IN THE COURT OF APPEALS OF IOWA

No. 1-601 / 10-1955
Filed August 24, 2011

STATE OF IOWA,
Plaintiff-Appellant,

vs.

RACHAEL OVERBAY,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, District Associate Judge.

The State seeks discretionary review of a ruling granting a defendant's motion to suppress the result of a blood alcohol test. **AFFIRMED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Brendan Greiner, Assistant County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

VAITHESWARAN, J.

The State seeks discretionary review of a ruling granting Rachael Overbay's motion to suppress the result of a blood alcohol test.

I. Background Facts and Proceedings

Early one morning, a trooper with the Iowa State Patrol was dispatched to the scene of a car accident. The trooper noticed a strong odor of alcohol around the driver, Rachael Overbay. Overbay admitted she had consumed several beers and some vodka that evening. Emergency personnel transported Overbay to a hospital, with the trooper following.

At the hospital, Overbay refused the trooper's request to submit to a horizontal gaze nystagmus test. Other field sobriety tests could not be performed due to her receipt of medical treatment. Overbay also refused to submit to a preliminary breath test. The trooper proceeded to read Overbay an implied consent advisory, after which Overbay agreed to a blood test. The test revealed a blood alcohol content of more than double the legal limit.

The State charged Overbay with operating while intoxicated, second offense. Overbay filed a motion to suppress the result of her blood test. She asserted the trooper failed to inform her that refusal of a blood test would not result in revocation of her driver's license. The district court granted Overbay's motion, and the State filed an application for discretionary review, which was granted by the Iowa Supreme Court. The matter was subsequently transferred to this court for disposition.

II. Analysis

Where a person is believed to have been operating a motor vehicle while intoxicated, that person is deemed to have consented to the withdrawal of a bodily substance for alcohol testing. Iowa Code § 321J.6(1) (2009). Notwithstanding this deemed consent, the person has a right to refuse the test. *See id.* § 321J.9(1) ("If a person refuses to submit to the chemical testing, a test shall not be given."); *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981). This is "a statutory right to withdraw consent which is deemed to exist by statutory implication." *Knous*, 313 N.W.2d at 512. This right to refuse the test must be voluntary, not coerced. *Id.* To that end, the person must be informed of "the effect on [the person's] driving privilege of a refusal to take the test." *Id.*

The effect of a test refusal on driving privileges depends on the type of bodily substance that is sought. A peace officer is allowed to choose among blood, breath, or urine. Iowa Code § 321J.6(2).[1] A refusal to provide a breath or urine sample will result in the revocation of a person's driver's license. *Id.*; *see also id.* § 321J.9(1) (detailing the penalty for refusing chemical testing). A refusal to furnish blood will not result in the revocation of the license. *Id.* § 321J.6(2).

In the district court, Overbay argued that the implied consent advisory the trooper read to her led her to believe her license would be revoked if she refused

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[1] The provision states in pertinent part:

> The peace officer shall determine which of the three substances, breath, blood, or urine, shall be tested. Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit, and section 321J.9 applies. A refusal to submit to a chemical test of blood is not deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other two substances shall be tested and shall offer the test.

Section 321J.9, in turn, requires revocation of the driver's license for specified periods, depending on whether there has been a prior revocation.

to provide any of the substances, including blood. In her view, this misleading advisory prevented her from making an informed and voluntary decision on whether to refuse the blood test. The district court agreed, citing an unpublished opinion of this court. *See State v. Michaloff*, No. 09-1413 (Iowa Ct. App. May 26, 2010). While this opinion is not controlling, the pertinent law articulated there is contained in *State v. Bernhard*, 657 N.W.2d 469 (Iowa 2003), a published opinion of the Iowa Supreme Court.

In *Bernhard*, the court concluded the implied consent advisory read to the defendant was misleading because it failed to inform him that a refusal to provide a blood sample was not a basis for a license revocation. 657 N.W.2d at 471–72. The court nonetheless refused to find the defendant's decision to submit to the blood test involuntary or subject to coercion. *Id.* at 473. The court reasoned that because the defendant was "motivated to agree to a blood test because of the desire not to lose his license," there was no reason "to assume that his choice would have been different had he been requested to provide a sample of one of the other two substances." *Id.*

The State argues that this case is just like *Bernhard*. In assessing this argument, we are obligated to examine "the totality of the circumstances to determine whether the decision was voluntary or coerced." *Knous*, 313 N.W.2d at 512.

The record reveals the following facts. Overbay was informed that her refusal to submit to chemical testing would result in the revocation of her driver's license. The advice did not distinguish between the consequences of refusing a

blood test and the consequences of refusing breath or urine tests.[2] At the time this advice was given, Overbay was strapped to a backboard, had a neck brace on, had tubes in her nose and down her throat, and was fitted with a urine catheter. The trooper acknowledged he could not have given Overbay a chemical breath test because there was no DataMaster machine available at the hospital. He also conceded he would not have had Overbay get up and walk to the bathroom to provide a urine sample if she was in danger of harming herself. Neither he nor anyone else testified about the possibility of directly extracting a urine sample from the catheter.[3]

The State seizes on this last fact to suggest that the misleading implied consent advisory was of no consequence. In its view, a urine sample could and would have been taken and the testing of that sample would have resulted in the revocation of Overbay's license. This argument overlooks the allocation of burdens. Once coercion is alleged, it is not the defendant, but the State that carries the burden to establish the absence of undue pressure or duress. *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994). The determination is made from evidence at or before the time the consent was given. *State v. Stanford*, 474 N.W.2d 573, 575 (Iowa 1991).

While the State adduced testimony from the trooper that he *would* have obtained a urine sample had Overbay refused the blood test, the State did not

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[2] The trooper was asked, "So the way that [the implied consent advisory] is written, it would indicate if you refuse either blood, breath or urine your license is going to be suspended for a longer time than if you provide a sample, right?" The trooper answered, "Correct." Although the trooper seemed to backtrack from this statement on questioning by the prosecutor, the State makes its argument as if the statement given by the trooper was indeed misleading as to the consequences of a blood test.

[3] A friend attempted to address the question of whether Overbay would have provided a urine sample but was stymied by successful objections.

present any evidence that, at the time Overbay consented to the blood test, the officer *could* have obtained urine from Overbay's catheter. In the absence of evidence that it was feasible to extract urine in this fashion, the State's argument that it would have simply used this alternate statutory procedure amounts to pure speculation.

The State also suggests "there is no reason to believe the decision would have been different if the officer had requested a urine sample." The problem with this argument is that, unlike *Bernhard*, there is no evidence indicating that Overbay was impelled to go forward with the blood test based on a desire not to lose her license. The officer could not recall whether Overbay said she was fearful of losing her license and the other witnesses did not speak to this question. Notably, Overbay refused a horizontal gaze nystagmus test as well as a preliminary breath test. The only test she agreed to was the blood test and her consent to that test came in the wake of the misleading advisory.

Based on this record, we agree with the district court that Overbay's decision to go forward with a blood test rather than exercise her statutory right to refuse the test was not "a reasoned and informed decision." *See Bernhard*, 657 N.W.2d at 473. Her consent to test was involuntary and the district court correctly granted the motion to suppress the test result.

AFFIRMED.

Sackett, C.J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully dissent. Because I believe that the outcome is controlled by *State v. Bernhard*, 657 N.W.2d 469 (Iowa 2003), I would reverse the district court's grant of the motion to suppress.

Like the trooper in *Bernhard*, Trooper Underwood elected first to request a sample of Overbay's blood. *See Bernhard*, 657 N.W.2d at 472. Because Overbay consented to that request, the inquiry went no further. If Overbay had refused to provide a sample of blood, "the implied consent procedure would have merely shifted to a request for a urine or breath sample." *See id.* at 472. As the supreme court reasoned in *Bernhard*, the defendant "would have been required to provide a sample of one of those substances" or face license revocation. *See id*. The supreme court found suppression was not warranted based on the following analysis:

> Bernhard was required by law to submit to a chemical test or have his license revoked. Although we recognize that the general admonition concerning license revocation that was read to defendant was misleading when given with respect to a request for blood, it was correct within the context of the complete statutory procedure that defendant was facing. At the time this admonition was given, the statutory procedure had not yet run its course.

Id.

In *State v. Michaloff*, No. 09-1413 (Iowa Ct. App. May 26, 2010), our court distinguished *Bernhard* based on the deputy's testimony that it would have been "very difficult, if not impossible, to obtain a breath or urine sample" from Michaloff because of his injuries. Our court accepted Michaloff's argument that because no other tests would have been possible, "unlike *Bernhard*, the statutory

procedure had run its course at the time the implied consent advisory was given." *Michaloff*, No. 09-1413, at *2.

We do not have the same distinctive testimony from the peace officer in this case as we did in *Michaloff*. Trooper Underwood testified that if Overbay had refused the request for blood he "would have requested urine." He further testified that he did not investigate the feasibility of obtaining a urine sample because Overbay consented to giving blood.

The majority finds that the State had a burden to present evidence that it would have been possible for the trooper to obtain a urine sample from Overbay's catheter before the implied consent admonition could be considered correct within the entire statutory procedure. I agree that the State bears the burden to prove a driver's consent to testing was free from duress and coercion. *See State v. Stanford*, 474 N.W.2d 573, 575 (Iowa 1991). But I disagree that the burden of proving voluntary consent to a blood test includes presenting evidence that—had the driver refused to give blood—another type of specimen could, as a practical matter, have been seized. Trooper Underwood had no information about the catheter because Overbay consented to providing a blood sample. At that point, the trooper had no occasion to probe into the availability of a urine sample. Neither *Bernhard* nor *Michaloff* stand for the proposition that the State must prove a sample of breath or urine could have been obtained in the hypothetical scenario where the defendant refuses to give blood.

If Overbay had refused to give blood and Trooper Underwood then had asked for a urine sample, it would have been up to Overbay to consent or refuse to provide that alternative. If Overbay had consented, but then been unable to

provide a specimen of urine because of her medical condition, the question would have been whether the inability to provide the sample amounted to a refusal. *See McCrea v. Iowa Dep't of Transp.*, 336 N.W.2d 427, 430 (Iowa 1983) (holding "[a]bsent evidence sufficient to convince a fact finder of a licensee's inability to provide a specimen, we believe that compliance with the statute requires successful completion of the test"), *but citing Burson v. Collier*, 175 S.E.2d 660, 662 (Ga. 1970) (holding failure to complete breathalyzer test due to emphysema is not a refusal); *see also Stanford*, 474 N.W.2d at 575 (rejecting defendant's claim he was coerced into giving urine sample when he voluntarily signed implied consent advisory, but later was unable to urinate and faced a nurse's threat of catheterization).

A peace officer's invocation of implied consent and request for a blood sample launches a flowchart of choices. Because a refusal to provide blood would trigger the choice between providing another kind of specimen or license revocation, the *Bernhard* court concluded the advisory was not coercive despite its failure to inform a motorist that refusing a blood test would not, by itself, result in license revocation. *See Bernhard*, 657 N.W.2d at 472 (noting that general admonition was "correct within the context of the complete statutory procedure"). Given the holding of *Bernhard*, I disagree with the majority's conclusion that a "misleading advisory" rendered involuntary Overbay's decision to go forward with the blood test. The *Bernhard* decision did not view the overall advisory as "misleading" when the "statutory procedure had not run its course." *Id*. If the adequacy of the implied consent advisory is to be revisited, it must be our supreme court that does so. *See State v. Hastings*, 466 N.W.2d 697, 700 (Iowa

Ct. App. 1990) (observing that court of appeals is "not at liberty to overturn Iowa Supreme Court precedent").