FILED
JAN 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DANIEL ROY ANDERSON,

Defendant-Appellant.

Filed January 28, 1987

119

6-428
85-1841

Appeal from the Iowa District Court for Johnson County (16455) - John R. Sladek, Judge.

Defendant appeals his conviction, following a jury trial, of operating a motor vehicle while under the influence of alcohol, second offense, in violation of Iowa Code section 321.281(1)(1) (1985). **REVERSED AND REMANDED.**

Charles Harrington, Chief Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merrell M. Peters, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

The defendant appeals his conviction, following a jury trial, of operating a motor vehicle while under the influence of alcohol, second offense, in violation of Iowa Code section 321.281(1)(a) (1985). We reverse and remand for a new trial.

On June 28, 1985, police stopped the defendant for driving "slightly erratically," which the defendant claimed was due to mechanical failure. When the police officer noticed that the defendant's breath smelled of alcohol and his eyes were bloodshot, he requested that the defendant perform three sobriety tests. After arresting the defendant, the officer attempted to administer a breath intoxilyzer test, but although the test yielded a visible readout of .135 alcohol concentration, it failed to "lock in" and print out a result on an evidence card. When three tests failed to "lock in," the officer informed the defendant that the improper tests constituted a refusal to test.

The trial court overruled the defendant's pretrial motions and objection at trial concerning the admissibility of any evidence relating to breath intoxilyzer tests given him by the police. At trial, the trial court reversed its ruling and admonished the jury to disregard any such evidence. The trial court subsequently overruled the defendant's motion for a new trial, stating that the admonition cured any prejudice to the defendant's right to a fair trial.

The defendant contends that the trial court erred in admitting testimony concerning the intoxilyzer's visible readout since the administering officer failed to comply with the procedural requirement of re-air blanking after each test. The defendant argues that this failure, along with the fact that this machine was sent in for repairs shortly thereafter, illustrates the State's failure to demonstrate the accuracy, reliability, and compliance with regular procedures required as a foundational matter before evidence may be admitted.

The defendant also contends that the trial court's admonition to the jury to disregard the visible readout evidence failed to cure the original error in admitting it, since irrevocable prejudice resulted from the jury hearing the numerical test results.

The admission of the evidence of the visual readout was error. In a motion in limine, defendant sought to exclude testimony relating to the intoxilyzer in question claiming that since the machine was not operating accurately, the mention of the tests in trial would be more prejudicial than probative. In State v. Wolfe, 369 N.W.2d 458, 459-60 (Iowa Ct. App. 1985), we found that when the intoxilyzer machine failed to yield a printed result and where the machine was not introduced into evidence, the State failed to meet its burden to show the machine was accurate and reliable. If the State is unable to demonstrate compliance with the procedural requirements, and the accuracy and reliability of particular test results, the results of the testing procedure may not be admitted into evidence. State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981). During the cross-examination of the arresting officer, the trial court reversed itself and excluded the evidence of the visual readout. We must determine, therefore, whether the admission of this evidence was unduly prejudicial to the defendant.

The general rule is that improper testimony is not unduly prejudicial if the jury is admonished to disregard it. State v. Burkett, 357 N.W.2d 632, 638 (Iowa 1984). Only in extreme circumstances where the prejudicial effect would probably remain to influence the jury's verdict despite the admonition to disregard, is the defendant entitled to a reversal. State v. Fuhrmann, 257 N.W.2d 619, 623 (Iowa 1977). In our view this is one of those extreme situations where the prejudicial effect would probably remain to influence the verdict despite its exclusion. There is a presumptive relationship between the blood alcohol level in a defendant's blood and driving under the influence. State v. Bratthauer,

354 N.W.2d 774, 776 (Iowa 1984). In Wolfe, we held that the evidence concerning the breath test should have been excluded and we reversed the conviction for this reason. State v. Wolfe, 369 N.W.2d at 460. Counsel must have a way to keep prejudicial and inadmissible evidence from the ears of the jury. See State v. Jensen, 216 N.W.2d 369, 374. The admission of the flawed test data allowed the jury to consider presumptive evidence that the defendant was under the influence of alcohol. Under these circumstances, we find it necessary to remand the case for a new trial.

REVERSED AND REMANDED.