IN THE COURT OF APPEALS OF IOWA

No. 3-742 / 12-1083
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY THOMAS PITZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris (motion to suppress), James D. Coil (bench trial), and Joseph M. Moothart (sentencing), District Associate Judges.

Defendant appeals his conviction for operating while intoxicated, third offense. **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, Thomas J. Ferguson, County Attorney, and Jeremy Westendorf, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

SACKETT, S.J.

I. Background Facts & Proceedings

On December 20, 2010, Sean Presnall reported an intoxicated man walked into his home in Cedar Falls, Iowa. Presnall saw the man leave in a black Lexus, and he noted the license plate number. A short time later Cedar Falls police officers received a report that a black Lexus had struck a telephone pole. Officer John Zolondek reported to the scene and found the vehicle, but no driver. The vehicle had the same license plate number as the vehicle reported by Presnall. Officer Zolondek determined the registered owner of the vehicle was Jeremy Pitz. Pitz's cell phone was in the vehicle. Officers found Pitz at a nearby home. He appeared to be intoxicated—he had a strong smell of alcohol, bloodshot, watery eyes, slurred speech, and impaired balance. Another person in the home, Sue Linck, stated Pitz told her he had struck a pole while driving.

Pitz was transported to the Cedar Falls Police Department and interviewed by Officer Zolondek. Officer Zolondek read a Miranda warning to Pitz and asked him to sign a written "Miranda Warning & Waiver." Pitz stated, "What if I want to call a lawyer?" The officer responded, "You can call a lawyer," and Pitz said, "I don't have to sign?" The officer said, "You can sign and you can call a lawyer. It doesn't matter. This is just acknowledging that you understand your rights." Pitz then went ahead and signed the written Miranda warning.

During the interview Pitz denied driving the car, stating he had loaned it to an acquaintance. Pitz was given a pat-down search, and the Lexus keys were found in his pocket. At one point, Officer Zolondek left, then came back in with a

cotton swab and asked, "What would you say if I swabbed your hand with this to see if there is airbag residue on there?" Pitz responded, "I would say call my lawyer." The officer said, "Call your lawyer?" Pitz said, "Yep," and the officer said, "You don't want to do this?" Pitz then continued with his story that he had loaned his car. The officer did not use the cotton swab on Pitz's hands.

Eventually, the officer took Pitz to another room and asked him to participate in field sobriety tests. Pitz stated he wanted to call his attorney, Richard Bartolomei. An attempt was made to call Bartolomei's office, and the call went to voice mail. Pitz then tried to call his wife, and was able to talk to her. He tried to call her back, but was not able to contact her. He then tried another number for his wife, and was again unsuccessful. The officer asked if Pitz wanted to call anyone else, and he said, "Nobody else, except for my attorney." Another attempt was then made to call Bartolomei's office, but Pitz was unable to contact him. Pitz refused to participate in field sobriety tests or a breath test.

Pitz was charged with operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2009). Pitz filed a motion to suppress, claiming he had been denied his right to an attorney during his interview with Officer Zolondek. The court found Pitz never invoked his right to communicate with counsel by making a statement that could reasonably be construed as a request to communicate with counsel. The court also found Pitz had not shown he had been denied his right to contact an attorney under section 804.20. The court denied the motion to suppress.

Pitz waived his right to a jury trial, and the parties stipulated the case would be decided solely on the minutes of evidence. The court found Pitz guilty of operating while intoxicated, third offense. He was sentenced to a term of imprisonment not to exceed five years, with all but thirty days suspended, and placed on probation. Pitz now appeals his conviction.

II. Miranda Rights

Pitz claims his statement, "What if I want to call a lawyer?" near the beginning of the interview adequately invoked his right to counsel. He asserts the officer should have permitted him to call an attorney at that time. Pitz claims that all of his statements made after he mentioned calling a lawyer should be suppressed.

In *Miranda v. Arizona*, 384 U.S. 436, 473 (1966), the United States Supreme Court determined that in a custodial interrogation, under the Fifth and Fourteenth Amendments, police officers must inform a suspect that he has the right to remain silent and the right to counsel.[1] If there has not been a valid waiver of a person's Miranda rights, the person's statements during interrogation are inadmissible.[2] *State v. Palmer*, 791 N.W.2d 840, 844-45 (Iowa 2010). On constitutional issues, our review is de novo. *State v. Ortiz*, 766 N.W.2d 244, 249 (Iowa 2009).

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[1] The State agrees Pitz was in custody at the time he was interviewed by officer Zolondek.

[2] The State also agrees that the first forty seconds of the interview, before Pitz was read his Miranda rights, should be suppressed. However, Pitz did not make any incriminating statements during those forty seconds.

At any point during an interrogation, if a person indicates that he wants an attorney, the interrogation must stop until an attorney is present. *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009). On the other hand, "[o]fficers have no obligation to stop questioning an individual who makes an ambiguous or equivocal request for an attorney." *State v. Harris*, 741 N.W.2d 1, 6 (Iowa 2007). "[T]he suspect must unambiguously request counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994). A suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id*. In *Davis*, the United States Supreme Court determined that a suspect's statement, "Maybe I should talk to a lawyer," was not an unambiguous or unequivocal request for counsel which would require officers to stop questioning him. *Id*. at 462.

We determine Pitz's statement, "What if I want to call a lawyer," was not a sufficiently clear request for counsel such that a reasonable police officer in the circumstances would have understood Pitz was requesting an attorney at that time. *See id.* at 459. Also, his later statement, "I would say call my lawyer," was made in response to a hypothetical question, and we determine his response was also hypothetical. We agree with the district court's conclusion that Pitz did not adequately invoked his right to counsel by the statements.[3]

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[3] Pitz raises a claim under the Iowa Constitution as well, but only in his reply brief does he set forth a specific argument for a separate analysis under the Iowa Constitution. In general, an issue raised for the first time in a reply brief is not properly presented. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996). Furthermore, "we generally decline to consider an independent state constitutional standard based upon a mere citation to the applicable state constitutional provision." *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., specially concurring).

III. Section 804.20

A. Pitz contends that during his interview with Officer Zolondek he was denied his statutory right to telephone an attorney. 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 there has been a violation of section 804.20, evidence obtained after the right was violated should be excluded. *State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009). We review the district court's interpretation of section 804.24 for the correction of errors at law. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005).

Pitz claims his statements, "What if I want to call a lawyer," and his later statement, "I would say call my lawyer," were sufficient to invoke his right to telephone an attorney under section 804.20. A suspect's statutory rights under section 804.20 should be liberally construed. *State v. Hicks*, 791 N.W.2d 89, 95 (Iowa 2010). "[W]hen 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." *Id*.

The district court concluded Pitz "never invoked his section 804.20 right to communicate with counsel by making a statement that could reasonably be construed as a request to communicate with counsel." We determine there is

substantial evidence in the record to support the court's findings that Pitz did not sufficiently invoke his right to communicate with counsel. In the first statement, Pitz with asking what would happen if he wanted to call an attorney. In the second statement, Pitz had been asked a hypothetical question about what he would do if the officer asked to swab his hand. Pitz's response was also then hypothetical. In fact, the officer never actually asked to swab Pitz's hand and never swabbed his hand. Thus, the situation that Pitz envisioned where he would have requested an attorney never arose at that point in time.

B. Pitz also claims that after he was moved to another room and asked to participate in field sobriety tests the officer did not do enough to facilitate his statutory right to call an attorney. He asserts the officer should have offered to make additional telephone calls or given him a local telephone book to assist him in calling another attorney. Once section 804.20 has been successfully invoked, an officer must provide a suspect with a reasonable opportunity to contact a family member or an attorney. *Id.* at 96.

In this case, Pitz stated he wanted to call his attorney, Bartolomei, and an unsuccessful attempt was made to contact him. Pitz called his wife and was able to talk to her. He tried to call his wife back two times, but was unsuccessful in those attempts. The officer asked if Pitz wanted to call anyone else, and Pitz replied, "Nobody else, except for my attorney." Another attempt was then made to call Bartolomei's office, but Pitz was unable to contact him.

"We have never interpreted section 804.20 as providing an absolute right to talk to one particular attorney if that person is unavailable or unable to be

reached." *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). The officer asked Pitz if he wanted to contact anyone else, and Pitz named only his attorney. We find no error in the court's conclusion that the officer complied with the letter and spirit of section 804.20 and gave Pitz a reasonable opportunity to confer with an attorney.

We affirm the decision of the court denying Pitz's motion to suppress. We affirm his conviction for operating while intoxicated, third offense.

AFFIRMED.

Vaitheswaran, P.J., concurs; Doyle, J. dissents.

DOYLE, J. (dissenting)

I respectfully dissent. The district court concluded Pitz "never invoked his [Iowa Code] section 804.20 [(2009)] right to communicate with counsel by making a statement that could reasonably be construed as a request to communicate with counsel." The majority here agrees, finding substantial evidence in the record to support the district court's findings that Pitz did not sufficiently invoke his right to communicate with counsel. I acknowledge this is a very close question, but I am compelled to disagree with the majority's conclusion.

Section 804.20 affords detained suspects the statutory right to call an attorney. Because the right to counsel is so fundamental, the best way to further this statutory right is to liberally construe a suspect's invocation of the right. *State v. Hicks*, 791 N.W.2d 89, 95 (Iowa 2010). A detained suspect invokes his or her section 804.20 right by making "a statement that can reasonably be construed as a request to communicate with . . . an attorney." *Id*.

After reading a *Miranda* warning and waiver form to Pitz, Officer Zolondek asked Pitz, "Do you wish to speak with me?" Pitz responded, "What if I want to call a lawyer?" Inquiry of right to counsel or invocation of that right? Tough call. But viewing the statement in the context of the colloquy immediately following the statement, I must agree with my colleagues that this statement was not sufficient to invoke the statutory right. Pitz was told he could call a lawyer. He made no request to do so.

Later in the interrogation, Officer Zolondek left the room and then returned with a cotton swab. He asked Pitz, "So what would you say if I swabbed your hand with [the cotton swab] to see if there is airbag residue on there?" Pitz responded, "I would say call my lawyer." The officer followed up with, "Call your lawyer?" Pitz responded, "Yep."

My colleagues characterize this interplay between Pitz and the officer as a hypothetical response to a hypothetical question and conclude Pitz did not adequately invoke his right to counsel. This is where I part ways with my colleagues. Taking into account the situational context of the exchange, and liberally construing Pitz's invocation of his right to counsel, I conclude Pitz's statements can reasonably be construed as a request to call counsel, not merely a hypothetical response to a hypothetical question. Consequently, any evidence gathered after his invocation of the right should have been excluded. *See id*. at 98 ("The remedy for a violation of section 804.20 is exclusion of any evidence gathered after invocation of the right."). Because I find Pitz's section 804.20 rights were violated, I would reverse the judgment of the district court and remand for further proceedings.

I note this appeal could have been avoided by the officer simply clarifying, through follow-up questioning, any ambiguities in Pitz's statements. Yet, I fully understand an officer's reluctance to seemingly encourage a call to counsel at the risk of having some "Chatty Cathy" clam up. Even so, the right to counsel being so fundamental, I believe a policy should be implemented to require follow-up questioning designed solely to resolve any ambiguity. *See State v. Effler*, 769

N.W.2d 880, 897 (Iowa 2009) (Appel, J., specially concurring) ("[E]ven if clarification of ambiguous requests for counsel is not constitutionally required, follow-up questioning designed solely to resolve any ambiguity before questioning continues represents good policy."). To date, we have no such policy. *See id*.