

IN THE COURT OF APPEALS OF IOWA

No. 2-367 / 11-1359
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CONNIE JAE EMGARTEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Audubon County, J.C. Irvin, Judge.

Connie Emgarten appeals a district court's order denying a suppression motion. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Francine O'Brien Andersen, County Attorney, and Grant Wilson, Student Legal Intern, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Connie Emgarten appeals a district court's order denying her motion to suppress the results of a chemical test. Because the State complied with the administrative guidelines regarding the collection of the urine sample and adhered to the general purposes of Iowa's implied consent law, we affirm the district court under Iowa Code section 321J.15 (2011). Further, because the chemical test results were competent evidence bearing on whether Emgarten was under the influence of a controlled substance or other drug, such evidence was admissible under Iowa Code section 321J.18. We therefore affirm.

I. Background Facts and Information

On January 26, 2011, Connie Emgarten was stopped by Deputy Sheriff Kent Gries in Audubon County for failure to display registration plates. During the stop, Gries's observations of Emgarten indicated that she might be under the influence of a drug or stimulant. Gries transported Emgarten to the sheriff's office where Emgarten failed several field sobriety tests. Gries ultimately decided to invoke implied consent and requested a urine specimen from Emgarten; Emgarten consented. Gries unwrapped a sealed, sterile container, which he gave to a female jailer to collect a urine sample from Emgarten. After the sample was collected, Gries unwrapped a sealed "iScreen drug abuse dipstick," removed the protective covering, and inserted the dipstick into the urine sample for a preliminary determination of the presence or absence of drugs. The dipstick registered positive for the presence of cocaine, amphetamines, and THC (marijuana). The urine sample was then transferred to a smaller test-kit cup,

sealed, labeled, and sent to the Iowa Division of Criminal Investigation (DCI) laboratory for further testing. Emgarten was placed under arrest.

On March 9, 2011, Emgarten was charged by trial information with operating while intoxicated (OWI), first offense, in violation of Iowa Code section 321J.2(1) and 321J.2(2)(a). On June 15, Emgarten filed a motion to suppress the lab results of the chemical test performed on her urine sample, alleging the testing procedures did not comply with the Iowa Department of Public Safety's administrative rules. A hearing was held on August 12, and the district court denied the motion. The district court clarified that the only issue before it was whether the use of the dipstick for the preliminary test contaminated the collected sample. It found the use of a dipstick is neither provided for nor prohibited by the administrative rules. From the testimony offered, it then found the use of the dipstick did not contaminate the sample and that sufficient foundation was laid for the introduction of the lab test results under Iowa Code section 321J.18. Our supreme court granted Emgarten's application for interlocutory appeal.

II. Standard of Review

Our review of a district court's decision to deny a motion to suppress based on its interpretation of a statute is for errors at law. *State v. Madison*, 785 N.W.2d 706, 707–08 (Iowa 2010). Emgarten asserts the district court erred in admitting the chemical test results under Iowa Code section 321J.18 by performing an end-run around the foundational requirements of Iowa Code sections 321J.11. More specifically, she contends that her urine sample was “not collected using devices and methods approved by the commissioner of

public safety,” contrary to the mandate of 321J.11. The State responds that the sample was “collected” in compliance with Iowa Code section 321J.11, and the chemical test results are admissible under both Iowa Code section 321J.15 and Iowa Code section 321J.18.

III. Iowa Code Chapter 321J

The primary purpose of Iowa Code chapter 321J is to remove “dangerous and intoxicated drivers from Iowa’s roadways in order to safeguard the traveling public.” *Welch v. Iowa Dep’t of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011). Our supreme court has recognized the difficulty in regulating the activity of driving under the influence of drugs because unlike alcohol, the effects of drugs “can vary greatly among those who use them.” *State v. Comried*, 693 N.W.2d 773, 776 (Iowa 2005). Further, “[u]nlike the blood alcohol concentration test used to measure alcohol impairment there is no similar test to measure [drug] impairment. There is, though, as was used here, a test to measure the use of [drugs] . . . in a person’s body.” *Loder v. Iowa Dep’t of Transp.*, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000).

Iowa’s implied consent law is found in chapter 321J of the Iowa Code. The statute establishes the basic principle that in exchange for the privilege of using the public highways, a driver impliedly agrees to submit to a test to determine blood alcohol concentration or the presence of a controlled substance. *State v. Hutton*, 796 N.W.2d 898, 902 (Iowa 2011). Where implied consent is invoked, the State must adhere to the procedural requirements outlined in Iowa Code chapter 321J. See *State v. Schlemme*, 301 N.W.2d 721, 723 (Iowa 1981)

(discussing the procedural requirements of what is now Iowa Code chapter 321J). As relating to this case, Iowa Code section 321J.11 provides instructions for the collection of a urine sample, stating in relevant part, “any peace officer, using devices and methods approved by the commissioner of public safety . . . may take a specimen of a person’s urine for the purpose of determining the presence of a controlled substance or other drugs.”

When a sample is properly taken, Iowa Code section 321J.15 provides for the admission of “evidence in any action” and states, in relevant part,

Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating a motor vehicle in violation of section 321J.2 or 321J.2A, evidence of the alcohol concentration or the presence of a controlled substance or other drugs in the person’s body at the time of the act alleged as shown by a chemical analysis of the person’s blood, breath, or urine is admissible.

Finally, Iowa Code section 321J.18 provides for the admission of “competent evidence” in an OWI proceeding, stating,

This chapter does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage or a controlled substance or other drug, including the results of chemical tests of specimens of blood, breath, or urine obtained more than two hours after the person was operating a motor vehicle.

A. Collection of Urine Sample

The foundational requirements of 321J.11 necessitate our review of Iowa Administrative Code chapter 661-157. Iowa Administrative Code rule 661-157.3 governs the collection and labeling of urine in OWI cases under chapter 321J of the Iowa Code for purposes of determining alcohol or drug concentration. The requisite procedures for the collection of a urine sample in drug cases include:

661—157.3(321J) Urine collection. A peace officer who collects a sample of a subject’s urine for the purposes of determining alcohol or drug concentration shall proceed as follows.

157.3(1) The collection shall be made in the presence of a peace officer or other reliable person under the supervision of a peace officer. The peace officer or other person in the presence of the subject shall be of the same gender as the subject.

157.3(2) As soon as practicable, the subject shall urinate into a urine alcohol kit-supplied bottle, cup, or other suitable container which is clean, dry, and free from any visible contamination. Anticoagulant and antimicrobial substances in a blood or urine kit do not constitute visible contamination.

.....
157.3(5) A listing of test kits known to meet the requirements of subrules 157.3(2), 157.3(3), and 157.3(4) may be found on the criminalistics laboratory Web site. . . .

.....
157.3(7) The peace officer shall label the container showing the date and time the sample was collected and identifying the peace officer, the subject, and the person present during the collection of the sample if other than the peace officer.

Iowa Admin. Code r. 661-157.3 (2011).

The State directs our attention to the narrow statement of purpose for the chapter, “The commissioner, by these rules, approves the following devices and methods *to take* a specimen of a person’s breath or urine for the purpose of determining the alcohol or drug concentration”—that is, how the sample is to be “collected.” *Id.* r. 661-157.1 (emphasis added).

The district court correctly noted the use of a dipstick is not provided for under the administrative rules, as the rules only pertain to the *collection* and subsequent labeling of a urine sample. Here, Emgarten was taken into the bathroom with a female jailer, who was deemed a “reliable person,” and provided the urine sample in a “suitable container” “free from any visible contamin[ants].” *Id.* r. 661-157.3(1), (2). After Deputy Gries unwrapped the sealed dipstick and

performed a preliminary test for drugs, the sample was transferred to another suitable container free from any visible contaminants, sealed in the appropriate manner, labeled, and sent to the DCI laboratory.¹ It is clear from the testimony offered that the procedures outlined under the administrative rules for collection of the urine sample were followed. We therefore find the urine sample itself was collected in a manner consistent with 321J.11 and did not violate the administrative rules.

B. Admissibility under Iowa Code section 321J.15

We now consider whether Deputy Gries's insertion of a dipstick into the urine sample contaminated the sample such that the lab test results should have been suppressed. At the suppression hearing, the State had the burden of proving "those foundational facts necessary for the admission of results of tests conducted pursuant to chapter 321[J]." *Heidemann v. Sweitzer*, 375 N.W.2d 665, 668–69 (Iowa 1985). Although nothing in Iowa Administrative Code rule 661-157.3 addresses the insertion of a dipstick to perform a preliminary test for drugs prior to the sample being sent for laboratory testing, we recognize Emgarten's concern regarding the integrity of the urine sample following the insertion of a dipstick.

Deputy Gries explained at the suppression hearing that he used the dipstick to perform a preliminary test for drugs,

Because at the time, I wanted to—if [Emgarten] was, as I felt, highly under the influence, I didn't want to release her. I wanted to arrest her that night. The reason I wanted to arrest her that night is for her own well-being and for . . . the liability of the

¹ Emgarten makes no claim that either the collection container or the second container were not suitable containers or contaminated in any way.

sheriff's office. What the dipstick allows me to do is to test to see if there's stuff in the urine, specifically drugs. In this case, I felt stimulants were present, and short of that, I don't have any other way of testing urine without a two- to three-month, sometimes even longer, waiting period.

Unlike a blood alcohol test, which can be performed by use of a DataMaster machine housed in most law enforcement facilities, testing for the presence of drugs is more difficult. The purpose of Gries's use of the dipstick in the collected sample was to determine whether to arrest Emgarten or to allow her to return to the public roadways—thereby advancing the purpose of Iowa Code chapter 321J. See *Welch*, 801 N.W.2d at 594 (explaining the purpose of Iowa Code chapter 321J).

Justin Grodnitzky, a criminalist at the Iowa Crime Laboratory, testified that a majority of drug recognition experts use a container that contains a preliminary field test—here, the dipstick—to test for the presence of drugs in a urine specimen that is later submitted to the laboratory. While Grodnitzky admitted the dipstick used in this case was not a “collection device” approved by the Department of Public Safety, he further explained that there is nothing addressing the use of a dipstick in the Iowa Administrative Code rules. He testified the urine sample collected from Emgarten and sent to the laboratory detected “metabolites,” or drugs, that had been processed through the filtration system of the body. For the stick to have been contaminated as Emgarten suggests, someone would have had to have infused the stick with urine containing the drug metabolites, and then placed it in the sealed wrapping before Deputy Gries opened it and inserted it into Emgarten's urine sample. Grodnitzky

stated the type of field testing performed by Gries, using a newly-opened dipstick, does not contaminate the urine specimen for laboratory testing. He also confirmed that there was nothing in the particular dipstick utilized in this case that would contaminate the laboratory analysis.

As we have determined, the administrative rules regarding implied consent pertain only to the *collection* of the urine sample and not a preliminary test to determine whether the defendant could safely return to the public roadways. The purpose of the procedural requirements in implied consent actions “is to protect the health of the person submitting to the test and to guarantee the accuracy of the test for use in judicial proceedings.” *Schlemme*, 301 N.W.2d at 723. While our courts have held evidence inadmissible where there is non-compliance with procedural standards, our courts have also “adhered to the general purposes of the chapter and allowed admission of evidence when objections based upon specific lack of foundation requirements did not endanger the defendant’s health or did not endanger the accuracy of the test.” *Id.* at 723–24.

There was nothing to suggest the accuracy of the lab test was compromised by use of the dipstick to perform a preliminary test for drugs. Moreover, because the State complied with the guidelines set forth in Iowa Administrative Code rule 661-157.3 and adhered to the general purposes of the chapter—as neither Emgarten’s health nor the accuracy of the test were endangered—the evidence of the chemical test results is admissible under Iowa Code section 321J.15. See *King v. State*, ___ N.W.2d ___, 2012 WL 1366597,

at *5 (Iowa 2012) (“We will uphold a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court.” (citation omitted)).

C. Admissibility under Iowa Code section 321J.18

We also find that the district court properly admitted the evidence of the chemical test results under the more encompassing provision of Iowa Code section 321J.18. Iowa Code chapter 321J “does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage or a controlled substance or other drug.” Iowa Code § 321J.18. In addition, Iowa Code section 321J.18, “expresses our legislature’s intent that the chapter not be construed as limiting the introduction of competent evidence bearing on whether an accused was intoxicated.” *State v. Demaray*, 704 N.W.2d 60, 64 (Iowa 2005) (internal citation omitted).

Because the chemical test results bear on the question of whether Emgarten was under the influence of drugs, the evidence is competent and therefore also admissible under Iowa Code section 321J.18. See *id.* at 64 (defining “competent evidence” as “evidence that is admissible and relevant to the point in issue”). We therefore affirm the district court’s denial of Emgarten’s motion to suppress.

AFFIRMED.