IN THE COURT OF APPEALS OF IOWA

No. 7-614 / 06-2060
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JOSEPH TEBBE,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, Hobart Darbyshire (motion to suppress), Patrick J. Madden (plea), David H. Sivright (sentencing), Judges.

Defendant appeals the district court's denial of his motion to suppress evidence and his conviction for operating while intoxicated, second offense. **AFFIRMED.**

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, and Phil Tabor, County Attorney.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Defendant, Michael J. Tebbe, was charged with operating while intoxicated, second offense, in violation of Iowa Code sections 321J.2(1)(a) and 321J.2(2)(b) (2005). Tebbe contends that a deceptive statement and conduct of the arresting officer invalidated his waiver of constitutional rights. We affirm.

I. BACKGROUND.

Tebbe filed a motion to suppress contending certain evidence was obtained in violation of his privilege against self-incrimination because the officer who advised him of his *Miranda* rights was deceptive in having him sign a waiver of rights form at the Maquoketa Law Center. The motion to suppress came on for hearing before district court Judge Hobart Darbyshire who noted that Tebbe

> argues that because the officer did not read that portion of the rights form to the defendant before having him sign it, the Court should suppress any inculpatory statement, admissions or videos of the defendant's processing at the Maquoketa Law Center.

Judge Darbyshire then denied the motion finding nothing the officer did could be characterized as deceptive.

The matter then came on for trial before district court Judge Patrick J. Madden. Tebbe waived a jury trial and agreed to the court taking judicial notice of the minutes of testimony filed in the case. The only reference in the minutes to what might be a specific statement made by Tebbe at the Law Enforcement Center is that Officer Joel Driscoll "will testify that he read the Implied Consent Advisory to the Defendant; that the Defendant refused a BAC test on the NPAS DataMaster cdm at the Maquoketa Law Center."

Judge Madden noted Tebbe did not claim any information in the minutes of testimony was incorrect for the purpose of the bench trial, and based on the minutes of testimony, found Tebbe guilty of operating while intoxicated, second offense.

Tebbe appeals his conviction claiming the district court erred in denying his motion to suppress. He requests that we reverse the district court's ruling on the motion and remand for a new trial without the allegedly inadmissible evidence.

II. FIFTH AMENDMENT VIOLATION.

The right to *Miranda* warnings is only triggered when there is both custody and interrogation. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). "Custodial interrogation is defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *State v. Simmons*, 714 N.W.2d 264, 274 (Iowa 2006) (quoting *State v. Turner*, 630 N.W.2d 601, 607 (Iowa 2001)). The minutes of testimony make no reference to statements made by Tebbe in response to custodial interrogation. Tebbe's brief fails to set forth what custodial interrogation he seeks to suppress.

We need not address Tebbe's contention that his waiver was involuntary. Constitutional errors, including violations of the Fifth and Fourteenth Amendments, do not require reversal of a conviction if the error was harmless. *State v. Peterson*, 663 N.W.2d 417, 430-31 (Iowa 2003). This requires the State to prove beyond a reasonable doubt that the error did not contribute to the

verdict. *Id.* at 431. We analyze the actual basis used to reach the verdict rather than speculating what could have been used. *Id.* In other words,

> "Harmless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.'" *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182, 189 (1993) (quoting *Yates v. Evatt,* 500 U.S. 391, 404, 111 S. Ct. 1884, 1893, 114 L. Ed. 2d 432, 449 (1991)) (emphasis added). The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. *Sullivan*, 508 U.S. at 279, 113 S. Ct. at 2081, 124 L. Ed. 2d at 189.

Peterson, 663 N.W.2d at 431. We are to determine what evidence the fact-finder considered and then "weigh the probative force of that evidence against the erroneously admitted evidence standing alone." *Id.* (citing *Yates*, 500 U.S. at 404, 111 S. Ct. at 1893, 114 L. Ed. 2d at 449).

Tebbe makes no claim that any specific statements in the minutes of testimony were statements he made in violation of his constitutional rights. Furthermore, he did not claim at trial any information in the minutes of testimony was incorrect for purpose of the bench trial. Judge Madden included the minutes of testimony by reference as the findings of fact upon which his decision was based and, based on the minutes he found Tebbe operated a motor vehicle in Jackson County, Iowa, under the influence of alcohol. The only conclusion we can draw is that the State has proved beyond a reasonable doubt that Tebbe has not suffered any prejudice.

AFFIRMED.