

**IN THE COURT OF APPEALS OF IOWA**

No. 1-044 / 09-1935  
Filed February 23, 2011

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

**vs.**

**BO LOUIS DIPPLE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Muscatine County, Christine Dalton (motion) and Gary P. Strausser (trial), District Associate Judges.

Bo Dipple appeals from his conviction, sentence, and judgment for operating while intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Gary Allison, County Attorney, and Korie Shippee, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

**POTTERFIELD, J.****I. Backgrounds Facts and Proceedings**

On November 5, 2008, Chief Tim Leathers of the Wilton police department responded to a call that a truck was in the ditch. When he arrived at the scene, the truck was off the side of a gravel road with smoke coming from it. The driver of the truck, Bo Dipple, was spinning the wheels trying to get the truck out of the ditch but was causing a grass fire in the process. Leathers yelled at Dipple to stop the vehicle. Dipple then saw the vehicle was on fire and doused the flames with a five-gallon bottle of water from his truck.

Dipple told Leathers he had driven off the road while talking on the phone. Leathers testified that Dipple's pupils were very constricted, his movements were quick and hurried, and he was excited to the point where his speech was garbled and incomprehensible.

Muscatine County Deputies Frank Draper and Dave Lerch arrived at the scene. Draper testified that Dipple's actions and speech were slow and that his eyes were watery. Draper asked Dipple whether he had been drinking alcohol, and Dipple responded that he had not used any alcohol or drugs and was not on medication. Draper asked Dipple to complete field sobriety tests. Draper saw two out of three clues indicating impairment when Dipple performed the horizontal gaze nystagmus test. Dipple performed fairly well on the other two tests, the one-leg stand and the walk-and-turn.

Lerch testified that Dipple's behavior was "similar to somebody who had like a head injury or concussion." He stated that it took Dipple a long time to answer questions. Lerch obtained Dipple's consent to search his vehicle.

Leathers testified that when Dipple signed the consent form, he smelled alcohol on Dipple's breath. In Dipple's truck, officers found numerous poppy seed containers and aerosol whipped cream cans, a water bottle containing a brown liquid, and a twenty-ounce energy drink bottle full to the top with black seeds and liquid. Dipple told officers the liquid was an herbal remedy to help with pain.

Leathers, Lerch, and Draper came to a consensus that they needed to call a drug recognition expert. Iowa State Patrol Trooper Neil Wellner responded to the call. Dipple told Wellner that the bottles found in his truck contained water and poppy seeds. Wellner asked Dipple to complete another set of field sobriety tests. Dipple completed the horizontal gaze nystagmus test and the walk-and-turn test, but he stated that he did not want to do the one-leg stand test because of the wind. After the field sobriety tests, Wellner decided to transport Dipple to his office for further testing.

Once there, Dipple performed additional sobriety tests. Dipple's performance suggested he was impaired. Dipple consented to a breath test that showed a breath alcohol result of .062. Dipple refused drug recognition tests and refused to provide a urine sample. Based on the totality of the circumstances, Wellner believed Dipple was under the influence of a combination of alcohol and other drugs.

On December 15, 2008, the State filed a trial information charging Dipple with operating while intoxicated in violation of Iowa Code section 321J.2 (2007). Dipple pleaded not guilty and waived his right to speedy trial.

The parties appeared for a jury trial on June 24, 2009. Before trial commenced, Dipple moved to exclude the testimony of the State's proposed

toxicologist expert witness, Justin Grodnitzky, because he was not listed in the minutes of testimony. The State specified that Grodnitzky would testify regarding how poppy seeds contain morphine and could affect the body if soaked in water and then consumed. The State resisted the motion, arguing Dipple was made aware of Grodnitzky. Dipple acknowledged that he learned of Grodnitzky in March. The State contended the minutes provided sufficient notice because they mentioned two other DCI crime lab witnesses and indicated these witnesses would offer an opinion that Dipple was impaired by alcohol, a drug, or a combination of such substances. Further, the minutes mentioned the discovery of empty poppy seed containers, bottles containing a tan liquid and poppy seeds, and aerosol cans in Dipple's truck.

The district court found the minutes were sufficient to allow Grodnitzky to testify only regarding alcohol impairment. The State requested a continuance to allow Dipple to depose Grodnitzky. The district court allowed Dipple to discuss the continuance with his attorney after warning him, "I think ultimately I am going to give [the State] that continuance." Dipple resisted the continuance. The district court granted the continuance "to allow the State to properly list Mr. Grodnitzky and file adequate minutes of testimony and allow Defense counsel time to investigate or conduct additional discovery."

The State subsequently filed a notice of additional minutes of testimony listing Grodnitzky as a witness. Trial was held on October 14 and 15, 2009, and Grodnitzky testified extensively about the effects of nitrous oxide found in aerosol cans, the presence of morphine and codeine in poppy seeds, the effects of morphine on the body, and the results of an experiment he conducted involving

soaking poppy seeds in water. Dipple appeals, arguing the district court abused its discretion in granting the continuance instead of forcing the State to proceed to trial with Grodnitzky's testimony limited to alcohol impairment.

## **II. Standard of Review**

A ruling on a motion for a continuance is a matter committed to the sound discretion of the court and will be reversed only when an abuse of discretion is shown. *State v. Marti*, 290 N.W.2d 570, 588 (Iowa 1980).

## **III. Merits**

Iowa Rule of Criminal Procedure 2.5(3) provides:

The prosecuting attorney shall, at the time of filing [a trial information], also file the minutes of evidence of the witnesses which shall consist of a notice in writing stating the name . . . of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.

Iowa Rule of Criminal Procedure 2.19(3) provides:

If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses . . . at least ten days before trial, the court may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witness.

Dipple contends he was prejudiced by the court's grant of the State's motion to continue, which allowed the State to present testimony from Grodnitzky that would have been excluded if the trial had commenced as scheduled the morning of June 24.

Consistent with the remedies provided by rule 2.19(3), the district court granted a continuance to give Dipple the opportunity to depose Grodnitzky prior

to trial. This remedy upheld the purpose behind rule 2.19, which is to provide defense counsel an opportunity to prepare for trial and defend the charges. *State v. LeGrand*, 501 N.W.2d 59, 61 (Iowa Ct. App. 1993).

As in *LeGrand*, we agree with Dipple that the testimony at issue “exceeded the information the State originally relied on to support the charge.” *Id.* at 62. We also agree that the substantive testimony benefitted the State and “put a burden on the defense attorney.” *Id.* However, the district court sought to ease this burden by allowing Dipple to depose the additional witness. While we do not condone the State’s failure to ensure that defendant had prompt notice of the additional witness and the nature of his testimony, we cannot find that the district court abused its discretion in selecting one of the remedies provides in rule 2.19(3).

We conclude the district court did not abuse its discretion in granting the State’s motion to continue.

**AFFIRMED.**