

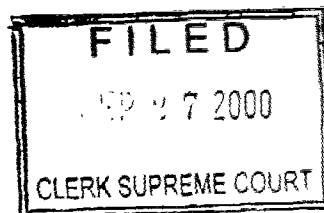
IN THE COURT OF APPEALS OF IOWA

No. 0-478 / 99-1354
Filed September 27, 2000

STATE OF IOWA,
Appellee,

vs.

BRIAN SCOTT GILTNER,
Appellant.



Appeal from the Iowa District Court for Wapello County, Kirk A. Daily,
District Associate Judge.

Brian Giltner appeals the judgment and sentence entered upon his
conviction of operating while intoxicated, third offense, in violation of Iowa Code
section 321J.2 (1997). **AFFIRMED.**

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for
appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Victoria Siegel, County Attorney, and Mark Tremmel, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

VOGEL, P.J.

Brian Giltner appeals the judgment and sentence entered upon his conviction of operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (1997). Because we find the officer had reasonable grounds to believe Giltner was operating while intoxicated and was lawfully arrested before invoking implied consent, we affirm the conviction.

Background facts. Giltner was arrested and charged with operating a motor vehicle while intoxicated. He was found guilty of his third offense in violation of Iowa Code section 321J.2. He now appeals claiming the Intoxilyzer result of .126 was admitted in error. Giltner contends the State failed to provide an adequate foundation for the use of the preliminary breath test (PBT) result by showing the instrument was properly calibrated. Therefore, the implied consent invoked for the Intoxilyzer test, based on the preliminary breath test result, was faulty and the Intoxilyzer result should not have been allowed into evidence. Giltner also argues the prosecutor committed an act of misconduct by "attempting to shift the burden of proof to the defendant" during closing arguments.

On July 25, 1998, Giltner was stopped by Officer Joseph Robinson for swerving twice and exceeding the speed limit by ten miles per hour. The officer observed Giltner to have watery, bloodshot eyes, slurred speech and a strong odor of alcohol. Giltner admitted to the officer that he had been drinking that evening and consented to take three field sobriety tests, consisting of the horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand

test. After failing all three tests, Giltner submitted to a preliminary breath test, which exceeded .10 alcohol concentration. Officer Robinson then arrested Giltner, took him to the county jail and invoked implied consent prior to administering a more reliable Intoxilyzer breath test. His alcohol concentration was .126, well over the Iowa Code section 321J.2 limit of .10.

Scope of review. Our scope of review is for correction of errors of law. Iowa R. App. P. 4. On evidentiary issues we review for an abuse of discretion. *State v. Weatherly*, 519 N.W.2d 824, 825 (Iowa App. 1994). In order to show an abuse of discretion, appellant must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (citation omitted).

Lack of foundation objection to preliminary breath test. Giltner argues the State failed to offer the proper foundation for the preliminary breath test by proving the instrument had been calibrated at least once a month as is required. See Iowa Admin. Code r. 661-7.5 (1997). The State contends Giltner failed to preserve error as this is essentially an effort to suppress the Intoxilyzer result from being admitted into evidence and, therefore, should have been preserved by a motion to suppress or a motion in limine prior to the trial. See Iowa R. Cr. P. 10(2) and 11(1). Although these motions are required to be made prior to the trial, we find Giltner adequately preserved error on this issue by making a foundational objection during the trial.

We do not need to reach the issue of whether there was a proper foundation laid for the use of the PBT result for triggering the invocation of

implied consent. Iowa Code section 321J.6 outlines the requirements necessary to invoke implied consent for chemical testing. First, the officer must have reasonable grounds to believe the person has been operating the vehicle while intoxicated. Iowa Code § 321J.6. Giltner does not contest this. Second, there must exist one of seven conditions, including the defendant being placed under lawful arrest for operating while intoxicated or a preliminary breath result of .10 or more. *Id.* On the consent form signed by Giltner, only the box referring to the PBT was checked, and the box indicating the defendant “was placed under arrest for violation of Iowa Code Section 321J.2” was left blank. Giltner contends that because the officer checked only the PBT box as the basis for further chemical testing, the subsequent lack of a foundation for this test must invalidate the consent and exclude the Intoxilyzer result from evidence at trial. We do not read the statute so narrowly as to exclude a condition merely because the officer failed to check a corresponding box on the consent form. Iowa Code section 321J.6 provides, “[t]he withdrawal of the body substances and the test or tests shall be administered at the *written* request of a peace officer having reasonable grounds to believe” the defendant was operating while intoxicated and one of the specified conditions exist. (emphasis added) Although written request is required, it is not a foundational prerequisite to subsequent use of a chemical test. Iowa Code section 321J.15 confirms this issue by stating:

[I]f it is established at trial that analysis of a breath specimen was performed by a certified operator using a device and methods approved by the commissioner of public safety, *no further foundation is necessary for introduction of the evidence.* (emphasis added)

At the time the officer invoked implied consent, he had already placed Giltner under arrest and taken him into custody. Although not checked on the form, Giltner was well aware of his arrest and such a detail missing on the form cannot invalidate the later use of the chemical test. Therefore, we find the officer properly invoked implied consent and requested an Intoxylizer test, according to the statutory requirements.

Prosecutorial misconduct. Giltner next argues the prosecutor committed an act of misconduct by "attempting to shift the burden of proof to the defendant" during closing arguments. Apparently, there existed a videotape of the police encounter and a second officer was present while the sobriety tests were administered. The prosecution did not present either the videotape or the second officer's testimony at trial. In closing arguments, Giltner apprised the jury of the missing evidence. In response, the State informed the jury that Giltner was also able to present this evidence at trial. Giltner objected on the grounds that the prosecution was attempting to transfer the burden of proof from the State to Giltner. The trial court overruled the objection on the basis that the jury instructions would clarify the burden of proof issue for the jury.

The State contends a prosecutor may properly comment on defendant's failure to present exculpatory evidence as long as it does not address defendant's failure to testify against himself. *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986). Here, the State merely pointed out to the jury the fact that Giltner could have presented the video and the officer's testimony as he had access to both.

In addition, the supreme court has previously held, "[i]f allegedly objectionable remarks are made in response to an opponent's argument, this will ordinarily obviate any impropriety that would otherwise exist." *State v. Swartz*, 601 N.W.2d 348, 353 (Iowa 1999). We find the State's comments did not exceed the bounds of what is allowable to inform the jury of exculpatory evidence available to the defendant and were made in response to Giltner's comments on the State's failure to present such evidence. Therefore, the prosecutor did not commit misconduct and we affirm Giltner's conviction and sentence.

AFFIRMED.