IN THE COURT OF APPEALS OF IOWA

No. 6-807 / 05-1174
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID D. ALLSUP,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, William H. Joy, Judge.

David Allsup appeals from the judgment and sentence entered upon his conviction of operating while intoxicated. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Wayne M. Reisetter, County Attorney, and Jeannine Gilmore, Assistant County Attorney, for appellee.

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

EISENHAUER, J.

David Allsup appeals from the judgment and sentence entered upon his conviction of operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2003). He contends the district court erred in overruling his objections to the admission of his urine test. We review his claim for correction of errors at law. Iowa R. App. P. 6.4.

In the early morning hours of September 15, 2004, Allsup and James Kalbach were drag racing their pickup trucks when they crashed into a parked train. Deputy Sheriff Ryan Bowers smelled the odor of an alcoholic beverage on Allsup, who admitted he had consumed alcohol just prior to the crash. Allsup refused to submit to a preliminary breath test.

Allsup was taken to the hospital. Deputy Jeremy Sprague was informed by hospital staff that Allsup was conscious, alert, and able to talk with him. Deputy Sprague described Allsup as laid back and relaxed. Deputy Sprague read Allsup the implied consent advisory and requested a urine sample for analysis. When Allsup stated his preference for a blood sample, the deputy stated he was specifically requesting a urine sample. Allsup then requested to speak with an attorney before determining whether to submit to a chemical test. Allsup made two phone calls, reaching answering machines both times. When asked again whether he would consent or refuse to submit to a chemical test, Allsup consented to the urine test and a sample was collected. Laboratory testing shows Allsup's blood alcohol concentration was .141.

Prior to and during trial, Allsup sought to exclude the results of the urine test on several grounds. He claims he was not given a reasonable opportunity to

contact an attorney, the State failed to properly collect the urine sample, the deputy failed to inform him of his right to an independent blood test, and there was no evidence presented regarding how the margin of error for urine tests is established. To the extent Allsup argues he was incapable for consenting to or refusing a chemical test, we conclude the issue was never presented to and passed on by the district court and therefore cannot be raised for the first time on appeal. *Conner v. State,* 362 N.W.2d 449, 457 (Iowa 1985).

Pursuant to Iowa Code section 804.20, a peace officer must provide an arrestee with a reasonable opportunity to contact an attorney or family member. *Bromeland v. Iowa Dep't of Transp.,* 562 N.W.2d 624, 626 (Iowa 1997). The right is limited to circumstances which will not materially interfere with the administration of testing within the two-hour time limit imposed by section 321J.6(2). *Moore v. Iowa Dep't of Transp.,* 473 N.W.2d 230, 231 (Iowa Ct. App. 1991). In addition, police have no affirmative duty to advise a defendant of this right. *See State v. Meissner,* 315 N.W.2d 738, 740 (Iowa 1982). Generally, the right is satisfied when an arrestee is allowed to make a telephone call to a family member or attorney. *Bromeland,* 562 N.W.2d at 626.

We conclude Allsup was given a reasonable opportunity to contact an attorney. Allsup requested to call his attorney and Deputy Sprague provided him with access to the phone to do so. Allsup called two numbers and left messages on answering machines. He did not attempt to make any other calls. When asked again whether he would consent to the test, he consented. The deputy fulfilled his obligation.

Allsup next argues the State failed to properly collect the urine sample. Iowa Administrative Code rule 661-7.3 (2004) states in pertinent part: "[A]s soon as practicable after arrest, the subject should provide the sample by being required to urinate into a bottle, cup, or other suitable container which is clean, dry, and free from any visible contamination." The deputy testified the container used to collect the sample appeared to be clean and free from contamination. We conclude the foundational requirements for a urine sample test result are met in this case.

Allsup also argues the deputy failed to inform him of his right to an independent chemical test and did not help him to obtain one. Iowa Code section 321J.11 governs independent chemical tests. It provides:

> The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer.

Iowa Code § 321J.11. Allsup did not request an independent chemical test. Although the deputy did not inform him of his right to obtain one, officers are not required to advise a defendant of the statutory right to an independent test. *State v. Wooten*, 577 N.W.2d 654, 655 (Iowa 1998).

Finally, Allsup argues the test results should be excluded because the State failed to present evidence showing how the Department of Criminal Investigations (DCI) established the margin or error in testing urine for blood alcohol concentration. Iowa Code section 691.2 states:

> Any report, or copy of a report, or the findings of the criminalistics laboratory shall be received in evidence, if determined to be relevant, in any court, preliminary hearing, grand jury proceeding,

> civil proceeding, administrative hearing, and forfeiture proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person.

Accordingly, the DCI lab report containing the analysis of Allsup's urine was admissible. Allsup's claim goes to the weight of the evidence, not its admissibility.

Because the results of the urine test were properly admitted, we affirm.

AFFIRMED.