IN THE COURT OF APPEALS OF IOWA

No. 2-334 / 11-1098
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK TODD CAREY,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Kevin A. Parker, District Associate Judge.

Defendant appeals his conviction and sentence for operating while intoxicated asserting the district court should have granted his motion to suppress. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Criswell, County Attorney, and Doug Eichholz and Brent Hinders, Assistant County Attorneys, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

MULLINS, J.

Defendant, Mark Todd Carey, appeals his conviction and sentence for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2011), asserting the district court erred in denying his motion to suppress his refusal to submit to chemical testing. He claims the implied consent advisory he was read failed to comply with the statutory requirements, and as a result, he claims he was denied substantive due process rights. For the reasons stated below, we affirm the district court.

I. BACKGROUND AND PROCEEDINGS.

On January 8, 2011, a 911 phone call was made in Warren County to report a possible intoxicated driver. Deputy Sheriff Lisa Ohlinger was dispatched to the scene. When she arrived the vehicle in question was stopped, and she observed Carey sitting in the driver's seat with a cut above his eye. The vehicle had damage to the front end, which restricted Carey's ability to open the driver's side door and exit the vehicle. Deputy Ohlinger learned from Carey he struck a pole somewhere in Des Moines. She assisted Carey in getting out of the vehicle by holding the driver's side door open. After Carey got out of the vehicle, Deputy Ohlinger had to steady him as he "kind of fell into [her] a little bit."

Carey refused to take field sobriety tests, though Deputy Ohlinger observed he smelled of alcohol and had bloodshot eyes. Deputy Ohlinger also offered Carey the preliminary breath test, which he refused. Carey was then placed in the back of Deputy Ohlinger's patrol car as she and another officer on the scene inventoried Carey's vehicle. They discovered one empty beer can

along with several full cans inside the car and one empty beer can outside the vehicle. The other officer on the scene had seen Carey throw the can out of the window after the officer arrived. Carey was read his *Miranda* rights and transported to jail.

After arriving at the jail, Deputy Ohlinger read the implied consent advisory to Carey from a form entitled "Revised Instructions for Request and Notice Form." The portion of the form challenged in this appeal states,

> If you hold a commercial driver's license the department will disqualify your commercial driving privilege for one year if you submit to the test and fail it, you refuse to take the test, or you were operating while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances. The disqualification shall be for life if your commercial driving privilege was previously disqualified. These actions are in addition to any revocation under Iowa Code Chapter 321J.

Deputy Ohlinger also read Carey the form entitled, "Right to Consult an Attorney or Family Member," which detailed Carey's right to call, consult, and see an attorney or family member before making the decision of whether to provide a breath specimen for chemical testing. Carey indicated he did not want to call anyone but also asserted he was not waiving his right to anything.

After several minutes inquiring whether Carey would like to call anyone and Carey asserting he did not want to call anyone but was not waiving his rights to anything, Deputy Ohlinger moved on to ask whether Carey was willing to provide a breath specimen for chemical testing. Carey again began saying he was not refusing to take the test but refused to affirmatively say he would take it. Deputy Ohlinger finally told him she would ask him one more time whether he would like to take the test, and if he answered anything but "yes" or "no," she

would interpret that as a test refusal. When he was asked one final time, he responded "other." Deputy Ohlinger informed him that his response would be considered a refusal and then completed the forms and delivered Carey to jail for booking.

The State filed a trial information charging Carey with operating while intoxicated on January 18, 2011. Carey filed a motion to suppress alleging among other things that the implied consent advisory did not comply with the statutory requirements and rendered his decision to refuse testing involuntary. He sought to suppress his refusal to submit to chemical testing. After an evidentiary hearing, the district court denied the motion to suppress, finding, "The language used by the deputy allowed the Defendant to make a reasoned and informed decision and substantially complied with the law at the time of the Defendant's arrest." The case proceeded to a stipulated bench trial on the minutes of testimony on June 28, 2011. The court found Carey guilty as charged and sentenced him to thirty days in jail with all but two days suspended. Carey was placed on probation for one year and ordered to pay the required fines and costs.

II. SCOPE OF REVIEW.

To the extent Carey challenges whether the advisory read to him complied with Iowa Code section 321J.8, our review is for correction of errors at law as this implicates questions of statutory interpretation. *State v. Hutton*, 796 N.W.2d 898, 901 (Iowa 2011). However, Carey also asserts he was denied his substantive due process rights as his decision to refuse the chemical test was not reasoned,

voluntary, or informed. We review this claim de novo making an independent evaluation of the totality of the record. *State v. Overbay*, ___ N.W.2d ___, 2012 WL 512635, at *3 (Iowa 2012). "While we are not bound by the district court's factual findings, we give considerable weight to the court's assessment of the voluntariness of the defendant's submission to the chemical test." *State v. Garcia*, 756 N.W.2d 216, 219–20 (Iowa 2008).

III. IMPLIED CONSENT.

Iowa Code section 321J.8 provides the information a peace officer must give to a person who has been requested to submit to a chemical test. The information required to be given under this statute, which is at issue in this case, provides:

> If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and either refuses to submit to the test or submits to the test and the results indicate the presence of a controlled substance or other drug or an alcohol concentration equal to or in excess of the level prohibited by section 321J.2, the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

Iowa Code § 321J.8(1)(c)(2). Carey challenges the advisory read to him as it stated his commercial driver's license would be suspended for one year, "if you submit to the test and fail it" rather than as provided under section 321J.8: "submits to the test and the results indicate . . . an alcohol concentration equal to or in excess of the level prohibited by section 321J.2." Carey asserts there was no information in the advisory that indicated what "fail it" meant. Carey claims the advisory contained alcohol concentration measurements of .08, .04, and .02,

and without further explanation, he was left to guess what measurement would result in a test failure. He alleges his decision to refuse to submit to the chemical test could not have been voluntary, knowing, and intelligent where the advisory was misleading as to what "fail it" meant and that terminology was unauthorized under section 321J.8(1)(c)(2).

We begin by noting the purpose of the advisory under section 321J.8(1)(c)(2) is to:

> provide a person who has been required to submit [to] a chemical test a basis for evaluation and decision-making in regard to either submitting or not submitting to the test. This involve[s] a weighing of the consequences if the test is refused against the consequences if the test reflects a controlled substance, drug, or alcohol concentration in excess of the "legal" limit.

Voss v. Iowa Dep't of Transp., 621 N.W.2d 208, 212 (Iowa 2001). The required advisory does not have to be conveyed in any particular language; we simply evaluate whether the purpose of the statute was accomplished under the circumstances. *Hutton*, 796 N.W.2d at 901. In this case, we find the purpose of the statute was satisfied.

We disagree with Carey's claim that the three different alcohol concentration measurements made the advisory misleading. First, Carey was never read that portion of the advisory that mentions a .04 alcohol concentration measurement as that section is applicable only to those who are operating a commercial motor vehicle at the time of the arrest. Carey was operating a noncommercial vehicle, and Deputy Ohlinger confirmed she did not read that paragraph to Carey as it did not pertain to him. Second, the portion of the advisory that mentions an alcohol concentration of .02 clearly explains that level

is only applicable to those under the age of twenty-one. As Carey was not under the age of twenty-one, the only level applicable to him that is mentioned in the advisory is .08. We find the use the term "fail" reasonably conveyed to Carey that his commercial driver's license would be disqualified for a year if he had an alcohol concentration of .08 or greater, which was the only alcohol concentration measurement applicable to Carey.

Carey asserts the legislature's amendment of sections 321J.8(1)(c)(2) and 321.208(2) in 2009 "necessarily admits the merit of the very challenges presented by the Defendant." We recognize the legislature did amend both section 321J.8(1)(c)(2) and section 321.208(2) in 2009. *See* 2009 Iowa Acts ch. 130, §§ 10, 14.[1] However, we fail to see how the changes made by the legislature rendered the use of "fail it" in the advisory misleading or inappropriate. In fact, we find the amendments did just the opposite.

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[1] 2009 Iowa Acts ch. 130 §§ 10, 14 provide:

> Sec. 10. Section 321.208, subsection 2, paragraph a, Code 2009, is amended to read as follows:
>
> a. Operating a motor vehicle while ~~under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances~~ intoxicated, as provided in section 321J.2, subsection 1.
>
> Sec. 14. Section 321J.8, subsection 1, paragraph c, subparagraph (2), Code 2009, is amended to read as follows:
>
> (2) If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and either refuses to submit to the test or ~~operates a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances~~ submits to the test and the results indicate the presence of a controlled substance or other drug or an alcohol concentration equal to or in excess of the level prohibited by section 321J.2, the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

In *Hutton*, 796 N.W.2d at 903, the defendant was read an implied consent advisory substantially similar to the one at issue in this case,[2] but the statutes applicable to Hutton were in the pre-2009 amendment form. The supreme court noted:

> Although the advisory read to Hutton warned him that his CDL would be revoked for a year if he consented to the test and failed it, section 321.208(2) (the revocation statute) did not at that time explicitly provide for revocation of a CDL for "failing" a chemical test and section 321J.8 (the warning statute) did not require the failure language to be included in the advisory.

Hutton, 796 N.W.2d at 903. The *Hutton* court later acknowledged the 2009 changes now explicitly provide for revocation of a commercial driver's license for failing a breath test. *Id.* at 903 n.3. Thus, we find the 2009 amendments to the statutes now make the previously inaccurate implied consent advisory given in *Hutton*, which used the language "submit to the test and fail it," accurate.

While the statutes at issue do not use the actual term "fail," the advisory does not have to be conveyed in any particular language, *id.* at 901, and we believe the advisory given here accomplished the purpose of the statute by providing "a basis for evaluation and decision-making in regard to either submitting or not submitting to the test." *Voss*, 621 N.W.2d at 212. We therefore affirm the district court's decision to deny Carey's motion to suppress.

AFFIRMED.

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[2] The implied consent advisory read to Hutton stated:

> If you hold a commercial driver's license the department will disqualify your commercial driving privilege for one year if *you submit to the test and fail it*, you refuse to take the test, or you were operating while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances.

Hutton, 796 N.W.2d at 903.