IN THE COURT OF APPEALS OF IOWA

No. 1-394 / 10-1663
Filed July 13, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEPHANIE E. HUFNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Monty W. Franklin (motion to dismiss), and Cynthia M. Moisan (findings of guilt and sentencing), District Associate Judges.

Stephanie Hufner appeals from her convictions and sentencing for operating while intoxicated and child endangerment. **AFFIRMED.**

Gary D. Dickey Jr. of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

In this case we are asked to determine whether Stephanie Hufner's encounter with law enforcement amounted to an arrest for the purposes of the speedy indictment rule. We conclude it did not and therefore affirm.

***I. Background Facts and Proceedings*.**

Shortly before midnight on January 22, 2010, Clive police officer Kempnich observed a car travelling on 86th Street with its headlights off. He turned his squad car around, got behind the car, and activated his emergency lights. When the car did not stop after following it for several blocks, Officer Kempnich activated his siren. The car then pulled into a parking lot, drove behind a retail business building, and stopped. The car's driver, Stephanie Hufner, informed Officer Kempnich her child was having a seizure. Officer Kempnich observed a child, two to three years old, lying on the floor behind the driver's seat crying. Officer Kempnich called dispatch for an ambulance. While talking to Hufner, Officer Kempnich smelled an odor of alcohol coming from Hufner and observed her speech to be slurred and her eyes to be bloodshot and watery. It appeared Hufner had thrown up on herself and on the driver's door of the car. Officer Kempnich told Hufner to sit in the back of her car to keep her son warm. He called dispatch for a traffic car because he believed Hufner to be intoxicated.

When Clive police officer Colby arrived on the scene and took over the investigation, Hufner and her son were in an ambulance. After conferring with Officer Kempnich, Officer Colby talked to Hufner. Like Officer Kempnich, Officer Colby observed Hufner's slurred speech and bloodshot and watery eyes. He

smelled a heavy odor of alcohol in the ambulance. Hufner asked that her son be transported to the hospital for observation. The medics asked if that was okay and Officer Colby said it was fine. Officer Colby told Hufner he would meet her at the hospital and that he preferred she stay with her son that night. He also told her he would be speaking to her about her drinking and driving and that he would ask her to perform field sobriety tests at the hospital and that he may or may not ask for a urine sample. Believing Hufner's car was parked illegally in a private parking lot, Officer Colby called for a tow truck to tow and impound Hufner's car. The record is not clear as to whether Hufner knew, at the time, that her car was being impounded.

The ambulance transported Hufner and her son to the hospital. When Officer Colby arrived at the hospital about ten minutes later, Hufner was in the ER with her son in her son's room. Officer Colby asked a nurse if it would be okay for the nurse to watch Hufner's son for a few minutes while he talked to Hufner. The nurse said that was fine. Officer Colby, Cynthia Heick (Colby's ride-along for the evening), and Hufner walked down the hall to a family waiting room. Heick recalled that Officer Colby explained to Hufner that she was not placed under arrest due to the fact that her son was in the hospital and she needed to remain with him. Officer Colby asked Hufner what she had had to eat and drink that evening. Officer Colby then conducted a series of standard field sobriety tests, which Hufner either failed or was unable to complete. At some point officer

Colby read Hufner her *Miranda* rights.[1] The three walked back to Hufner's son's room. Hufner then submitted to a preliminary breath test. After that test showed an alcohol level over two-and-a-half times the legal limit, Officer Colby read Hufner the implied consent advisory. He requested a sample of urine and told Hufner she could make phone calls to anyone she wished. Hufner said she did not need to make any phone calls and signed the implied consent form. A urine sample was obtained. In the hallway of the ER, Officer Colby told Hufner he was going to send the urine to the Iowa Department of Criminal Investigation (DCI) for testing and he would contact her at a later date. He also told Hufner he "was looking out for her son's best interest, and the whole reason she was not arrested that night or not being arrested" that night was he "was not going to leave her two- or three-year-old son at the hospital alone in the middle of the night without Mom or Dad there." He told Hufner the Iowa Department of Human Services may be contacted by the hospital staff and they may want to talk to her. Hufner went back into her son's room and Officer Colby left the hospital.

The word "No" is typed in the box labeled "Offender Arrested?" on Colby's written incident report dated January 22, 2010. The DCI lab report, dated March 24, 2010, was received by the Clive Police Department and noted in Officer Colby's supplemental report dated March 26, 2010.

On April 15, 2010, preliminary complaints were filed charging Hufner with operating a motor vehicle while intoxicated (OWI) in violation of Iowa Code section 321J.2 (2009), and child endangerment in violation of section 726.6.

[1] Officer Colby's written report indicates he read the rights about ten minutes after he arrived at the hospital. Heick could not recall whether they were read before or after the field sobriety tests were conducted.

Hufner filed an appearance, pled not guilty, and requested a preliminary hearing. After the hearing, Hufner's arraignment was set. The trial Information charging Hufner with OWI and child endangerment was filed May 20, 2010.

Hufner filed a written arraignment and plea of not guilty. She also filed a motion to dismiss asserting the trial information was not filed within forty-five days of her arrest in violation of Iowa Rule of Criminal Procedure 2.33(2)(*a*). Hearing on the motion was held August 3, 2010. The district court overruled the motion, concluding Hufner had not been taken into custody or arrested on January 23, 2010, and the forty-five day time period for filing a trial information did not commence on that date.

Hufner then waived jury trial and stipulated to a trial on the minutes of testimony. The court found Hufner guilty on both charges of child endangerment and OWI. On the child endangerment charge, her sentence of two years incarceration was suspended, and she was placed on probation for two years. On the OWI charge, her sentence of one year of incarceration was suspended except for thirty-three days, with credit for two days. She was also placed on one year of probation, fined $1250, and ordered to attend an OWI first class.

Hufner now appeals.

***II. Scope and Standards of Review*.**

"We review a district court's decision regarding a motion to dismiss for lack of speedy indictment for corrections of errors of law." *State v. Wing*, 791 N.W.2d 243, 246 (Iowa 2010). We are bound by findings of fact if they are supported by substantial evidence. *Id*.

***III. Discussion*.**

Hufner contends that for purposes of the speedy indictment rule, she was arrested during her encounter with Clive police on January 22, 2010, and the May 20, 2010 trial information was therefore untimely.[2] Iowa Rule of Criminal Procedure 2.33(2)(*a*) provides:

> When an adult is arrested for the commission of a public offense . . . and an indictment is not found against the defendant within [forty-five] days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's rights thereto.

Hufner did not waive her right to a speedy indictment, and the State makes no suggestion there was good cause to file the trial information more than forty-five days after arrest. This case therefore turns on the sole issue of whether Hufner was "arrested" during her encounter with the Clive police on January 22-23, 2010. We conclude she was not arrested for the following reasons.

An arrest "is the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." Iowa Code § 804.5.

> The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so . . . ."

Id. § 804.14. Even if the notification requirements of section 804.14 are not met, a seizure by law enforcement officials may still constitute an arrest. *Wing*, 791

[2] For purposes of Iowa Rule of Criminal Procedure 2.33(2)(*a*), an indictment includes a trial information. *See State v. Lies*, 566 N.W.2d 507, 508 (Iowa 1997).

N.W.2d at 247-48. Naturally, there is no bright-line rule or test to determine whether a defendant was "arrested." *See generally id*.

Traditionally, our courts have looked at several factors in considering whether an arrest had been made: what the suspect was told or not told about his or her arrest status, whether the person was handcuffed, whether the person was booked, whether the person merely submitted to authority, and whether a reasonable person would have felt free to leave during the encounter. *Id.* at 248. Our supreme court recently concluded, in the context of a speedy indictment issue:

> When an arresting officer does not follow the protocol for arrest outlined in section 804.14 *and* does not provide any explicit statements indicating that he or she is or is not attempting to effect an arrest, we think the soundest approach is to determine whether a reasonable person in the defendant's position would have believed an arrest occurred, including whether the arresting officer manifested a purpose to arrest.

Id. at 249 (emphasis added).

Hufner suggests this is a new test to be applied. We believe the pronouncement in *Wing* is a clarification, not a new test. *See id*. n.9 at 249. The court recognized its language in *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992), "could be understood as grafting an additional requirement onto sections 804.5 and 804.14 that an officer possess an intent to arrest." *Wing*, 791 N.W.2d at 248. The court then noted "neither section 804.5 nor 804.14 explicitly requires an assessment of the officer's subjective intent to determine if an arrest has occurred." *Id*. Rather, section 804.14 requires notice to the arrestee that he or she is being arrested. *Id*. So, the *Wing* court clarified that in those situations where no notice is given, the focus should be on whether a reasonable person in

the defendant's position would have believed an arrest has occurred, and not on the officer's a subjective intent. *Id*. at 249. This is not one of those situations as Hufner was told she was not being arrested.

Employing *Wing* as a new test and citing the old adage, "[w]hat looks like a duck, and walks like a duck, and quacks like a duck is probably a duck," *State v. Zbornik*, 248 Iowa 450, 456, 80 N.W.2d 735, 738 (1957), Hufner argues the facts here lead to the inescapable conclusion that a person in Hufner's position would have believed an arrest occurred from her encounter with the Clive Police Department. She then points to the fact that three officers asserted authority over her movement at the scene of the traffic stop; she was confronted with the officers' suspicion of her intoxication and was told she would be required to perform field sobriety tests at the hospital; her car was impounded; she was not free to leave the hospital during the course of Officer Colby's investigation; she was given her *Miranda* rights at the hospital; and she was allowed to make phone calls before deciding whether to give a urine sample. We are obligated to review all the facts, not just those handpicked by the defendant.

The protocol for an arrest, as outlined in section 804.14, was not followed. Hufner was told more than once that she was not under arrest and would not be arrested that night. She was not handcuffed. She was not booked. She was not placed in a police car. She was not transported to the police station, jail, or any other law enforcement facility. She was not accompanied by a police officer as she rode in the ambulance to the hospital. She was specifically told she could spend the night with her son at the hospital. She was not issued a citation or summons. She was told law enforcement would be in touch with her once the

urine test results were received from the DCI lab. She was left at the hospital with her son after being told she was not being arrested.

There is no dispute that Hufner was detained by Officer Colby, but not every detention by law enforcement results in an arrest. "[A]n individual's detention by an officer for the purposes of performing field sobriety tests does not rise to the level of custody, but merely detention for investigative purposes." *State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997). "[I]nvocation of the implied consent procedures does not require an arrest if the situation qualifies under one of the conditions set forth in Iowa Code section 321J.6(1)(b)-(f)." *Id*.[3] No arrest was implied through Officer Colby's invocation of the implied consent procedures since this situation qualified under section 321J.6(d) because Hufner's preliminary breath test results indicated an alcohol concentration in excess of .08. Having *Miranda* rights read did not necessarily mean an arrest occurred. *See State v. Johnson-Hugi*, 484 N.W.2d 599, 600 (Iowa 1992) (no arrest despite administration of *Miranda* warnings, where defendant was never advised she was under arrest, and she accepted offer to cooperate as a confidential informant in lieu of being arrested). Permitting Hufner to make any phone calls she wished did not necessarily imply an arrest occurred. *See State v. Krebs,* 562 N.W.2d 423, 426 (Iowa 1997) (recognizing that "section 804.20 may be implicated in a situation short of a formal arrest" so long as defendant was restrained of his liberty).

[3] The *Dennison* court also found the "limited detention necessary to transport Dennison to the ASAP office to conduct the tests to determine whether he was under the influence of drugs was incidental to the investigation, and did not constitute an arrest." *Id*. Here, Hufner was not transported to a law enforcement facility for testing. She remained at the hospital with her son while the testing was conducted.

Viewing all the facts and circumstances surrounding Hufner's encounter with the Clive police, and employing the applicable factors under the traditional analysis, we conclude no arrest occurred here. Even under the *Wing* approach, it is our opinion a reasonable person in Hufner's position would not have believed an arrest occurred.[4] Additionally, Officer Colby manifested no purpose to arrest, and in fact manifested just the opposite through his words and actions.

We agree with the district court when it concluded Hufner "was not taken into custody or arrested on January 23, 2010, and the forty-five day time period for the filing of a trial information did not commence that date." Consequently, Hufner's rights under Iowa Rule of Criminal Procedure 2.33(2)(*a*) were not violated, and the district court properly denied Hufner's motion to dismiss.

AFFIRMED.

[4] Another court faced somewhat similar facts: the defendant was transported to a hospital by ambulance, submitted to a chemical test, spoke with officers but was never told she was arrested or could not leave, and had her vehicle towed, and the court determined no seizure, i.e., no "arrest" occurred. *Lawrence v. City of St. Paul*, 740 F. Supp. 2d 1026, 1042-43 (D. Minn. 2010).