

IN THE COURT OF APPEALS OF IOWA

No. 0-083 / 09-0487
Filed March 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY GENE MCMILLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Robert J. Dull,
District Associate Judge.

Defendant appeals his conviction for operating while intoxicated, second
offense. **AFFIRMED.**

Curtis Krull of Krull Law Firm, L.L.C., Orange City, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Coleman McAllister, County Attorney, and Jared R. Weber, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.**I. Background Facts & Proceedings**

Terry McMillen was charged with operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2007). The minutes of testimony stated Officer Bruce Jacobsma of the Orange City Police Department would testify “to the facts that gave him reasonable cause to conduct an investigatory stop,” and would “further testify to the contents of his reports.” Officer Jacobsma’s investigative report stated he had stopped McMillen’s vehicle “because I had observed it crossing the center line several times.”

McMillen filed a motion to suppress, claiming there was not reasonable cause to stop his vehicle. At the suppression hearing, held on October 2, 2008, Officer Jacobsma testified that at about 2:20 a.m. on July 19, 2008, he was at the intersection of Fifth Street Northeast and Albany Avenue, when he saw a car two blocks away make a wide right turn onto Albany Avenue so that it was in the opposite lane of travel. He stated the car went into its proper lane, then went back across the center line “with the passenger’s side tires being on the yellow center line, and then it went back in its lane, and then before I lost sight of it it had crossed the center line again, basically straddling the center line.” Officer Jacobsma decided to stop the vehicle. He followed the car for about two miles. At some point during the time he was following the vehicle he turned on the video recorder in his patrol car. He admitted the video recording did not show the events that caused him to decide to stop the vehicle.

McMillen's attorney asked to have Officer Jacobsma's testimony about the wide turn stricken because it was not included in the minutes of testimony. The court reserved ruling on that issue. The defense attorney continued to ask Officer Jacobsma questions about the wide turn. The court stated, "If you're going to bring up the—I'm going to consider your objection waived if you're going to bring up questions on the wide turn, which you say he can't testify to." Later, defense counsel asked again about the wide turn, but the court made no further comments or rulings.

On October 9, 2008, before the court had entered a ruling on the suppression motion, McMillen filed a motion to reopen the hearing for additional evidence. He asserted he should be able to present "facts relating to Officer Jacobsma's alleged position at the corner of 5th and Albany that were not known to Defense counsel at the time of the hearing," or in the alternative, all evidence pertaining to the wide turn and crossing the center line shortly thereafter should be excluded.

The court issued a ruling denying the motion to suppress and the motion to reopen the evidence on October 30, 2008. The court found Officer Jacobsma had legal cause to stop McMillen's vehicle. One of the court's factual findings was that Officer Jacobsma had observed the vehicle make a wide right-hand turn, which took it into the opposite lane of travel.

McMillan filed a motion to reconsider and made an offer of proof. He submitted an affidavit of Ricky Lee Van Roekel, a private investigator, who stated that if a vehicle was legally stopped facing west at the intersection of Fifth Street

and Albany, the view of the intersection two blocks to the north was impeded by a row of trees. McMillen also submitted an affidavit that stated he was led to believe that whatever was on the videotape documented the reason for the stop. The court denied the motion.

The case proceeded to a bench trial on the minutes of testimony. The court found McMillen guilty of operating while intoxicated, second offense. McMillen had a blood alcohol level of .217. He was sentenced to 365 days in the county jail, with all but seven days suspended. McMillen was ordered to pay a fine and was placed on probation for one year. McMillen appeals his conviction, claiming the court should have granted his motion to suppress.

II. Minutes of Testimony

McMillen contends the court abused its discretion by overruling his objection to Officer Jacobsma's testimony on the ground that it exceeded the minutes of testimony. He asserts the court should have excluded the officer's testimony that McMillen engaged in a wide right turn, and in doing so crossed the center line and went into the opposing lane of traffic. McMillen states he was unable to prepare a meaningful defense against this statement.

A prosecuting attorney should file minutes of evidence listing each expected witness and "a full and fair statement of the witness' expected testimony." Iowa R. Crim. P. 2.5(3); *State v. Ellis*, 350 N.W.2d 178, 181 (Iowa 1984). "The minutes of testimony need only be sufficient to alert the defendant generally to the source and nature of the evidence against him." *State v. Mehner*, 480 N.W.2d 872, 878 (Iowa 1992). It is not necessary for the minutes to

specifically detail a witness's testimony; it is sufficient if the testimony "was consistent with the overall nature of the minutes of . . . testimony." *Ellis*, 350 N.W.2d at 182. Whether a party's testimony is within the minutes of testimony should be determined on a case by case basis. *Id.* at 181.

We review a court's ruling on an objection that certain testimony is beyond the scope of the minutes of testimony for an abuse of discretion. *State v. Hayes*, 532 N.W.2d 472, 476 (Iowa Ct. App. 1995). "[W]hen the challenged minutes, though incomplete, put defendant 'on notice of the necessity of further investigation of the witness' probable testimony,' reversal need not follow admission of matters they do not disclose." *State v. Musso*, 398 N.W.2d 866, 868 (Iowa 1987) (citation omitted). Even if the minutes are deficient, we will not reverse unless the complaining party was prejudiced or deprived of the opportunity to make a defense to the charges presented. *State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993).

The minutes of testimony stated Officer Jacobsma would testify "to the facts that gave him reasonable cause to conduct an investigatory stop." The minutes also referred to the officer's investigatory report, which stated the officer stopped the vehicle "because I had observed it crossing the center line several times." It is not necessary for the minutes to list each detail of a witness's testimony. *Ellis*, 350 N.W.2d at 181. The minutes stated McMillan was stopped for crossing the center line several times. The minutes were not deficient merely because it was not specified that in one instance McMillen crossed the center line while making a wide right turn. We find the minutes provided "a full and fair

statement sufficient to alert [defendant] to the source and nature of the information against him.” See *id.* We conclude the court did not abuse its discretion in permitting Officer Jacobsma’s testimony.

IV. Right of Confrontation

In his motion to reopen the evidence, McMillen claimed that because Officer Jacobsma testified beyond the minutes and beyond his investigative report he was denied his right to confrontation under the Sixth Amendment to the United States Constitution and article 1, section 8 of the Iowa Constitution.¹ The court denied the motion to reopen the evidence.

We review *de novo* constitutional claims arising from a motion to suppress. *State v. Feregrino*, 756 N.W.2d 700, 703 (Iowa 2008). Our review is *de novo* in light of the totality of the circumstances. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004). While we are not bound by the district court’s factual determinations, we may give deference to the court’s credibility findings. *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004).

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him.” There are two important policies in the Confrontation Clause—a preference for face-to-face confrontation and the right to cross-examination. *State v. Newell*, 710 N.W.2d 6, 24 (Iowa 2006). Even if evidence is admitted in violation of the

¹ Because defendant has not contended that the Iowa Constitution should be interpreted differently than the Confrontation Clause in the Sixth Amendment to the United States Constitution, we construe the provisions identically. See *State v. Shipley*, 757 N.W.2d 228, 234 (Iowa 2008).

Confrontation Clause, a verdict will not be reversed if the error was harmless beyond a reasonable doubt. *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003).

We determine McMillen has not shown he was denied his right to confrontation because the evidence does not show Officer Jacobsma testified beyond the minutes or beyond his investigative report. We have already found the minutes were “sufficient to alert [defendant] to the source and nature of the information against him.” See *Ellis*, 350 N.W.2d at 181. McMillen was not denied his right to cross-examination because Officer Jacobsma testified he made a wide right turn and went into the lane for opposing traffic.

On appeal, McMillen also claims there was a Confrontation Clause violation because the court limited his ability to cross-examine Officer Jacobsma on his testimony about the wide right turn. McMillen did not object during the suppression hearing on Confrontation Clause grounds, and we determine this issue had not been preserved for our review. See *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (noting we do not consider an issue raised for the first time on appeal, even an issue of constitutional dimension). Furthermore, we note McMillan’s attorney did question Officer Jacobsma on cross-examination about the wide right turn.

We affirm the decision of the court.

AFFIRMED.