**IN THE COURT OF APPEALS OF IOWA**

No. 0-208 / 09-0638
Filed February 9, 2011

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**NICHOLAS DANIEL GROSE,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Ringgold County, David L. Christensen, Judge.

Appeal from the denial of a motion to suppress and the subsequent conviction and sentence for operating while intoxicated, second offense. **AFFIRMED.**

Richard A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, and Clinton L. Spurrier, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

**PER CURIAM.**

Defendant-appellant, Nicholas Daniel Grose, appeals from the district court's denial of his motion to suppress and his subsequent conviction of and sentence for operating while intoxicated, second offense. He contends he was denied substantive due process when given an improper and misleading implied consent advisory, thus rendering his consent involuntary and uninformed. He further contends the district court erred in concluding he was not denied his rights under Iowa Code section 804.20 (2007). We affirm.

**Background.** Grose was brought to the local police department in July of 2008 in part on suspicion of operating a motor vehicle while intoxicated. He was allowed to call his mother, who came to the station. A deputy read the implied consent advisory to Grose and offered to read it to his mother. Grose's mother made several calls, but was unable to contact an attorney before Grose had to decide whether to consent to a breath test. He consented and the test showed a breath alcohol content exceeding 0.08 grams per 210 liters of breath. He was charged with operating while intoxicated, second offense.

Grose filed a motion to suppress, alleging the proper implied consent advisory was not given concerning both his regular driver's license and his commercial driver's license and the deputy did not properly advise him whom he could call, the purposes for which he could call, and that he had a right to a private consultation with family and an attorney. Following a contested evidentiary hearing on the motion, the court denied the motion. It concluded the implied consent "advisory read to defendant is an accurate statement, and is not

misleading." It further concluded Iowa Code section 804.20 does not require law enforcement to advise an arrested person who the person may call, to allow the arrested person to speak confidentially with family members, or prohibit law enforcement's presence when a family member makes phone calls.

Grose waived a jury trial and proceeded to a trial on the minutes of testimony. The court found Grose guilty of operating while intoxicated, second offense, based on his operation of a motor vehicle with a breath alcohol content above the statutory limit and a prior conviction. This appeal followed.

**Scope and Standards of Review.** To the extent Grose raises constitutional claims our review is de novo. *State v. Massengale*, 745 N.W.2d 499, 500 (Iowa 2008). We evaluate the totality of the circumstances to determine whether his consent to breath testing was voluntary. *State v. Garcia*, 756 N.W.2d 216, 219-20 (Iowa 2009). Our review of the district court's interpretation of section 804.20 is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009).

**Merits.** *Implied Consent Advisory.* Grose contends he was denied substantive due process because the implied consent advisory he was given was misleading and did not comply with the statute.

Under Iowa Code section 321J.8, when a law enforcement officer requests that a person submit to chemical testing, the officer must advise the person of the consequences of the decision to submit to or to refuse testing. Iowa Code § 321J.8; *Massengale*, 745 N.W.2d at 501. The purpose of that section is to give the person

> a basis for evaluation and decision-making in regard to either submitting or not submitting to the test. This involves a weighing of the consequences if the test is refused against the consequences if the test reflects a controlled substance, drug, or alcohol concentration in excess of the "legal" limit.

*Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 212 (Iowa 2001). An advisory that is misleading concerning the applicable revocation periods may render the decision unknowing and involuntary and thus violate the substantive due process rights of the person asked to submit to chemical testing. *Massengale*, 745 N.W.2d at 504-05.

Section 321J.8 specifies what information must be conveyed in the implied consent advisory. *See id.* at 503. At the time of Grose's arrest, that section provided:

> A person who has been requested to submit to a chemical test shall be advised by a peace officer of the following:
>
> . . . .
>
> . . . If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and either refuses to submit to the test *or operates a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances*, the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

Iowa Code § 321J.8(1)(c)(2) (emphasis added). Section 321.208 set the applicable period of disqualification from operating a commercial motor vehicle at one year for:

> a. *Operating a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances.*
>
> b. Refusal to submit to chemical testing required under chapter 321J.

*Id.* § 321.208(2)(a), (b) (emphasis added).

> The advisory read to Grose provided, in relevant part:
>
> > If you hold a commercial driver's license the department will disqualify your commercial driving privilege for one year *if you submit to the test and fail it*, you refuse to take the test, or you were operating while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances.

(Emphasis added.) Grose argues that neither code section mentions test "failure" as a basis for disqualification, so the advisory read to him was incorrect and misleading. He contends he could not give informed and voluntary consent because the advisory was misleading and did not comply with the statute. He points to the subsequent amendment of sections 321J.8(1)(c)(2) and 321.208(2)(a) as evidence the legislature "has now definitively recognized and established the advisory" given to him "was both false and misleading."

Our supreme court reviewed section 321.208(2) in *Massengale* and determined that section provides for "a one year CDL revocation for an individual who refused *or failed chemical testing* regardless of whether the individual was operating a commercial or noncommercial motor vehicle." 745 N.W.2d at 503 (emphasis added). The court also determined under section 321.208(2), "an individual, such as Massengale, holding a CDL and driving a noncommercial vehicle will lose his commercial driving privileges for one year if he refuses *or fails chemical testing*." *Id.* (emphasis added); *see also Garcia*, 756 N.W.2d at 222 (noting the purpose of section 321J.8 "is to advise accused drivers of the consequences of submitting to *or failing the chemical test*" (emphasis added)).

Both section 321J8 and section 321.208 were amended in 2009. Grose contends the amendments are a recognition the advisory given, including revocation for test failure, was false and misleading. We believe the amendments were intended to clarify existing law, not change it. *See State v. Guzman-Juarez*, 591 N.W.2d 1, 3 (Iowa 1999) ("An amendment to a statute does not necessarily indicate a change in the law."). The amended language does not indicate a clear and unmistakable intent to change the law. *See id.* The amendments do not materially change the law, so there is no presumption the legislature intended to alter the law. *Id.*

We conclude that Grose's contention the applicable statutes did not authorize disqualification of his commercial driving privileges for test "failure" is without merit. The implied consent advisory read to him accurately described a possible result of submitting to the test and failing it. Grose contends the implied consent advisory given reasonably misled him in his consideration of his options and the consequences of his decision whether to take or refuse the test. "The ultimate question is whether the decision to comply with a valid request under the implied-consent law is a reasoned and informed decision." *State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003). Grose has not suggested or explained how the additional statement "if you submit to a test and fail it" affected his ability to make a reasoned and informed decision. Grose opted to submit to the test. If the additional statement in the advisory did anything, it should have made him more reluctant to submit to the test. His citation to the "objective" standard in *Garcia* is inapposite. *See Garcia*, 756 N.W.2d at 222-23. The objective test

applied in *Garcia* was not to the defendant's understanding of the advisory, but whether the "implied consent warnings were sufficiently administered." *Id.* at 223. In *Garcia* the question was whether an interpreter should have been provided before the defendant had to decide whether to submit to the test. *Id.* at 218-19. So long as the officer made objectively reasonable efforts "to convey the consequences of the person's refusal to submit to the test *or his failure of the test*," the statute is satisfied. *Id.* at 220, 223.

Because the advisory adequately informed Grose of "the consequences of refusing the test as well as the consequences of failing the test," *Massengale*, 745 N.W.2d at 501, we reject his argument his decision to submit to the breath test was not reasoned and informed. Grose was not denied substantive due process and the district court did not err in denying his motion to suppress the breath test results on this ground. We affirm on this issue.

*Section 804.20.* Grose contends the court erred in determining his rights under section 804.20 were not violated. Section 804.20 provides:

> 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.

Grose alleges four violations: (1) the deputy failed to inform him of all the persons he could call and the purposes for which the calls could be made; (2) the deputy failed to facilitate calls Grose requested; (3) the deputy failed to offer Grose the opportunity to consult privately with family members; and (4) the deputy shortened the time period within which Grose could place calls so that the State could obtain the evidentiary presumption set forth in Iowa Code section 321J.2(8)(a).

The district court concluded "these matters do not violate section 804.20."

> There is no requirement that the law enforcement officer advise an arrested person who he or she may call. There is no requirement that he be allowed to speak confidentially with family members. (Compare the language of the statute concerning confidential consultation with an attorney.) Lastly, there is no prohibition on an officer being present when a family member makes phone calls.

Concerning the time allowed, the court further concluded:

> If the two-hour presumption was not significant . . . then the legislature would not have codified it in section 321J.2(8). The deputy is entitled to obtain a breath test within this time period, particularly where a test demanded within this time period still allowed the defendant over an hour to consult with his mother and brother, and to contact anyone else whose counsel he sought.

Grose contends the officer had a duty to advise him of all the persons he could call and the purposes for which calls could be made. His reliance on *Didonato v. Iowa Dep't of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990), and *State v. Garrity*, 765 N.W.2d 592, 596 (Iowa 2009) is misplaced. They do not support a blanket requirement for an officer to advise a defendant of all the persons that may be called or of all the purposes for which calls may be made. Neither does the statute. In *Garrity* the defendant asked to call a narcotics officer, and the arresting officer refused the request, but did nothing more. *Garrity*, 765 N.W.2d

at 594. After an analysis of the requirements of the statute and *Didonato*, the court clarified that, "If, as here, the officer turns down the arrestee's phone call request *because the request is to call someone not contemplated in the statute*, the officer must explain the scope of the statutory right." *Id.* at 597 (emphasis added). Likewise, in *Didonato*, the defendant asked to call a friend, a person not contemplated by the statute. *Didonato*, 456 N.W.2d at 371. The supreme court explained the officer failed in a duty by not explaining the permissible bounds of the phone calls allowed in section 804.20 instead of just denying the request to make a phone call. *Id.* ("*In these circumstances* the statute is implicated and the officer should then advise for what purpose a phone call is permitted under the statute." (emphasis added)). In contrast, in the case before us, Grose asked to call his mother and his mother was called and came to the police station. No duty to advise Grose arose.

Grose contends the officer failed to facilitate the calls he requested. The officer dialed the call to Grose's mother and held the phone for Grose, who was intoxicated and handcuffed. The statute allows "the person having custody" to make the call if the defendant is intoxicated. Iowa Code § 804.20. Once Grose's mother arrived, she placed the other calls for Grose. Calls were not refused. While "the person having custody" did not place all the calls, we apply the statute "in a pragmatic manner." *See State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005). Grose does not contend he was not allowed to make the calls he wanted to make. We see no pragmatic difference between the officer dialing the calls or Grose's mother making the calls. We find no merit in this claim.

Grose further contends the officer failed to offer him the opportunity to consult privately with family members. The district court ruled, and we agree, that the statute does not contain such a requirement. Although the statute provides for phone calls to family and an attorney, it is only the attorney that "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." Iowa Code § 804.20 (emphasis added). Grose's reliance on a statement in *State v. Moorehead*, 699 N.W.2d 667, 674 (Iowa 2005) (quoting *State v. McAteer*, 290 N.W.2d 924, 925 (Iowa 1980)), is misplaced. The supreme court "*believe[d] the right . . . to communicate with a family member is neither more nor less qualified than the right given to communicate with an attorney*." *Id.* (quoting *McAteer*, 290 N.W.2d at 925 (emphasis added)). In both *McAteer* and *Moorehead*, the issue was whether a person has a right to communicate with a family member, which was denied in both cases. *See Moorehead*, 699 N.W.2d at 670; *McAteer*, 290 N.W.2d at 925. In the case before us, Grose was allowed to call and communicate with his mother and brother. We find no violation of the statute; nor were Grose's substantive due process rights violated.

Grose also contends the officer impermissibly shortened the time period for making calls so the State could obtain the evidentiary presumption set forth in Iowa Code section 321J.2(8)(a). That section provides:

> The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn

> within two hours after the defendant was driving or in physical control of a motor vehicle is presumed to be the alcohol concentration at the time of driving or being in physical control of the motor vehicle.

Iowa Code § 321J.2(8)(a). Section 321J.6(2), dealing with implied consent, provides, in relevant part:

> If the peace officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.

Grose argues the district court erred by concluding the officer had a right to demand his decision on testing within the two-hour period after he was driving rather than the two-hour period from the earlier of his preliminary breath test or arrest for operating while intoxicated. In many cases, the preliminary breath test is administered shortly after a driver is stopped, so the two-hour periods in both sections will be nearly identical. But they need not be, as is the case here.

The problem with Grose's argument is that he reads section 321J.6(2) as basically requiring that a defendant be given a full two hours within which to decide whether to submit to a test. All the statute requires is that the test be offered "within two hours." *Id.* A defendant's "right to prior consultation is limited to circumstances where it does not 'materially interfere' with the chemical test procedure." *Garrity*, 765 N.W.2d at 595-96. "[T]he statute [section 804.20] is to be applied pragmatically by balancing the rights of the arrestee and the goals of the chemical-testing statutes." *Id.* at 596 (citing *Tubbs*, 690 N.W.2d at 914). Furthermore, the "two-hour period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing." *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa Ct. App.

1991). An officer must provide a defendant with a "reasonable opportunity" to contact an attorney or family member. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). Generally, the right is satisfied when a defendant is allowed to make a telephone call to a family member or attorney. *Id.* In the case before us, Grose was allowed to make calls even before he submitted to the preliminary breath test or was arrested for operating while intoxicated. He does not suggest there were calls he was not allowed to make because of the timing of the request for a chemical test. We conclude Grose was allowed a "reasonable opportunity" to contact a family member and attorney and that his rights under section 804.20 were not violated.

We have considered all of the claims concerning section 804.20, whether expressly mentioned in this decision or not, and we conclude the district court did not err in denying Grose's motion to suppress for alleged violation of that section. We affirm on this issue. Having determined the district court did not err in denying Grose's motion to suppress, we affirm his subsequent conviction and sentence.

**AFFIRMED.**