STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRUCE HENRY THOMPSON,

Defendant-Appellee.

UNPUBLISHED
July 10, 1998

No. 200756
Kalamazoo Circuit Court
LC No. 96-001372 AR

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

The prosecutor appeals by leave granted the order of the circuit court that affirmed the district court's decision to suppress defendant's breath test results. We reverse and remand to the district court.

Defendant was arrested and charged with operating a motor vehicle under the influence of intoxicating liquor. Shortly after his arrest, defendant was informed of his chemical test rights under MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b) and voluntarily submitted to two breath tests administered by police authorities. The issue on appeal concerns whether defendant was properly provided "a reasonable opportunity" to arrange for and take an independent chemical test administered by "a person of his . . . own choosing." MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d).

The relevant facts, as decided by the district court, were as follows:

> There's no question but what the defendant agreed to take the test. And then under any circumstances wished to know how to go about doing so. . . . So he sought something, which I guess is everybody's right, and that's to consult with counsel. Having made arrangement to consult with counsel and counsel responding to the request to make contact with him, counsel was then denied the right to talk to his client.

As a result, the district court ordered the suppression of the police-administered breath tests.

The prosecutor raises two questions on appeal: whether, the district court properly determined these facts; and whether, assuming the district court properly determined these facts, defendant's statutory right to an independent test was violated. Because we find it necessary to remand for further factfinding, we need not reach the second of these questions.

The prosecutor argues that the decision of the district court was improperly based on facts not in evidence. We agree. Defendant's attorney, appearing as counsel and not as a witness, stated in district court that defendant had asked to speak to him after defendant's arrest, that defense counsel had received a message to that effect, and that he "thereafter contacted the Sheriff's Department for the purpose of advising [defendant] what his rights were pursuant to the statute." However, the prosecutor does not agree with these assertions, having stipulated for purposes of expediting the district court's suppression hearing only that defense counsel would testify that he had asked to talk with defendant. The district court stated, "There's no question but what the defendant agreed to take the test. And then under any circumstances wished to know how to go about doing so. . . . Having made arrangement to consult with counsel and counsel responding to the request to make contact with him, counsel was then denied the right to talk to his client." In concluding that defendant had arranged to consult with counsel, that counsel responded, and that police personnel did not permit counsel access to defendant, the trial court accepted as fact what had been stipulated to only as potential testimony.

The prosecutor further states that defendant "never requested an independent test." Indeed, if defendant expressed no interest in an independent test after having his right to such a test explained to him, or even expressly rejected that option, this would have great bearing on whether police were obliged to permit defendant to consult with counsel—or anyone else—under the statute. However, the parties did not stipulate to whether defendant ever expressed a desire for an independent test, leaving the record silent on this important consideration.

The record is likewise silent on other factual questions that may bear on the issue of whether defendant was afforded the statutorily required "reasonable opportunity" to obtain an independent test. Considerations relevant to this inquiry may include such factual matters as what ordinary police policy was at the time of defendant's detention; whether police selectively denied defendant access to his attorney in order to coerce cooperation with their investigation, or for some punitive or other inappropriate reason; whether defendant's attorney presented himself to police as making contact specifically to help defendant arrange for an independent test; whether defendant manifested an understanding of his rights to arrange for an independent test; and whether defendant had other avenues available to him for arranging a test, and, if so, whether he attempted to take advantage of these avenues.

We reverse the circuit court's order that affirmed the district court's order suppressing the police-administered test results. We remand for further factfinding consistent with this opinion. We retain jurisdiction.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman