

FILED

APR 26 1979

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Appellee,

)

Filed April 26, 1979

vs.

)

IVAN RAY ARNOLD,

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Appellant.

)

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals conviction of O.M.V.U.L, second offense, alleging that trial court's remarks denied him a fair trial. - Affirmed but remanded for resentencing.

Robert R. Rigg, Des Moines, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Dan L. Johnston, Polk County Attorney, for Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals conviction of operating a motor vehicle while under the influence of alcohol, in violation of section 321.281, Code Supp. 1977, alleging he was denied a fair trial by certain remarks made by trial court. Defendant specifically complains of four occasions when the trial judge, on his own motion, interrupted defense counsel during her cross-examination of a State's witness. The first time, the judge told the attorney to let the witness answer before she asked another question; the second time, the judge asked her to explain one of her questions; on the third and fourth occasions respectively, the judge told the attorney her questions were rather complicated and her examination was becoming argumentative.

We recognize the rule that a trial court must not assume the role of advocate for either party to a case. See State v. Glanton, 231 N.W.2d 31, 34 (Iowa 1975). Here, however, the judge's remarks were aimed at promoting an orderly trial, and they did not serve to telegraph to the jury the judge's personal view of the case. We conclude defendant's motion for mistrial was properly denied.

Although defendant raises no issue concerning the sentence imposed, we note that the sentence is constitutionally infirm, thus necessitating a remand to district court. See State v. Terrill, 241 N.W.2d 16, 21 (Iowa 1976). Upon his conviction of O.M.V.U.I., second offense, defendant was sentenced to be confined in the Polk County jail for seven days and fined \$500. The court directed that if defendant failed to pay this sum, he should serve one day in jail for each \$10 of the fine unpaid. No provision was made in the sentencing decision for payment of the above fine in installments. At his initial appearance, defendant requested court appointed counsel and filed an affidavit showing his financial condition. The offender advocate was thereafter appointed. Defendant has been represented by the offender advocate throughout the proceedings below and on appeal. On this record, we assume trial court was aware that Arnold could not make an immediate payment of the \$500 fine because of indigency. See State v. Snyder, 203 N.W.2d 280, 286 (Iowa 1972). We find the following sentence from Snyder applicable hereto: "The trial court's direction for confinement of [defendant] for default in payment of his fine gives rise to a difference in treatment that constitutes invidious discrimination on the basis of wealth in violation of the equal protection clause of the

United States Constitution, ..." 203 N.W.2d at 291. There are methods less discriminatory than imprisonment by which the State may collect fines from indigent offenders. See Tate v. Short, 401 U.S. 395, 399, 91 S. Ct. 668, 671, 28 L.Ed.2d 130, 134 (1971). Defendant's sentence is vacated and the case remanded for resentencing.

Affirmed but remanded for resentencing.

All judges concur, except Donielson, J., who concurs specially.

LONNELSON, J. (specially concurring)

I agree with the majority's affirmance of defendant's conviction but would not remand for mandatory sentencing under § 321.281, The Code 1977. I do not consider the sentence given here to be the same as that in State v. Snyder, 203 N.W.2d 280, 286 (Iowa 1972). In any event, the defendant has not raised the issue of sentencing on this appeal, and I would not do so in this particular instance.