IN THE COURT OF APPEALS OF IOWA

No. 1-707 / 11-0066
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LANDON JOHN EWOLDT,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Robert E. Sosalla (motion to suppress) and Douglas S. Russell (trial), Judges.

Defendant appeals his conviction for operating while intoxicated and the district court's ruling on his motion to suppress. **AFFIRMED.**

Robert Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Tyler J. Buller, Student Legal Intern, Brent D. Heeren, County Attorney, and Ivan Miller, Prosecuting Student Intern, for appellee.

Considered by Eisenhauer, P.J., Mullins, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

I. Background Facts & Proceedings.

In the early morning hours of March 13, 2010, Deputy Bryan Ellenbecker of the Tama County Sheriff's Department stopped a car for speeding. The driver of the car, Landon Ewoldt, exhibited signs of intoxication. There was an open can of beer in the car. Ewoldt had bloodshot and watery eyes, and he admitted he had been drinking. Ewoldt failed field sobriety tests. Deputy Ellenbecker placed him under arrest for operating while intoxicated.

At the police station Ewoldt was given a breath test which showed a blood alcohol concentration of .169. He was charged with operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2009). Ewoldt filed a motion to suppress, claiming his statutory rights under section 804.20 had been violated. (Section 804.20 gives a person in custody the right "to call, consult, and see a member of the person's family or an attorney of the person's choice, or both.")

At the suppression hearing evidence was presented that Ewoldt had informed Deputy Ellenbecker he lived only about a mile from the location of the traffic stop. As Deputy Ellenbecker was placing handcuffs on Ewoldt, he asked if Ewoldt would like him to call somebody to get his vehicle. Ewoldt responded, "yeah," and started to reach for his cell phone. Deputy Ellenbecker responded, "No, I'll call them." After Deputy Ellenbecker and Ewoldt got into the patrol car, the deputy asked for a phone number, and Ewoldt told him his mother's number. The deputy called Ewoldt's mother and made arrangements with her to pick up the car.

Ewoldt testified that after Deputy Ellenbecker asked if there was someone he could call about the vehicle he responded, "Yeah, I'll call." He stated Deputy Ellenbecker then responded that he would make the call.

The district court found, "Ewoldt never requested to talk to his mother. He never requested to talk to any specific person by name or generic designation, such as family member or lawyer. In fact, Ewoldt never requested to call anyone at all." Also, "[w]hen Ellenbecker made the call, Ewoldt gave no indication that he wanted to talk to the person on the phone as well. " The court concluded Ewoldt did not indicate at any time that he wanted to talk to someone and, therefore, had not invoked his rights under section 804.20. The court denied the motion to suppress. The court also denied Ewoldt's motion to reconsider.

Ewoldt waived his right to a jury trial and stipulated to a trial before the court on the minutes of evidence. The court found Ewoldt guilty of operating while intoxicated. He was ordered to serve forty-eight hours in jail and fined $1250. He appeals his conviction, including the ruling on the motion to suppress.

II. Standard of Review.

We review the district court's interpretation of section 804.24 for errors of law. *State v. Hicks*, 791 N.W.2d 89, 93 (Iowa 2010). Where the district court has correctly applied the law and there is substantial evidence to support its findings of fact, we will uphold the court's ruling on a motion to suppress. *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009). "Evidence is considered substantial when reasonable minds could accept it as adequate to reach a conclusion." *Id*.

III. Merits.

Ewoldt contends he invoked section 804.20 by his statements and actions and claims he should have been permitted to make a phone call. Ewoldt claims when Deputy Ellenbecker asked him if he wanted the deputy to call someone to pick up his car that when he responded by saying "yeah," plus his action of attempting to pull out his cell phone, this indicated he wanted to make a phone call. Ewoldt asserts the district court should have found his statement and actions, taken together, adequately invoked his statutory right under section 804.20. He believes section 804.20 was violated and the results of his chemical breath test should have been suppressed.

Section 804.28 provides:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and to see a number of the person's family or an attorney of the person's choice, or both.

Section 804.20 does not require a peace officer to inform a defendant of the right to contact counsel or a family member. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). "An officer may not, however, tell a defendant he does not have such a right, and once the right is invoked the officer must give the defendant the opportunity to call or consult with a family member or attorney." *Id*.

In considering whether a defendant has invoked the statutory right to make a phone call under section 804.20, we apply "an objective consideration of the statements and conduct of the arrestee and peace officer, as well as the surrounding circumstances." *Id*. at 672 (quoting *Bromeland v. Iowa Dep't of*

Transp., 562 N.W.2d 624, 626 (Iowa 1997)). In a case where a defendant's request to talk to his mother arose in the context of a discussion about the disposition of the car he had been driving, the Iowa Supreme Court noted "Moorehead specifically, separately, and unequivocally requested to talk to his mother." *Id*.

We find there is substantial evidence in the record to support the district court's finding Ewoldt did not sufficiently invoke his rights under section 804.20. Ewoldt did not specifically request to speak to anyone. When Deputy Ellenbecker asked if he could call someone to pick up Ewoldt's vehicle, Ewoldt responded in the affirmative. Thus, Ewoldt agreed Deputy Ellenbecker could call someone, but this does not show Ewoldt desired to call anyone. Furthermore, there is no indication Ewoldt actually pulled out his cell phone. At most, the evidence showed he made a gesture toward his cell phone. We do not believe this is sufficient to show Ewoldt was invoking his right to call someone.

Ewoldt notes the district court did not have the benefit of the Iowa Supreme Court's decision in *State v. Hicks*, 791 N.W.2d 89 (Iowa 2010), at the time it made its decision and argues that under this case courts should take a much more liberal approach to an individual's invocation of section 804.20.

The suppression hearing was held on June 3, 2010, and the court's ruling on the motion to suppress was made on July 13, 2010. The Iowa Supreme Court decided *Hicks* on November 24, 2010, several months later. Supreme court decisions are binding on Iowa courts as soon as they are filed. *State v. Harris*, 741 N.W.2d 1, 9 (Iowa 2007). In this case the district court correctly applied the law in effect at the time of the suppression ruling.

We conclude, however, that even if *Hicks* were applied, the result in this case would be the same. The Iowa Supreme Court held, "when a suspect 'restrained of [his] liberty' makes a statement that can reasonably be construed as a request to communicate with family members or an attorney, the suspect has invoked his section 804.20 right to communicate with family or counsel."[1] *Hicks*, 791 N.W.2d at 95. Ewoldt did not make any statements that could reasonably be construed as a request to communicate with a family member or an attorney. As the district court found, "Ewoldt never requested to call anyone at all."

In considering a motion to suppress, "if the district court properly applied the law and there is substantial evidence to support its findings of fact, we will uphold its ruling on a motion to suppress." *Moorehead*, 699 N.W.2d at 671. We have determined the district court properly applied the law. We have also found the court's decision is supported by substantial evidence. Therefore, we determine the ruling of the district court should be affirmed.

AFFIRMED.

[1] The Iowa Supreme Court also abandoned a previous requirement that a person make a good-faith request to make a telephone call, rather than making a request for an unrelated or frivolous purpose. *Hicks*, 791 N.W.2d at 96. There were no claims in the present case that Ewoldt made a request to make a call for an unrelated or frivolous purpose, and therefore this change in the law found in *Hicks* was not applicable.