IN THE COURT OF APPEALS OF IOWA

No. 3-412 / 12-1638
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN DAVID ROLLING,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, Peter B. Newell, District Associate Judge.

A defendant appeals his conviction for operating while intoxicated, first offense. **AFFIRMED.**

David R. Johnson of Brinton, Bordwell & Johnson, Clarion, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and Dan Wiechmann, County Attorney, for appellee.

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

VOGEL, P.J.

Ryan Rolling appeals his conviction for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2011).[1] He argues the district court erred in finding the police officer did not violate Rolling's rights under Iowa Code section 804.20. Because we find there is sufficient evidence to support the district court's finding the officer's actions were reasonable, we affirm the district court.

I. Background Facts and Proceedings

After failing three field sobriety tests and providing a preliminary breath sample above the legal limit, Rolling was brought to the police station at approximately 2:50 a.m. on October 8, 2011, after being arrested for driving while intoxicated. Officer Alan Brandt read Rolling his *Miranda* rights and the implied consent advisory. At approximately 2:56 Rolling requested to call "his attorney." After allowing the phone to ring, but receiving no answer or an answering machine so that a message could be left, Officer Brandt asked Rolling if he would like to try to contact a different attorney. Rolling refused. Rolling then requested to call Keith Koenen and identified Koenen as his stepfather.[2] Asking for both advice on whether to consent to the Data Master test and to help locate an attorney, Koenen replied he would attempt to locate an attorney for Rolling and call back. Approximately eleven minutes later, after a conversation between Officer Brandt and Rolling regarding license revocation, Rolling called Koenen again. This second phone call lasted approximately seven minutes. Officer

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[1] Rolling was originally charged with operating while intoxicated, second offense.

[2] Koenen is not married to Rolling's mother. Koenen is Rolling's mother's paramour and cohabitates with her.

Brandt told Koenen it was "time to wrap it up." At 3:31 a.m. Rolling signed the consent form to take a sample of his breath. After Officer Brandt started calibrating the Data Master machine Rolling asked if he could speak to his mother. Rolling testified he heard his mother speaking to someone in the station lobby. Officer Brandt responded, "Once we complete the test." Rolling agreed. Rolling provided a sample of his breath with the test results of .251 mg%BAC.

Rolling was charged by trial information of operating while intoxicated second offense on October 18. He filed a motion to suppress on February 22, 2012, alleging his rights under Iowa Code section 804.20 were violated when he was not allowed "to call or consult with his mother prior to having to decide whether to consent or refuse chemical testing." The motion was denied by the district court.

Rolling waived his right to a jury trial, and the case proceeded to a stipulated bench trial on the minutes of testimony. The district court found Rolling guilty of operating while intoxicated, first offense, and sentenced him to 365 days in jail with all but two days suspended. Rolling appeals.

II. Standard of Review

We review the district court's interpretation of Iowa Code section 804.20 for errors at law. *State v. Walker*, 804 N.W.2d 284, 289 (Iowa 2011). "We affirm the district court's suppression ruling when the court correctly applied the law and substantial evidence supports the court's fact-finding." *Id.*

III. Iowa Code Section 804.20

On appeal, Rolling argues section 804.20 was violated both by denying access to his mother at the station and by not providing him with a reasonable

number of telephone calls to secure an attorney. Rolling only argued the first issue before the district court, and the district court accordingly did not rule on the second. The only issue properly preserved is whether the officer's action in denying Rolling an opportunity to speak to his mother after he had been allowed to make three phone calls and after he signed a written consent form was so unreasonable as to violate section 804.20 and require the court to exclude evidence of the subsequent breath test. *See Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009) (finding issues cannot be raised for the first time on appeal).

Iowa Code section 804.20 provides in its entirety:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

This guaranteed right is a limited one and only requires a peace officer to provide the suspect with a reasonable opportunity to contact a family member. *State v. Hicks*, 791 N.W.2d 89, 94 (Iowa 2010). In addition, this section "is to be applied in a pragmatic manner, balancing the rights of the arrestee and the goals of the chemical-testing statutes." *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005).

To determine whether Rolling was denied his right to contact a family member under section 804.20, two distinct inquiries are required. *See Hicks*, 791 N.W.2d at 94. There is no dispute as to the first inquiry—the record shows Rolling invoked his rights under section 804.20. *See id.* (finding a suspect invokes his rights by "specifically, separately, and unequivocally" requesting to speak with a family member). The question becomes whether Rolling was afforded the rights section 804.20 guarantees. *See id.*

In finding the officer's actions were reasonable and therefore not in violation of section 804.20, the district court found:

> In the present case, the arresting officer knew that the Defendant had spoken to his mother at the scene. The officer knew that the Defendant had made an attempt to reach an attorney. The Defendant had spoken to a family member or a person identified as a family member on two occasions, and the Defendant had consented to submit to a breath test. The officer had initiated the procedure for collecting a breath sample when the Defendant requested to speak to his mother. The officer advised the Defendant that he could speak to his mother after the breath sample had been collected, and the officer did allow the Defendant to do this.

Section 804.20 only requires a peace officer to provide the arrestee with a reasonable opportunity to contact a family member or attorney. *Id.* Ordinarily, this right to counsel is satisfied if an arrestee is allowed to make a telephone call to his attorney. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). We conclude the right to consult with a family member is similarly satisfied if an arrestee is permitted to call a family member. In this case, Rolling already had the opportunity to speak with his mother before he was taken to the station. Although he was not able to recall much of that conversation or how long it lasted, he did recall giving her his cell phone and things from his pocket. At the

station and before consenting to the test, Rolling placed three calls over a period of about forty-five minutes, including speaking twice to a man he identified as his stepfather. After not being able to reach "his attorney," the officer asked Rolling if he would like to contact another attorney. Rolling refused the suggestion.

Rolling argues there was still time left before the two hour limitation of section 321J.2(6) was a problem. *See* Iowa Code § 321J.2(6) (providing the time for consultation is effectively limited by law enforcement's interest in obtaining the test within two hours of the defendant's driving). However, "[t]he two-hour period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing." *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa Ct. App. 1991). Reviewing the record as a whole, we agree with the district court that Rolling was provided a reasonable opportunity to contact a family member. *See Hicks*, 791 N.W.2d at 94.

IV. Conclusion

The district court correctly applied the law and substantial evidence supports the court's fact-finding. We affirm the district court's suppression ruling because the officer afforded Rolling his rights under Iowa code section 804.20.

AFFIRMED.