FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 27, 1986
vs.	)	313
TUYEN BACCAM,	)	6-223
Defendant-Appellant.	)	85-977

Appeal from the Iowa District Court for Polk County (OM 14964 and CR 27070) - Theodore H. Miller, Judge.

Defendant appeals from his conviction of operating a motor vehicle while intoxicated in violation of Iowa Code section 321.281(1)(b). **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

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

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J. 314

On the evening of August 18, 1984, defendant, while driving south on Highway 65 in Polk County, struck the rear of a motorcycle operated by William Martin. Mr. Martin died at the scene. Because of the fatality and the fact that liquor was found in defendant's car, the investigating officer called the ASAP unit. A deputy assigned to the ASAP unit met defendant at the hospital and administered five field sobriety tests. The results of these tests were inconclusive. The deputy took defendant to the Polk County Jail where at 10:01 p.m. a breath test was taken by defendant. This test yielded a visual result of .118.

Defendant was initially charged with OWI and later charged with involuntary manslaughter. The charges were consolidated and tried to the court. The trial court found defendant not guilty of involuntary manslaughter and guilty of OWI in violation of Iowa Code section 321.281(1)(b). Defendant was sentenced to one year, with all but forty-eight hours suspended, and fined $500 plus 80 hours of community service work in lieu of an additional $500. Notice of appeal was timely filed.

I.

The first error alleged by defendant is that there was insufficient evidence to support the trial court's finding of guilt for operating a motor vehicle in violation of Iowa Code section 321.281(1)(b) (1983).

Our scope of review is at law for correction of errors only. Iowa R. App. P. 4. We also note that when reviewing a challenge to the sufficiency of evidence we view evidence in the light most favorable to the State. State v. Doss, 355 N.W.2d 874, 877 (Iowa 1984). All legitimate inferences and presumptions which may fairly and reasonably be deduced from the record, in favor of the State, shall be considered. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984).

Defendant contends that the evidence at trial was inconsistent with him having .13 or more blood alcohol level and this raised a reasonable doubt regarding guilt. Defense counsel moved for judgment of acquittal at the close of State's evidence and at the close of all evidence. Both motions were overruled.

Pursuant to Iowa Code section 321.281(1)(a) and (b) (1983), a person shall not operate a motor vehicle in either of the following conditions: a) under the influence of an alcoholic beverage or other drug; b) having an alcohol concentration of thirteen hundredths or more. There is no question that defendant was operating a motor vehicle at the time of the accident. Further, the trial court concluded that the State failed to show that defendant was under the influence. We need only consider whether the evidence supported a finding of .13 blood alcohol level. A person with thirteen hundredths or more of one percent by weight of alcohol in the blood is presumed to be under the influence. State v. Bratthaver, 354 N.W.2d 774, 777 (Iowa 1984).

The accident occurred shortly before 8:37 p.m.; defendant was breath tested at 10:01 p.m. The test result was .118. At trial Dr. Thomas Bennett, the Iowa State Medical Examiner, testified that human beings metabolize alcohol out of their systems at a rate of .02 percent per hour. The doctor testified that this rate is applicable whether a person weights 150 or 500 pounds; defendant weighed 120 pounds at trial. The trial court, in its ruling, calculated defendant's blood alcohol content to be .136 at the time of the accident. After an hour and a half defendant would metabolize .03 out of his system. This, plus the reading, equals .148. The Court arrived at .136 by subtracting ten percent of .118, based on the intoxilyzers supposed intolerance level. We conclude that the trial court's method of calculation was conservative. Defendant contends that the court should not have considered the .02 metabolism rate because defendant's weight fell below 150 pounds. With the example given by the doctor it would be logical

to conclude that the same alcohol metabolism rate applied to everyone. It was more than reasonable for the trial court to conclude that this rate also applied to defendant.

After considering the record in a light most favorable to the State, and weighing all presumptions, we conclude that the State sustained its burden and proved defendant guilty beyond a reasonable doubt.

II.

On appeal defendant also contends that the court abused its discretion by allegedly basing the sentence solely upon the concern that the case would gain "notoriety."

The trial court judge has a duty to consider all relevant factors and every sentencing option before pronouncing sentence. State v. Wright, 340 N.W.2d 590, 593 (Iowa 1983). Upon review, the sentencing court cannot be held to have abused its discretion unless the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)).

The sentencing court considered all relevant sentencing factors and determined that probation was appropriate because it would teach the defendant and the public that it was "not wise to drink and drive." The court mentioned that the sentence had nothing to do with Mr. Martin's death. The court stated that it did not "want the public to feel that people can go around violating the drinking codes without some penalty." The trial court did not abuse its discretion in sentencing defendant, therefore we affirm.

AFFIRMED.