

IN THE COURT OF APPEALS OF IOWA

No. 9-349 / 88-1660

FILED

JAN 25 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

386

vs.

CARL JOHN LINGE,

Appellant.

Appeal from the Iowa District Court for Johnson County,
John R. Sladek, District Associate Judge.

The defendant appeals from his conviction, following a
jury trial, for second offense OWI. **AFFIRMED IN PART;
REVERSED IN PART; AND REMANDED.**

Gerald J. Kucera, of the Tom Riley Law Firm, Cedar
Rapids, for the appellant.

Thomas J. Miller, Attorney General; Carolyn J. Olson,
Assistant Attorney General; and Timothy Ross-Boon,
Assistant County Attorney, for the appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel,
JJ.

OXBERGER, C.J.

387

Carl John Linge (Linge) was convicted by a jury trial of second offense OWI. He contends the district court erred in (1) submitting a jury instruction concerning irregularities in a breath test, (2) not granting his request for mistrial, (3) overruling his motion to suppress evidence of a breath test, (4) not granting a new trial due to improper acts by the prosecutor, (5) revoking defendant's license for six years. Linge appeals from the resulting conviction and sentence. Our review is for the correction of errors at law. Iowa R. App. P. 4. We affirm in part, reverse in part and remand to the district court.

I. Jury Instruction No. 7.

First, Linge contends the district court erred by submitting the breath test instruction to the jury. At the conclusion of the evidence, the jury was given the following instruction:

Evidence has been introduced as to an analysis of breath that was taken from the Defendant shortly after his arrest in this case. This analysis is not admissible unless this breath was obtained from the Defendant voluntarily, and without any threat or coercion, and without any inducement or promise of immunity from prosecution.

Further, this analysis is not admissible unless the Officer was certified to operate the CMI Intoxilyzer Model 4011A, that the machine was certified to be in operating order and that the officer followed an operational checklist approved by the Commission of Public Safety. A new evidence card is not required for a valid test nor is the officer required to initial Step 11 of the checklist for the test to be accurate.

If you find the Defendant voluntarily permitted said breath to be analyzed, and that it was obtained without any threat or coercion, and without any inducement or promise of immunity from prosecution, then you will give this evidence respecting this analysis such weight as you think it is entitled to in determining the guilt or innocence of the Defendant. (Emphasis added.)

Linge asserts this instruction misdirected the jury on a material matter of law. Specifically, he argues that the emphasized portion of the instruction "magnified the importance of the particular testimony, and gave undue prominence to the Court's rule as a matter of law that the exact facts referred to by the Defendant were irrelevant."

Our supreme court addressed a similar contention in State v. Marsh, 392 N.W.2d 132 (Iowa 1986); see also State v. Wullner, 401 N.W.2d 214, 217 (Iowa 1986). In Marsh the defendant argued that a flight instruction unduly focused the jury's attention on flight to avoid prosecution and improperly allowed the jury to infer his guilt. Id. at 133. The Iowa Supreme Court stated that since flight instructions have a propensity to unduly emphasis certain evidence they should be given cautiously. Id. at 134. The Marsh court, however, held that such an instruction did not necessarily constitute reversible error. Id. The court further stated that the defendant failed to show he was prejudiced by the instruction, and that "[t]he instruction was a correct statement of law and left any inferences . . . to the jury as they considered all the evidence." Id.

In this case, we do not think Linge has shown he was prejudiced by the instruction. The instruction was tailored to meet the evidence presented in this case. See State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978). The instruction was a correct statement of law. We believe the instruction left the determination of whether the test was accurate to the jury. Additionally, any inferences to be drawn regarding the accuracy of the test were left to the jury in its consideration of all the evidence.

There was no reversible error by the district court in inserting the language that a new evidence card is not required for a valid test, nor for inserting the language that the officer is not required to initial Step 11 of the checklist. Linge has not shown how the failure to initial Step 11 could affect the accuracy of the breath test. We find no reversible error in the giving of this instruction.

II. Prosecutorial Misconduct.

Next, Linge contends he should have been granted a mistrial due to two improper acts by the prosecutor.

"A showing of prosecutorial misconduct alone will not warrant a new trial. Defendant must show he was so prejudiced by the misconduct he was denied a fair trial." State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986). Trial courts have considerable discretion to determine whether defendant has suffered such prejudice and we reverse only upon a showing that that discretion was abused. State v.

Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). The trial court is in the "better position to determine if prejudice resulted from the prosecutor's conduct because that court observed the alleged misconduct and the jury's reaction." Bishop, 387 N.W.2d at 561.

A. Inquiry about a blood test.

Linge contends he was entitled to a mistrial, or at least a jury admonition, because the prosecutor referred to an independent blood test obtained by the defendant. Linge notes that the results of this blood test were inadmissible because he had not disclosed them to the State during discovery. He asserts that the prosecutor's deliberate reference to an inadmissible blood test was prejudicial because it encouraged the jury to speculate that the defendant did not offer the blood test into evidence because its result was adverse to him.

The prosecutor asked the arresting officer whether after he had given Linge the breath test he offered him any other test. The officer said no, then volunteered that defendant wanted an independent blood test. Contrary to Linge's assertion, it is not clear that the State's purpose in asking the officer about any other tests offered to Linge was to taint the jury. Outside the presence of the jury, the State indicated its reason for the line of questioning was as follows:

MS. LYNESS [PROSECUTOR]: We really in this line of questioning are going through the series of events that occurred. The defendant later

mentioned that he felt he had not been given the opportunity to give another test, and that's the reason we were going on in this area of questioning. The intent was not in any way to prejudice the jury or to taint the jury, simply a matter of what had actually occurred at the scene.

The district court sustained Linge's objection regarding the prosecutor's inquiry about other tests offered to Linge. The district court went on to overrule Linge's request for a mistrial. After Linge's defense counsel asked the court whether it was going to admonish or caution the jury the court stated:

THE COURT: At this time all they know he requested a test and not anything further, whether one was granted or not. The Court in and of itself does not find that prejudicial to your client, the fact that he requested an independent test. I'm cautioning the attorneys they shouldn't bring it up in final arguments unless it's dealt with in the presentation of further evidence.

We agree with the analysis of the district court in overruling Linge's request for a mistrial. Furthermore, the prosecutor's question did not ask for the officer's volunteered response regarding the independent blood test. There is no claim the volunteered response was instigated by the prosecutor. We find no abuse of discretion on the part of the district court. Under these circumstances we do not find Linge was denied a fair trial.

B. Inquiry about a breath test.

Linge also contends he was entitled to a mistrial because the prosecutor asked the arresting officer for his

opinions concerning the effect and significance of the used evidence card and the omissions from the checklist. Linge objected to the questions on grounds that they call for legal conclusions on the part of the witness. The district court sustained Linge's objections to these questions and informed the jury that "at the end of trial, I'll give you instructions with regard to the validity of the test and how you may use it in this particular case."

Linge contends the mere asking of the questions was prejudicial. He also asserts prejudice in that the prosecutor tried to mislead the jury with an incorrect conclusion of law. Specifically, the prosecutor asked the officer whether the evidence card was an essential part of the intoxilyzer test, and whether in his training he was taught the visual readout of the breath test was sufficient for a valid test. Linge cites State v. Wolfe, 369 N.W.2d 458 (Iowa App. 1985), for the proposition that a visual read out of an intoxilyzer machine is not alone sufficient. In Wolfe the breath test was excluded from the evidence as "[t]here was nothing to indicate that the external indicator will give a reliable reading for purposes of a judicial proceeding." Id. at 460. It is important to note that in Wolfe there was evidence that the intoxilyzer machine was malfunctioning.

The circumstances in this case differ from those in Wolfe. Here the officer's testimony regarding the visual

read out only supplemented evidence recorded on the printout card. Additionally, there is no claim that the intoxilyzer machine was malfunctioning.

Upon our review of the record we do not find the prosecutor's questions to be unduly prejudicial. An improper question or comment will, in most instances, not be held to constitute prejudice where the court admonishes the jury to disregard it. See State v. Burkett, 357 N.W.2d 632, 638 (Iowa 1984); State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982). Only in rare cases where the prejudicial effect of the comment cannot be wiped away will an admonition be found insufficient. Williams, 315 N.W.2d at 56. We find the district court did not abuse its broad discretion in denying Linge's request for mistrial.

III. Motion to Suppress.

Linge also contends the district court erred by refusing to suppress the result of a breath test. He asserts the breath test was not taken in compliance with procedural requirements pursuant to Iowa Code section 321J.11 and Iowa Administrative Code Chapter 680 section 7.2(1) (recodified at 661 Iowa Admin. Code 7.2(321J)). He complains that the officer who administered the breath test employed a used evidence card rather than a new one. He also complains that the officer neglected to check and initial one of the blanks on the checklist.

A trial court's ruling on a motion to suppress is upheld if supported by substantial evidence in the record. State v. Laughridge, 437 N.W.2d 570, 572 (Iowa 1989). We set aside a trial court ruling only when there is no substantial evidence to support its finding. Id.

Iowa Code section 321J.15 (1989) mandates the only foundational requirements for the introduction of an analysis of a breath test is a showing that the test was "performed by a certified operator using a device and methods approved by the commissioner of public safety." The methods approved by the commissioner are set out at Iowa Administrative Code Chapter 661 section 7.2(321J) (1988) and includes a requirement that "[t]he operator of the intoxilyzer shall proceed in accordance with the instructions furnished by the Iowa department of public safety's criminalistic laboratory" The purpose of the procedural requirements is to "guarantee that the test results are sufficiently accurate for use in judicial proceedings." State v. Geinzer, 406 N.W.2d 457, 457 (Iowa App. 1987).

In the case at bar, Linge agreed to submit to a breath test following his arrest and after consulting with an attorney. The administering officer proceeded in accordance with instructions furnished by the department of public safety in the form of an operational checklist. The officer testified that he performed all of the steps listed

on the checklist. After the breath test had been completed, the officer discovered that the evidence card which had been inserted in the machine had previously been used to record the first three steps of another test. As a result, the first air blank on the card showed a double printing of .00, the calibration step showed both .14 and .15, and the second air blank showed a double printing of .00. The correct reading for each air blank is .00. The .14 and .15 readings for the calibration step are both within the normal limits of this step. Nevertheless, the printed results on the card matched the visual readouts as observed and recorded by the administering officer.

Additionally, the officer testified that after he received the printout of the test he overlooked initialing Step 11 on the checklist. Step 11 on the checklist is the final step on the checklist for operating the intoxilyzer machine. Step 11 states, "[r]econnect air and breath hoses, turn selector to 'Air Blank', and allow instrument to run through cycle." As noted, the officer testified that he completed each step on the operational checklist. The officer further testified as follows:

Q. You didn't initial Number 11?

A. No, I overlooked that. Normally after I receive the printout on the breath test, I finish filling out the implied consent form while the final air blank is running -- when the final air blank is finishing and prints under the code. I pull the card out and fill out the card, and at that time I overlooked checking the final step on the checklist.

Mr. Michael L. Rehberg, administrator of Division of Criminal Investigation Crime Laboratory, an expert witness called by the State, testified that even if Step 11 of the operational checklist was not done it would not affect the determination that an accurate test was done. He further testified that by examining the printout card a person could tell whether Step 11 was completed. He then testified that he felt the officer in this case correctly used the intoxilyzer machine.

Our review of the record demonstrates substantial evidence to support the district court's ruling on the admissibility of the breath test results. In our review of Iowa Administrative Code Chapter 661 and the operational checklist, we find no requirement that a new evidence card be used. Although it is preferable and more sensible to use a new evidence card each time the intoxilyzer machine is used, in this case we believe the tests results are sufficiently accurate and reliable. The district court stated "the card had not been used to obtain a breath sample reading or printout; and therefore, the sample taken from the defendant was clearly printed on the evidence card." We agree. We find substantial evidence to support the district court's finding that the evidence establishes all of the procedures required were followed and the results of the breath test were reliable. Accordingly, we find no abuse of discretion by the district court in

overruling Linge's motion to suppress the results of the breath test.

IV. License Revocation.

Finally, Linge contends the district court erred by directing a six-year license revocation due to two previous OWI charges. Linge contends the enhanced revocation period was erroneous because one of the prior charges relied on was a Florida charge which was not adequately pleaded or proved.

At the time of the sentencing, the State requested that the Court revoke Linge's license for a period of six years pursuant to Iowa Code section 321J.4. The State based its recommendation on the professional statement of the prosecutor that Linge "had prior convictions for OWI and it was learned after the initial filing of the charge that this was actually a third offense, that he had been convicted in Florida in July of 1984 for OWI so this would actually be his third offense." The State did not present any evidence regarding this additional conviction. Neither Linge nor his defense counsel challenged the accuracy of the prosecutor's statement. In resisting the request for revocation, defense counsel stated:

This conviction carries a mandatory [sic] (minimum) sentence of 7 days in jail and a \$750.00 fine and the Court can't impose a sentence less than that. That would be the sentence I would request in this case. I think it's improper to take the defendant's license for six years because there has been no proper showing of the conviction in the proper paperwork, and I don't think that should be a basis for taking his license away for six years.

The district court took the issue under advisement and later ruled Linge's license was revoked for six years.

In Shaw v. Department of Public Safety, 257 Iowa 30, 33, 131 N.W.2d 261, 263-64 (Iowa 1964), the Iowa Supreme Court addressed the issue of proper notification of motor vehicle matters as between two states. The Shaw case involved notice in Iowa of a party's suspended driving privileges in another state. In Shaw the court stated, "[a]ny legal appearing form of certification from another state to Iowa or any other state which, in fact, gives the information to Iowa as to appellant's suspension in Colorado is sufficient." Id. at 263.

In this case the State presented insufficient evidence to confirm Linge's conviction for OWI in the State of Florida. The only evidence presented was the prosecutor's professional statement about such conviction. Here the State wanted to use this alleged conviction along with his two Iowa convictions as a basis for revoking his driving privileges. We are aware that the purpose of revoking a driver's license "upon a third or subsequent violation of operating while intoxicated is not to punish the driver, but to protect the public by providing that drivers who have demonstrated a pattern of driving while intoxicated be removed from the highways." State v. Socarras, 425 N.W.2d 426, 428 (Iowa App. 1988). This is true whether the offense occurs on Iowa streets and highways or those of

other states. State v. Peterson, 347 N.W.2d 398, 402 (Iowa 1984). However, we find the State has failed to sufficiently establish in the record Linge's alleged third conviction for OWI.

We therefore find the district court erred in revoking Linge's license for six years. The court imposed a fine of \$750.00 and sentenced Linge to fourteen (14) days in jail, and credited Linge for the three hours he was incarcerated in the Johnson County Jail. The court also ordered substance abuse evaluation and treatment pursuant to Iowa Code section 321J.3. We agree with district court's sentencing. We, however, remand the case to the district court with directions to vacate the order revoking Linge's driver's license for six (6) years.

Since the State has failed to properly establish Linge's conviction for OWI in Florida, we do not reach Linge's remaining contentions.

V. Conclusion.

We find no reversible error in the district court by submitting the breath test instruction to the jury. The district court did not abuse its discretion in denying Linge a mistrial for prosecutorial misconduct. We also find no error by the district court in refusing to suppress the results of a breath test. Finally, the district court erred in revoking Linge's driver's license for six years. This matter is remanded to the trial court to vacate the

order revoking the defendant's driver's license for six (6) years.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.