

IN THE COURT OF APPEALS OF IOWA

JOHN J. GRISER,	)	
Appellant,	)	Filed October 12, 1978
vs.	)	
IOWA DISTRICT COURT IN AND	)	
FOR LINN COUNTY, AUGUST F.	)	628
HONSELL, JUDGE,	)	<u>2-61048</u>
Appellee.	)	

Certiorari to Linn District Court - August F. Honsell, Judge.

Certiorari action alleging the trial court acted illegally in failing to suppress the testimony of a witness. - Writ sustained.

Thomas L. Koehler and Ted V. Ruffin, Cedar Rapids, for Appellant.

Richard C. Turner, Attorney General of Iowa, Thomas A. Evans, Jr., Assistant Attorney General, and Eugene F. Kopecky, Linn County Attorney, for Appellee.

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

PER CURIAM

Plaintiff-petitioner John J. Griser brings this certiorari action alleging that defendant-respondent Iowa District Court in and for Linn County, August F. Honsell, Judge, acted illegally in overruling Griser's motion to exclude the testimony of Clark McKey based upon the fact § 780.10, The Code, prohibits the State from introducing at trial a witness who was not examined before a committing magistrate or the indicting grand jury and where statutory notice of his testimony was not given to the petitioner or his attorney at least four days prior to the commencement of trial as required by statute. See section 780.10, The Code.

The purpose of § 780.10 is to inform the defendant of the witnesses against him and the substance of their testimony. *State v. Bruno*, 204 N.W.2d 879, 886 (Iowa 1973); *State v. Johnson*, 259 Iowa 599, 604, 145 N.W.2d 8 (1966). See also *State v. Thomas*, 222 N.W.2d 488, 493 (Iowa 1974). Respondent argues that petitioner in the instant case had notice of McKey's testimony before the first grand jury which failed to return an indictment against Griser. The State argues that reading McKey's sworn testimony before the second grand jury was not improper. Additionally, respondent argues that petitioner had notice of the substance of McKey's testimony because Griser's counsel in fact deposed McKey. Thus, respondent argues, there was no error.

Section 780.10 is couched in mandatory terms. "The County Attorney. . . shall not be permitted to introduce any witness who was not examined before. . . the grand jury. . ." (emphasis added). In interpreting the predecessor statute to § 780.10, the supreme court in *State v. Porter*, 74 Iowa 623, 624, 38 N.W. 514 (1888), stated: "a disregard of the material portion of the statute, which is mandatory in character, must be conclusively presumed to be prejudicial." See also *State v. Moline*, 164 N.W.2d 151, 154-55 (Iowa 1969).

Where the language of a statute is plain and unambiguous, and the meaning clear and unmistakable, there is no room for construction. In *re Estate of Johnson*, 213 N.W.2d 536, 539 (Iowa 1973). We find the language of § 780.10 is plain and unambiguous; its meaning is clear and unmistakable. The prohibition is against the introduction of the witness; the clear legislative intent is to enable a defendant to

prevent such a person being used as a witness. *State v. Hard*, 103 Iowa 391, 397, 70 N.W. 613 (1897).

In the instant case, McKey was not examined before the grand jury or a committing magistrate and the minutes of his testimony were not presented with the indictment as required by § 780.10. Neither did the county attorney give defendant or his attorney notice of the substance of McKey's proposed testimony at least four days prior to trial as an alternative. When Griser's counsel timely objected to the testimony of McKey, the trial court should have sustained petitioner's motion to suppress and we find it acted illegally when it failed to do so. See *Moline*, *supra*.

Because the trial court acted illegally in not sustaining Griser's motion, the writ of certiorari is sustained and the trial court is directed to suppress the testimony of the witness.

Writ sustained.

All judges concur, except Donielson, J., who dissents.

DONIELSON, Acting C. J. (dissenting)

I dissent. The purpose of § 780.10, The Code, is clearly set forth in *State v. Bruno*, 204 N.W.2d 879, 886 (Iowa 1973) where it states: "The purpose of this statute is to inform defendant of the witnesses against him and the substance of their testimony."

Keeping that specific purpose in mind, the record reflects that although witness McKey was not called before the second grand jury, portions of his testimony before the previous grand jury were read to them. Minutes of this testimony were prepared and attached to the indictment. The substance of the McKey testimony was known to the defendant in April, 1977 in a case that did not come to trial until December 12, 1977. The defendant had the State's investigative file and a complete transcript of the grand jury's proceedings, and defense counsel had taken a deposition of witness McKey on July 14, 1977.

Technical defects in procedure do not call for reversal unless it appears they have in some way prejudiced complaining party. *State v. Rank*, 214 N.W.2d 136, 138 (Iowa 1974); *State v. Thompson*, 254 Iowa 331, 337, 117 N.W.2d 514, 517 (1962). Literal compliance with § 780.10 has not always been required. *State v. Thomas*, 222 N.W.2d 488, 493 (Iowa 1974); *State v. Johnson*, 259 Iowa 599, 604, 145 N.W.2d 8 (1966). The importance of witness McKey's testimony was clearly recognized by defense counsel and the substance of that testimony was available well in advance of trial. I see no prejudice resulting from this technical defect in procedure and would not sustain the writ of certiorari.