IN THE COURT OF APPEALS OF IOWA

No. 0-670 / 09-1860
Filed January 20, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESS MIKAEL MCCARTY,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Paul R. Huscher (suppression) and Peter A. Keller (trial and sentencing), Judges.

The defendant appeals from his judgment and sentence following his convictions of operating a motor vehicle while intoxicated, third offense, and serious injury by vehicle. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Steven P. DeVolder of The DeVolder Law Firm, Norwalk, and William L. Kutmus of Kutmus & Pennington, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Mary Benton, County Attorney and Britt Gagne, Assistant County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

EISENHAUER, P.J.

Jess Mikael McCarty appeals from his judgment and sentence following his convictions of operating a motor vehicle while intoxicated (OWI), third offense, and serious injury by vehicle. He contends the district court erred in failing to suppress the results of his blood alcohol test. He also contends the court erred in failing to merge the OWI conviction with the serious injury conviction. Because the State proved McCarty voluntarily consented to provide a blood sample, we affirm the denial of his motion to suppress. However, we vacate the judgment and sentence on McCarty's OWI conviction because it was a lesser-included offense of the serious injury conviction.

I. Background Facts and Proceedings. On the morning of June 28, 2008, McCarty met his friend, Brian Krakau, for a round of golf at the Lake Panorama National Golf Course. The men drank multiple alcoholic beverages during the course of their game. After finishing their round at approximately 12:30 p.m., the men had lunch at the golf course snack shop.

At around 1:00 p.m., McCarty began driving home toward Panora. While driving southbound on Highway 4 at about 1:15 p.m., his vehicle crossed the center line and struck the vehicle Deb DeHaan was driving northbound. DeHaan sustained serious injuries in the collision.

When emergency responders arrived on scene, McCarty was observed to have an odor of alcoholic beverage on him, slurred speech, and bloodshot eyes. When a deputy sheriff asked if he had been drinking, McCarty paused and then answered in the negative. The deputy suspected McCarty was under the

influence of alcohol and contacted Trooper Jared Kastner about obtaining a blood sample.

McCarty appeared alert at the scene and did not complain of any pain. Although McCarty's eyes were closed, he would open them when someone spoke to him. The Glasgow coma test was administered by the emergency medical technician in the ambulance. He scored a fourteen out of fifteen on the Glasgow coma scale, which evaluates a person's consciousness based on their eye reactions, verbal responses, and motor sensory function. McCarty lost one point because his speech was slurred.

McCarty was transported to the emergency room where his blood sugar tested at 460, which is high. McCarty suffers from type I diabetes and requires regular injections of insulin, which his body is unable to produce. Without insulin, glucose cannot be absorbed into the body's cells. The body's cells require glucose for energy, and if not present, the body begins to break down muscle and fat cells for energy. McCarty' blood sugar reading indicated he required an insulin injection.

Trooper Kastner interviewed McCarty at the hospital at approximately 3:07 p.m. He noted a moderate odor of alcoholic beverage emanating from McCarty. The trooper read McCarty his Miranda warnings, during which time, McCarty's eyes remained closed. Because his responses were mumbled, Trooper Kastner asked Dr. Koerner to determine if McCarty was conscious. Dr. Koerner rubbed McCarty's forehead, and when McCarty opened his eyes, Dr. Koerner opined McCarty had "selective hearing." Trooper Kastner then reread McCarty his

Miranda warnings with a nurse present as a witness. When the nurse shook his shoulder, McCarty briefly opened his eyes. The trooper then read the implied consent advisory and the nurse shook McCarty's shoulder a second time and told him to listen. McCarty opened his eyes and consented after being asked four times for a yes or no response to the request for a blood sample. McCarty consented and provided his signature.

After two vials of blood were drawn, McCarty admitted to having drunk four or five beers while playing golf, but claimed he did not feel the effects. He told the trooper he was a type 1 diabetic and had taken insulin at 5 a.m. that morning. McCarty was started on IV fluids and given an injection of insulin at 4:25 p.m. His blood sugar level was lowered to 301 by 6:56 p.m. and he was discharged from the hospital at 7:25 p.m. The results of the blood test revealed a blood alcohol content of .171.

On August 29, 2008, McCarty was charged with OWI, third offense, and serious injury by vehicle. On December 1, 2008, McCarty filed a motion to suppress the results of the blood test. Following a hearing in May 2009, the court overruled the motion. The case proceeded to a jury trial on September 22, 2009. On September 30, 2009, the jury returned verdicts of guilty on both counts.

McCarty filed a motion to vacate his OWI conviction on merger and double-jeopardy grounds. The State resisted, and the court overruled the motion. McCarty was sentenced to serve a suspended five-year sentence on the

OWI conviction, and a five-year sentence on the serious injury conviction with the sentences to be served concurrently. McCarty appeals.

II. Scope and Standard of Review. McCarty alleges the Double Jeopardy clause was violated when the district court failed to merge his sentences. He also alleges his federal and state constitutional rights were violated when the district court denied his motion to suppress. In reviewing an alleged violation of a constitutional right, we review de novo the totality of the circumstances as shown by the entire record. *State v. Harriman*, 737 N.W.2d 318, 319 (Iowa 2007). We are not bound by the district court's determinations, but we may give deference to its credibility findings. *Id.* In reviewing the district court's ruling, we consider both the evidence presented at the suppression hearing and that introduced at trial. *Id.*

To the extent the merger issue presents a question of statutory interpretation, our review is for correction of errors at law. *State v. Palmer*, 554 N.W.2d 859, 864 (Iowa 1996).

III. Motion to Suppress. We first consider McCarty's contention the district court erred in overruling his motion to suppress the results of his blood test. He contends his consent to the testing was not voluntary.

Under the implied consent statute, a person operating a motor vehicle on the highways impliedly agrees to submit to chemical testing. *State v.Garcia*, 756 N.W.2d 216, 220 (Iowa 2008). However, a person "has the right to withdraw his implied consent and refuse the test." *Id.* To be valid, the driver's decision to consent to testing must be voluntary, i.e., freely made, uncoerced, reasoned, and

informed. *Id.* Statements are voluntary if they are the product of essentially unconstrained choice, made by a defendant whose will was not overcome or whose capacity for self-determination was not crucially impaired. *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994). Factors to consider in determining whether consent was voluntarily given include the defendant's age and prior criminal history, if any; whether he was under the influence of drugs or alcohol; whether he ably understood and responded to questions; his physical and emotional reaction to interrogation; and whether physical punishment was used or threatened. *Id.*

McCarty contends the State failed to meet its burden of proving he voluntarily consented to the blood test. He claims that at the time consent was given, he was in a state of diabetic ketoacidosis and therefore incapable of understanding and giving reasoned consent. McCarty cites his 460 glucose level and statements by Dr. Koerner that he had "grave concern" about McCarty's condition. Although Dr. Koerner opined McCarty was physically and mentally able to understand Troop Kastner's questions, McCarty notes Dr. Koerner incorrectly believed McCarty had been given insulin and fluids before Trooper Kastner spoke to him.

Dr. Koerner's testimony supports the State's contention McCarty was able to consent to the blood sample. Dr. Koerner testified that although he had "grave concerns" about McCarty's blood sugar level, it was "a high value, but not extremely high." He testified:

> Based on my experience I—there is—I've seen many patients who were at a high level of conscious state or who were functioning

> normally or near normal with that value. So that value in and of itself told me that there was the potential—I mean, that I had—I needed to consider diabetes as part of my overall approach to the patient.

One of Dr. Koerner's concerns regarding McCarty's condition was the fact he could vomit and aspirate it while on the backboard. Vomitting, abdominal pain, and tachycardia are all characteristic signs of a diabetic in ketoacidosis, but none of these signs were present with McCarty. Dr. Koerner concluded, "[T]he lab data supported my clinical assessment that he was not in ketoacidosis."

With regard to the specific events surrounding McCarty giving consent to the blood sample, Dr. Koerner testified he asked McCarty if the trooper could come in and ask him questions. McCarty's eyes were open when McCarty answered in the affirmative. Dr. Koerner testified, "I thought he clearly understood my questions. I didn't have any doubt about it." He believed McCarty was physically and mentally able to understand the questions asked by the trooper. Although Dr. Koerner believed McCarty had been given some insulin and fluids by that point, his testimony that McCarty was sufficiently alert to make a decision to consent or refuse the blood sample did not depend on the belief he had received insulin. Dr. Koerner further testified, "[T]here is no other lab data that suggests anything but alcohol was the cause of this—of the influence on him. In terms of his mental status, yeah."

McCarty argues the testimony of Dr. Petersen, an expert for the defense, shows he was not able to provide consent. Based on his review of McCarty's records, Dr. Peterson opined McCarty was suffering from ketoacidosis—and possibly head trauma—when he gave consent to give a blood sample. It was Dr.

Peterson's opinion McCarty would not have had the level of alertness and orientation necessary to make a knowing, voluntary decision regarding consent. He testified McCarty

> would not have been able to make any decision. He—He was unable to have any meaningful conversation. He didn't demonstrate he was oriented. He would be in a stuporous state and a very ill state and a life-threatening state.

Faced with differing opinions by two expert witnesses, along with the eyewitness testimony of other medical staff who observed and interacted with McCarty, we conclude the State demonstrated McCarty had the capacity to give his consent to the blood test voluntarily. While the evidence shows McCarty was suffering from an elevated blood sugar level, other symptoms of ketoacidosis were not present. Even had McCarty been in a state of ketoacidosis, it did not necessarily render him unable to give consent. Between the two experts, this court gives more credence to Dr. Koerner, who had the opportunity to personally observe McCarty and his responses and give an opinion as to whether he was in a condition to voluntarily consent to the blood test. The on-duty nurse also testified McCarty was coherent and responding to her questions. The opinions of Dr. Peterson were dependent upon the observations of these medical providers. Coupled with the observations of the other emergency response providers and law enforcement officers, the evidence shows McCarty was able to provide consent.

Because the State proved McCarty voluntarily consented to the blood testing, we affirm the district court's ruling denying his motion to suppress.

IV. Merger. McCarty also contends the district court erred in failing to merge the OWI and serious injury by vehicle convictions at sentencing. He claims OWI is a lesser-included offense of serious injury by vehicle.

Iowa Code section 701.9 (2007) provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

The purpose of this statute is to prevent a court from imposing a punishment greater than that contemplated by the legislature. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000). Legislative intent is indicated, in part, by whether the crimes at issue meet the legal elements for lesser-included offenses. *State v. Caquelin*, 702 N.W.2d 510, 511 (Iowa 2005). That is, if the greater offense cannot be committed without also committing the lesser offense, the lesser offense is an included offense of the greater. *Id.*

Here, the State originally charged McCarty with serious injury by vehicle under two alternatives: OWI and reckless driving. However, the State withdrew the reckless driving alternative at the start of trial and the jury was only presented with the OWI alternative. The first element of this alternative is identical to the elements necessary for OWI.

At trial, the State conceded OWI is a lesser-included offense of the serious injury by vehicle charge, but argued the legislature intended cumulative punishment for a third-offense OWI. *See id.* (noting that even though a crime may meet the legal elements test for lesser-included offenses, separate

punishment is permissible if the legislature intended to impose multiple punishments for both offenses). On appeal, the State concedes the district court erred in accepting this argument. *See State v. Pettyjohn*, 436 N.W.2d 65, 68 (Iowa 1988) (holding OWI is a lesser-included offense of homicide by vehicle and must merge). Because the OWI offense is a lesser-included offense of serious injury by vehicle, the trial court erred in entering judgment against McCarty on both charges. Accordingly, we vacate the OWI judgment and sentence and remand to the district court for resentencing on the serious injury by vehicle conviction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

Potterfield, J., concurs; Doyle, J., dissents in part.

DOYLE, J. (concurring in part and dissenting in part)

I concur with the majority on the merger issue, but I respectfully dissent from the majority opinion concerning the motion to suppress.

> When a defendant who has submitted to chemical testing asserts that the submission was involuntary, we evaluate the totality of the circumstances to determine whether or not the decision was made voluntarily. *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994). Our review is de novo. *Id*. While we are not bound by the district court's factual findings, we give considerable weight to the court's assessment of the voluntariness of the defendant's submission to the chemical test. *Id*.

State v. Garcia, 756 N.W.2d 216, 219 (Iowa 2008).

"It is well settled that for a consent to be valid, it must be voluntary . . . ." *Gravenish*, 511 N.W.2d at 381. To be voluntary, the consent must be "the product of an essentially free and unconstrained choice made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." *State v. Ransom*, 309 N.W.2d 156, 159 (Iowa Ct. App. 1981) (citing *State v. Snethen*, 245 N.W.2d 308, 315 (Iowa 1976)). It is the State's burden to prove by a preponderance of the evidence that the consent was voluntary. *State v. Stanford*, 474 N.W.2d 573, 575 (Iowa 1991) (citing *Garcia*, 461 N.W.2d at 462). Preponderance of the evidence is evidence that is more convincing than opposing evidence. *Mabrier v. A.M. Servicing Corp. of Raytown*, 161 N.W.2d 180, 184 (Iowa 1968).

McCarty is a type 1 diabetic. On the day of the collision, he had taken his long-lasting insulin injection early in the morning. Typically he took additional injections of short-lasting insulin throughout the rest of day as needed, but he had not taken any additional insulin prior to the 1:15 p.m. collision. He was

admitted to the emergency room at 2:05 p.m. At about 3:30 p.m., a specimen of his blood was drawn for blood alcohol testing. Despite having a high glucose level upon arrival to the emergency room, it was not until 4:25 p.m. that McCarty was administered any intravenous fluids and insulin injections. Additional insulin was injected at 5:48 p.m. After the treatment, McCarty became more alert and communicative.

Doctor Gregory Peterson, a well-credentialed diabetes expert, testified on behalf of McCarty at the suppression hearing. Upon his review of McCarty's emergency room records and after being told of McCarty's symptoms in the emergency room, Dr. Peterson opined McCarty was ill, finding McCarty

> [h]ad ketoacidosis. More than likely had at least suffered a head trauma. May have had a significant contusion to his brain. And was suffering from the metabolic processes that go on with ketoacidosis.

Dr. Peterson further testified that prior to the administration of IV fluids and insulin at 4:25 p.m., McCarty made no demonstration he was oriented; would not been able to make any decisions; and would have been in a stuporous, very ill, and life-threatening state. Further,

> [McCarty] demonstrated that his level of consciousness was depressed. . . . He demonstrated the only thing he was able to do was be aroused. . . . But there is no documentation that anything was purposeful.

Dr. Peterson further opined that McCarty's senses were depressed because of his acute, critical illness, stating "I'm specifically talking about his brain function. . . . [H]e could not be able to process normal conversations. And the documentation shows that he only was able to be aroused." When asked

whether McCarty would have knowingly and voluntarily been able to comprehend what was going on when he pressed the consent box and scribbled his name on the trooper's computer screen, Dr. Peterson responded: "I don't believe he could have been aware of what he was doing." Additionally, Dr. Peterson testified McCarty was "critically ill, unable to follow commands, unable to make any type of appropriate gesture, let alone consent for anything." . . . "I don't believe that he was capable of making any decision." Dr. Peterson's testimony makes it clear that when the trooper requested McCarty's consent for a blood specimen, McCarty's capacity for self-determination was critically impaired.

Dr. Theodore Koerner, the on-duty emergency room physician, acknowledged McCarty's glucose level was of a "grave concern." He opined McCarty was "conscious enough" to decline, refuse, or agree to a request to draw blood from him. Dr. Koerner's opinions were based on his assumption that McCarty had been administered intravenous fluids by EMS prior to his arrival at the emergency room and that he was given an insulin injection soon after the Glucometer reading was obtained. The medical records indicate otherwise. McCarty was not administered IV fluids and insulin until 4:25 p.m., long after the trooper requested consent for a blood sample. For that reason I find Dr. Koerner's opinion flawed.

After my review of the record, I find McCarty's evidence that he was incapable of making a voluntary consent to be more convincing than the State's evidence to the contrary. I would therefore reverse the district court's denial of the motion to suppress.