IN THE COURT OF APPEALS OF IOWA

No. 9-454 / 08-1735
Filed September 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRANDEE RAE PETTENGILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Casey D. Jones, District Associate Judge.

A defendant appeals her conviction of operating while intoxicated, second offense. **REVERSED AND REMANDED.**

Robert Rehkemper and Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Harold Denton, County Attorney, and Jason Burns, Assistant County Attorney, for appellee.

Considered en banc.

MANSFIELD, J.

Brandee Pettengill appeals her conviction for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2007). She contends the district court erred in denying her motion to suppress her breath test result. Because we conclude Pettengill's statutory rights under Iowa Code section 804.20 were violated, we reverse and remand.

I. Background Facts and Proceedings.[1]

At approximately 2:20 a.m. on March 4, 2008, a Marion police officer was inside a convenience store speaking with the clerk. He noticed two vehicles turn into the parking lot of the store and park next to each other. After the vehicles parked, a male passenger got out of one car, walked over to the other car, and "mooned" the female occupants of that car by dropping his pants and pressing his buttocks against the driver's side car window. Pettengill was the driver of this second car. Pettengill was twenty-one years old at the time.

The officer went outside and investigated the situation. Based on his conversations and observations, he concluded that the drivers of both vehicles appeared to be intoxicated. Pettengill failed the field sobriety tests and refused a preliminary breath test. At approximately 2:40 a.m., the officer placed her under arrest. The female driver of the other vehicle failed her field sobriety tests and was also arrested. Both women were taken to the Linn County Correctional Center. Another person already present at the jail was processed first, so the

[1] This summary is drawn largely from the district court's written ruling on the motion to suppress. Although we differ with the court's ultimate decision, we believe its factual findings were supported by substantial evidence.

officer did not explain and invoke implied consent on Pettengill until 3:35 a.m. A sheriff's deputy was also present.

After being read the implied consent advisory, Pettengill requested to call her father.[2] Pettengill placed a phone call to her father at 3:38 a.m. It took many rings for the father to answer the phone as he was sleeping and had taken some medication earlier in the day for a back problem.

After Pettengill's father answered the phone, a couple of minutes elapsed while he oriented himself and his daughter explained the situation to him. Pettengill's father tried to locate a phone number for an attorney. There was also some discussion about other matters. After about fourteen minutes, the arresting officer told Pettengill to focus on the sole issue of whether she would take the breath test. He advised that she had one minute left to discuss that with her father. Over Pettengill's objection, the arresting officer terminated the phone call at 3:53 a.m.

When asked why he terminated the phone call, the officer stated that although he did hear Pettengill discussing the breath test, "[t]here was a matter of minutes where she wasn't talking about whether or not to take the breath test." The officer elaborated:

> It ended with me telling her that she'd had ample opportunity to discuss the issue at hand. We gave her several opportunities to refrain from talking about things other than the breath test to her dad, and after a certain amount of time we felt it reasonable to tell her that the phone conversation was over.

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[2] Pursuant to the standard policy then in effect at the jail, the video and audio recording of the implied consent and the phone call were not preserved.

When the call ended, Pettengill did not request to make any additional phone calls. Pettengill testified that she was not told she could place any further phone calls. The arresting officer testified that Pettengill was asked if there was anyone else she wanted to call. The district court resolved this factual dispute in favor of Pettengill, finding, “The Defendant was not informed that she could make any other calls.” Pettengill then consented to submit to a breath test, which demonstrated that she had a blood alcohol content of .139.

Pettengill filed a pretrial motion to suppress the results of the breath test, asserting a violation of Iowa Code section 804.20. In its ruling, the district court first noted that it was not unreasonable for the conversation between Pettengill and her father to include other matters, given the time of day and the circumstances of the call. The court also commented that it “does not necessarily believe [the officer] needed to terminate the Defendant’s phone call to her father when he did.” However, “the bottom line is that the Defendant was provided a reasonable opportunity to discuss her options with a family member.” Consequently, the district court found no violation of Pettengill’s rights under section 804.20 and denied Pettengill’s motion to suppress.

Pettengill waived her right to a jury trial and stipulated to trial on the minutes of evidence. The district court thereafter found Pettengill guilty of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2(b). Pettengill now appeals the denial of her motion to suppress the breath test results.

II. Scope and Standard of Review.

Our review of the district court's interpretation of Iowa Code section 804.20 is for correction of errors at law. *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009); *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). "If the district court applied the law correctly, and there is substantial evidence to support the findings of fact, we will uphold the motion-to-suppress ruling." *Garrity*, 765 N.W.2d at 595.

III. Analysis.

A. Was There a Violation of Iowa Code section 804.20?

On appeal, Pettengill contends her rights pursuant to Iowa Code section 804.20 were violated when the officer terminated her phone call to her father after fifteen minutes. Section 804.20 provides, in relevant part:

> Any peace officer . . . 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.

Pursuant to this provision, a person has a limited statutory right "to call both an attorney and a family member." *Garrity*, 765 N.W.2d at 595; *State v. Vietor*, 261 N.W.2d 828, 831-32 (Iowa 1978). A police officer generally does not have a duty to advise a defendant of this right. *Moorehead*, 699 N.W.2d at 671; *but see Garrity*, 765 N.W.2d 597 (holding that a duty to advise of the scope of the right arises when the defendant asks to call someone not contemplated in the statute). However, once a defendant invokes this right, an officer must give the defendant a reasonable opportunity to call or consult with an attorney or family

member. *Moorehead*, 699 N.W.2d at 671; *Bromeland v. Iowa Dep't of Trans.*, 562 N.W.2d 624, 626 (Iowa 1997); *see Garrity*, 765 N.W.2d at 595 (stating that requests to call an attorney or family member are equally important); *State v. McAteer*, 209 N.W.2d 924, 925 (Iowa 1980) (stating a defendant's right to communicate with a family member is neither more nor less qualified than the right to communicate with an attorney).

A defendant's right to communicate with an attorney or family member is limited to circumstances "when that course will not materially interfere with the taking of a test" within the two-hour time limit set forth in section 321J.6(2). *See Vietor*, 261 N.W.2d at 832. Under that code section, a chemical test must be offered within two hours of the defendant taking or refusing a preliminary screening test or the defendant being arrested, whichever occurs first. Iowa Code § 321J.6(2). Therefore, "[s]ection 804.20 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).

Although we view this as a close case in some respects, the "pragmatic" approach set forth in the supreme court's precedents leads us to the conclusion that a violation of section 804.20 occurred. We reach this conclusion based on the following combination of four factors: First, there is no evidence that Pettengill was stalling. She did not place the call until 3:38 a.m. because implied consent was not invoked until that time. Second, when the arresting officer terminated Pettengill's phone call with her father, forty-seven minutes remained before the end of the two-hour time period set forth in section 321J.6(2). The district court found the officer did not "necessarily . . . need [ ] to terminate the

Defendant's phone call to her father when he did." Third, as the district court noted, "While the Court believes the Defendant may have discussed other matters with her father during the fifteen-minute conversation, the Court does not believe it was unreasonable to do so given the circumstances of the call, including the time of day, the nature of the call, and a father's natural concern for his daughter." A father who is on medication and is awakened in the middle of the night by his twenty-one-year-old daughter phoning from jail may need some time to gather his thoughts and address the situation. Finally, as the district court found, after Pettengill's call to her father was involuntarily terminated, she was not advised of the right to call anyone else. *See* Iowa Code § 804.20 ("Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney."). While a police officer does not generally have an obligation to advise an arrestee of his or her rights under section 804.20, the supreme court recently held that such an obligation arises when the arrestee asks to make a call that is *not* covered by section 804.20. *Garrity*, 765 N.W.2d 596-97. In these circumstances, the supreme court held that the officer "must explain the scope of the statutory right" and cannot "remain mute." *Id.* at 597. Here, once her conversation with her father was cut off, Pettengill would have logically assumed (unless told otherwise) that no further phone calls were allowed. Based on this specific combination of four circumstances, we hold that Pettengill's rights under section 804.20 were violated.

We recognize that the application of section 804.20 presents some difficult issues, especially when combined with the two-hour time limit prescribed in Iowa

Code section 321J.6(2). We have considerable sympathy both for the arresting officer, who was trying to do his job in good faith, and for the district court, which had to navigate the substantial number of legal precedents in this area. Many of those precedents are fact-specific. *See, e.g., Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa Ct. App. 1991) (stating that a prior decision "should be limited to its facts"). Ultimately, we believe that, under a fair reading of section 804.20 and the supreme court's precedents, it was inappropriate to terminate the defendant's middle-of-the-night phone call to her father involuntarily after fifteen minutes where the defendant was not stalling and the overall purpose of the call was to obtain relevant information and advice, where forty-seven minutes still remained to conduct the breath test, and where the defendant was not advised of the right to make any other calls.[3]

B. Is Reversal Required?

The exclusionary rule applies to violations of Iowa Code section 804.20, thus requiring the breath test result to be excluded. *See Garrity*, 765 N.W.2d at 597; *Moorehead*, 699 N.W.2d at 672-73. However, Pettengill is not automatically entitled to a new trial because the error in this case was not of constitutional dimensions. *See Garrity*, 765 N.W.2d at 597. Where, as here, a nonconstitutional error has occurred,

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[3] The district court denied relief because, in its view, "the bottom line is that the Defendant was provided a reasonable opportunity to discuss her options with a family member." With respect for the views of the district court, we disagree that this is the "bottom line." One purpose of section 804.20 is to allow the arrestee to call an attorney. *Garrity*, 765 N.W.2d at 596. When the arresting officer peremptorily cut off Pettengill's phone call to her father over her objection, and without advising her of the right to make any further calls, we believe that option was effectively eliminated.

> the test for determining whether the evidence [i]s prejudicial and therefore require[s] reversal [i]s this: "Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that [s]he has suffered a miscarriage of justice?"

Id. (citations omitted). Prejudice is presumed unless the record affirmatively established otherwise. *Id.* However, error is harmless when evidence obtained from a violation of section 804.20 is merely cumulative. *Id.*

In determining whether admission of the breath test result was harmless error, we first note that "[a] breath test result is important evidence in prosecutions for drunk driving." *Moorehead*, 699 N.W.2d at 673. In support of its verdict, the district court stated that the officer "detected an odor of alcohol about Defendant," that Pettengill "failed a series of sobriety tests," and that according to the breath test her blood alcohol level was .139. Although there was clearly other evidence of intoxication, the district court specifically relied on the breath test result in finding Pettengill guilty. Under the facts of this case, we cannot say that the admission of the breath test results did not injuriously affect Pettengill's rights. *See id.* at 672-73 (finding that the erroneous admission of a breath test was not harmless error in spite of the fact that the defendant "was speeding, did not immediately stop for the deputy, swerved over the center line twice, had an odor of alcohol, slurred speech, and glazed eyes, failed all field sobriety tests, and admitted he was 'drunk as hell' at the station."). Therefore, we must reverse and remand for a new trial.

IV. Conclusion.

We conclude Pettengill was not afforded her statutory rights under Iowa Code section 804.20 and the error was not harmless. Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED.

Sackett, C.J., and Potterfield and Doyle, JJ., concur; Vogel, Vaitheswaran, and Eisenhauer, JJ., dissent.

VOGEL, J. (dissenting)

As I would conclude that Pettengill was afforded her rights under Iowa Code section 804.20 (2007), I respectfully dissent and would affirm the district court.

Pettengill refused a preliminary breath test and was arrested at 2:40 a.m. After arriving at the police station, Pettengill invoked her right pursuant to section 804.20 and placed a phone call to her father at 3:38 a.m. Pettengill consulted with her father for fifteen minutes before the arresting officer terminated her phone call at 3:53 a.m. When Pettengill's phone call was terminated, forty-seven minutes remained in the two-hour time limit prescribed in Iowa Code section 321J.6(2).

It is important to consider that "[s]ection 804.20 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); *compare Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa Ct. App. 1991) (finding no violation after arrestee spoke with his attorney on the phone for twenty minutes and informed officers that he wanted to speak with his attorney in person, who later arrived at the police station when thirty-seven minutes remained in the two-hour period specified in section 321J.6(2)), *with Haun v. Crystal*, 462 N.W.2d 304, 305-06 (Iowa Ct. App. 1990) (finding a violation when defendant was awaiting a return phone call from his attorney and approximately an hour remained in the two-hour period specified in section 321J.6(2)). In determining whether a defendant's rights pursuant to section 804.20 were

violated, we objectively consider the surrounding circumstances. *See Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988).

Pettengill specifically argues that with forty-seven minutes remaining in the two-hour time limit prescribed in Iowa Code section 321J.6(2), her phone call should not have been cut short by the officer. I agree with the district court that the content of the discussion between Pettengill and her father was not by itself a sufficient reason to terminate the phone call. While the statute does suggest the purpose of allowing phone calls is "to secure an attorney," it does not restrict the content of any phone conversation. *See State v. Garrity*, 765 N.W.2d 592, 596 (Iowa 2009). As the district court found, given the circumstances of the call, it was not unreasonable for the conversation between Pettengill and her father to include other matters.

Nevertheless, I would find Pettengill's argument, and the majority's opinion, do not properly focus on the requirements of the statute. The issue is not under what circumstances an officer may terminate a phone call. Rather, the correct inquiry is whether Pettengill was afforded an opportunity to call or consult with an attorney or family member pursuant to section 804.20. *See State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). Our supreme court has stated, that "ordinarily the statutory right [pursuant to section 804.20] would be satisfied if the arrestee was allowed to make a phone call." *Ferguson*, 424 N.W.2d at 466 (citing *State v. Vietor*, 261 N.W.2d 828, 831-32 (Iowa 1978)). In the present case, once Pettengill invoked her right to speak with a family member, she was permitted to place the phone call and consult with her father for fifteen minutes. Following this phone call, Pettengill did not request to make another phone call to

either an attorney or family member. Therefore, Pettengill was not denied the opportunity "to call, consult, and see a member of the person's family or an attorney." Iowa Code § 804.20; *see also Tubbs*, 690 N.W.2d at 914.

As "the district court applied the law correctly, and there is substantial evidence to support the findings of fact, our scope of review should require that we uphold the motion-to-suppress ruling." *Garrity*, 765 N.W.2d at 595. Therefore, I would conclude that Pettengill was afforded her rights under Iowa Code section 804.20 and would affirm the district court.

Vaitheswaran and Eisenhauer, JJ., join this dissent.