IN THE COURT OF APPEALS OF IOWA

No. 9-325 / 08-0990
Filed June 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM CHARLES O'DELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Cass County, Susan L. Christensen, District Associate Judge.

William O'Dell appeals his conviction and sentence following a jury trial for operating while intoxicated, first offense. **AFFIRMED.**

Aaron Rodenburg, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Daniel Feistner, County Attorney, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

William O'Dell appeals his conviction and sentence following a jury trial for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2(2) (2007). O'Dell argues that the district court erred in denying his motion to suppress both nontestimonial and testimonial evidence, the district court erred in refusing certain proposed jury instructions and in giving a particular response to a juror question during deliberations, the jury's verdict was not supported by substantial evidence, and his sentence was unlawful. We affirm.

I. FACTS.

Early in the morning of January 1, 2008, O'Dell—with his wife in the front passenger seat—was driving eastbound in a blue Chevy pick-up on Highway 92. It was a cold and windy night. A Cass County sheriff's deputy, Kyle Quist, was behind O'Dell's vehicle in his patrol car. As the pick-up turned right, or southbound, on to Highway 48, Quist noticed the driver made an overly wide turn into the northbound lane, then had to correct and get back in the southbound lane. Quist followed O'Dell's vehicle for about three miles on Highway 48. He saw the vehicle cross briefly over the center line three times. O'Dell was also driving about ten miles above the fifty-five-mile-per-hour speed limit. Quist decided to pull over the vehicle for these traffic violations. Both O'Dell's vehicle and Quist's vehicle stopped on the right shoulder of the highway. Quist walked up to O'Dell's pickup.

According to Quist's testimony, as O'Dell rolled down the window, Quist could smell alcohol. Quist asked O'Dell to get into the front of his patrol car with him. Once O'Dell got in the patrol car with Quist, Quist asked O'Dell if he had

been drinking. O'Dell initially shook his head and mumbled. Quist repeated the question, and O'Dell said no. Quist asked O'Dell where he had come from. O'Dell answered that he and his wife came from a bar in Griswold. At this point, Quist could smell alcohol coming personally from O'Dell and noticed O'Dell's eyes had a bloodshot, glassy appearance.

Quist then asked O'Dell to perform two of the three standard field sobriety tests—the Horizontal Gaze Nystagmus and the walk and turn. Quist did not ask O'Dell to perform the third test, the one-legged stand, because O'Dell was not dressed to be out in the cold weather. The results of these two tests indicated a probability of intoxication. O'Dell was then asked to perform a preliminary breath test, which he refused. At that point, Quist formally placed O'Dell under arrest and transported him to the Cass County Jail. At the jail, O'Dell performed the Datamaster breath test. This showed a .091 blood alcohol level.

Quist's vehicle contained video recording equipment. However, the stop of O'Dell was not recorded because the equipment had been malfunctioning for some time.

Following the denial of a motion to suppress, O'Dell's case went to trial. The jury found O'Dell guilty. The district court sentenced him to one year in jail with all but thirty days suspended. The district court also explained that it was not willing to grant a deferred judgment because O'Dell had received a deferred judgment in connection with a prior 1984 OWI conviction. Although O'Dell could not be charged with a second offense due to the date of the prior conviction, the court stated it would be inappropriate to allow a second deferred judgment. O'Dell appeals.

II. STANDARD OF REVIEW.

O'Dell raises multiple issues on appeal. Our review of constitutional claims is de novo. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). We review challenges to the sufficiency of the evidence and challenges to jury instructions for correction of errors at law. *State v. Smitherman*, 733 N.W.2d 341, 345 (Iowa 2007); *State v. Newell*, 710 N.W.2d 6, 28 (Iowa 2006). Finally, we review a sentence imposed in a criminal case for corrections of error at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure." *Id*.

III. ANALYSIS.

Unlawful Seizure.

O'Dell first asserts a Fourth Amendment argument, contending the district court should have suppressed all evidence that resulted from the stop of his vehicle or his subsequent arrest on January 1. We disagree.

O'Dell does not dispute that Quist was justified in stopping his vehicle for the initial moving violations. Additionally, when Quist smelled alcohol, that fact in addition to the somewhat erratic driving provided probable cause for a further detention. *See State v. Marks*, 644 N.W.2d 35, 38 (Iowa Ct. App. 2002) (holding that the odor of alcohol, the defendant's watery, bloodshot eyes, and the defendant's admission to having consumed beer gave the officer reasonable grounds to perform field tests and invoke implied consent). While not all the factors noted in *Marks* were initially present here, we believe the totality of the circumstances demonstrates there was no unlawful seizure of the defendant. As

the State points out, to hold otherwise would mean "an officer who smells alcohol on a person exhibiting erratic driving behavior cannot detain that person for further investigation." We do not believe that is, or should be, the controlling law. Moreover, having detained O'Dell to conduct the field sobriety tests, and the results of those tests having pointed toward O'Dell's likely intoxication, Quist had a basis for arresting him, bringing him to the jail, and conducting a full breath analysis.

Accordingly, O'Dell was not unlawfully detained or arrested, and the district court correctly refused to suppress evidence obtained therefrom.

Self-Incrimination.

O'Dell also argues separately that the district court should have suppressed his answers to Quist's questions. As noted above, after smelling alcohol, Quist directed O'Dell to the front of his patrol car and questioned him there. It is undisputed that Quist did not give O'Dell *Miranda* warnings before questioning him. O'Dell's responses—including his admission that he had just come from a bar—came into evidence at trial.

The critical question here is whether the record supports the district court's finding that O'Dell was not in custody when Quist questioned him. As a general matter, the State argues that a reasonable person would not understand himself or herself to be in custody. *See Countryman*, 572 N.W.2d at 557-78 (characterizing the "reasonable person" as the relevant standard). The State also points to the well-established rule that roadside questioning of a motorist detained pursuant to a routine traffic stop is not considered custodial interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 435-40, 104 S. Ct. 3138,

3147-51, 82 L. Ed. 2d 317, 331-35 (1984). Additionally, the State draws a distinction between the front and the back of a patrol car, arguing that a person who is directed to the front would not reasonably believe himself or herself to be in custody. According to the State, O'Dell was asked to go to the front of the patrol car—rather than just to step outside—because of his relatively light clothing and the extremely cold weather. Finally, the State relies on our unpublished opinion in *State v. Plager*, No. 03-0619 (Iowa Ct. App. Jan. 28, 2004), where we held that a roadside interrogation that took place in the front of a patrol car was not custodial.[1]

Although we believe the issue is fairly close, and there are some differences between *Plager* and this case,[2] we agree with the district court's conclusion that O'Dell was not in custody when Quick questioned him in the front of the patrol car. To us a key consideration is the very cold weather, which was apparently responsible for moving the venue of this otherwise routine, clearly noncustodial traffic stop from the frigid outdoors to the interior of Quick's police car. We are reluctant to hold that a constitutional line has been crossed simply because an officer showed a decent respect for Iowa's winter. *See also State v. Herem*, 384 N.W.2d 880, 881 (Minn. 1984) (holding that a motorcyclist who had

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[1] Although *Plager* is unpublished, we discuss it here because the State relied on it in its briefing. The State also relies on *State v. Aderholdt*, where the court said that a reasonable investigation "includes asking for the driver's license and registration, *requesting that the driver sit in the patrol car*, and asking the driver about his destination and purpose." *State v. Aderholdt*, 545 N.W.2d 559, 563-64 (Iowa 1996) (quoting *United States v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994)) (emphasis added). However, *Aderholdt* presented Fourth Amendment issues. It is not a Fifth Amendment case that addresses when *Miranda* warnings need to be given.

[2] In *Plager*, the deputy asked the defendant to come back to his patrol car "to wait while he checked the validity of his driver's license." The defendant was told "he could leave his car running because it would not take long."

been pursued at high speeds before eventually stopping was not in custody when the officer put him in his police car after smelling alcohol). For this reason, we hold the district court did not err in denying the motion to suppress O'Dell's statements.

Due Process.

O'Dell alternatively argues that even if he was not in custody when he was in the front of the patrol car, the district court should have found that a due process violation occurred when the county's video equipment was not working. O'Dell concedes that in *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006), the supreme court encouraged but did not require recording of custodial interrogations. It is not our role to revisit the supreme court's decisions. Furthermore, even "requiring" what *Hajtic* merely "encouraged" would not necessarily alter the outcome of this case. As we have already held, the interrogation in the front of Quist's patrol car was not custodial.

Sufficiency of the Evidence.

O'Dell also argues that there was insufficient evidence to find him guilty. The State responds that O'Dell waived this argument by failing to specify the grounds in his oral motion for judgment of acquittal. Regardless, there was sufficient evidence on which a reasonable jury could find O'Dell guilty. O'Dell's arguments about insufficient evidence depend upon his prevailing on the motion to suppress. For the reasons discussed above, we have already upheld the district court's denial of that motion.

Jury Instructions.

O'Dell argues that the district court erred in failing to give two jury instructions he requested. Both related to the unavailability of recordings of his statements. They read as follows:

> [Proposed] Jury Instruction No. 18
>
> Evidence has been offered to show that the defendant made statements at an earlier time and place
>
> If you find any of the statements were made, then you may consider them as part of the evidence, just as if they had been made at this trial, but only if those statements were recorded and the recorded statements have been introduced and admitted into evidence in this case.

> [Proposed] Jury Instruction No. 19
>
> If you find that an audio or video recording was made of the contact between Deputy Quist or any other law enforcement officer testifying in this matter involving any statements made by William Charles O'Dell and the State knowingly and intentionally destroyed the audio tape or made it unavailable to the defendant, the court and the jury, you are required to conclude that the information contained in the audio or video tape would have been favorable to the defendant.

We agree the district court was not required to give either of these instructions, since neither was an accurate statement of Iowa law. As we have already discussed, Iowa law does not mandate recording of law enforcement interrogations. Also, spoliation enables the fact-finder only to infer that the evidence was unfavorable to the party responsible for spoliation; it does not create an irrebuttable presumption. *State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979) ("the fact finder may draw the inference"). The district court was not required to give the jury legally inaccurate jury instructions.

Based on a stipulation between the parties, the district court *did* give the standard Iowa Criminal Jury Instruction on spoliation. *See* Iowa Crim. Jury

Instruction 200.46. We agree with the State that this appears to have been generous to O'Dell, because there was no evidence that the State had intentionally destroyed a recording. *See State v. Hartsfield*, 681 N.W.2d 626, 631-32 (Iowa 2004) (holding that spoliation instruction is required when the circumstances would support a finding that the destruction of the evidence was intentional); *Langlet*, 283 N.W.2d at 333.

O'Dell also argues that the district court gave an improper supplemental instruction after receiving a juror question during deliberations. The question was:

> Did the question of *Miranda* rights come up on direct testimony of Officer Quist? We are especially interested in whether the information about the question of *Miranda* from the prior hearing was testimony or attorney comment.

The district court responded, "I received your question. You are reminded that you should rely on the evidence presented during the trial, the exhibits received, and all instructions given to you by the court." We fail to see how this plain vanilla instruction—the judge rightly characterized it as "very generic"—would have prejudiced the defendant. O'Dell contends it harmed him by emphasizing "exhibits," which were not the subject of the juror question, while not specifically mentioning "testimony," which was. We disagree. Read as a whole, the instruction essentially gave the jury the unexceptional advice to rely on their recollection of the trial evidence, which would have included both testimony and exhibits.

Sentence.

Finally, O'Dell appeals his sentence, claiming the district court erred in sentencing him to thirty days in jail. In effect, O'Dell complains the district court should not have taken his 1984 OWI conviction into account at sentencing. We disagree. Despite the relative antiquity of the 1984 conviction, the court was entitled to make it part of the sentencing calculus. O'Dell's ultimate sentence fell within the statutory range for OWI, first offense. Iowa Code §§ 321J.2(2)(a); 903.1(1)(b). The district court explained the reasons behind the sentence it gave. No *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), violation occurred, because the relevant "fact" that the trial judge found was simply the existence of a prior conviction, and in any event that fact did not take O'Dell's sentence outside the prescribed range. *See Formaro*, 638 N.W.2d at 724 (noting that "the decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor").

For the foregoing reasons, we affirm O'Dell's conviction and sentence.

AFFIRMED.