IN THE SUPREME COURT OF IOWA

No. 17-0637

STATE of IOWA

Plaintiff-Appellee,

vs.

ROBERT A. DAVIS

Defendant-Appellant

APPEAL FROM THE MUSCATINE COUNTY DISTRICT COURT

THE HONORABLE GARY P. STRAUSSER

APPELLANT'S APPLICATION FOR FURTHER REVIEW

Court of Appeals Opinion filed May 2, 2018

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ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals panel issued a ruling directly in conflict with this Court's precedent in *State v. Moorehead,* 699 N.W. 667 (Iowa 2005), such that the Court must correct that error and at the same time clarify that a formal arrest is not necessary to trigger the statutory right of a person to communicate with a family member and an attorney, but that the right is triggered the moment the person is restrained of his liberty in custody.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P.

6.903(1)(g)(1) or (2) because: -this brief contains 4,831 words, excluding the parts of the brief exempted by Iowa R. App. P.

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/s/ Kent A. Simmons

Kent A. Simmons

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STATEMENT SUPPORTING FURTHER REVIEW

In his opening brief, Mr. Davis had originally determined this action was appropriate for the Court of Appeals. In its brief, however, the State relied on a mixture of reported and unreported cases. The brief claimed a police officer has a right to continue to complete his investigation before honoring a timely assertion of the right to speak with a family member or attorney, as guaranteed by Section 804.20, the Code. Mr. Davis changed his routing recommendation in his reply brief to recommend the Supreme Court retain this case to resolve this very important question affecting the proper administration of justice. The Court of Appeals panel followed the State's lead, relying heavily on unreported cases, to conclude Judge Strausser erred in suppressing field tests conducted while the Defendant was in full custody at the jail. This Court must vacate and correct the result to explain that the key question to triggering the statutory right is in the legal question as to whether the Defendant is in full custody, and not the factual question of whether the police officer has completed his investigation. Investigations and arrests for OWI are among the most common contacts between law enforcement

officers and the public. The panel's decision is in conflict with prior decisions of this Court. Need for proper resolution of the questions presented is critical as a matter of broad public importance.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a direct appeal that Robert A. Davis takes from his conviction after a bench trial.

PROCEEDINGS: The County Attorney filed a Trial Information on March 30, 2015, charging Mr. Davis with the sole count of Operating While Intoxicated (OWI), Second Offense in violation of Sections 321J.2(1)(a) and (b), the Code. (App. 3) The offense is an aggravated misdemeanor. In details set out below, Mr. Davis litigated an Amended and Substituted Motion to Suppress, challenging evidence on the basis of a violation of his statutory right to consult with counsel upon being taken into custody. The right is set out in Section 804.20, the Code. The motion proceeded to hearing, and the Honorable Gary P. Strausser issued a ruling granting the motion in part, and denying it in part. (Ruling on Motion to Suppress, 8/1/16; App. 13-20).

The case was submitted for trial on the basis of the suppression hearing transcript and several exhibits. One of the exhibits was the entire transcript of the hearing in the Department of Transportation (DOT) proceedings regarding the revocation of the privilege to drive. Upon the record made, Judge Strausser issued a verdict of guilt based upon the breath test result of .128 blood alcohol content from the DataMaster analysis. (Order on Verdict, 3/1/17; App. 28-31) Sentencing proceeded March 23, 2017, and a timely Notice of Appeal was filed April 14, 2017. (App. 36)

Statement of the Facts

Robert Davis and his wife, Barbara, were at the Geneva Country Club in Muscatine one evening for drinks and dinner. It was February 25, 2015. When they started the drive home, it was snowing. Deputy Sheriff Edward Cardenas of the Muscatine Police Department described the conditions as "actively snowing", with two or three inches of snow on the ground at the time in question, about 10:30 p.m. The officer said the roads were slippery. It was "very hard to see", and it was cold. As Barb and Bob Davis were heading home, an oncoming vehicle slid into the Davis vehicle's path. Bob's evasion limited the collision to contact on the front

corner of his driver's side, but his Toyota Tundra ended up in the ditch. The officer conceded in the suppression hearing that the other driver caused the accident, not Mr Davis. (Suppression Hearing Transcript, 4/1/16 [hereafter "Supp. Tr."] pp. 4-6, L. 15-24 , p. 34, L. 5-17) (Suppression Ruling, 8/1/16, pp. 1-2; App. 13-14)

Deputy Cardenas found that Bob and Barb were sitting in the back of their vehicle by the time he arrived on the scene. Cardenas said he could smell a "slight odor of alcohol," as he spoke to the couple from outside their truck. They moved into an ambulance for a cursory medical exam. Cardenas said that he could also smell alcohol when he talked to Mr. Davis outside the vehicles and in the ambulance. Bob agreed to participate in the officer's observations for Horizontal Gaze Nystagmus (HGN). Barb Davis told the officer they had been out for dinner and drinks. Cardenas testified Bob admitted to drinking three rum and cokes. Bob and Barb both told the officer that Bob was the driver when the accident occurred. The deputy claimed he detected six out of six signs of intoxication from the HGN exam, and then he told Bob to get in the back of his squad car. Cardenas said he "ordered" Barb to stay near the ambulance as he placed Bob in the back of the squad. He did not use handcuffs. (Supp. Tr. pp. 7-12, L. 2-9, p. 15, L. 10-23) (Supp. Ruling, pp. 1-2; App. 13-14)

Due to the weather conditions, the deputy told Bob he was going to transport him to the jail for additional testing. Bob and Barb were still sitting in the ambulance at that time after completion of the HGN test. Bob told Cardenas he wanted to talk to his attorney before deciding whether to go to the jail. He had his cell phone in his hand and had already dialed his attorney's number. The officer took the phone out of Bob's hand and handed it to Barb. He then took Bob to the squad. Cardenas testified in the DOT hearing that he knew Bob's wife was talking to Bob's attorney on the phone, and Barb said Bob needed to talk to his attorney before doing any further testing. In the suppression hearing, Cardenas testified Barb did not say anything to him. The officer took the phone from Barb and left with Bob for the jail. Barb had told her husband's attorney what had happened and that the deputy was taking Bob to the jail. (Defense Ex. "B", DOT Transcript, 7/1/15, [hereafter "DOT Tr." pp. 18-19, L. 9-19; App 22-23) (Supp. Tr. 15-17, L. 10-5; pp. 70-71, L. 14-19, p. 73, L. 4-24) (Supp. Ruling, p. 2; App. 14) The officer literally restrained Bob of his liberty when he took the phone that was dialing his attorney out of his hand and placed Bob in the back of the squad car. The deputy testified that once he put Bob in the backseat of the squad, Bob was in full custody and not free to leave, and that stus continued throughout field testing in the jail sallyport. (Supp. Tr. 40-41, L. 8-14)

Deputy Cardenas was untruthful in his suppression hearing testimony about what he did with Mr. Davis's phone once he took it from Barb. In that hearing, Cardenas testified he gave the phone to Bob as he sat in the back of the squad car, and then he started the transport to the jail. The transcript of the squad audio recording shows the deputy did not give Mr. Davis his phone back until sometime after he had gotten him into the jail. (Trial Ex. "C"; App. 25-26) The squad audio/video was put into evidence and Judge Strausser was directed to the portions showing the Cardenas testimony was false. (Supp. Tr. 16-18, L. 8-25) The conversation recorded shortly after the officer placed Mr. Davis in the squad car shows the phone was not returned until after field tests were completed at the jail. In his ruling, the judge concluded:

> The evidence establishes that Deputy Cardenas retrieved the defendant's phone. It is unclear at which point the defendant was provided with his phone during transport to the jail. Deputy Cardenas can be heard on the recordings stating I have your phone and will give it to you **at the jail.**
>
> At 22:57:14, shortly after the defendant was placed in the back of the squad car, the defendant states as follows: "Can I talk to my wife before we

> leave?" Deputy Cardenas' response is **once we are all done we can**. (Supp. Ruling, p. 2; App. 14) (emphasis added)

The attorney Barb talked to on the phone that night was Greg Johnston. He testified at the suppression hearing. Attorney Johnston told the Court that he got the call as he was leaving Iowa City after a Hawkeye basketball game. After Barb filled him in on the details, Johnston called the jail to say he would be arriving there to speak with Bob. Cardenas had not yet arrived at the jail at that point. When Johnston got to the jail, he told the staff it was important that he be able to speak with Mr. Davis. Cardenas had arrived at that point. The staff told Attorney Johnston that Cardenas would not talk to him and would not allow Johnston to talk to his client before completion of the field tests. It was after Bob had performed the one-leg stand and walk-and-turn field tests in the jail's sally port, that Mr. Johnston finally got to talk to his client. (Supp. Tr. 18-19, L. 3-24, pp. 47-55, L. 16-10, pp. 61-64, L. 14-24) (Supp Ruling, pp. 2-3; App. 14-15) As explained in detail, below, the fact that Bob had performed the balance field tests at the jail directly affected and completely changed the legal advice. Rather than follow his standard procedure of recommending against the breath test, Attorney Johnston advised Mr. Davis to submit a breath sample that could be admissible as evidence

at trial. He advised Bob to submit a breath sample to the DataMaster analysis for the deputy. "The result was a .128 blood alcohol content." (Order on Verdict, p.2; App. 29)

Attorney Johnston testified as to how he had to adjust his legal advice because he was not allowed to consult with Mr. Davis before he took the balance tests at the jail:

> Q. Greg, is it your understanding by the time you were allowed to talk to Mr. Davis he had already submitted to and purportedly failed a series of field sobriety tests?
>
> A. That's exactly the reason why I was so insistent to talk to the deputy and to talk to the jailer, to tell them that I was going to be assisting Mr. Davis. And I didn't want anybody to talk with him or him to do anything until -- until I had a chance to talk with him.
>
> Q. Hypothetically, if you were allowed to talk to Mr. Davis -- let's say if he was in the back of a squad car on the way to the jail -- by phone, what would your advice have been and why?
>
> A. I represented Mr. Davis about 13 years ago on an OWI charge, and I was well aware that in that case he was convicted. And I

> was aware from what his wife told me that they had been struck by another vehicle who spun out in front of them and drove them into the ditch. So with that in mind, I know he has at least the potential that this would be a second offense drunk driver case and that he was not at fault driving. It would have been my advice to not participate or do anything. I would not have authorized him to do horizontal gaze nystagmus. I would have directed him not to do any field sobriety tests. (Supp. Hrg. pp. 58-59, L. 8-5)

Attorney Johnston went on to explain that due to experience with reports and testimony of field tests, he was predicating his advice on the assumption Mr. Davis had failed the balance tests in the jail. It is an extremely rare occurrence where the officer reports favorably on the performance of those tests. Assuming those two tests resulted in failure for Mr. Davis, the attorney opined that the "die was cast." The client virtually had nothing left to lose at that point. If Mr. Davis had not taken the field tests, Attorney Johnston would have advised against submitting a breath specimen on the DataMaster analyzer. (Supp. Tr. 59-60, L. 1-24)

> Q. So by the time you arrived, Mr. Davis had failed a series of

field sobriety tests, or purportedly so. What were you left with as far as advice?

A. When I was admitted to the DataMaster room, it was clear Mr. Davis had complied with or performed the field sobriety tests. I had -- would have to tell you that my experiences are that in all of my cases, I can't imagine that I've only had but one or two times where an officer wrote any favorable outcome of field sobriety tests, so I didn't ask whether he had failed the tests, didn't matter. He had to make a decision concerning whether or not he would take a -- provide a bodily specimen. And at that point in time, the die was cast. I mean, I would recommend he take the test for the sole reason that he might be under the legal limit. If he refused, he would -- potentially the jury could hear that he refused the test or the jury could hear -- or the driver's license sanctions, if he refused, could be enhanced. But I would have recommended -- but for the field sobriety tests, I would have recommended to decline to provide a bodily specimen. There's kind of a general rule on the Data-Master. First offense, take the test; second offense, probably not; third, no. It's not a rule, it's a policy. (Supp. Tr. 60-61, L 5-2)

In his ruling on the suppression motion, Judge Strausser seemed to conclude that Attorney Johnston should have determined before he talked to Mr. Davis at the jail that all the evidence of field testing was inadmissible because he was denied his right to consult with his attorney beforehand. The judge concluded the field tests were conducted in violation of Mr. Davis's statutory rights. Additionally, the judge determined the meeting he had with his attorney before deciding to submit to the DataMaster satisfied the right Mr. Davis had under the Code. "From that point forward, there was no violation of Iowa Code Section 804.20 and evidence collected after that point is admissible." The judge suppressed all evidence of field tests but allowed the DataMaster result. (Supp. Ruling, pp. 6-7; App. 18-19)

ARGUMENT

JUDGE STRAUSSER ERRED IN DENYING SUPPRESSION OF THE BREATH TEST RESULT BECAUSE UNDISPUTED EVIDENCE PROVED MR. DAVIS MADE THE DECISION TO SUBMIT TO THE BREATH TEST AS A DIRECT RESULT OF THE VIOLATION OF HIS STATUTORY RIGHT TO CONSULT WITH HIS ATTORNEY BEFORE THE FIELD TESTS, AND THE APPELLATE PANEL ERRED IN CONCLUDING MR. DAVIS'S LIBERTY WAS NOT RESTRAINED WHEN HE WAS TRANSPORTED TO THE JAIL IN A SQUAD CAR

STANDARD OF REVIEW: The interpretation of the statute is reviewed for error of law. The Court will affirm the suppression ruling where the trial court "correctly applied the law and substantial evidence supports the court's fact-finding." "Prejudice is **presumed** upon a violation of section 804.20." *State v. Walker,* 804 N.W. 2d 284, 289, 296 (Iowa 2011) (emphasis added) A fact-finding is supported by substantial evidence if it can be reasonably inferred from the evidence presented. *Hubby v. State,* 313 N.W. 2d 690, 694 (Iowa 1983)

The Court cannot ignore clear language to speculate as to what the legislature might have meant to say. *State v. Hearn,* 797 N.W. 2d 577, 583 (Iowa 2011). The Court's task is to give the words in the statute "their ordinary and common meaning by considering the context within which they are used." The Court "assesses the statute in its entirety, not just isolated words or phrases." *State v. Romer,* 832 N.W. 2d 169, 176 (Iowa 2013) The statute in question reads *in toto*:

> 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. (emphasis added)

There were no errors in fact findings. The trial court and the panel erred in legal conclusions as to when the statutory right was triggered and the presumed prejudice that must result from the violation of the statutory right. The two courts reached different conclusions, but both were in error.

The Panel' s Error

(Slip Op. pp. 7-9)

The panel relied on unreported cases to conclude Mr. Davis had no right to consult with his wife or his attorney before submitting to field tests at the jail. In relying on those cases, the panel focused on the facts of those cases rather than adhering to the statute that provides the right to communication is triggered by a restraint of the person's liberty "for whatever purpose." Additionally, in relying on the unreported cases, the panel attempted to distinguish the instant case from the clear rule of *State v. Moorehead,* 699 N.W.2d 667, 671-672 (Iowa 2005) :

> Moorehead was "restrained of [his] liberty" as he sat in the back of

> the patrol car….
> He was restrained of his liberty, and therefore his request fell within the timeframe of the statute. Like the Court of Appeals, we can find nothing in the plain language of Iowa Code 804.20 that requires the defendant to make his request for counsel or a family member at the ultimate place of detention.

The rule is simple. If the officer puts a person in the back of a squad car, where the person cannot leave, the person is restrained of liberty, and a request for communication under the statute must be afforded "without unnecessary delay after arrival at the place of detention." Because of the various factual situations under which the question has arisen, the unreported decisions have taken the Court of Appeals down a path to a factual test that focuses on analysis of whether investigation is continuing. The statute says nothing about "investigation". The factual analysis must be refocused to "restraint of liberty". The panel's error is launched in this fact finding: "Although Davis was being detained for further investigation when he arrived at the jail, he was not yet under arrest." (Slip, p. 8) From that finding, the panel directly proceeded into analysis of *State v. Smith,* No. 16-0749, 2017 WL 510957 (Iowa Ct App. February 8, 2017), *State v. Delzer,* No. 15-1737, 2016 WL 3276944 (Iowa Ct. App. June 15, 2016), and *State v. Krebs,*

562 N.W. 2d 423 (Iowa 1997). That analysis led the panel to the wrong legal conclusion:

> We agree that Davis was being detained for the purpose of field sobriety testing and that he was denied an opportunity at the scene of the accident to communicate with his wife. We find, however, that Davis's section 804.20 rights were not triggered until the completion of the field sobriety testing, which was the point in time when the investigatory stage of the traffic stop concluded. The field sobriety tests therefore should not have been suppressed as having been conducted in violation of Davis's Section 804.20 rights. (Slip, 9)

Oddly, the panel only attempted to distinguish *Moorehead* in footnote 4. The panel pointed out that Mr. Moorehead had already failed three sobriety tests and displayed "many symptoms of drunkeness" before he was placed in the squad car. The error was in placing importance on the fact field tests were completed before Moorehead was placed in the police car, and seizing on this sentence in that case: "The deputy himself testified that he considered Moorehead technically under arrest after he failed the field sobriety tests. 699 N.W. 2d at 671" (Slip, 9) The panel placed legal importance on the point where the Defendant completed field

tests rather than the point when he was placed in the squad. The emphasis was on investigation, rather than the statutory question of "restraint of liberty". The sentence the panel omitted from *Moorehead* was this: "See *Krebs,* 562 N.W. 2d at 426 (recognizing that 'section 804.20 may be implicated in a situation short of a formal arrest' so long as defendant was restrained of his liberty." That quote was directly preceded by the *Moorehead* court's holding that restraint of liberty occurs when a defendant is placed in the back of a patrol car. *Moorehead,* 699 N.W. at 671. The root of the panel's error is in giving meaning and purpose only to "arrested" and not to "or restrained of the person's liberty for any reason whatever". The *Smith* and *Delzer* cases were both situations where the Court of Appeals determined an officer can complete his field tests in the jail before allowing the defendants phone calls. The confusion in placing the focus on the stage of the investigation, rather than restraint of liberty, goes all the way back to *Krebs.* There, the Court said the defendant did not have a right to make a call before field tests. The critical fact, however, is that Mr. Krebs was detained out on the street, outside of the squad, when he was asked to do the tests. His liberty had not been restrained, and that was reason the call had to wait until after tests, after custody was imposed. *Krebs,* 562 N.W. 2d at 423, 426.

The *Walker* court's conclusion that "Prejudice is presumed upon a violation of section 804.20." cites *Moorehead,* 699 N.W. 2d at 673, as authority. *Walker,* 804 N.W. 2d at 296. The district court found the proper point on the restraint of custody before the field tests at the jail, but failed to follow the exclusionary rule that invokes the presumption of prejudice on the DataMaster test.

The Exclusionary Rule and Presumption of Prejudice

The straightforward approach to the issue is that the breath test result is always suppressed after a violation of the statute. "The exclusionary rule extends to the exclusion of breath tests, breath test refusals, and non-spontaneous statements obtained after unnecessary delay in allowing the person the statutory right to consult with an attorney or family member." *State v. Garrity,* 765 N.W. 2d 592, 597 (Iowa 2009). In *State v. Walker,* 804 N.W. 2d 284, 296 (Iowa 2011), the Court said, "The district court applied the remedy mandated by more than a generation of our precedent -- suppression of the breath test results." There is no reason the exclusionary rule would be applied differently in enforcing the statutory right, as compared to constitutional rights. The mechanics and rationale of the

exclusionary rule were set out in detail in *State v. Seager,* 571 N.W. 2d 204 (Iowa 1997).

> The exclusionary rule is designed to deter illegal police misconduct. (cite) It applies to evidence gained indirectly as well as directly through unconstitutional conduct to ensure the prosecution is not "put in a better position than it would have been if no illegality had transpired. 571 N.W. 2d at 210

Judge Strausser correctly ruled Cardenas had violated Section 804.20 by not allowing Mr. Davis to talk to his wife and not allowing him to talk to his attorney after transport to the jail and before the field tests. Without citing any authority, the judge went on to reach this legal conclusion:

> The State's misconduct by violating Iowa Code Section 804.20 ended when the defendant was allowed to consult with his wife by phone and his attorney in person. From that point forward there was no violation of Iowa Code Section 804.20 and evidence collected after that point is admissible.

The judge laid down an artificial line of demarcation, rather than applying the law of the exclusionary rule. The question is whether the violation of the statute indirectly or directly led to the result obtained from the breath test. On that score, there can only be one fact-finding drawn from the evidence. As the judge stated it in his ruling: "Attorney Johnston testified that but for the field sobriety tests, he would have recommended the defendant decline the DataMaster." (Ruling Supp. 6; App. 18) That testimony certainly does not rebut the presumption of prejudice, and it clearly shows the DataMaster breath result was obtained as a direct result of the violation of the statutory right. Attorney Johnston also testified that if he could have spoken to Mr. Davis before he performed the field sobriety tests at the jail, he would have recommended those tests be declined, as well. (Supp. Tr. 58-59, L. 8-12) Once the right was violated, the attorney was significantly hampered in providing effective legal advice. The interference with the statutory right to communication put the State in a better position than it would have been if Mr. Davis's right had been honored. The fact situation in the instant case demonstrates the wisdom of applying the presumption of prejudice. The focus is not on what the attorney should have known, should have done, or could have done. The focus is on the officer's violation of rights and the result obtained.

CONCLUSION

The Court must grant Further Review, vacate the decision of the Court of Appeals, and rule that all evidence obtained after Mr. Davis was restrained by placement in the back of the police car must be suppressed, including the DataMaster testing evidence.

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