IN THE COURT OF APPEALS OF IOWA

No. 1-849 / 10-1703
Filed November 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID JAMES RIEKS,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Kim M. Riley, District Associate Judge.

Defendant appeals his conviction for operating while intoxicated claiming the district court erred in denying his motion to suppress. **AFFIRMED.**

R.A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Randall J. Tilton, County Attorney, for appellant.

Considered by Sackett, C.J., and Vogel and Eisenhauer, JJ.

SACKETT, C.J.

Defendant, David James Rieks, appeals his conviction for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2009). Rieks contends the district court erred in denying his motion to suppress the chemical test result as the implied consent advisory read to him was improper under Iowa Code section 321J.8 rendering his consent involuntary. He also claims the district court should have granted his motion to suppress because the arresting officer violated his rights under Iowa Code section 804.20. For the reasons stated below, we affirm.

I. BACKGROUND AND PROCEEDINGS. In the early morning hours of August 8, 2009, Deputy Mitchell Kappel saw Rieks drive up onto a curb and strike a mailbox. After pulling Rieks's vehicle over, Deputy Kappel noted Rieks's eyes were bloodshot and watery and his speech was slurred. He also detected a strong odor of alcohol coming from Rieks. After administering three field sobriety tests and a preliminary breath test, Deputy Kappel transported Rieks to the county jail.

After arriving at the jail, Deputy Kappel read Rieks the implied consent advisory located on the back of the Iowa Department of Transportation Request and Notice under Iowa Code Chapter 321J/Section 321.208 form. The implied consent advisory in part contained the following language.

> If you hold a commercial driver's license the department will disqualify your commercial driving privilege for one year if you submit to the test and fail it, you refuse to take the test, or you were operating while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances. The disqualification shall be for life if your commercial

> driving privilege was previously disqualified. These actions are in addition to any revocation under Iowa Code Chapter 321J.

Rieks told Deputy Kappel the commercial driving disqualification was particularly important to him because he made his living driving commercial vehicles. Rieks inquired which test was going to be administered and Deputy Kappel told him he was going to offer him a breath test. Deputy Kappel explained that if Rieks blew a .085 or more, his license would be revoked for a year, but if Rieks blew a .084 then no revocation would occur. Rieks indicated his understanding and again expressed his concern that his livelihood depended on this decision.

Deputy Kappel told Rieks that he if wanted he could call someone to help him make a decision on whether to consent to the test. Rieks made four phone calls, two to his mother and two to his attorney. He had to leave messages with his attorney as the calls went to voicemail, but he was able to speak with his mother on both occasions. After waiting for a call back from his attorney, Deputy Kappel asked Rieks if there was anyone else he wanted to call. Rieks responded he had no one else to call. Rieks then consented to the chemical breath test, which showed he had a blood alcohol level of .148.

On August 25, 2009, the State filed a trial information charging Rieks with operating while intoxicated, second offense. Rieks filed a motion to suppress on October 15, 2009, alleging, among other things, that the results of his breath test should be suppressed as the implied consent advisory did not comply with Iowa Code sections 321J.8 and 321.208(2), and the deputy violated Iowa Code section 804.20 by failing to advise Rieks of the persons he was permitted to call,

the purpose of the calls, his right to private consultation, and his right to receive advice over the phone.

On April 5, 2010, the district court denied Rieks's motion to suppress after a hearing where Deputy Kappel testified and the video recording from the county jail showing Rieks and Kappel's interaction was admitted as an exhibit. The district court concluded Deputy Kappel substantially complied with section 804.20, as the section does not require the officer to tell the arrestee whom he can call or the purpose of the calls. The district court determined Rieks was given a reasonable opportunity to consult with an attorney, which is all that is required under the statute. The court also rejected Rieks's implied consent argument finding that while the paragraph of the implied consent advisory applicable to Rieks's commercial driver's license did not spell out what a test failure was, the preceding paragraphs made it clear that a test failure was having a blood alcohol concentration of eight hundredths or more. The court concluded the record revealed no evidence of confusion on the part of Rieks, nor was there any evidence of coercive or deceptive practices.

Rieks proceeded to a trial on the minutes of testimony on September 21, 2010. The court found him guilty and sentenced him to seven days in jail and imposed the required fines, court costs, and restitution. Rieks appeals claiming the district court erred in denying his motion to suppress. Rieks asserts the implied consent advisory failed to inform him what a "test failure" was with respect to the disqualification of his commercial driver's license. As a result, he contends his consent to the chemical test was not reasoned, informed, or

voluntary. He also asserts the deputy violated section 804.20 when the deputy failed to inform him of the three classes of persons he could call, the purpose for which he could call, and also failed to inform him what specimen would be requested. He also claims the deputy improperly made him decide whether to consent to the test when he was waiting for a call back from his attorney and there was still an hour left for the deputy to request the test. Finally, Rieks complains the deputy did not give him a phone book so that he could call another attorney after his efforts to reach his attorney failed.

II. SCOPE OF REVIEW. We review do novo Rieks's claim that the implied consent advisory violated his due process rights. *State v. Massengale*, 745 N.W.2d 499, 500 (Iowa 2008). We evaluate the totality of the circumstances to determine whether his consent was voluntary. *State v. Garcia*, 756 N.W.2d 216, 219 (Iowa 2008). However, we review Rieks's claim that the implied consent advisory violated Iowa Code section 321J.8 for corrections of errors at law. *State v. Hutton*, 796 N.W.2d 898, 901 (Iowa 2011). We also review Rieks's claim that the deputy violated his rights under Iowa Code section 804.20 for corrections of error at law. *State v. Hicks*, 791 N.W.2d 89, 93 (Iowa 2010). "If the district court applied the law correctly, and there is substantial evidence to support the findings of fact, we will uphold the motion-to-suppress ruling." *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009).

III. IMPLIED CONSENT ADVISORY. Iowa Code section 321J.8 provides that a person who has been requested to submit to a chemical test for the purpose of determining the alcohol concentration or presence of a controlled

substance in that person's system is to be advised of the consequences of his/her decision. The portion of the advisory at issue in this case provides,

> If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and either refuses to submit to the test or submits to the test and the results indicate the presence of a controlled substance or other drug or an alcohol concentration equal to or in excess of the level prohibited by section 321J.2, the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

Iowa Code § 321J.8(1)(c)(2). The purpose of the advisory is to "provide a person who has been required to submit [to] a chemical test a basis for evaluation and decision-making in regard to either submitting or not submitting to the test." *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 212 (Iowa 2001). The advisory allows the person to weight the consequences of refusing the test against the consequences of the test indicating the presence of a controlled substance or an alcohol concentration in excess of the legal limit. *Id*.

Rieks claims his consent to the chemical breath test was not informed or voluntary because the advisory read to him used the phraseology "submit to the test and fail it" rather than using the language of the statute above that provides "submits to the test and the results indicate . . . an alcohol concentration equal to or in excess of the level prohibited by section 321J.2." Rieks claims there is no way he could have known what it meant to "fail" the test.

First, there is no requirement in section 321J.8 that the required advisory be conveyed in any particular language or in any particular way. *Hutton*, 796 N.W.2d at 905. So long as the person who is requested to submit the sample

knows the consequences of his/her decision, the purpose of the statute is accomplished. *Id*. Here, there was no doubt Rieks understood the consequences of his decision. *Id.* In fact during his conversation with Deputy Kappel, Rieks said, "I did understand every bit of it" when Deputy Kappel asked him if he understood the advisory.

Secondly, immediately above the paragraph in question in the advisory read to Rieks, a test failure was defined by stating, "If you consent to chemical testing and the test results indicate an alcohol concentration of eight hundredths or more, . . . the department shall revoke your privilege to operate a motor vehicle."[1] In addition, Deputy Kappel went beyond the Department of Transportation advisory form and explained to Rieks that if he blew a .085, his commercial license would be disqualified for a year, but if he blew a .084, he would be fine. Any possible question Rieks could have had over what it meant to "fail" the test were removed with Deputy Kappel's explanation.

After reviewing the facts of this case we have no reason to doubt Rieks's decision to consent to the chemical test was reasoned, informed, and voluntary. *State v. Bernhard*, 657 N.W.2d 469, 472 (Iowa 2003).

Rieks also complains the advisory did not inform him the test results could be used in a criminal proceeding against him, and failed to inform him what

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[1] Rieks argues the advisory was confusing because it also contains penalties if a person's blood alcohol concentration was two hundredths and four hundredths. However, we find the advisory clearly explains the penalties for having a blood alcohol concentration of two hundredths only applied to those individuals who are under the age of twenty-one, which Rieks was not, and the provisions dealing with a blood alcohol concentration of four hundredths was not read to Rieks at all as it only applied when someone was operating a commercial vehicle.

specimen would be requested for testing. We find no statutory requirement that the advisory contain this information. In addition, the video of the interaction between Deputy Kappel and Rieks shows Deputy Kappel specifically told Rieks he was going to offer Rieks a breath test.

We affirm the district court's denial Rieks's motion to suppress on this ground.

IV. IOWA CODE SECTION 804.20. Rieks also claims the district court erred in denying his motion to suppress when Deputy Kappel failed to fully advise him of his rights under Iowa Code section 804.20.[2] Specifically, Rieks claims the deputy failed to inform him who he could call, or for what purpose the calls could be made, and failed to inform him what specimen would be requested before the calls were made. Rieks also believes his rights were violated when Deputy Kappel asked him to decide whether to consent instead of waiting longer for Rieks's attorney to call back when there was an hour remaining for the deputy to request a decision.[3] Finally, Rieks complains the deputy did not give him a

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[2] Iowa Code section 804.20 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 see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

[3] Iowa Code section 321J.6(2) provides that an officer must offer the chemical test within two hours of the administration or refusal of the preliminary screening test, or within two

phone book so that he could call another attorney after his efforts to reach his attorney failed. We find none of these claims provide a basis to suppress the test results.

First, Rieks claims the deputy erred when he failed to inform Rieks who could be called and for what purpose. Rieks cites *Didonato v. Iowa Dep't of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990), in support of his position; however we find this case offers no support for Rieks's claim. *Didonato* holds that an officer is not required to tell an arrested person he has a right to counsel under section 804.20, but when an arrested person requests to make a phone call to someone other than a family member or attorney, the officer cannot remain mute. 456 N.W.2d at 371. The officer must then inform the arrested person who he can call and for what purpose. *Id*. It is only when there is confusion over who the arrestee can call that the officer's duty to clarify the scope and purpose of the law is triggered. *Garrity*, 765 N.W.2d at 596; *see also Hicks*, 791 N.W.2d at 94 ("The statute does not require a police officer to affirmatively inform the detainee of his statutory right; however, the peace officer cannot deny the right exists.").

Here, when Rieks indicated he was concerned the decision of whether to consent would have a great impact on his ability to earn a living, Deputy Kappel told Rieks he could call somebody if he wanted. Rieks then asked whether the call could pertain to his decision to consent or not, and the deputy responded affirmatively. Only when an officer turns down a request for a phone call

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hours of the arrest, whichever occurs first. Deputy Kappel's report indicates the time of the arrest or preliminary breath test was 2:33 a.m., and the deputy requested a specimen for chemical testing at 3:35 a.m.

because the request is to call someone outside the scope of section 804.20, must the officer explain the scope of the right. *Garrity*, 765 N.W.2d at 597. Deputy Kappel suggested to Rieks he could contact somebody without Rieks first making a request to call someone other than a family member or attorney. In addition, Deputy Kappel never restricted who Rieks could call, but simply said he could call "somebody." Finally, Rieks was informed of the purpose of the call as he asked Deputy Kappel whether the call could be made in order to ask someone whether or not he should blow. Deputy Kappel told him yes. We find Deputy Kappel went above and beyond his duty under the statute.

Rieks claims his rights were violated because the deputy failed to inform him of the specific test that would be requested. We find no statutory support for the proposition that an officer must inform the arrestee of which chemical test will be requested before an arrestee makes his phone calls under section 804.20. Even if there was support for this contention, the video shows Rieks was advised by Deputy Kappel he would be offered a breath test approximately five minutes before Rieks made his first phone call.

Rieks also believes the chemical test results should be suppressed because Deputy Kappel asked him to decide whether to consent before Rieks received a call back from his attorney after he left a message for him. Rieks complains there was an hour remaining for the deputy to request a decision, and therefore, there was no reason for Deputy Kappel to make him decide at that time. The fact that section 321J.6(2) gives officers a two-hour window within which to offer a chemical test does not mean that every arrestee is granted two

hours before a decision is required. *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa Ct. App. 1991). The limited right granted under section 804.20 is satisfied if the arrestee is permitted to make a phone call to an attorney. *Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa Ct. App. 1990). The right was satisfied here.

Rieks made four phone calls over a half an hour time period, two to his mother and two to his attorney. He did leave messages for his attorney to call back, but Rieks never conveyed to Deputy Kappel he expected a call back or that he wished to continue waiting after the last message was left. *See id*. (finding the arrestee was denied his right to consult with an attorney when, after speaking with his attorney, the arrestee told the officer that the attorney would be calling again, but the officer instituted implied consent proceedings before the attorney called back with close to an hour remaining in the two-hour period). Several minutes after the second message was left, Deputy Kappel asked Rieks if he wished to call anyone else. Rieks responded that he had no one else call. Where there was no indication that the attorney would call back, and where Rieks did not request more time to continue making calls, we find the deputy was under no obligation to wait until the end of the two hour period before offering the chemical test.

Finally, Rieks contends the results of the chemical test should be suppressed because the deputy did not give him a phone book so that he could call another attorney after his efforts to reach his attorney failed. Again we find no support for the proposition an officer is required to offer an arrestee a phone book when the arrestee is unable to reach an attorney. Rieks never made a

request for a phone book, but instead told Deputy Kappel that he had no one else to call.

Because Rieks has offered no basis from which we could conclude his statutory right under section 804.20 was violated, we affirm the district court's denial of his motion to suppress.

AFFIRMED.