct in finding that "defendant was advised of his constitutional rights per Miranda . . . that defendant understood those rights and voluntarily waived his right to remain silent and his right to counsel." Twice defendant was fully informed about his Miranda rights. Defendant admits that no specific request for an attorney was made. Defendant alleges that he said that "he could not afford an attorney," but this allegation is denied by the arresting officer. Even if we assume defendant's allegation is correct, we find that his statement is ambiguous and not tantamount to a request for an attorney. The trial court's denial of the motion to suppress is affirmed.

III.

Defendant next argues that the trial court erred in admitting opinion testimony of two law enforcement officers that defendant appeared to be intoxicated. We disagree. "The admission of opinion testimony, whether lay or expert, rests in the sound discretion

of the trial court. We reverse only for an abuse of discretion." State v. Brewer, 247 N.W.2d 205, 213 (Iowa 1976). There is no abuse of discretion so long as the witness is qualified to advance an opinion on the area in question and there is sufficient factual basis for the opinion. State v. Paulsen, 265 N.W.2d 581, 589 (Iowa 1978). In this case, both officers had extensive experience in either making or processing OMVUI arrests,[1] and both officers personally observed defendant's physical characteristics and demeanor on the night of the arrest. We find there was no abuse of discretion and that the officers' testimony was properly admitted.

IV.

Defendant next asserts it was error for the trial court to admit evidence from an alcometer test taken in the field by the arresting officer. The arresting officer testified that he had already decided to arrest defendant before the alcometer test was given. The trial court did not mention the results of this test in its order finding defendant guilty and there was sufficient other evidence to support the trial court's verdict. We therefore find that, if admission of the alcometer test was error, it was not prejudicial error because it did not result in a miscarriage of justice. State v. Massey, 275 N.W.2d 436, 439 (Iowa 1979).

V.

Defendant's final assertion is that the trial court relied on erroneous information in pronouncing sentence. Defendant was given the opportunity to comment on the information contained in the pre-sentence report before sentencing and declined to do so. The pre-sentence report recommended defendant be sentenced for two years to the director of adult corrections. The trial court declined to follow this recommendation and gave a much more lenient sentence. We find that the trial court did not rely on erroneous information in light of the sentence actually given and the trial court's comments on the reasons for the sentence given.

AFFIRMED.

---

1 The arresting officer had been involved in approximately 125 OMVUI arrests and the deputy sheriff had been involved in several hundred such arrests prior to processing the defendant.