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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed February 24, 1982

339

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DAVID PAUL HOLTZ)

Defendant-Appellant.)

1-425
64162

Appeal from Linn District Court, Robert Osmundson, Judge.

The defendant appeals from his conviction and sentence for OMVUI, second offense, in violation of § 321.281, The Code. AFFIRMED AND REMANDED.

Mark H. Rettig of Hines, Pence, Day & Powers, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

The defendant appeals from his conviction and sentence for OMVUI, second offense, in violation of § 321.281, The Code. We affirm and remand.

When the defendant was arrested for OMVUI, he demanded that he be given a blood sobriety test, but the officers refused. At the jail he was given a breath test, which showed a blood alcohol level of .145. The jury convicted him of OMVUI.

In this appeal from his conviction and sentence, the defendant argues (1) that his rights under the sixth, fifth, and fourteenth amendments of the United States Constitution were violated by the officer's refusal to permit him to obtain a blood test at the time of his arrest; and (2) that the trial court's sentence was based in part on an erroneous record and that he was not given credit for time spent in jail prior to sentencing.

I. Blood test

Section 321B.4, The Code, provides that a defendant may have an independent chemical test in addition to any test administered at the officer's direction. It also provides that the failure or inability to obtain such independent test will not preclude admission of the test taken at the officer's direction. The defendant argues that the statute and the officer's denial of his request for a blood test denied him the opportunity to obtain relevant exculpatory evidence and prevented him from receiving a fair trial. We disagree.

The defendant made the same argument when he filed suit in the United States District Court for the Northern District of Iowa, alleging that his constitutional rights were violated by the officer's refusal to provide him with a

blood alcohol test. In that suit, Judge McManus found that the "Plaintiff [defendant in this appeal] has failed to prove by a preponderance of the evidence that defendants violated his rights to due process, a fair trial, or to obtain exculpatory evidence, guaranteed by the fifth, sixth and fourteenth amendments to the United States Constitution, by refusing to provide him with an independent blood alcohol test at the time of his arrest." We see no reason to disagree with Judge McManus's ruling that there was no federal constitutional violation. We therefore uphold the defendant's conviction.

II. The sentence.

The defendant next argues that the trial court erred by sentencing him to a term of fifteen months, and by not granting him credit for time spent in jail prior to sentencing.

When the trial judge sentenced the defendant on the OMVUI charge, he ordered that the sentence run concurrently with the sentence the defendant had received upon a conviction of burglary in Benton County. Subsequently, in State v. Holtz, 300 N.W.2d 888 (Iowa 1981), the burglary conviction was reversed and the case remanded for a new trial. On August 13, 1981, the defendant was sentenced to probation after a plea bargain.

It is clear from the sentencing order that the trial judge based the sentence on a number of factors. The sentence was within the judge's discretion, § 903.1(1), and we will not disturb it on appeal.

Section 246.38, The Code, requires that a defendant be given credit for days already served if he was confined in jail prior to sentencing, or after sentencing but prior to decision on appeal because of failure to furnish bail. Iowa R. Crim. P. 24(f) states that the "defendant shall receive full credit for time spent in custody on account of the offense for which he or she is convicted." The trial court did not include in the judgment a statement of the days credited as required by § 901.6, The Code. However, after application by the defendant, the judge

ruled that the defendant was to be given credit for two days.

The defendant was arrested for OMVUI on March 25, 1979. On March 26, he was released from jail on his own recognizance. On April 6, 1979, he was incarcerated [presumably because he was arrested on the Benton county burglary charge]. He remained incarcerated until August 30, 1979, the date of sentencing on the OMVUI charge. The jury verdict was rendered on August 7, at which time the judge said he did not need to set bond since the defendant was in Anamosa. The defendant argues he should receive credit for all of the time he was incarcerated prior to sentencing. However, he may only receive credit for time served on account of the offense for which he was convicted. Iowa R. Crim. P. 24(f). The incarceration from April 6 to August 7 was due to the Benton county arrest, not the OMVUI charge. The defendant had been released on his own recognizance on the OMVUI charge. Therefore, he may not receive credit for that time. However, once the jury verdict was rendered on August 7, the defendant's incarceration was on account of the OMVUI offense. Therefore, he should have received credit for the days served between August 7 and August 30.

We remand the case to have trial judge modify the sentencing order so that the defendant receives credit for 23 days, in addition to the two days already given for time served prior to sentencing.

AFFIRMED AND REMANDED.