

IN THE COURT OF APPEALS OF IOWA

No. 3-761 / 12-2130
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSE MANUEL LOPEZ-PENA,
Defendant-Appellant.

Appeal from the Iowa District Court for Greene County, Kurt J. Stoebe,
Judge.

A defendant appeals his conviction for operating while intoxicated asserting the court erred in denying his motion to suppress. **AFFIRMED.**

Jennifer Bonzer of Johnson and Bonzer, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Nicola J. Martino, County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

VOGEL, P.J.

Jose Lopez-Pena appeals his conviction for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2011). He asserts the district court erred in denying his motion to suppress when the state trooper did not make reasonable efforts to convey the implied consent advisory and the *Miranda* warnings in Spanish.

Lopez-Pena was pulled over by Trooper Cunningham for driving eight-four miles per hour in a fifty-five-mile-per-hour zone. When Trooper Cunningham approached the vehicle, he noticed a moderate odor of alcohol. He requested Lopez-Pena's license, registration, and proof of insurance; Lopez-Pena complied. Trooper Cunningham then asked Lopez-Pena to accompany him back to the patrol car. He noticed Lopez-Pena's eyes were bloodshot and watery, and he administered field sobriety tests and a preliminary breath test. Lopez-Pena did not have any difficulty following the trooper's instructions except when asked to count from 1001 to 1030 while standing on one leg.¹ Lopez-Pena responded to the trooper's questions including telling the trooper he was heading to Marshalltown. Lopez-Pena had trouble either remembering or saying the name of the town he was coming from—Carroll. The trooper testified Lopez-Pena could not speak English well, but "he seemed to understand all the tests and everything that I asked him to do."

The trooper read the implied consent advisory to Lopez-Pena in English while they were still seated in the vehicle. Trooper Cunningham asked Lopez-Pena whether he would consent or refuse to take the test on the Datamaster;

¹ Lopez-Pena completed the test by counting from one to thirty instead of 1001 to 1030.

Lopez-Pena responded, "Consent." Trooper Cunningham asked whether he wanted to call anyone or speak to anyone to help him make that decision; Lopez-Pena asked to have his passenger, who spoke English, come back to the car. The informed consent was not repeated to the passenger to translate to Lopez-Pena, but the officer did have the passenger translate the consequences of failing or refusing the test.² Lopez-Pena again through his passenger's interpretation stated he would consent to the test. Lopez-Pena was then informed he was being arrested, and, after reacting with "Oh my God," he refused to communicate in English from that point forward. Trooper Cunningham read Lopez-Pena his *Miranda* rights in English and handed him a card with a Spanish version printed on it. Lopez-Pena did not make any further statements to the trooper.

Lopez-Pena filed a motion to suppress asserting the trooper did not make reasonable efforts to communicate the informed consent advisory and the *Miranda* warnings in Spanish. At the suppression hearing, Trooper Cunningham testified, and the State admitted the video from the trooper's patrol vehicle, which included the discussions between the trooper and Lopez-Pena while both outside and inside the car. Lopez-Pena called Angela Martinez to testify at the hearing. She has known Lopez-Pena for approximately nine years and frequently performed interpretation services for him. Martinez testified,

² We note the Trooper incorrectly informed both Lopez-Pena and the passenger that if Lopez-Pena took the test and failed it he would lose his license for one year and if he refused to take the test he would also lose his license for one year. The trooper knew Lopez-Pena had one prior OWI on his record from 2005. With this prior conviction, a refusal to submit to the test results in a two-year revocation, and a test failure results in a one-year revocation. See Iowa Code §§ 321J.8, 321J.9(1)(b), 321J.12(1)(b).

Every time that [Lopez-Pena] gets anything in the mail or if there's anything that he gets that is important or that he has any questions about, then that comes in English, he brings it to me. Or if he has any question regarding phone calls, anything that he needs, he comes and asks me for assistance.

She stated he only understands minimal English and would not be able to understand a complex legal document; however, "he would not sign anything unless he knew exactly what he was signing because he would not put his name on something without knowing one hundred percent." She thought he could probably say "please" and "thank you," and maybe recite his address, but "beyond that, if it was complicated, he would make sure that he would know what he was doing first." On cross-examination, Martinez again stated that if Lopez-Pena did not understand something, he would ask for help, and if he did not ask for help, he probably understood it.

The district court denied the motion to suppress finding the trooper's actions reasonable. The court noted Lopez-Pena's actions in performing the field sobriety tests, signing documents, obtaining his license, showing his registration, producing his proof of insurance, going to and from the patrol vehicle, requesting his passenger's assistance, and explaining a prior OWI arrest confirms Lopez-Pena's understanding of the steps of the procedure. *See United States v. Heredia-Fernandez*, 756 F.2d 1412, 1416 (9th Cir. 1985) (stating a defendant who had been arrested numerous times in the past could be "presumed to be familiar with *Miranda* rights procedures."); *see also United States v. Collins*, 40 F.3d 95, 98 (5th Cir. 1994) (holding the district court did not error when it considered the defendant's familiarity with the criminal justice system in determining whether a *Miranda* waiver was valid). The court stated it was not

convinced the passenger was fluent in English such that he could have done anything more to assist the trooper in communicating with Lopez-Pena. In addition, Lopez-Pena communicated through his passenger that he understood the situation.

Our review of this appeal is de novo based on the totality of the circumstances, and we determine whether or not the decision to submit to chemical testing was voluntary. *State v. Garcia*, 756 N.W.2d 216, 219 (Iowa 2008). We are not bound by the district court's factual findings, but we give them considerable weight. *Id.* at 219–20.

To be valid, the driver's decision to consent to testing must be voluntary, i.e., freely made, uncoerced, reasoned, and informed. . . . [A] driver's consent to testing may be considered involuntary, and therefore invalid, if it is coerced or if the driver is not reasonably informed of the consequences of refusal to submit to the test or failure of the test.

Id. at 220. When faced with a non-English speaking person, an officer is required, “under the circumstances facing him or her at the time of the arrest to utilize those methods which are reasonable, and would reasonably convey the implied consent warnings.” *Id.* at 222 (citing *State v. Piddington*, 623 N.W.2d 528, 534–35 (Wis. 2001)). We utilize a pragmatic approach to determine what is reasonable, and while “making an interpreter available when possible is desirable, finding an interpreter is not absolutely necessary and should not ‘interfere with the evidence-gathering purposes of the implied consent statute.’” *Id.* (citations omitted).

Lopez-Pena asserts the trooper did not make reasonable efforts to convey the implied consent advisory in Spanish through the use of the readily available

passenger who spoke “very fluent English.” He asserts it would have taken only a few more minutes for the passenger to have translated the informed consent advisory. We agree with the district court that Trooper Cunningham acted reasonably in reading the informed consent advisory in English. Up to the point of arrest, Lopez-Pena was appropriately answering questions and following directions given in English. The video makes it clear that Lopez-Pena understands and speaks more English than just “please,” “thank you,” and his address. The video also contradicts Lopez-Pena’s assertion in his brief that he spoke only “single-word answers.” It was not until Trooper Cunningham made it clear Lopez-Pena would be arrested that he stated he did not understand English or he refused to answer questions. See *State v. Hajtic*, 724 N.W.2d 449, 455 (Iowa 2006) (discussing and encouraging the electronic recording of police interactions with a defendant as an aid to the court in determining whether a *Miranda* waiver was valid).

We view the dissent as identifying “best practices” and not a failure to reasonably inform Lopez-Pena. In particular we note that after the officer gave Lopez-Pena the implied consent advisory and asked him for a breath specimen, Lopez-Pena stated in clear English—“consent.” In an abundance of caution or perhaps to comply with Iowa Code section 804.20 permitting a call to family or an attorney, the officer made sure Lopez-Pena wanted to consent by asking him if he wanted to talk to someone to help him make the decision. In response Lopez-Pena informed the officer he wanted to talk to Ivan, his passenger. Ivan then helped translate the gist of the informed consent advisory and subsequently informed the officer Lopez-Pena consented. These facts reflect an effort to

reasonably inform Lopez-Pena of the consequences of refusal to submit to the test or failure of the test as required by *Garcia*. 756 N.W.2d at 222.

Lopez-Pena also asserts the trooper should have requested the passenger translate the *Miranda* warnings. Again, we conclude based on our de novo review that Lopez-Pena understood his rights under *Miranda* as he refused to speak after he was arrested. The officer provided Lopez-Pena with a card that had the *Miranda* warnings written in Spanish. See *State v. Ortiz*, 766 N.W.2d 244, 253 (Iowa 2009) (“[R]egardless of what language is used to convey the warnings to [the defendant], the warnings must be clear and not susceptible to equivocation and provide meaningful advice to the unlettered and unlearned in language which [he] can comprehend and on which [he] can knowingly act.” (citations omitted) (internal quotation marks and citations omitted)). Even if we were to find the trooper should have had the passenger translate the *Miranda* warnings, we cannot find the waiver was unknowing or involuntary because Lopez-Pena never waived his right to remain silent. He never made any statement after his arrest that was used against him.

We affirm the district court’s denial of Lopez-Pena’s motion to suppress and affirm his conviction.

AFFIRMED.

Danilson, J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully disagree with the majority's conclusion the trooper reasonably conveyed the implied consent advisory to Lopez-Pena.

A driver's consent to chemical testing must be "freely made, uncoerced, reasoned, and informed." *State v. Fischer*, 785 N.W.2d 697, 701 (Iowa 2010) (quoting *State v. Garcia*, 756 N.W.2d 216, 220 (Iowa 2008)). Iowa Code section 321J.8 implements this voluntariness mandate. *Fischer*, 785 N.W.2d at 701. When a peace officer asks a driver to submit to chemical testing under Iowa's implied consent laws, section 321J.8 requires the officer to advise the driver of the consequences of testing over the statutory limit and of refusing the test. The advisory provides the accused driver with a basis for evaluating and deciding whether or not to take the test. *Garcia*, 756 N.W.2d at 221–22.

The *Garcia* court adopted a reasonableness standard for communicating the consequences to the accused driver. *Id.* at 222. An officer must use "methods which are reasonable, and would reasonably convey the implied consent warnings" under the circumstances facing the officer at the time of the encounter. *Id.* (approving standard from *State v. Piddington*, 623 N.W.2d 528 (Wis. 2001)). Under the *Garcia* standard, we look to the objective conduct of the officer, rather than the subjective comprehension of the accused driver. *See id.* In describing the pragmatic approach expected of peace officers, the *Garcia* court quoted *Piddington* for the proposition an officer does not have to take "extraordinary, or even impracticable measures" to convey the implied consent warnings, especially considering that alcohol dissipates over time. *Id.* (citing *Piddington*, 623 N.W.2d at 542).

An officer can satisfy the reasonableness standard by taking into account and accommodating any barriers to communication. *Id. Garcia* recognized the desirability of offering an interpreter when available, but emphasized that finding an interpreter was not “absolutely necessary” and should not interfere with the evidence-gathering purposes of the implied consent statutes. *Id.*

It was obvious to the trooper in this case that Lopez-Pena struggled to understand English. The video shows the trooper interjected a few Spanish words when speaking with Lopez-Pena.³ For instance, when Lopez-Pena did not respond to the trooper’s comment that he was “going pretty fast today,” the trooper adds: “mucho.” The trooper also asked Lopez-Pena if he had been drinking “cerveza”—the Spanish word for beer. When starting the field sobriety tests, the trooper asked if Lopez-Pena “comprender” his right from his left (while the trooper was gesturing to his right, then left leg). The trooper acknowledged, but played down the language barrier in his suppression testimony: “I wouldn’t say he could speak as well as you and I, but he seemed to understand all the tests and everything I asked him to do.”

I disagree with the majority’s assessment as to what the video shows regarding Lopez-Pena’s proficiency in the English language. He often hesitated in responding to the trooper’s questions and only gave rudimentary answers in English. His facility to repeat “right” and “left” when the trooper demonstrated the walk-and-turn test does not equate with an ability to understand phrases like

³ The trooper also gave Lopez-Pena a card with a Spanish translation of the Miranda warnings.

“bodily specimen,” “chemical testing” and “revocation of your privilege to operate a motor vehicle” from the implied consent advisory.

Simply reading the implied consent advisory in English—and reading it at a very fast clip—did not amount to a reasonable method of conveying the warnings under the circumstances in this case. The conduct captured on the video demonstrates the trooper himself was not confident Lopez-Pena understood the warnings. At the end of the advisory, the trooper said: “I hereby request a specimen of your breath for chemical testing, do you consent or refuse?” Lopez-Pena responds: “Consent?” The trooper then asked him twice if he wants to call anybody for help making that decision. Lopez-Pena finally replied: “My buddy. He speak English.” The trooper then invited the passenger, named Ivan, back to the patrol car, saying: “He just wants you to translate in case he didn’t understand everything fully.”

But rather than having Ivan, who spoke fluent English,⁴ translate the full advisory, the trooper gave Ivan an abbreviated, and flawed, explanation of the consequences of testing over the limit and refusing the test. Ivan and the defendant then had a brief discussion in Spanish, and Ivan confirmed Lopez-Pena would take the breath test.

If the reasonableness standard from *Garcia* is to have any meaning, a peace officer must accommodate the driver’s language barrier by seeking interpretive help from a bilingual speaker who is already at the scene, whose aid has been requested by the driver, and who indeed the officer has already called

⁴ The district court writes in the suppression ruling that it was “not convinced that the passenger was fluent in English.” This observation was belied by the video. In addition, the trooper testified Lopez-Pena’s friend “could speak very fluent English.”

upon to translate part of the conversation. The trooper's evidence-gathering function would not have been significantly impinged by taking a few minutes to have the bilingual passenger translate the implied consent advisory.

I do not suggest the trooper acted in bad faith. The video shows the trooper was respectful of Lopez-Pena and worked diligently to investigate the possible operating-while-intoxicated offense. But the purpose of the implied consent advisory is to benefit the driver. See *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 211–12 (Iowa 2001). This purpose is thwarted if peace officers do not make reasonable accommodations for non-English speakers.⁵ Under the circumstances in this case, the trooper did not use reasonable methods to convey the implied consent advisory when he had a ready translator at his fingertips. When the warnings are not reasonably conveyed, we cannot be confident the driver voluntarily consented to chemical testing. I would grant the motion to suppress the results of the DataMaster test because the State did not show Lopez-Pena voluntarily consented to taking the test.

⁵ While it is impossible to anticipate what would be reasonable accommodations in other circumstances, the Wisconsin Supreme Court encouraged its law enforcement officers and department of transportation officials to adopt methods to assist officers in reasonably conveying the implied consent warnings, including video translations prepared in different languages. *Piddington*, 623 N.W.2d at 542, n. 17. Similar efforts would be worthwhile in our state.