

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 22 1979

CLERK SUPREME COURT

348

STATE OF IOWA,

)

Appellee,

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Filed March 22, 1979

vs.

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MICHAEL JAMES REMAKEL,

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793

Appellant.

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62075

Appeal from Dubuque District Court - Alan L. Pearson, Judge.

Defendant appeals from conviction of OMVUI asserting that the trial court erred in denying his motion to suppress evidence of chemical tests. Affirmed.

Frank D. Gilloon, III, of Klauer, Stapleton, Ernst, Gilloon & McCauley, of Dubuque, for appellant.

Thomas J. Miller, Attorney General; Thomas A. Evans, Jr., Assistant Attorney General; and Robert J. Curnan, Dubuque County Attorney, for appellee.

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

Defendant appeals from judgment of conviction upon a criminal charge of operating a motor vehicle while under the influence of an alcoholic beverage (OMVUI) contrary to § 321.281, The Code. He asserts error was committed by the trial court in denying his motion to suppress evidence and in overruling his post-trial motions reasserting the same evidentiary issues. We affirm the trial court.

The issue before us involves the application of *State v. Vietor*, 261 N.W.2d 828 (Iowa 1978). That decision held that an accused arrested for OMVUI should be afforded the opportunity to call an attorney of his choice prior to electing whether to submit to a chemical test. The court indicated the source of this right is to be found in § 755.17, The Code. It also held that failure to afford this right to an accused renders evidence of his refusal to submit to such a test inadmissible at a criminal trial on the OMVUI charge.

In the present case defendant relied upon § 755.17 in his motion to suppress the results of a chemical test undertaken after his arrest for OMVUI. The record reflects that the written request for a chemical analysis of defendant's breath informed him:

"YOU ARE NOT ENTITLED TO CONSULT AN ATTORNEY
PRIOR TO CONSENTING OR REFUSING TO THE WITH-
DRAWAL OF A BODY SPECIMEN."

He thus urges that under the holding in *Vietor* his motion to suppress should have been granted.

The State does not contend that the exclusionary rule adopted in *Vietor* does not embrace results of a chemical test as well as refusal to take such test. Rather it urges that the trial court correctly concluded that *Vietor* does not apply to defendant's case because of the very specific limitations which the court placed upon the application of that holding to other cases.

In that regard, the court in *Vietor* stated (261 N.W.2d at 832):

"This opinion shall be applicable to the present case, to all cases now on appeal in which proper objection under § 755.17 was made and preserved in the trial court, and to all chemical test procedures under Chapter 321B, The Code, after the date this opinion was filed [January 18, 1978]."

If we ascribe to the foregoing language its plain meaning, and omit the applicability of the *Vietor* holding to its own factual situation, there are only two remaining classes of cases to which it is made applicable: (a) cases involving chemical tests procedures initiated after January 18, 1978; and (b) cases on appeal on January 18, 1978.

As to the first category of cases, the chemical test involved in defendant's motion to suppress was administered on October 21, 1977. This circumstance does not bring him within *Vietor*'s applicability clause.

With respect to the second category of cases, we cannot conclude that the word "cases now on appeal" embrace defendant's situation. On January 18, 1978, the date Vietor was filed, defendant's trial had concluded and the jury had returned a verdict of guilty but no appeal had been taken nor had any judgment been entered against defendant which might have been the subject of an appeal. Judgment was entered on May 23, 1978 and notice of appeal served on May 26, 1978.

Defendant urges that the Vietor decision only applied what § 755.17, The Code, has always required and thus his reliance on the statute in the trial court is sufficient to present the issue for appellate review, notwithstanding what was said in Vietor. There are two reasons why we cannot accept this argument. First, while § 755.17 may have always afforded the right to counsel which defendant claims to have been denied, it could not have been said with certainty, prior to Vietor, that a violation of that right required a suppression of evidence. To this extent the Vietor holding did establish a new legal principle. Secondly, if we accept defendant's argument it would render meaningless the effort which the supreme court made to specifically limit the applicability of the principles announced in Vietor.

We are sympathetic with defendant's plight. He clearly advised the trial court that he was relying upon a legal theory which Vietor subsequently held to be meritorious. Indeed, his trial court record in this regard was far superior to that made by the successful party in Vietor. Because of fortuitous circumstances relating to the timing of his appeal, he is denied the relief afforded to the successful party in that case. But, because the exclusionary rule in Vietor was based upon the law of this state, the supreme court was free to give the rule announced in that case such application as it deemed proper. Any extension beyond the limits which were thus established may only be made by that court. While we may interpret what was said in that case, we cannot change the clear meaning thereof. For the reasons stated, all of which are based upon the clear language of the Vietor decision, we hold it does not apply to defendant's case.

AFFIRMED.

Donielson, Snell and Carter, JJ., concur; Oxberger, C.J., and Johnson, J., dissent.

I dissent from the majority's holding and would reverse defendant's conviction and remand for further proceedings. The general rule is that judicial decisions operate both prospectively and retrospectively. State v. Knox, 186 N.W.2d 641, 642 (Iowa 1971). However, a decision may be made to operate prospectively only. See Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.E.2d 1199 (1967); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.E.2d 882 (1966). Vietor, by its terms, states that "[e]xcept for the present case, [the rule] . . . shall have only prospective effect as hereafter explained."¹ State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978). On January 18, 1978, the date Vietor was filed, defendant's trial had concluded and the jury had returned a verdict of guilty, but no judgment had been entered against defendant which might have been the subject of an appeal.²

While the language of Vietor may permit a restrictive interpretation which excludes defendant's case, I believe that the language does not mandate such an interpretation. It assaults the principle of fairness to apply the rule of Vietor to cases on appeal on January 18, 1978, in which error had been properly preserved, but exclude cases in which error had been properly preserved where trial court's judgment in the original proceedings had not been entered.

The phrase "now on appeal" can be reasonably interpreted as distinguishing pending cases from those cases in which the rights of the parties had been terminated by a final judgment prior to January 18, 1978.³ Interpreting the language of Vietor to mean "pending cases in which error has been preserved" would not offend the case's stated principle of prospectivity and would produce a more fair result. See State v. Fields, 223 N.W.2d 197, 198 (Iowa 1974).

Oxberger, C.J., joins this dissent.

¹ The rule enunciated in Vietor is to apply to its own facts as well as cases "now on appeal." This, in fact, gives Vietor limited retroactive effect.

² Judgment was entered on May 23, 1978, and notice of appeal served on May 26, 1978.

³ "Final judgment" in this context means a judgment as to which the ordinary methods of review, such as appeal or certiorari, previously have been exhausted or the right to utilize them has expired through passage of time. See Annot., 10 A.L.R.3d 1378 n.14 (1966).