

**IN THE COURT OF APPEALS OF IOWA**

No. 9-050 / 08-0880  
Filed April 8, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ADAM LEE KAUFMAN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Bremer County, Peter B. Newell,  
District Associate Judge.

A defendant appeals from his conviction of operating while intoxicated,  
first offense. **AFFIRMED.**

Dale Putnam, Decorah, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney  
General, Kasey E. Wadding, County Attorney, and Jill Dashner, Assistant County  
Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VOGEL, P.J.**

Adam Kaufman appeals from judgment and sentence following his conviction of operating while intoxicated, first offense. He asserts that the district court erred in not granting his motion in limine and permitting evidence of a preliminary breath test. We affirm.

**I. Background Facts and Proceedings**

At approximately 2:00 a.m. on May 19, 2007, Police Chief Steve Aiello of Readlyn, having just come off duty, heard tires squealing about a block away from his home. Upon investigation, Chief Aiello found Kaufman's vehicle with the two front tires on the roadway, the two back tires over the curb, and Kaufman attempting to drive the vehicle back onto the roadway. Chief Aiello approached the vehicle and spoke to Kaufman. He noticed a strong odor of alcohol on Kaufman's breath and that Kaufman's speech was slurred and difficult to understand. Chief Aiello observed one full and two empty beer cans in the console area. When asked, Kaufman repeatedly gave the false name of "Ralph," but admitted that he had been drinking "everything in the bar." He soon pointed across the street, mentioning that he had smashed into another vehicle that was parked in a private driveway. Eventually Kaufman produced his driver's license, but stated the Chief would not be able to charge him with OWI as his step-father was a city of Readlyn council member. He also told Chief Aiello that he should have taken off running, as the Chief would not have been able to catch him.

Deputy Brian Bockhaus of the Bremer County Sheriff's Office arrived at the scene and also noticed an odor of alcohol on Kaufman and that Kaufman's

speech was slurred and his eyes were bloodshot and watery. With a video camera running, the Deputy administered three field sobriety tests as well as a preliminary breath test (PBT). Immediately following the PBT, Kaufman fled the scene. Kaufman was later arrested and charged with operating while intoxicated and two counts of interference with official acts.<sup>1</sup>

On December 14, 2007, Kaufman filed a motion in limine requesting the district court to prohibit any mention at trial of a preliminary breath test. After a hearing, the district court ruled the State could refer to the fact that a PBT was administered and Kaufman fled the scene immediately afterwards, but could not refer to the result of the PBT. Following a jury trial, Kaufman was convicted of operating while intoxicated, first offense, in violation of Iowa Code sections 321J.2(1)(a) and (b) and 321J.2(2)(a) (2007). At the sentencing hearing, the district court entered judgment and sentence on the OWI conviction. Additionally the district court entered judgment and sentence on one count of interference with official acts in violation of Iowa Code section 719.1 and dismissed one count of interference with official acts at the State's request. Kaufman appeals.

## **II. Standard of Review**

We review evidentiary rulings for an abuse of discretion. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). We review a district court's interpretation of the rules of criminal procedure for correction of errors at law. *State v. Sanders*, 623 N.W.2d 858, 859 (Iowa 2001).

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<sup>1</sup> Kaufman was also charged with failure to maintain control pursuant to Iowa Code section 321.288 (2007), and striking an unattended vehicle pursuant to Iowa Code section 321.264.

### **III. Analysis**

A video tape, with audio, captured the deputy while he conducted three field sobriety tests and administered the PBT, as well as Kaufman's flight from officers. Kaufman filed a motion in limine on December 14, 2007, and the district court took up the motion on the morning of the scheduled trial, February 7, 2008. Kaufman appeals the district court's denial of his motion in limine requesting the court to prohibit the State from "offering testimony, statements about, or interjecting the term 'preliminary breath test' or the results thereof."

First, Kaufman asserts that his motion should have been "deemed granted" as the State did not file a written resistance and counsel was unprepared to reply to the State's oral argument. The district court did not specifically rule on Kaufman's assertion but rather stated, "I think you better argue the merits." The hearing continued with both sides afforded the opportunity to speak to the motion.

Iowa Rule of Criminal Procedure 2.11(4) provides that "[m]otions in limine shall be filed when grounds therefor reasonably appear but no later than nine days before the trial date." There is no provision requiring a time or manner in which the State must reply to the motion. Iowa Rule of Criminal Procedure 2.35(2) provides: "If no procedure is specifically prescribed by these rules or by statute, the court may proceed in any lawful manner not inconsistent therewith." While a written resistance prior to the date of the hearing may provide the moving party an opportunity to better formulate a reply argument, it is not required by the

rules. Therefore, we find no error in the district court proceeding to hear the merits as well as the resistance to the motion.

The State asserts Kaufman has not preserved error on the district court's denial of his motion in limine as he failed to also lodge an objection during the trial. See *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006) ("Ordinarily, error claimed in a court's ruling on a motion in limine is waived unless a timely objection is made when the evidence is offered at trial."). We disagree. In determining whether a motion in limine preserves error, we must examine what the district court's ruling actually does. *Id.*; *State v. O'Connell*, 275 N.W.2d 197, 275 (Iowa 1979). "A ruling only granting or denying protection from prejudicial references to challenged evidence cannot preserve the inadmissibility issue for appellate review." *O'Connell*, 275 N.W.2d at 275. However, "if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial." *Id.*

In the present case, it was very clear during the hearing on the motion in limine as to what the court would allow and what must be excluded in reference to the PBT. Both counsel described what the jury would see and hear on the video tape and what would be muted so the jury would not hear certain comments by the deputy. The district court's ruling reached the "ultimate issue," declaring the video tape admissible with certain audio muted. *Id.* Therefore, Kaufman was not required to make any further objections during trial, as the issue had been decided in advance of trial.

Next, Kaufman asserts the video should have been redacted, so the jury would not see Kaufman taking the breath test. He claimed this should have been done in order to avoid prejudice to Kaufman, as immediately after taking the test, Kaufman fled the scene. Kaufman feared the jury would infer that he had failed the breath test, anticipated being arrested, and therefore took off running. The State, seeking to have the video made part of the record, offered to have the volume muted, so that the jury could see what transpired, but there would be no audio of any conversation between Kaufman and the deputy as it pertained to the PBT. Kaufman and the State agree that because the administration of the PBT, the brief dialog, and Kaufman's flight happened so quickly that it was impossible to sever or redact the events, but it was possible simply to mute the volume. The district court concluded:

I would agree that I think the general rule is that the PBT is sort of the third rail of an OWI trial; you just don't put those in; you just don't talk about them. And I think, generally, that's appropriate because the State has all the other evidence of intoxication.

But in this case, his running I think is a critical issue for the jury to hear about. And, you know, the reason behind his fleeing the scene, I think, is critical.

So, I'm going to go ahead and indicate that the State is not allowed to talk about the results of the PBT, but the evidence about the offering of the PBT and the Defendant's running, I think, is admissible.

The court then instructed the State to mute that part of the tape when the PBT test was being administered, the subsequent comments by the deputy and the actions of Kaufman.

Iowa Code section 321J.5 restricts the use of a PBT.

The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether

to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5(2). While the jury may have inferred from Kaufman's flight that he failed the PBT, they may have also linked his flight to his earlier comment to Chief Aiello that he should have taken off running when he first saw the Chief. Furthermore, the district court instructed the jury: "The results of a preliminary breath test, also known as a PBT, are not admissible in evidence as the results are not reliable as a matter of law."

The State argues, and we agree, there was no violation of the ruling on the motion in limine nor was the ruling itself in error. Merely showing that Kaufman was given a PBT does not violate the statute. *Gavlock v. Coleman*, 493 N.W.2d 94, 96-97 (Iowa Ct. App. 1992). As our supreme court has stated:

In enacting this section the legislature's underlying purpose was to provide peace officers with the tool of a quick, convenient test to assist officers in determining whether an arrest should be made. The problem with this quick, convenient test is unreliability. To guard against this problem, the legislature chose to make the "results" inadmissible in evidence.

*State v Denshaw*, 404 N.W.2d 156, 158 (Iowa 1987).

There was no "result" of the PBT mentioned or offered by the State. The only evidence was playing the muted video tape, showing the administration of the PBT. Kaufman's own conduct is captured on the tape, including his fleeing the scene after he had been administered three field sobriety tests and the PBT. As the district court reasoned, "his running is a critical issue for the jury to hear about. And, you know, the reason behind his fleeing the scene, I think, is critical." See *State v Barr*, 259 N.W.2d 841, 842 (Iowa 1977) ("We continue in the view a

jury might believe a person fleeing to avoid and retard the prosecution might be more apt to be guilty than one who does not.”). We conclude the district did not err in admitting the objected to portions of the videotape.

Finally, Kaufman claims the district court erred in entering judgment and sentencing him on a misdemeanor charge of interference with official acts pursuant to Iowa Code section 719.1. The State asserts that we do not have jurisdiction to decide the issue. Under Iowa Code section 814.6(1), Kaufman does not have a right of appeal of a simple misdemeanor and he has not sought discretionary review. See Iowa Code § 814.6(2) (providing for discretionary review from simple misdemeanor convictions). His proper course of appeal is utilizing Iowa Rule of Criminal Procedure 2.73. We have no jurisdiction, nor even a record of the simple misdemeanor case, to entertain his appeal.

**AFFIRMED.**