IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0305

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEEGAN CRAIG SMITH,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WARREN COUNTY
THE HONORABLE KEVIN PARKER AND
THE HONORABLE MARK SHLENKER, JUDGES

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

ZACHARY MILLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
zachary.miller@ag.iowa.gov

DOUGLAS EICHHOLZ
Warren County Attorney

JUSTIN ROGERS
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Codes

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The district Court properly denied Smith's motion to suppress because Smith failed to invoke his right to independent testing under 321J.11 and because Officer Darrah fulfilled any duty he had under that statute.

Authorities

Ginsberg v. Iowa Dep't of Transp., 508 N.W.2d 663 (Iowa 1993)
State v. Bindner, No. 01–0064, 2002 WL 531504
State v. Bloomer, 618 N.W.2d 550 (Iowa 2000)
State v. Daniel, No. 16–0891, 2017 WL 706339 (Iowa Ct. App. Feb. 22, 2017)
State v. De Hoyos, 2014 WL 1234475 (Iowa Ct. App. Mar. 26, 2014)
State v. Foss, 2003 WL 21361556 (Iowa Ct. App. June 13, 2003)
State v. Frake, 450 N.W.2d 817 (Iowa 1990)
State v. Lukins, 846 N.W.2d 902 (Iowa 2014)
State v. Madison, 785 N.W.2d 706 (Iowa 2010)
State v. Moorehead, 699 N.W.2d 667 (Iowa 2005)
State v. Sinnard, 2002 WL 1334822 (Iowa Ct. App. June 19, 2002)
State v. Tillinghast, No. 04–1786, 2005 WL 1959081 (Iowa Ct. App. Aug. 17, 2005)
State v. Wootten, 577 N.W.2d 654 (Iowa 1998)
Iowa Code § 321J.2
Iowa Code § 321J.2(1)(a)
Iowa Code § 321J.11
Iowa Code § 804.20

ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

Defendant Keegan Craig Smith appeals his conviction for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2. He argues the district court erred by overruling his motion to supress, which alleged a violation of his right to an independent blood or urine test under Iowa Code section 321J.11. But he never invoked that right and Officer Demareo Darrah did not prevent Smith's exercise of that right, so this Court should affirm.

Course of Proceedings and Facts

Early in the morning, Officer Demareo Darrah saw a pickup truck driving with an unilluminated license plate. Attach. Mins. Test. (4/3/2017) at 1, 6; App.13, 18. He pulled it over. *Id.*; App.18.

When Officer Darrah reached the truck, he saw that Smith—the driver—had bloodshot, watery eyes and Smith's breath smelled of alcohol. *Id.*; App.18. Smith slurred his words when speaking. *Id.*; App.18. He had reduced motor skills when he handed his license to

Officer Darrah. *Id.*; App.18. After giving Officer Darrah his license, Smith tried to hand him a second license. *Id.*; App.18. Smith acknowledged he had had two beers. *Id.*; App.18.

Smith agreed that he hesitated to do the Horizontal Gaze Nystagmus (HGN) test "because he was borderline with the intoxication limit." *Id.*; App.18. After the HGN test, he said "I shouldn't have came to pick these people up in the condition that I'm in." *Id.* at 8; App.20. Smith failed all three field-sobriety tests he took. *Id.* at 6–8, 9; App.18–20, 21.

While in the field, Smith stated three or four times: "[i]f I deny taking or doing HGN, then you would just take me straight up to the jail to do a blood test." Tr. Mot. Supp. Hr'g, p.12, ln.5–14, ln.15–17. Officer Darrah explained they do a breath, not blood, test. *Id.* at p.12, ln.8–10.

At the jail, Officer Darrah read Smith informed consent, and Smith said "[i]f I refuse this, then we do a blood test." *Id.* at p.14, ln.4–7; Ex.A at 2:26. Smith then asked "[s]o if I refuse, are you going to take me to the hospital to do a piss test?" *Id.* at p.14, ln.12–15. Officer Darrah told Smith that "if he consent[ed] to the breath test" that "he can get an independent test done on his own at his own

expense." *Id.* at p.14, ln.16–21. The officer said he would "take [Smith] to do that." *Id.* at p.14 ,ln.22–23. Officer Darrah explained the independent-test right so that Smith had "all the information possible." *Id.* at p.19, ln.8 to p.20, ln.6. Smith blew a .188 on the Datamaster. Attach. Mins. Test. (4/3/2017) 13, 17, 20; App.25, 29, 32. He did not ask for a retest or any other test. Tr. Mot. Supp. Hr'g, p.10, ln.22 to p.11, ln.1.

The State charged Smith with OWI, both by operating a motor vehicle while under the influence of alcohol and with a blood alcohol concentration (BAC) over 0.08. Trial Info. (4/3/2017) at 1; App.8. He moved to suppress the "breath test results and other evidence obtained from [him] as a result of his arrest," alleging a violation of Iowa Code section 321J.11. Mot. Supp. (5/15/2017) at 2; App.34.

The district court denied the motion after a hearing. Order Denying Mot. Supp. (9/26/2017); App.65–66. The court found that Smith "did not inquire as to an independent test." *Id.* at 1; App.65. It concluded that Smith "failed to request an independent test subsequent to the test on the Datamaster." *Id.* at 2; App.66.

Following a trial on the minutes, the district court convicted Smith of OWI first offense in violation of section 321J.2. Order of Conviction (1/11/2018) at 2; App.88. It found that Smith "operated a motor vehicle … while having alcohol concentration in excess of .08 or more as measured in his breath, and while under the influence of alcoholic beverages." *Id.*; App.88. Smith timely appealed.

ARGUMENT

I. The district Court properly denied Smith's motion to suppress because Smith failed to invoke his right to independent testing under 321J.11 and because Officer Darrah fulfilled any duty he had under that statute.

Preservation of Error

Smith moved to suppress his breath test result asserting that the State violated his right to an independent test under Iowa Code section 321J.11. Mot. Supp. (5/15/2017) at 1–2; App.33–34. The court rejected his claim, preserving error. Order Denying Mot. Supp. (9/26/2017) at 2; App.66.

Standard of Review

This Court reviews suppression orders interpreting a statute for correction of errors at law. *State v. Lukins*, 846 N.W.2d 902, 906 (Iowa 2014) (citing *State v. Madison*, 785 N.W.2d 706, 707–08 (Iowa 2010)). The district court's "findings of fact are binding on [this

Court] if supported by substantial evidence." *State v. Wootten*, 577 N.W.2d 654, 656 (Iowa 1998) (citing *State v. Frake*, 450 N.W.2d 817, 818–19 (Iowa 1990)).

Merits

Iowa Code section 321J.11 provides in pertinent part:

> The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer.

Smith argues that "the court incorrectly concluded that the officer had no duty to help [him] obtain independent testing" and thus erred by "denying the motion to suppress." Def.'s Br. at 12. To reach that issue, Smith must show that the district court erroneously found that he failed to invoke his right to independent testing and that he could invoke that right before the State's test. *See* Def.'s Br. at 12–20. He cannot win on either predicate issue. Even if he could, Officer Darrah complied with any duty he had under the statute. And any error was harmless. Each of those reasons is independently sufficient to affirm.

A. Smith failed to request an independent chemical test.

Smith asserts that he adequately "invoke[d] his right to an independent test" under section 321J.11. Def.'s Br. at 13 (bolding removed). He says requests for testing "should be liberally construed," and his multiple questions about blood or urine testing sufficiently invoked his right. Def.'s Br. at 13–14 (quoting *Lukins*, 846 N.W.2d at 909); *id.* at 15–16.

But the district court found that "[Smith] did not inquire as to an independent test." Order Denying Mot. Supp. (9/26/2017) at 1; App.65. Substantial evidence supports that finding. Officer Darrah explained that "three or four times" Smith said, "as more of a statement than a question," "[i]f I deny taking or doing HGN, then you would just take me straight up to the jail to do a blood test." Tr. Mot. Supp., p.12, ln.5–17. Then at the station Smith stated "[i]f I refuse [implied consent], then we do a blood test," and "[s]o if I refuse, are you going to take me to the hospital to do a piss test?" *Id.* at p.14, ln.4–15, p.18, ln.9–16; *see also* Ex.A at 2:27:50, 2:30:09. These statements, and the one question, are about what would happen if Smith declined a police-offered test. None request an alternate test. Tr. Mot. Supp., p.10, ln.22 to p.11, ln.1; p.18, ln.9–16.

Because substantial evidence supports the district court's finding that Smith never inquired about an independent test, it binds this Court. *See Wootten*, 577 N.W.2d at 656.

The district court's finding comports with caselaw. For example, in *State v. De Hoyos*, the Court of Appeals concluded that an arrestee's statement that "he would prefer a blood test over the field sobriety test" did "not amount to an invocation of [his] right to an independent test under section 321J.11." No. 13–0915 , 2014 WL 1234475, at *2 (Iowa Ct. App. Mar. 26, 2014); *cf. Lukins*, 846 N.W.2d at 904–05, 909–10 (holding a request for a retest immediately after a breath test triggered right to be informed about independent testing). As in *De Hoyos*, Smith made indefinite statements that were not requests for an independent test.

That Officer Darrah explained Smith's right to independent testing bolsters, not undermines, the court's finding. Before the breath test Officer Darrah told Smith that he "can get an independent test done on his own at his own expense" if Smith consented to the breath test. Tr. Mot. Supp. Hr'g, p.14, ln.16–23. Officer Darrah even offered to "take [Smith] to do that." *Id.* at p.14, ln.22–23. Yet Smith never asked for a blood or urine test. *Id.* at p.10, ln.22 to p.11, ln.1.

All this shows that, construing Smith's statements liberally, he never asked for an independent test. Instead, he asked about the consequences of refusing certain tests. This Court should affirm.

B. If Smith invoked his right to an independent test, he did so too soon to get such a test.

Next, Smith asserts that even though he requested an independent test before the State's breath test, meaning before he was statutorily entitled to it, *State v. Bloomer*, 618 N.W.2d 550, 553 (Iowa 2000), that "timing … was sufficient to invoke his right to an independent test," Def.'s Br. at 17 (bolding removed). He is mistaken: he had to request an independent test after taking the State's test.

Cases interpreting 321J.11 strongly suggest that a defendant must invoke the right to independent testing after the State has completed its chemical test. For example, in *State v. Foss*, the Court of Appeals only considered the defendant's statements about independent tests made after he completed the State's test when deciding if he requested an independent test. No. 02–0953, 2003 WL 21361556, at *2 (Iowa Ct. App. June 13, 2003); *see also State v. Daniel*, No. 16–0891, 2017 WL 706339, at *1–2 (Iowa Ct. App. Feb. 22, 2017) (holding that the defendant had not invoked his right to an independent test by asking about a blood test before refusing the

State's breath test). That temporal limit makes sense because a defendant has no right to an independent test until after completing the State's test. *Bloomer*, 618 N.W.2d at 553.

Smith says *Ginsberg v. Iowa Dep't of Transp.*, 508 N.W.2d 663 (Iowa 1993) (per curiam), "stands for the proposition that a request for a 'blood or urine test' is sufficient to invoke the right to independent testing … when an officer is asking for a breath test." Def.'s Br. at 15. But *Ginsberg* merely affirmed a district court's decision "overturning [an] agency[] decision to revoke … Ginsberg's license." *Ginsberg*, 508 N.W.2d at 664. And it did so because officers erroneously treated Ginsberg's statement "that he was not refusing to take the breath test but that he wanted his blood or urine tested as well" as a refusal to take a breath test warranting revocation. *Id.* The Court reasoned that the officers should have explained independent testing to Ginsberg and Ginsberg merely tried to invoke that right, not refuse a breath test. *Id.* Thus *Ginsberg* has no application here.

Analogies to Iowa Code section 804.20's right to a phone call are similarly unavailing. *See* Def.'s Br. at 17–18. True, a detainee can invoke their right to a phone call before that right attaches by arriving at jail. *See State v. Moorehead*, 699 N.W.2d 667, 671–72 (Iowa

2005). But section 321J.11 is a far narrower statute warranting a narrower time frame in which a detainee can invoke independent testing. Practical reasons also support a narrower time to invoke.

First, section 321J.11 puts the obligation to secure an independent test on the detainee, but section 804.20 does not place such a burden on detainees. Indeed, section 321J.11 provides that "[t]he failure or inability of the [restrained] person" to get a test "does not preclude the admission of evidence" from tests administered by the State. Iowa Code § 321J.11. Because the onus is on detainees to get independent tests, the window in which they may invoke that right is narrower.

Second, the State's getting to test the detainee's BAC before the detainee can exercise their right to an independent test justifies making the detainee wait to effectively request such a test. Detainees often fail the State's test. *See, e.g.*, Attach. Mins. Test. (4/3/2017) at 8, 13, 20; App.20, 25, 32; *Lukins*, 846 N.W.2d at 904. In that situation, an independent test would usually duplicate the incriminating test's result. By contrast, exercising section 804.20's right to phone calls will not usually confirm evidence the State already has of the

detainee's guilt. Making detainees wait to invoke their right to independent testing until they know their test result makes sense.

If Smith requested an independent test, he did so too soon. This Court should affirm.

C. Even if Smith made an adequate and properly timed request, Officer Darrah did not infringe on his independent-test right; instead, he offered to take Smith for a test.

That brings us to Smith's ultimate claim: Officer Darrah "failed to provide [] Smith with a reasonable opportunity to exercise his right to independent testing" because he took "no affirmative steps … to secure independent testing." Def.'s Br. at 20 (bolding removed), 22–23. He is legally and factually wrong.

Legally, officers have no duty to take "affirmative steps … to secure independent testing." Def.'s Br. at 22–23. Instead, officers have a duty to inform a detainee of the right to independent testing once the person has invoked that right. *Lukins*, 846 N.W.2d at 909. Then, officers cannot thwart that right by preventing the detainee from exercising it. *See Ginsberg*, 508 N.W.2d at 664; *State v. Bindner*, No. 01–0064, 2002 WL 531504, at*2 (Iowa Ct. App. Mar. 27, 2002). Smith's claim thus fails because Officer Darrah did not

have a legal obligation to facilitate Smith's taking an independent test.

Smith counters that Officer Darrah had to act reasonably to carry out his duties under section 321J.11. Def.'s Br. at 20 (citing *State v. Tillinghast*, No. 04–1786, 2005 WL 1959081 (Iowa Ct. App. Aug. 17, 2005)). Even if Officer Darrah had to act reasonably and that duty could extend to facilitating an independent test, the officer acted reasonably here.

Factually, Officer Durrah fulfilled his 321J.11 duties—even a duty to act reasonably. He explained the right to independent testing to Smith. Tr. Mot. Supp. Hr'g, p.14, ln.16–21. Then he offered to take Smith to get an independent test if Smith wanted one, but Smith never requested such a test. *Id.* at p.14 ,ln.22–23. Smith also got to make phone calls—he could have made a call to obtain testing. Attach. Mins. Test. (4/3/2017) at 8; App.20.

Caselaw confirms that Officer Darrah did not violate Smith's 321J.11 right. In *State v. Sinnard*, for example, when an officer informed a defendant of the defendant's right to an independent test but the defendant never "requested … a phone call or any other assistance in obtaining an independent test," no 321J.11 violation

occurred because "any failure to obtain independent testing [could]not be attributed to the officer's actions." No. 01–1035, 2002 WL 1334822, at *1 (Iowa Ct. App. June 19, 2002). And in *Tellinghast*, the officer did not violate section 321J.11 when the officer explained the right to independent testing, told the defendant he could exercise that right, allowed the defendant to call whomever he wanted, but the defendant did not secure testing. 2005 WL 1959081, at *1–3. The Court of Appeals reasoned that the defendant "simply made an informed, deliberate decision not to pursue an independent test." *Id.* at *3. Just like in *Tellinghast*, Smith decided against independent testing.

Finally, requiring Officer Darrah to ask Smith if he wanted an independent test after Smith just failed a breath test is not reasonable. Such a request could be viewed as coercive. After all, the test would almost certainly provide more evidence of Smith's guilt. Also, Officer Darrah reasonably assumed that Smith would ask for an independent test if he wanted one since Smith had been informed of that right. Tr. Mot. Supp. Hr'g, p.15, ln.4–10. And saddling Officer Darrah with a duty to ask Smith if he wanted an independent test

when the officer had no duty to tell Smith about the independent test makes little sense. *Wootten*, 577 N.W.2d at 655.

For whatever reason—likely because he knew he was drunk—Smith decided not to get an independent test. He cannot foist any consequences of that decision on Officer Darrah. This Court should affirm.

D. Even if the district court erred in denying Smith's motion, the error was harmless because evidence he drove under the influence overwhelmed.

If the district court erred in overruling the motion to suppress, the error was harmless because evidence that Smith drove under the influence of alcohol overwhelmed. *See Lukins*, 846 N.W.2d at 911 (citing *Moorehead*, 699 N.W.2d at 672).

Even without the Datamaster result and any statement Smith made as a result, ample evidence supported his conviction:

- When Officer Darrah approached Smith's truck, the truck smelled of alcohol. Attach. Mins. Test. (4/3/2017) at 6; App.18. Smith's breath had that stench when he spoke. *Id.*; App.18.
- Smith had bloodshot, watery eyes. *Id.*; App.18.
- Smith slurred his speech and had reduced motor skills. *Id.*; App.18.
- After Smith had given Officer Darrah his driver's license, he attempted to give the officer a second licence and did not seem to remember already having handed over his license. *Id.*; App.18.

- Smith admitted to drinking beer earlier in the night. *Id.*; App.18.
- When Smith hesitated to consent to field sobriety testing, he agreed that "he might be hesitant because he was borderline with the intoxication limit." *Id.*; App.18.
- As Officer Darrah explained the walk-and-turn test, Smith "got out of the starting position." *Id.*; App.18. Smith took "30+ steps" instead of the instructed nine. *Id.* at 7; App.19. He then took 13 steps instead of 9 on the way back. *Id.*; App.19. He also raised his arms and missed heel to toe. *Id.*; App.19.
- On his first try at the one leg stand, Smith "used his arms for balance, did not count out loud, couldn't keep his balance, and put his foot down." *Id.*; App.19. His second and third attempts went no better. *Id.*; App.19.
- During HGN, Officer Darrah "observed several clues of intoxication" including "lack of smooth pursuit, distinct and sustained Nystagmus at maximum deviation and onset of Nystagmus prior to 45 degrees. *Id.*at 8; App.20 He also had vertical Nystagmus." *Id.*; App.20.
- Before the preliminary breath test, Smith acknowledged "I shouldn't have came to pick these people up in the condition that I'm in." *Id.*; App.20.

This evidence overwhelming proved that Smith drove while under the influence of an alcoholic beverage. *See* Iowa Code § 321J.2(1)(a).

A general-verdict problem does not prevent affirming on harmless error. *Cf. Lukins*, 846 N.W.2d at 912 (rejecting a harmless error argument while noting the Court could not tell whether Lukins was convicted of the "under the influence" alternative or the "alcohol concentration of .08 or more" alternative). While the district court

convicted Smith of "Operating While Intoxicated" and the State charged the case under the operating under the influence and BAC over 0.08 alternatives, the district court explicitly concluded that Smith "operated a motor vehicle … while under the influence of alcoholic beverages." Order of Conviction (1/11/2018) at 2[1]; App.88; Trial Info. (4/3/2017); App.8. And as just explained, the evidence overwhelmingly supported that verdict. Moreover, in reaching its verdict, the district court only relied on the Datamaster result in finding Smith had a BAC "in excess of the Iowa limit of .08." Order of Conviction (1/11/2018) at 1; App.87. Thus, *Lukins*'s general verdict analysis does not apply.

Because overwhelming evidence supported the district court's verdict that Smith drove under the influence of alcohol, this Court should affirm.

CONCLUSION

Smith never asked for a blood or urine test. He certainly did not ask for such a test after his breath test. And he did not avail himself of Officer Darrah's offer to take him to get a blood test. In any event, the

[1] The district court also concluded that Smith drove with a BAC over .08. Order of Conviction (1/11/2018) at 2; App.88.

evidence he drove under the influence of alcohol overwhelmed. This Court should affirm.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

ZACHARY MILLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
zachary.miller@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,435** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: August 22, 2018

ZACHARY MILLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
zachary.miller@ag.iowa.gov