

IN THE COURT OF APPEALS OF IOWA

No. 8-490 / 97-2142

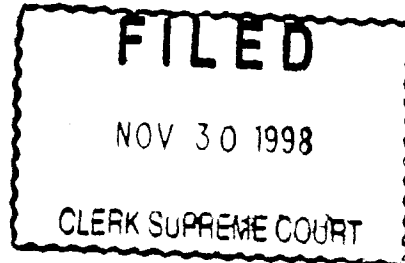
STATE OF IOWA,

Plaintiff-Appellee,

vs.

BARBARA J. MAURER,

Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, James A. Weaver,
District Associate Judge.

Defendant appeals the judgment and sentence entered upon her conviction of
operating while intoxicated, second offense, in violation of Iowa Code section
321J.2(1)(a) (1997). **AFFIRMED.**

David Scieszinski, Wilton, for appellant.

Thomas J. Miller, Attorney General, Martha Boesen and Chris Odell, Assistant
Attorneys General, Richard R. Phillips, County Attorney, and Christine Dalton,
Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Mahan and Hayden,* JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

MAHAN, J.

Barbara Maurer appeals the judgment and sentence entered upon her conviction of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2(1)(a) (1997). She argues the district court erred in denying her motion to dismiss the amended trial information because (1) the amendment was entered ex parte; and (2) a new offense was charged. We affirm.

On March 18, 1997, the Muscatine County Attorney filed a trial information charging Maurer with operating while intoxicated, second offense. The relevant portion of the trial information stated Maurer did:

[U]nlawfully and willfully operate a motor vehicle *either*:

- a. while under the influence of an alcoholic beverage, or drug, or a combination of such substances, or
 - b. while having an alcohol concentration, as defined in section 321J.1, of .10 or more
- and was previously convicted of the crime of OWI in Muscatine County, IA, on or about July 26, 1992.

The minutes of testimony attached to the trial information listed two witnesses. The first was an associate clerk of court who would testify to the prior offense. The second was the arresting officer from the Wilton Police Department who would testify about the stop and subsequent arrest of Maurer.

On April 16, 1997, the county attorney filed a motion to amend the trial information. The amendment did not add anything new to the trial information. Instead, it simply deleted 321J.2(1)(b) as an alternate theory. The amended trial information thus read that Maurer did:

[U]nlawfully and willfully operate a motor vehicle while under the influence of an alcoholic beverage, or drug, or a combination of such substances and was previously convicted of the crime of OWI in Muscatine County, IA, on or about July 26, 1992.¹

On April 24, 1997, Maurer filed a motion in limine seeking to bar any reference to test results because the intoxilyzer had malfunctioned. The State consented and the motion was granted on May 6, 1997.

Trial of this case was scheduled for May 27, 1997. On May 9, 1997, the county attorney filed a supplemental trial information charging Maurer with operating while intoxicated "in violation of section 321J.2(1)(a)." ² An additional minute of testimony listed a Cedar County deputy sheriff who took part in Maurer's arrest.

The trial originally scheduled for May 27, 1997, was continued to June 25, 1997, without resistance from Maurer. On June 16, 1997, Maurer filed a motion to dismiss on the grounds substantial rights of the defendant were prejudiced because of the amendment and the defendant did not have an opportunity to resist the amendment.³ Two additional continuances were granted upon request of Maurer. On September 23, 1997, the district court denied Maurer's motion to dismiss. The district court stated:

¹ All parties agree the amendment was obtained ex parte.

² It is equally unclear why this supplemental trial information was filed in light of the amended trial information of April 16, 1997, which accomplished the same purpose.

³ Maurer also requested the district court dismiss the notice of additional witnesses filed with the supplemental trial information.

First, defendant observes that notice of the proposed amendment was not served on the defendant prior to submission to the Court. Thus, the defendant was not given an opportunity to resist the same. Rule 4(8)(b), Iowa Rules of Criminal Procedure.

The observation of the defendant is correct. However, in the absence of a showing of actual prejudice the defendant is not entitled to dismissal. The amendment offered by the State eliminated the alternative involving a test result. This was consistent with the position taken by the defendant. The defendant asked the Court to preclude introduction of the test result at trial. If this request was granted and the matter proceeded to trial the Court would not have allowed the jury to contemplate a verdict based on the alcohol concentration alternative since there would be no supporting evidence of record.

This matter finally proceeded to trial on October 29, 1997, and Maurer was convicted as charged.

I. STANDARD OF REVIEW. Review is for errors at law. Iowa R. App. P. 4; *State v. Davis*, 525 N.W.2d 837, 838 (Iowa 1994).

II. DENIAL OF MOTION TO DISMISS. Maurer argues the district court erred in failing to sustain her motion to dismiss the amended trial information.

Maurer first claims the motion should have been granted because it was obtained ex parte in violation of Iowa Rule of Criminal Procedure 4(8)(b). The State concedes the amendment was obtained ex parte and in violation of rule 4(8)(b). However, the State points out the district court found Maurer was not prejudiced by the amendment. We agree.

The amendment did not add anything new but simply deleted one alternative theory.⁴ Maurer had adequate time to prepare for trial. Indeed, the district court

⁴ This was consistent with the desired results of Maurer's motion in limine.

granted her three motions to continue trial. Maurer was not only given adequate opportunity to prepare for trial, but she was also given time to complete all discovery. Finally, the addition of the new witness did not violate Iowa Rule of Criminal Procedure 18(2). In summary, it is difficult to understand how Maurer could claim she was prejudiced by the elimination of one of the State's alternative theories from the trial information. *State v. Waters*, 515 N.W.2d 562, 567 (Iowa App. 1994).

Maurer's second argument is that the amendment essentially permitted "the State to allege a different offense." Iowa Rule of Criminal Procedure 4(8)(a) allows for amendments before or during the trial. However, amendments are not allowed if substantial rights of the defendant are prejudiced by the amendment, or if "a wholly new and different offense is charged." Iowa R. Crim. P. 4(8)(a); *State v. Berney*, 378 N.W.2d 915, 919 (Iowa 1985); *State v. Gray*, 429 N.W.2d 571, 572 (Iowa App. 1988). We find Maurer's argument to be without merit. The amended trial information did not charge Maurer with a new or different offense.

We affirm the district court.

AFFIRMED.