IN THE COURT OF APPEALS OF IOWA

No. 7-082 / 06-0810
Filed February 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SAMUEL JOSEPH WINBERG,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan Callahan (Trial) and James D. Coil (Motion to Suppress), District Associate Judges.

Samuel Winberg appeals his conviction for operating while intoxicated, third offense. **AFFIRMED.**

Kevin D. Engels of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Charity McDonell, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Samuel J. Winberg appeals his conviction for operating while intoxicated (OWI), third offense. He contends the district court erred in denying his motion to suppress, arguing his consent to submit to a breath test under the implied consent advisory was involuntary. We affirm.

I. Facts and Prior Proceedings

At approximately 2:30 in the morning on May 8, 2005, Officer Ryan Bellis stopped a swerving car. The driver of the vehicle, Winberg, smelled strongly of alcohol and had bloodshot and watery eyes. Winberg consented to a field sobriety test and a preliminary breath test. Winberg was unable to properly complete the field sobriety tests, and his preliminary breath test registered blood alcohol content (BAC) in excess of .080. He was arrested for OWI and transported to the Cedar Falls Police Department.

A police video documented a large portion of Winberg's experience at the police department. Before Bellis had a chance to finish reading the implied consent form, Winberg stated he was not going to take the test. Bellis explained that if he gave a breath test that was over the legal limit, then the administrative license revocation would be for a period of one year, but if he refused the test then the revocation would be for a period of two years. Winberg then wanted to know whether his prior deferred judgment and OWI conviction would make this a third OWI offense. Up to this point, Bellis only knew of one previous OWI conviction, so he took the time to verify Winberg's criminal record. He then confirmed that this would be a third OWI offense. A discussion ensued as to whether this would change the length of time his license would be revoked.

Bellis told him he did not know the exact length of time his license would be revoked. At one point, Winberg asked Bellis for his opinion on what to do. Bellis told him he was not an attorney, and offered him the opportunity to speak with a family member or an attorney. Winberg spoke with his brother, and then once again stated he did not want to take any tests.

Bellis requested that Winberg sign the implied consent form and check the box that indicated he refused to provide a breath test. Winberg refused to sign the form, but then told Bellis to sign the form for him. Bellis told him that he could not sign the form for him. Winberg said he would sign the form if he could be guaranteed that he would only lose his license for a year. Bellis told him that he could not guarantee him anything. Winberg eventually signed the form and provided a breath specimen yielding a .164 BAC.

Prior to trial, Winberg moved to suppress the breath test results. He argued his consent was not voluntary because Bellis did not accept his repeated refusals to take the test and because Bellis repeatedly explained the ramifications of refusing to take the test. The district court denied the motion.

Winberg stipulated to a trial to the court on the minutes of testimony and the exhibits offered into evidence at the suppression hearing. He was found guilty as charged. He now appeals, contending the district court erred in refusing to grant his motion to suppress.

II. Standard of Review

"When a person who has submitted to a chemical test asserts that the submission was not voluntary, we evaluate the totality of the circumstances to determine whether the decision was freely made or coerced." *State v.*

Gravenish, 511 N.W.2d 379, 381 (Iowa 1994). Although we are not bound by the trial court's factual findings, we give considerable weight to the court's assessment on the question of voluntariness. *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992). Our review of this constitutional issue is de novo. *Gravenish*, 511 N.W.2d at 381.

III. Merits

For consent to be valid, it must be voluntary and "uncoerced." *Id.* When the defendant alleges coercion, the State must prove by a preponderance of the evidence the absence of undue pressure or duress. *Id.* A statement is voluntary if it is the product of essentially free and unconstrained choice made by a defendant "whose will was not overcome or whose capacity for self-determination was not crucially impaired." *Id.*

Our supreme court has identified a number of factors to help determine voluntariness. These factors are:

> Defendant's age; whether defendant had prior experience in the criminal justice system, whether defendant was under the influence of drugs; whether *Miranda* warnings were given; whether defendant was mentally "subnormal;" whether deception was used; whether defendant showed an ability to understand the questions and respond; the length of time defendant was detained and interrogated; defendant's physical and emotional reaction to interrogation; [and] whether physical punishment, including deprivation of food and sleep, was used.

Payton, 481 N.W.2d at 328-29 (internal citations omitted). Most of these factors are not applicable to this case. For example, Winberg is not mentally subnormal, he does not allege a *Miranda* violation, he was not subject to physical punishment or sleep deprivation, and he does not present any evidence concerning a physical or emotional reaction to the questions posed by Bellis.

Also, Winberg was a fully functioning twenty-seven year old adult at the time of the arrest, and he does not allege the alcohol made him susceptible to coercion. At the suppression hearing Winberg testified that "he had been advised not to blow before" and acknowledged that he had "been down this road before." This, when coupled with his two prior OWI offenses, illustrates he had prior experience in the criminal justice system.

Winberg's primary argument is that the length of time spent discussing the consent form and the repeated statements regarding the ramifications of refusing to consent to the test made him realize Bellis would not accept a refusal. When asked why he changed his mind and consented to the test, Winberg stated

> I just didn't feel as if we were getting anywhere. I didn't feel I was going to get out of the room if I don't—if I didn't take the test because we had been in there talking *for over an hour*.

(Emphasis added.) Winberg's testimony and the videotape of his discussion with the police officer belie this argument.

Winberg acknowledged that Bellis never said he could not leave unless he consented to the test. Also, Winberg's claim that he spent "over an hour" discussing the consent form with Bellis is grossly exaggerated and not supported by the record. Winberg arrived at the police station at 2:53 and provided his breath sample at 3:40. In the span of these forty-seven minutes Winberg was checked in to the police station, searched, and had a lengthy phone conversation with his brother. Bellis also left Winberg alone for a nine-minute span while he verified whether this would be Winberg's second or third OWI offense. Much of the conversation between Bellis and Winberg consisted of Winberg asking questions and explaining that he "was not a bad guy." Bellis was very patient

and courteous in answering Winberg's questions. We conclude the length of time spent discussing the informed consent form was not excessive.

Winberg also claims the consent only came after he was provided inaccurate information by Bellis. This argument is without merit and not supported by the record. Winberg does not point to any specific instances where Bellis provided inaccurate information. Winberg's claim that Bellis was untruthful when he said that he could not sign the form for Bellis does not constitute deception. Winberg asked Bellis to sign the form for him, and Bellis correctly stated that he could not sign his name to the form. The fact that Bellis could have brought in another witness to verify that Winberg refused to sign the form does not constitute deception.

Finally, Winberg contends "fundamental rules of fairness" suggest that law enforcement officers should not be allowed to make additional requests for consent once they receive a clear and unequivocal refusal. Because "anything less than an unqualified, unequivocal consent is a refusal," *Ferguson v. State Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988), Winberg argues an unqualified, unequivocal refusal bans law enforcement officers from further discussing the implied consent form. We find no legal basis for this argument. We also do not agree that Winberg unequivocally refused to take the test. His numerous questions about the OWI process and the potential charges he faced made his refusal less than unequivocal.

We find the State proved by a preponderance of the evidence that there was not duress or undue influence. Even if we assume the test was inadmissible, Winberg is still not entitled to a new trial. The district court found

Winberg guilty of OWI pursuant to the "under the influence" alternative of Iowa Code section 321J.2 as well as under the alcohol concentration alternative. *See* Iowa Code § 321J.2 (providing that a person commits the offense of operating while intoxicated if the person operates a motor vehicle either while under the influence of an alcoholic beverage or while having an alcohol concentration of .08 or more). A person is "under the influence" when their consumption of alcohol results in one or more of the following: (1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; or (4) the person has, to any extent, lost control of bodily actions or motions. *See State v. Dominquez*, 482 N.W.2d 390, 392 (Iowa 1992). The person's manner of driving is relevant evidence bearing on whether he or she was under the influence. *See id.*

In the present case, Winberg's erratic driving behavior shows his judgment was impaired. His vehicle swerved several times from the outside lane to the inside lane and almost struck the median. Also, his slurred speech and inability to complete field sobriety tests demonstrated that he had, to some extent, lost control of his bodily actions or motions. This, when coupled with his blood shot, watery eyes and the strong odor of alcohol, constitutes substantial evidence to support the district court's conclusion that he was under the influence while operating a vehicle.

We affirm the district court's decision.

AFFIRMED.