FILED
APR 29 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 29, 1980

vs.)

JAMES WILLIAM SEYDEL,) 0-65
63648

Defendant-Appellant.)

Appeal from Muscatine District Court - Jack L. Burns, Judge.

Defendant appeals from conviction of operating a motor vehicle while under the influence in violation of section 321.281, The Code 1977, contending it was error to admit evidence of his refusal to submit to a chemical test when nothing concerning this was mentioned in the minutes of testimony and that he should have been granted a new trial based on prosecutorial misconduct as a result of certain statements made by the prosecutor in final argument. AFFIRMED.

David L. Scieszinski of Wilton, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie F. Pottorff, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals from conviction of operating a motor vehicle while under the influence in violation of section 321.281, The Code 1977, contending it was error to admit evidence of his refusal to submit to a chemical test when nothing concerning this was mentioned in the minutes of testimony and that he should have been granted a new trial based on prosecutorial misconduct as a result of certain statements made by the prosecutor in final argument. We affirm the trial court.

I. Defendant's first contention is premised upon the change in the standards for judging the sufficiency of minutes of evidence as a result of the adoption of the Iowa Criminal Code, effective January 1, 1978. In State v. Walker, 281 N.W.2d 612, 613-14 (Iowa 1979), it was held that under rules 4(6)(a) and 5(3) of the Iowa Rules of Criminal Procedure, minutes of testimony "must be sufficient -- fully and fairly -- to alert defendant generally to the source and nature of the evidence against him." The penalty for failure to comply with this requirement is exclusion of the testimony not thus embraced by the minutes. Id.

In the present case, the minutes reflected that the witness, D. Wiegand, would testify:

> ...that he is a resident of West Liberty, Muscatine County, Iowa, and by occupation is a police officer with the West Liberty Police Department; that on the 30th day of December, 1978, at approximately 2:30 a.m. he apprehended the Defendant at 600 block of Columbus Street, West Liberty, Muscatine County, Iowa; that the Defendant was operating a motor vehicle; that in his opinion at said time and place, the Defendant was under the influence of an alcoholic beverage or drugs or a combination thereof.

At defendant's trial, this witness was permitted to testify as to the procedures invoked after defendant's arrest pursuant to the implied consent laws, including defendant's refusal to submit to a chemical test. Such testimony came in over defendant's timely objection that it was outside the minutes of testimony. Defendant now urges that the admission of this evidence constitutes reversible error by the trial court. We disagree. Officer Wiegand's testimony constituted a continuing chronological description of the apprehension and arrest of the defendant. Anyone reasonably familiar with the law incident to O.M.V.U.I. arrests would realize that the implied consent is a routine, integral part of such an arrest. Given the knowledge that defendant had declined the test, it would indeed have been strange, in view of section 321B.11, The Code, had the State not presented such evidence.

Defendant was at all times represented by counsel. We hold the minutes were thus sufficient to fully and fairly alert him generally to the source and nature of the evidence against him.

II. Defendant next contends that certain statements of the prosecutor in final argument to the jury were sufficiently improper and prejudicial to require a new trial. These were: (1) reference to defendant's failure to call his girlfriend and his doctor to corroborate certain of his claims; and (2) reference to the fact that either the witnesses for the State or the witnesses for the defendant were lying.

Considering the latter point first, we find it to be without merit. It is based on the premise that the prosecutor was expressing his personal view of the truth or falsity of certain testimony contrary to A.B.A. Standard of Criminal Justice Prosecution Function 5.8(b). Our reading of the record (through a bill of exceptions) suggests that the prosecutor's statement did not purport to be based on his personal knowledge but rather on what the prosecutor urged to be an inescapeable conclusion based on all of the evidence. Such argument was not improper.

With respect to the prosecutor's reference to defendant's failure to call certain witnesses, he relies on the holding in State v. White, 225 N.W.2d 104, 106 (Iowa 1975), that this is reversible error. We need not consider the merits of this claim. Our reading of White and State v. Horsey, 180 N.W.2d 459, 460-61 (Iowa 1970), convinces us that the raising of this matter for the first time in a motion for new trial was untimely.[1] The trial court, therefore, did not err in overruling said motion for new trial.

We have considered all grounds presented and find no ground for reversal.

AFFIRMED.

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[1] In so holding we consider and reject defendant's theory that this contention could properly be raised for the first time in a motion for new trial as a result of Iowa R. Crim. P. 23(2)(b)(5). A similar contention was raised and rejected in State v. Rouse, ___ N.W.2d ___, ___ (Iowa 1980).