IN THE COURT OF APPEALS OF IOWA

No. 0-177 / 09-1131
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JARED LYNN BERGLUND,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt J. Stoebe, District Associate Judge.

A defendant appeals his judgment and sentence for operating while intoxicated, asserting his motion to suppress evidence of breath test results should have been granted because: (1) statutory grounds to perform the test did not exist under Iowa Code section 321J.6(1) (2009), and (2) he was not given a reasonable opportunity to confer with an attorney as required by Iowa Code section 804.20. **AFFIRMED.**

David Johnson of Brinton, Bordwell & Johnson, Clarion, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Ricki Osborn, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

Jared Berglund appeals his judgment and sentence for operating while intoxicated. He asserts his motion to suppress evidence of breath test results should have been granted because: (1) statutory grounds to perform the test did not exist under Iowa Code section 321J.6(1) (2009), and (2) he was not given a reasonable opportunity to confer with an attorney as required by Iowa Code section 804.20.

I. Background Facts and Proceedings

Sergeant Mike Halligan of the Webster County Sheriff's office was dispatched to rural Webster County, where he observed Jared Berglund's vehicle in the ditch with its headlights on and the motor still running. Berglund was slumped over and asleep in the driver's seat. A can of beer was in the cup holder next to him and an open twelve-pack of beer was on the front passenger seat. The deputy knocked on the window until Berglund awoke, and asked him to roll down the window. Berglund succeeded in doing so after two failed attempts.

Berglund was told to step out of the car. When he did so, he fell backwards into the driver's door. Sergeant Halligan and another officer helped Berglund stand up. Berglund walked to the deputy's vehicle on his own but told the deputy he was "fucked up." Sergeant Halligan advised Berglund that he intended to take him to the Law Enforcement Center due to weather conditions to "try and get a controlled environment and investigate the possibility of him being intoxicated further." Halligan placed Berglund in the passenger seat of the patrol car. He noticed a strong odor of alcohol coming from Berglund.

At the Law Enforcement Center, Halligan asked Berglund to accompany him to the back receiving room. At that time, Berglund used his cell phone to contact his wife and an attorney. He spoke to his wife, but the attorney did not answer. While Berglund was making the calls, Sergeant Halligan completed forms indicating Berglund was under arrest for operating a motor vehicle while intoxicated. A breath specimen taken from Berglund showed alcohol content of .18, well over the .08 legal limit for operating a motor vehicle. *See* Iowa Code § 321J.2(b).

The State charged Berglund with operating while intoxicated. Berglund moved to suppress the test result on the ground that he was never arrested and he was not given a reasonable opportunity to contact an attorney. The district court denied the motion. Following a trial on the stipulated minutes of testimony, the court found Berglund guilty as charged. This appeal followed.

II. Motion to Suppress

A. Arrest

"[C]hapter 321J provides authority for chemical testing of bodily substances from persons suspected of driving while intoxicated." *State v. Palmer*, 554 N.W.2d 859, 860 (Iowa 1996). "This statute is known as Iowa's implied consent law." *Id.* The statute sets forth what have come to be known as "implied consent" procedures. *See* Iowa Code § 321J.6; *State v. Bloomer*, 618 N.W.2d 550, 552 (Iowa 2000). Preliminarily, an officer must have reasonable grounds to believe that the person is intoxicated and must invoke one of seven enumerated conditions. Iowa Code § 321J.6(1).

Sergeant Halligan invoked the first of those conditions which states, "[a] peace officer has lawfully placed the person under arrest for violation of section 321J.2." *Id.* § 321J.6(1)(a). Berglund contends this statutory prerequisite was not satisfied, as he was never placed under arrest. The district court found otherwise, stating:

> In the present case, it is clear that Sergeant Halligan asserted his authority to seize the defendant. The defendant agreed to go to the Law Enforcement Center, but it was clear that Halligan was going to take the defendant even if he did not agree. Halligan explained to the defendant the purpose for the detention was processing for Operating While Intoxicated. Halligan had probable cause to arrest the defendant based on the presence of the defendant's operating vehicle in the ditch of a highway in the early hours of a cold and snowy January morning. In addition, Halligan observed the defendant's demeanor, which was indicative of intoxication. The defendant was sleeping or passed out when Halligan arrived. The defendant was difficult to rouse. The defendant had difficulty opening the window of the vehicle. The defendant had difficulty walking. The defendant had a strong odor of an alcoholic beverage on his person. The defendant admitted that he was drinking and he was "fucked up." The defendant would not agree to perform sobriety tests and called them "pointless."
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> Finally, Halligan had the purpose to arrest in order to complete the OWI procedure and place the defendant in custody. Clearly, Halligan controlled the defendant's movements and the defendant understood this. The defendant asked permission to use the restroom at the LEC and did so only with the permission of the sergeant. Halligan read the defendant his Miranda warning. The defendant told his wife that he was in "trouble."
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> Accordingly, the Court finds that the defendant was under arrest when the implied consent advisory was invoked.

We review the district court's fact-findings for substantial evidence. *State v. Laughridge*, 437 N.W.2d 570, 572 (Iowa 1989).

The legislature has defined "arrest" as "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or that person's submission to custody." Iowa Code § 804.5. An arrest requires an

assertion of authority by a peace officer with the purpose to arrest that is followed by submission to that authority by the arrestee. *State v. Rains*, 574 N.W.2d 904, 910 (Iowa 1998). The manner of making an arrest is as follows:

> The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody . . . .

Iowa Code § 804.14.

As noted, Sergeant Halligan placed Berglund in his vehicle and told him he would be taking him to the Law Enforcement Center. Berglund agreed to accompany the deputy. These facts evince an assertion of authority followed by submission to that authority.

We recognize Halligan said he needed to make the trip in order to "get a controlled environment and investigate the possibility of [Berglund] being intoxicated further." This statement suggests that Berglund was only being detained for investigative purposes and under our precedent, that type of detention does not rise to the level of an arrest. *See State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997) (stating "an individual's detention by an officer for the purposes of performing field sobriety tests does not rise to the level of custody, but is merely detention for investigative purposes"). However, the language used by Sergeant Halligan indicates that Berglund was not in a position to refuse the invitation to proceed to the Law Enforcement Center. Additionally, Halligan testified that he brought Berglund to the center "[t]o continue all my paperwork and process him for operating while intoxicated." Finally, even if the

assertion of and submission to authority at the scene did not amount to an arrest, subsequent events did amount to an arrest.

At the Law Enforcement Center, Halligan asked Berglund whether he would consent to field sobriety tests. Berglund responded, "[W]hat for, it would be pointless." At this point, Halligan stated he considered Berglund to be arrested.[1] He administered *Miranda*[2] warnings and had Berglund sign an implied consent advisory. Berglund consented to a breath test.

It is true that Halligan did not tell Berglund he was under arrest as required by Iowa Code section 804.14. However, our courts have not insisted on the use of formal words to effectuate an arrest. *See Dennison*, 571 N.W.2d at 495. Indeed, this court has stated that "an arrest can occur without the police specifically informing the arrestee of their intention to arrest." *State v. Delockroy*, 559 N.W.2d 43, 45 (Iowa Ct. App. 1996). Accordingly, the absence of arrest language is not dispositive.

We conclude the record contains substantial evidence to support the district court's finding that Berglund was placed under arrest.

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[1] While Halligan testified that he considered Berglund to be under arrest at the time he refused the field sobriety tests, his reports recorded an arrest time of 4:15 a.m., which was the time he was dispatched to the scene, rather than the time Berglund effectively refused the field sobriety tests. Assuming without deciding that this casts doubt on Halligan's testimony that the arrest occurred later rather than sooner, it was for the district court to sort out this discrepancy. *See State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa 2004).

[2] *See Miranda v. Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 722 (1966).

B. Right to Contact Attorney

Berglund also contends he was not afforded a reasonable opportunity to confer with counsel pursuant to Iowa Code section 804.20. That provision states in pertinent part:

> 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.

Iowa Code § 804.20. We will uphold a ruling based on the district court's interpretation of this provision if the court correctly applied the law and there is substantial evidence to support the fact-findings. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005).

The district court found as follows:

> Halligan gave the defendant nearly an hour to speak with an attorney. Halligan assisted the defendant in finding telephone numbers and identifying attorneys. The defendant was able to speak to his wife as many times as he desired and actually spoke with her twice. Halligan placed no limit on the number of calls. When Halligan asked the defendant what he wanted to "do," the defendant had stopped making calls and was no longer looking for telephone numbers in the book. The defendant did not ask for additional time or make any indication that he was not ready to take the test.

These findings are supported by substantial evidence. Berglund asked his wife for a number and asked her to call him back and leave a message when she found it. Berglund then told Halligan he would call a lawyer. Halligan asked if Berglund had a specific attorney in mind. Berglund called his wife again and obtained the name of an attorney. Halligan looked up the attorney's number for

Berglund and Berglund called the number. The attorney did not answer and Berglund did not leave a message.

Sergeant Halligan next asked Berglund if he wished to call anybody else. Berglund responded that he was not sure. Halligan gave Berglund the phone book, opened it to the attorney section of the yellow pages, and allowed Berglund to review it. Berglund pulled out his cell phone and called another number, but again received no answer. Berglund told Halligan he did not have any luck reaching an attorney.

Halligan asked Berglund what he wanted to do. After a pause, Halligan told Berglund that he was requesting a specimen of his breath for testing. As the officer was preparing to administer the test, Berglund pulled out his cell phone again and put it to his ear but did not converse with anyone. When Halligan instructed Berglund on how to use the machine, Berglund put his phone away and did not ask for the opportunity to make additional calls.

We conclude Berglund was afforded a reasonable opportunity to contact an attorney. *See Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626–27 (Iowa 1997); *State v. Shaffer*, 774 N.W.2d 854, 856–57 (Iowa Ct. App. 2009). While Berglund testified he was not done making phone calls, there is no indication he was awaiting the call of an attorney. *Cf. Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa Ct. App. 1990) ("Immediately after this call, appellee informed Officer Barker that appellee's attorney would be calling again. As such, Officer Barker was effectively put on notice that appellee desired further communications with his attorney and was expecting another phone call from his

attorney."). And, while an hour and fifteen minutes remained until the statutory two-hour chemical-testing period expired,[3] this fact does not mandate a different result, as Sergeant Halligan gave Berglund several opportunities to contact an attorney during the prior forty-five minutes. *See Shaffer*, 774 N.W.2d at 856.

We conclude the district court did not err in denying Berglund's motion to suppress. Accordingly, we affirm Berglund's judgment and sentence for operating while intoxicated.

AFFIRMED.

[3] *See* Iowa Code § 321J.6(2).