FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, Appellee,	)	Filed May 31, 1978
v.	)	
LLOYD B. GILDERSLEEVE, Appellant.	)	514 / 60744

Appeal from Polk District Court - Thomas A. Renda, District Associate Judge.

Defendant appeals conviction for violation of § 321.281, The Code (OMVUI). Reversed and remanded.

Jerry L. Jones, of Ames, for appellant.

Richard C. Turner, Attorney General, Raymond Sullins, Assistant Attorney General, Dan Johnston, Polk County Attorney, and Robert A. Burnett, Jr., Assistant County Attorney, for appellee.

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

PER CURIAM

Defendant was convicted in the trial court of a violation of § 321.281, The Code 1975 (OMVUI). He appeals, assigning several errors which we consider separately although not necessarily in the order presented.

I. Sufficiency of Instructions. Defendant contends that the trial court erred in giving jury instructions, numbers 3, 5, 6, and 7, over his objection. The exceptions taken to these instructions included the contention that they improperly injected into the case, without evidentiary support, issues concerning whether defendant was under the influence of drugs or a combination of alcohol and drugs.

The State seeks to justify the giving of the instructions based on the testimony of an Iowa State trooper that defendant had told him that he was taking codeine and librium and had taken his last dosage about 20 minutes prior to his arrest. There was no evidence offered by the State tending to show the quantity of said dosages or the effect, if any, which the ingestion of such drugs would have on the reason, judgment, passion, or bodily control of the user.

We cannot conclude, in the absence of controlling authority, that judicial notice may be taken of the fact that the ingestion of codeine and librium in unspecified quantities, even if taken in combination with alcohol, would produce a physical condition consistent with the definition of "under the influence." See State v. Tamburro, 68 N.J. 414, 346 A.2d 401 (1975) (expert testimony required). It was error to instruct the jury concerning defendant being under the influence of drugs or a combination of alcohol and drugs.

II. Failure of State to File Minutes of Testimony of Certain Witnesses. Next, defendant urges that the trial court erred in allowing testimony of certain witnesses whose names were listed on the county attorney's information but as to whom no minutes of testimony were filed. Defendant made timely objection to such evidence in the trial court based on § 780.10, The Code 1975. We conclude this objection should have been sustained as a result of the provisions of that statute which are made applicable to prosecutions under county attorney's informations by § 769.13, The Code 1975. We are not persuaded that failure to move to dismiss the information based on failure to file minutes of evidence, as permitted by § 769.17(2), The Code 1975, is a waiver of defendant's right to seek exclusion of the testimony of these witnesses. State v.

Girdler, 251 Iowa 1214, 102 N.W.2d 872 (1960), relied upon by the State does not so hold. That case concerned waiver of a challenge to the sufficiency of the information itself, rather than waiver of the right to exclude the testimony of witnesses under § 780.10. No other authority has been cited by the State for its waiver contention. We must conclude that the remedies of dismissal of the information (if applicable) under § 769.17(2) and exclusion of the testimony under § 780.10, are separate and distinct.

It is a much closer question whether, as the State contends, on the facts of the present case the error in permitting the witnesses to testify was harmless because defendant was not misled. We need not determine that issue in view of our reversal on other grounds. It appears the State will have adequate time to act to alleviate the cited omission prior to retrial of the case.

III. Admissibility of Results of Breath Test. Defendant also asserts that the trial court erred in admitting the results of a blood alcohol determination based on a sample of his breath. Simply stated, the objection in the court below and on appeal is that the device used to administer the test was not shown to have been a device approved by proper administrative authority. If it was not an approved device, the result of the test is inadmissible under State v. Hansen, 203 N.W.2d 216, 223 (Iowa 1972).

Under the applicable administrative regulations[1] it is necessary that the device be "a type meeting the minimum performance requirement established the 'Standard For Devices to Measure Breath Alcohol' (published in 38 Federal Register 30459) as revised periodically by the National Highway Traffic Safety Administration or its successor." Our examination of the record results in considerable uncertainty as to whether or not the device employed to test defendant's blood alcohol level was such an approved device. Nor can we find in the record where the trial court resolved this issue. In overruling defendant's objection to this evidence, the trial court relied upon general testimony that the device was accurate and approved without determining if it was the type declared to be a qualifying device in the manner required by the regulation. Upon remand and prior to retrial, an evidentiary hearing should be conducted by the trial court out of the presence of the jury, to determine whether the test was conducted with a device declared to be qualified under the applicable regulation.

[1] Iowa Administrative Code, chapter 3, p. 4, "Public Safety (680), 4/5/76, 680 - 3.13 (321B) (1) (a).

IV. Exclusion of Jailor's Comments or Conduct. Defendant further assigns as error the exclusion of testimony offered by the witness, Dickerson, that a Polk County jailor had been advised that defendant was going to drive home after he had posted bond and that the jailor made no objection to such procedure. We believe the trial court acted properly in excluding such evidence based upon the State's objection that it was hearsay. While the trial court might have erred in restricting defendant's offer of proof, see, e.g., Parrish v. Denato, 262 N.W.2d 281, 286 (Iowa 1978), we find that no prejudice resulted.

V. Improper Closing Argument by State's Attorney. Next, defendant charges that the trial court erred in not sustaining his motion for mistrial based on remarks made by an assistant county attorney during final argument to the jury. These remarks concerned observations which the assistant county attorney claimed to have made as to defendant's manner of walking. The jury was told that such observations were made as defendant "walked about the court house." Defendant's ability to walk in a normal manner had been an issue in the case during the trial.

We deem such comment by the prosecutor to be improper. As applied to final argument of counsel the distinction between explaining the evidence and generating new evidence beyond the record is well established.[2] We conclude in the present case the comment by the prosecutor constituted new evidence outside the record and should not be repeated if the case is retried.

VI. Remarks of Trial Judge During Sentencing. Finally, defendant complains that the trial court employed an impermissible factor in determining to deny his application for deferred judgment. At time of sentencing, the trial court stated:

> Well, it has been the policy of the Court that individuals who admit their guilt and do have clean driving records and admitting that they have driven under the influence of an alcoholic beverage, with driving records, this Court has on occasions, probably more than a lot of jurisdictions, given deferred sentences to individuals to give them a chance to prove themselves.

[2] See, in particular, State v. Peeples, 250 N.W.2d 390, 395-96 (Iowa 1977).

We cannot say with certainty that this comment of the trial court demonstrates that the court did in fact give weight to the fact that defendant refused to plead guilty in fixing defendant's sentence. The situation presented is thus not unlike that which was before the court in State v. Nichols, 247 N.W.2d 249, 255-56 (Iowa 1976). There the case was remanded for resentencing in accordance with only permissible considerations. In the event defendant is retried and again convicted care should be taken by the trial court to avoid consideration of defendant's failure to plead guilty in its determination of what his sentence should be.

REVERSED AND REMANDED.