IN THE COURT OF APPEALS OF IOWA

No. 3-379 / 12-1761
Filed June 12, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARY EDWARD ROCKOW,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Gregg R. Rosenbladt, Judge.

A defendant appeals his judgment and sentence for operating while intoxicated, contending that the district court erred in failing to suppress evidence of his breath test. **AFFIRMED.**

Colin C. Murphy of Law Offices of Colin C. Murphy, P.C., Clear Lake, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Rachel A. Ginbey, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Gary Rockow appeals his judgment and sentence for operating while intoxicated (first offense). He contends the district court should have suppressed the result of his breath sample provided at the police station.

I. Background Facts and Proceedings

Clear Lake Police Officer Zachary Hall, responding to a citizen complaint of an erratic driver, followed Rockow's motorcycle as he proceeded along city streets. After seeing Rockow weave in his lane, Hall stopped him and administered field sobriety tests, which Rockow failed. Rockow consented to a preliminary breath test (PBT), which revealed an alcohol concentration well over the legal limit.

Hall transported Rockow to the Clear Lake Police Department and began the process of administering a DataMaster breath test. After the machine was calibrated, Rockow mentioned that he needed to remove chewing tobacco from his mouth. Hall waited an additional fifteen minutes before having Rockow provide a breath sample. The test revealed an alcohol concentration of .124.

The State charged Rockow with operating while intoxicated. Rockow moved to suppress the DataMaster test result on the ground that, when the earlier PBT was administered, he had chewing tobacco in his mouth that may have affected the PBT result, precluding subsequent testing. He also asserted that suppression of the DataMaster test result was required because he was not placed under arrest. The district court denied the motion, and the case proceeded to trial, with the jury finding Rockow guilty as charged. This appeal followed the imposition of the sentence.

II. Analysis

A person suspected of operating a motor vehicle while intoxicated is deemed to have consented to the withdrawal of a bodily substance for alcohol testing. Iowa Code § 321J.6(1) (2011). The withdrawal of the substances and the tests shall be administered at the written request of a peace officer (1) who has reasonable grounds to believe that the person was operating a motor vehicle while intoxicated and (2) who has found that any of seven statutory conditions has been met. *Id.*

Rockow does not dispute that Hall had reasonable grounds to believe he was driving while intoxicated; he contends the second requirement, compliance with statutory conditions, was not satisfied.

Hall invoked two of these conditions: (A) "[a] peace officer has lawfully placed the person under arrest for" operating under the influence and (B) "[t]he preliminary breath screening test was administered and it indicated an alcohol concentration equal to or in excess of" .08. *Id.* § 321J.6(1)(a), (d). We will address the evidence supporting each.

A. Preliminary Breath Test

Rockow argues that Hall did not follow the instructions for administering the PBT, requiring suppression of the subsequently-administered DataMaster test result. *See* Iowa Admin. Code r. 661-157.5(2) ("Any peace officer using an approved device shall follow the instructions furnished by the manufacturer for use of such a device."). Those instructions required a "fifteen-minute deprivation period" during which "no foreign substance is introduced into the mouth."

Rockow's argument is premised on his assertion that he had chewing tobacco in his mouth during the PBT, as well as the subsequent Datamaster test. The State disputes this premise, stating that "the available evidence contradicts" the assertion. On this question, the district court found as follows:

> Officer Hall did have the Defendant under his general observation at all times following the stop of the motorcycle, until the Defendant was placed into the back of the patrol car. Officer Hall did not check the Defendant's mouth prior to the administration of the PBT test, but neither did he see the Defendant introduce any substance into his mouth. The Defendant did not volunteer that he had a chew of tobacco in his mouth at the time he gave the PBT test. It is reasonable to assume that the Defendant put the tobacco into his mouth in the patrol car, on the way to the police station, and that he voluntarily offered to remove the chew before he provided the DataMaster test. This was followed by fifteen minutes of direct observation before the DataMaster test was completed. The Court finds and concludes that Officer Hall substantially complied with the instructions for the PBT test, and that the defendant was sufficiently observed prior to the administration of the PBT.

These findings are supported by substantial evidence. *See State v. Green*, 680 N.W.2d 370, 372 (Iowa 2004) (setting forth the standard of review).

Hall testified that he did not see anything on the street that would indicate Rockow had tobacco in his mouth. While he also said that, given the tobacco in Rockow's mouth at the station, there was "[p]robably a good chance" Rockow had the tobacco in his mouth at the time of the PBT, a video recording of the stop reveals that Rockow removed a can of chewing tobacco from his saddlebag only after the preliminary breath test was completed. *See State v. Hershey*, 348 N.W.2d 1, 3 (Iowa 1984) ("Any reasonable likelihood that the arrested person had anything to smoke, eat or drink can be negated by circumstantial as well as direct evidence."). Because the court's findings are supported by substantial

circumstantial evidence, we conclude the court did not err in determining that this statutory condition was satisfied.

B. Arrest

Rockow next contends there was no basis for invoking the "arrest" condition of section 321J.6(1).

Iowa Code section 804.5 defines "arrest" as "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." Section 804.14 specifies the manner of arrest as follows:

> The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and 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 . . . .[1]

"[M]ere submission to authority does not constitute an arrest." *State v. Rains*, 574 N.W.2d 904, 910 (Iowa 1998). There must be an assertion of authority by a peace officer with the purpose to arrest that is followed by submission to that authority by the arrestee. *Id.* "[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 is merely detention for investigative purposes." *State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997).

Rockow hones in on the principle articulated in *Dennison*. He argues he was not arrested but detained for investigative purposes. The district court found otherwise, stating:

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[1] Minor amendments to this provision were contained in House File 556 and approved by the governor on May 1, 2013. H. Journal 985, 85th Gen. Assemb., 1st Sess. (Iowa 2013).

> The Court also finds and concludes, that while Officer Hall did not explicitly place the Defendant under arrest for OWI, in so many words, all indications are that the Defendant was, in fact, under arrest at the conclusion of the field sobriety tests and the PBT. He was placed into a patrol car, and his requests to go somewhere else other than the police station were denied. He was read his *Miranda* warning. The arrest of the Defendant was supported by abundant probable cause. Mr. Rockow was informed that he would be charged with OWI unless a breath sample at the police station was below the legal limit.

These findings are supported by substantial evidence. Officer Hall told Rockow he had enough to "hook" Rockow for operating while intoxicated and said he had "enough clues to arrest [Rockow] for operating." After the PBT revealed an alcohol concentration over the legal limit, Hall told Rockow that he would have to transport him to the station. As the district court noted, he took Rockow to the station in a police vehicle. While he did not tell Rockow he was under arrest, "[a]n arrest to be effective does not require formal words of arrest or stationhouse bookkeeping." *See State v. Harvey*, 242 N.W.2d 330, 339 (Iowa 1976) (quoting *United States v. Hensley*, 374 F.2d 341, 348 (6th Cir. 1967)).

Because the court's finding of an arrest is supported by substantial evidence, we conclude the district court did not err in determining that this statutory condition was satisfied.

III. Disposition

We conclude the district court did not err in denying Rockow's motion to suppress the DataMaster test result. We affirm his judgment and sentence for operating while intoxicated.

AFFIRMED.