ELECTRONICALLY FILED SEP 30, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–0849

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS C. CASPER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HON. ADAM SAUER, DISTRICT ASSOCIATE JUDGE

APPELLEE'S BRIEF

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I. Casper asked for a second DataMaster test, 56 minutes after he provided a breath sample. The trooper was in the process of granting that request, and asked Casper for his driver's license to input his information again. Casper changed his mind and left—he had already posted bond and his wife was there to give him a ride, so Casper simply left the jail. Casper argued that the trooper was obligated to explain his statutory right to get an independent chemical test at his own expense, under Iowa Code section 321J.11. Did the trial court err in rejecting Casper's argument and overruling Casper's motion to suppress?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Breuer, No. 03–0422, 2004 WL 2386824 (Iowa Ct. App. Oct. 27, 2004)
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ROUTING STATEMENT

The State concurs with Casper's routing statement. *See* Def's Br. at 9. This appeal requires application of existing legal principles and well-established law, and it therefore meets the criteria for transfer to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Thomas C. Casper's direct appeal from his conviction for operating while intoxicated (first offense), a serious misdemeanor, in violation of Iowa Code section 321J.2 (2018). Casper filed a motion to suppress evidence of the DataMaster breath test results that showed his BAC was .111, on the grounds that his request for a second test on the DataMaster (which was granted, but Casper declined to provide his driver's license and did not ultimately take the breath test again) triggered the obligation for the trooper to explain his right to seek an independent chemical test at his own expense, under section 321J.11. *See* Motion to Suppress (11/7/18); App. 28. The trial court denied the motion. *See* MTS Ruling (2/18/19); App. 32. Casper stipulated to a trial on the minutes of testimony, and the court found him guilty. *See* Ruling (4/19/19); App. 42. Casper was sentenced to serve 2 days in jail and pay the applicable fine. *See* Judgment (5/13/19); App. 46.

In this direct appeal, Casper argues that the trial court erred in finding section 321J.11 was not violated and in denying his motion to suppress the chemical breath test result.

Course of Proceedings

Beyond the proceedings already described, the State generally accepts Casper's description of the relevant proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 6–7.

Statement of Facts

Shortly after midnight on August 11, 2018, Iowa State Patrol Trooper Nathan Snieder saw a motorcycle travelling unusually fast. He used his radar to determine that it was traveling at 110 mph. *See* Minutes (9/25/18) at 4; App. 12.[1]

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[1] Normally, the minutes of testimony are outside the record that is considered on a motion to suppress, and material in the minutes cannot be used to defend a ruling on such a motion. *See generally Rasmussen v. Yentes*, 522 N.W.2d 844, 846–47 (Iowa Ct. App. 1994); *see also* Iowa R. Crim. P. 2.4(6)(b); Iowa R. Crim. P. 2.5(5). However, "[i]n reviewing district court rulings on motions to suppress, we may consider both the evidence presented during the suppression hearing and that introduced at trial"—and if that trial is a stipulated trial on the minutes of testimony, a reviewing court may consider information contained in the minutes of testimony in reviewing the district court's ruling on the motion to suppress. *See State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005); *accord State v. Adams*, 554 N.W.2d 686, 689 (Iowa 1996) ("We consider both the evidence presented during the suppression hearing as well as the minutes of testimony constituting the record at trial.").

Trooper Snieder pursued the motorcycle, caught up to it, and initiated a traffic stop. Casper was the driver. Trooper Snieder observed that Casper "had bloodshot and watery eyes, appeared unsteady on his feet and spoke with a slur and thick tongue." *See id.*; App. 12. Trooper Snieder had Casper sit in the passenger seat of his patrol vehicle. At that point, Trooper Snieder could smell "the odor of an alcoholic beverage" coming from Casper, and he concluded that Casper "appeared to be intoxicated." *See id.*; App. 12. Casper said that "he had a couple of alcoholic beverages." *See id.*; App. 12.

Trooper Snieder administered the "horizontal gaze nystagmus" standardized field sobriety test—and Casper "showed all clues" that indicated intoxication on that test. *See id.*; App. 12. Casper said he could not take the remaining tests, although he had another idea:

> I asked [Casper] about his ability to walk. [Casper] stated that he had several medical issues with his legs that inhibited his ability to walk and balance normally. [Casper] would not be able to complete the walk and turn and one leg stand due to his medical issues.
>
> [Casper] stated that he could run for 10 miles faster than any millennial and that I could follow him while he ran because no drunk person would be able to run for 10 miles. I advised him that we would not be conducting a 10 mile run as a field sobriety test.

Id.; App. 12. Casper was given a preliminary breath test, arrested, and taken to the Cerro Gordo County Jail. *See id.*; App. 12.

At the jail, Trooper Snieder read Casper an implied consent advisory, with Casper following along. Casper said he understood, consented to providing a breath sample for chemical testing, and checked the box on the form indicating that he consented. *See id.*; App. 12. The DataMaster test showed that Casper's BAC was .113. *See id.*; App. 12. Casper answered questions during an interview, and "stated that he had drank 6 bottles of tequila since the accident." *See id.*; App. 12. Casper's "emotions were back and forth" between "mad, happy, talkative, abrasive, and indifferent." *See id.*; App. 12.

Casper was booked and processed, and he bonded out. His wife was present and was ready to drive him home. Then, as Casper was on his way out the door, he had a request for Trooper Snieder:

> [A]s he was leaving, I was standing kind of across from the pre-book room, and then behind me is the door for the public entrance, and he had bonded out at that point and the jail staff was getting him through the doors so that he could leave. And he asked me, can I take another test from the DataMaster? And I said sure. And he had his driver's license and his paperwork. I said, I just need the driver's license because at that point to go back in I need to type all of his information and I don't remember his date of birth from having done it all and his driver's license number and that information, so I just asked him for his driver's license. And he said no, no, I don't want to. And the jail staff said, well, do you have everything. And he said, yeah, yeah, I do. And they went out the door and he was released.

MTS Tr. 9:15–10; *accord* Minutes (9/25/18) at 4; App. 12. Trooper Snieder agreed that he had not explained any right to an independent chemical test to Casper; he said their policy was to explain that "[if] they ask for an independent test." *See* MTS Tr. 12:22–13:7. Instead, Trooper Snieder heard Casper ask for another DataMaster test, and Trooper Snieder tried to provide it. *See* MTS Tr. 13:8–18.

The trial court denied Casper's motion to suppress:

> When an arrestee requests an independent chemical test, a police officer must act reasonably under the circumstances of the case. *State vs. Wootten*, 577 N.W.2d 654 (Iowa 1998). The invocation of a Defendant's request for an independent test is liberally construed. *State vs. Lukins*, 846 N.W.2d 902 (Iowa 2014). When an individual implicates their statutory right to an independent chemical test, an officer is required to inform the individual that he or she is entitled to an independent chemical test at his or her own expense.
>
> Iowa Code section 321J.11 does not provide a time limit for a Defendant's request, however, the request obviously must be made within a reasonable time under the circumstances. The circumstances to be considered should include the time that has elapsed after the arrest and after the completion of the State's test. *Wootten* at 656. Defendant requested a second DataMaster test at approximately 2:15 a.m. Defendant's request for a second DataMaster test came one hour and thirty-nine minutes after his arrest, and fifty-six minutes after his first DataMaster test. The timing of these tests is significant because it affects the accuracy of the test results. Under Iowa Code section 321J.6(2) an officer cannot require a chemical test beyond two hours following arrest or preliminary screening.

> Defendant provided no explanation for the delay in his request for a second test. Further, Defendant had ample opportunity to make his request for an independent test and failed to do so until fifty-six minutes had passed. Finally, Defendant's request was made after he had already bonded out and was in the process of leaving the jail.

MTS Ruling (2/18/19) at 3; App. 34. Casper's Datamaster result was obtained at 1:16 a.m.; the second request was made as he left the jail, at "[a]bout quarter after two." *See* Minutes (9/25/18) at 15; App. 23; MTS Tr. 10:11–23.

Additional facts will be discussed when relevant.

ARGUMENT

I. The district court did not err in denying Casper's motion to suppress.

Preservation of Error

Casper is renewing the same claim he litigated in his motion to suppress, which was considered and ruled upon. *See* MTS (11/7/18); App. 28; MTS Tr. 18:19–24:22; MTS Ruling (2/18/19); App. 32. That ruling preserved error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

"We review for correction of errors at law a district court's ruling on a motion to suppress based on the interpretation of a statute." *See State v. Lukins*, 846 N.W.2d 902, 906 (Iowa 2014) (citing *State v. Madison*, 785 N.W.2d 706, 707–08 (Iowa 2010)).

Merits

Iowa Code section 321J.11(2) provides:

> 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. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

Iowa Code § 321J.11(2). Casper argues that "[j]ust as occurred in *Lukins*, [he] requested a second attempt at the Datamaster," and that should count as a request that triggers the obligation to explain that he could seek an independent chemical test. *See* Def's Br. at 10–11. But the similarity begins and ends with that single fact. In *Lukins*, the officer heard repeated requests for a "re-check" or "re-blow" and he denied those requests, without any explanation of the alternative provided by statute that would have offered a chance for the re-test that the arrestee was seeking. *See Lukins*, 846 N.W.2d at 904–05. Here, Trooper Snieder granted Casper's spur-of-the-moment request and offered him the re-test on the DataMaster. *See* MTS Tr. 9:15–10; *accord* Minutes (9/25/18) at 4; App. 12. Casper chose to walk away, for reasons that are not clear—and it was reasonable to believe that his desire for any additional testing had evaporated. Taken together, his request and conduct cannot "reasonably be construed as a request for an independent chemical test." *See Lukins*, 846 N.W.2d at 912–13.

Casper is right: "an officer who fields a legally imprecise request for an independent test cannot stand mute and deny the request." *See* Def's Br. at 10 (quoting *Lukins*, 846 N.W.2d at 909). Trooper Snieder did not do that—he *granted* the request. There was no violation here.

Lukins drew an analogy to cases about section 804.20, when arrestees asked to call somebody who they were not permitted to call. *See Lukins*, 846 N.W.2d at 907–09. *Lukins* imported the rule that an invalid request, *if denied*, triggers an obligation to inform the person of what they *can* request. Extending that analogy to this case would mean applying the rule from cases where an arrestee asks if they can call someone who is not specifically listed in section 804.20. In those cases, Iowa courts have routinely held that there is no obligation to explain the parameters of section 804.20 if the officer *allows* the call. *See State v. Markley*, 884 N.W.2d 218, 220 & n.1 (Iowa Ct. App. 2016) (rejecting challenge under section 804.20 and collecting other cases that reached the same conclusion); *accord State v. Lyon*, 862 N.W.2d 391, 401 (Iowa 2015) (citing *State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009)) ("An accused who seeks to talk to a narcotics officer may be advised that he or she cannot do so, but must then affirmatively be advised that he or she can call an attorney or family member."). Here, that same logic applies: giving Casper what he asked for, beyond the scope of the applicable statutory right, did not trigger the obligation to explain the scope of that statutory right, which no longer mattered. *See* MTS Tr. 16:10–17:13. Therefore, Casper's challenge must fail.

The trial court focused on *State v. Wootten*, and held that Casper's quasi-request was unreasonably untimely—it had been almost an hour since the prior DataMaster test. *See* MTS Ruling (2/18/19) at 3; App. 34. *Wootten* held that any request under section 321J.11 "obviously must be made within a reasonable time under the circumstances," and analyzing reasonableness of timing "should include the time that has elapsed after the arrest and after the completion of the State's test." *See State v. Wootten*, 577 N.W.2d 654, 656 (Iowa 1998). Casper points out that, unlike *Wootten*, it had been less than two hours since his arrest—which meant that, at the point where he requested the second DataMaster test, the results would be "presumed to be the alcohol concentration at the time of driving." *See* Def's Br. at 13; Iowa Code § 321J.2(12)(a). But that only makes the delay between tests *more* unfair to the State. *Wootten* noted that the two-hour window only limited the ability to invoke implied consent, not independent testing—its only relevance in this context was as "an apparent recognition that the results of an attenuated test would not be as accurate as results of one obtained earlier." *See Wootten*, 577 N.W.2d at 656 (citing Iowa Code § 321J.6(2)). Like in *Wootten*, this request was invalid because it was not made within a reasonable time.

Moreover, the trial court's ruling noted one other important fact: "Defendant's request was made after he had already bonded out and was in the process of leaving the jail." *See* MTS Ruling (2/18/19) at 3; App. 34. In most cases implicating section 321J.11, the request is made by a person who is being held in police custody. In those cases, the explanation of that right is useful because it allows an arrestee to demand transportation to a facility that can perform those tests. *See, e.g.*, *Wootten*, 577 N.W.2d at 655 (noting that, because Wootten was in custody, honoring that request would mean "transporting him to the hospital, where he would have his independent test"). Casper did not need to invoke any right to have an independent chemical test at his own expense—immediately after turning down the DataMaster, Casper walked out the door of the jail facility, got into his wife's car, and departed for some destination of their own choosing. *See* MTS Tr. MTS Tr. 9:12–10:10; MTS Tr. 13:25–14:8. Even without knowledge of his statutory rights, he could ask his wife to drive to a medical facility of their choice—so describing his right to an independent chemical test at his own expense would not have enabled Casper to do anything that he did not already have the ability to do. It was reasonable not to read section 321J.11 to Casper at that moment, and to let him leave instead.

Finally, any error was harmless. Casper was found guilty of both charged alternatives: he was found guilty of operating a motor vehicle while he had a BAC above .08, *and* while he was under the influence. Critically, the trial court's finding that he was under the influence did not include any reference to the DataMaster breath test result:

> On August 11, 2018, Trooper Snieder initiated a traffic stop of a motorcycle after a radar check had the Defendant travelling 110 miles per hour on B-20 in Cerro Gordo County. Trooper Snieder approached the motorcycle and advised the Defendant of the reason for the stop. While visiting with the Defendant, Trooper Snieder noticed that the Defendant had blood shot and watery eyes, appeared unsteady on his feet and spoke with a slur and thick tongue. While in his patrol vehicle, Trooper Snieder could smell the odor of an alcoholic beverage coming from Defendant. Defendant admitted to consuming a couple alcoholic beverages. Defendant submitted to the horizontal gaze nystagmus field sobriety test, which resulted in six of six clues. Defendant stated that he would not be able to complete the walk and turn and one-leg stand test due to physical restrictions. All of those factors together demonstrate that due to the ingestion of an alcoholic beverage, Defendant's reason or mental ability was affected, his judgment was impaired and he had to any extent, lost control of his bodily actions or motions. At the time of operation of the motorcycle, the Defendant was under the influence of an alcoholic beverage.

Ruling Following Trial (4/19/19) at 2; App. 43. Thus, because the stipulated record established that Casper was "under the influence" without the chemical test, and because the court found that evidence proved his intoxication beyond a reasonable doubt, any erroneous

failure to grant the motion to suppress would be harmless error. *See, e.g.*, *State v. Poster*, No. 18–0217, 2019 WL 319846, at *4 (Iowa Ct. App. Jan. 23, 2019) ("Regardless of whether the district court should have suppressed the Datamaster result, we accept the State's argument that reversal is unwarranted. The district court specifically found the minutes contained proof beyond a reasonable doubt under two independent theories for OWI. . . . Any violation of Poster's rights under section 321J.11 was harmless error."); *State v. Deimerly*, No. 15–1304, 2016 WL 3275828, at *4 n.3 (Iowa Ct. App. June 15, 2016) (remarking that erroneous admission of breath test result would have likely been harmless because the court specifically found him guilty on the "under the influence" alternative, and "[w]hile the court also noted Deimerly's BAC level, it is clear here the evidence establishes the 'under the influence' alternative to operating while intoxicated even without breath test evidence"); *State v. Gobush*, No. 10–0321, 2011 WL 1136441, at *1 (Iowa Ct. App. Mar. 30, 2011) ("On appeal, Gobush challenges only the test failure basis for conviction. We need not address those issues because we affirm his conviction under the unchallenged 'under the influence' alternative."); *State v. Breuer*, No. 03–0422, 2004 WL 2386824, at *3–4 (Iowa Ct. App. Oct. 27, 2004)

("Other than the Intoxilyzer test result, Breuer does not dispute the evidentiary support for the trial court's findings of fact. Under these circumstances, the trial court's ruling admitting the Intoxilyzer test result did not affect Breuer's substantial rights."). In this situation, any error in ruling on this motion to suppress would be harmless. *Accord Garrity*, 765 N.W.2d at 598; *Poster*, 2019 WL 319846, at *4. Thus, even if Casper's motion to suppress had merit, his challenge to this conviction would still fail.

CONCLUSION

The State respectfully requests that this Court reject Casper's challenge and affirm his conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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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:

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