IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-0849

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS CHRISTOPHOR CASPER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF CERRO GORDO COUNTY
THE HONORABLE ADAM SAUER (TRIAL AND MOTION TO SUPPRESS)

APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF FILING

I, Scott A. Michels, hereby certify that I will file the attached Brief by filing an electronic copy thereof to the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on September 30, 2019.

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CERTIFICATE OF SERVICE

I, Scott A. Michels, hereby certify that on September 30, 2019 I served a copy of the attached brief on all other parties to this appeal by electronically filing a copy of the attached brief to the Iowa Attorney General, Hoover State Office Building, 2nd Floor, Des Moines, Iowa 50319.

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Legal Argument

I. Trooper Snieder violated Iowa Code section 321J.11 when he failed to advise Mr. Casper of his right to an independent test.

First the State contends that Mr. Casper's request to take the Datamaster test again, coupled with his refusal to provide the trooper with his driver's license "cannot 'reasonably be construed as a request for an independent chemical test.'" Appellee's Brief p. 12. This argument has not been preserved for appeal. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012). The State never raised this issue at the district court level, as such it is barred from raising it for the first time on appeal.

The scenario presented in this case is nearly identical to that presented in *Lukins*. Both cases involve a request to retake the Datamaster test. The *Lukins* Court has already held that this type of a request sufficiently implicates the statutory right to an independent test. *State v. Lukins*, 846 N.W.2d 902, 909 (Iowa 2014). To hold otherwise would require this Court to overturn Iowa Supreme Court precedent. "We are not at liberty to overturn Iowa Supreme Court precedent." *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa App. 1990).

Next, the State contends that Trooper Snieder was relieved of his obligation to advise Mr. Casper of his rights pursuant to Iowa Code section 321J.11 because he agreed to allow Mr. Casper a second chance at the Datamaster test. Appellee's Brief p. 12. This argument fails on two grounds. First, Mr. Casper was not entitled to a second opportunity at the Datamaster.

> As with the statutorily impermissible requests in those cases, Lukins was not entitled under Iowa Code section 321J.11 to take a second crack at the Breathalyzer machine. Nevertheless, his statements, reasonably construed, indicated he wanted another test, even if he was mistaken, unsure, or unaware of the way in which the additional test would be conducted. His statements, like those of the detainees in *Didonato* and *Garrity*, were adequate to implicate the statute.

State v. Lukins, 846 N.W.2d at 909. (emphasis added). The Court went on to hold that when Lukins implicated the statute, the officer "should have informed [him] that he was entitled to an independent chemical test at his 'own expense in addition to' the Breathalyzer test." *Id.* at 910; *quoting* Iowa Code section 321J.11. Again, the State is requesting this Court to overturn Iowa Supreme Court precedent, which this court is not at liberty to do. *State v. Hastings*, 466 N.W.2d at 700.

The second reason this argument fails is because the Datamaster is not an independent test. It is a machine that is owned, maintained, and operated by the State. For an arresting officer to skirt his obligations under Iowa Code section 321J.11 by granting Mr. Casper an opportunity to retake the Datamaster is wholly inconsistent with the intent and purpose of Iowa Code section 321J.11.

Third, the State claims the request for a second test was too far attenuated from the Datamaster test requested by Trooper Snieder. Appellee's Brief p. 14. In its argument, the State cries foul about the fact that Mr. Casper's request came within the two-hour window of operation and the presumption pursuant to Iowa Code section 321J.2(12)(a), arguing that that fact "only makes the delay between test *more* unfair to the State." Appellee's Brief p. 14. While a breath test that is taken two hours after a person was operating a vehicle is completely contrary to science and common sense, it is the law. It is a law that the State routinely relies upon, many times disadvantaging a defendant; but now the State cries foul when used against it. Appellant raises the issue of the 321J.2(12)(a) presumption, in part, to demonstrate the factual differences between this case and *Wootten*, but also to demonstrate the if the State were to have obtained its test result at this time, it would still be entitled to a presumption that the test is an accurate reflection of what Mr. Casper's breath alcohol content was at the time he was driving. If the State would be allowed to obtain a chemical test result in this time frame, should not Mr. Casper be allowed the opportunity to obtain one as well? What is sauce for the goose is sauce for the gander.[1]

[1] British idiom – used to say that one person or situation should be treated the same way that another person or situation is treated. https://www.merriam-webster.com/dictionary/what's%20sauce%20for%20the%20goose%20is%20sauce%20for%20the%20gander

Additionally, a breath test obtained after the two-hour window in Iowa Code section 321J.2(12)(a) is still admissible, however, it is not entitled to the presumption. Iowa Code section 321J.2(12). Mr. Casper's request, which triggered his rights pursuant to Iowa Code section 321J.11 was made within a reasonable amount of time, especially considering that all Trooper Snieder was required to do was advise him that he could get an independent test at his own expense. There was no need to take him to get the test done because Mr. Casper's bond had been posted and he was awaiting his release from the jail. *See State v. Lukins*, 846 N.W.2d at 910-11.

Which leads to the State's next argument, that Trooper Snieder didn't have to advise Mr. Casper of his 321J.11 rights because he had already bonded out. Appellee's Brief p. 15. First off, this argument is not supported by the facts. While Mr. Casper's bond had been posted, he was still detained by law enforcement. Mr. Casper's movement was still restrained, and he was not free to leave on his own accord; the doors to the room where he was being detained were still locked, and he needed to be let out by the jail staff. Supp. Hrg. Tr. p. 14. Secondly, the State cites to no case law to support this argument. In fact, the State's argument flies in the face of precedent interpreting Iowa Code section 321J.11. "Although we did not directly address this issue, we explained in *Ginsberg v. Iowa Department of Transportation* that when a detainee requests an

independent chemical test, officers should convey to the detainee information about the detainee's statutory right to an independent test." *State v. Lukins*, 846 N.W.2d at 909 (Iowa 2014) *citing Ginsberg v. Iowa Department of Transportation*, 508 N.W.2d 663, 664 (Iowa 1993). If this Court were to hold that an officer need not advise someone of their 321J.11 rights if the officer has no intention of further detaining that individual, this Court would be creating a slippery slope. It would give law enforcement carte blanch to ignore requests for independent tests and violate person's rights by releasing them on citation or otherwise. Such a holding would not only overturn existing case law, but also obliterate the spirit and purpose of 321J.11.

Lastly, the State contends that any error was harmless. Appellee's Brief p. 16. "In cases of nonconstitutional error, reversal is required if it appears the complaining party has suffered a miscarriage of justice or his rights have been injuriously affected. (citations omitted). We presume prejudice unless the record affirmatively establishes otherwise. (citations omitted)." *State v. Moorehead*, 699 N.W.2d 667, 672-73 (Iowa 2005). "A breath test result is important evidence in prosecutions for drunk driving." *Id*. at 673. (citations omitted). In *Moorehead*, the Iowa Supreme Court held that the "it cannot be fairly said that the breath test result did not injuriously affect Moorehead's rights." *Id.* The Iowa Supreme Court held this despite the district court noting that Moorehead 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 test, and admitted he was 'drunk as hell' at the station." *Id.* at 672. The facts supporting a finding of under the influence are much stronger in *Moorehead* than those cited by the district court in Mr. Casper's case. *See* Ruling Following Trial To The Court and Order Setting Sentencing p. 2; App. 43. Given that admission of the breath test was not deemed to be harmless error in *Moorehead*, despite such strong evidence of under the influence, surely the admission of the breath test against Mr. Casper cannot be harmless error.

Conclusion

For the reasons set forth above, Appellant respectfully requests that this Court reverse the District Associate Court's order denying Mr. Casper's motion to suppress evidence and remand for further proceedings.

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_____ September 30, 2019

Scott A. Michels Date

Attorney's Cost Certificate

I, Scott A. Michels, attorney for the Appellant, hereby certifies that the actual cost of reproducing the necessary copies of this Brief was $0.00, and that amount has been paid in full by me.

Respectfully Submitted,

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