IN THE COURT OF APPEALS OF IOWA

No. 0-868 / 09-1594
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL LEE SHARP,
Defendant-Appellant.

Appeal from the Iowa District Court for Greene County, William C. Ostlund, Judge.

Michael Sharp appeals from his conviction and sentence for operating while intoxicated. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Nicola J. Martino, County Attorney, and Holly Stott, Student Legal Intern, for appellee.

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

PER CURIAM

I. Background Facts and Proceedings

On August 15, 2008, Deputy Matt Silbaugh responded to a report of an individual driving in an erratic manner. He stopped the vehicle, which was driven by Michael Sharp. Sharp had a commercial driver's license (CDL), but was not driving a commercial vehicle when stopped by Silbaugh. Based on Sharp's appearance and behavior, Silbaugh suspected Sharp had been drinking and administered a field sobriety test. Silbaugh also asked Sharp to do a preliminary breath test, which indicated his blood alcohol concentration (BAC) exceeded the legal limit.

Sharp was arrested for operating while intoxicated (OWI). He was transported to the law enforcement center, where Silbaugh read Sharp the implied consent advisory, which stated in 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 . . . .

Silbaugh also gave Sharp a written copy of the implied consent advisory. Sharp then consented to a breath test, which showed his BAC was .209.

The State charged Sharp with OWI in violation of Iowa Code section 321J.2 (Supp. 2007). Sharp filed a motion to suppress the results of the breath test, alleging the implied consent advisory read to him failed to comply with Iowa Code section 321.208. The district court issued a ruling denying the motion to suppress on March 17, 2009, after a hearing. The case proceeded to a trial before the court, and the district court found Sharp guilty of OWI.

Sharp now appeals, arguing he was denied substantive due process and his statutory right to be given the proper implied consent advisory under sections 321.208(2) and 321J.8(1)(c)(2). He asserts he could not have given informed and voluntary consent to chemical testing because the implied consent advisory he received was misleading and not in compliance with the Iowa Code.[1]

II. Standard of Review

> 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. Our review is de novo. 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.
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> To the extent the issue presents a question of statutory interpretation, our review is for correction of errors at law.

State v. Garcia, 756 N.W.2d 216, 219–20 (Iowa 2008) (internal citations omitted).

III. Merits

"Iowa's implied consent statute establishes the basic principle that a driver impliedly agrees to submit to a test [to determine alcohol concentration or presence of a controlled substance] in return for the privilege of using the public highways." *State v. Massengale*, 745 N.W.2d 499, 501 (Iowa 2008) (internal quotation omitted). "However, a person has the right to withdraw his implied consent and refuse the test." *Id.*

> Under Iowa Code section 321J.8, when a peace officer requests a person to submit to chemical testing, the peace officer must advise the person of the consequences of refusing the test as well as the consequences of failing the test.

[1] Sharp also raised an issue regarding the use of the TRaCS system. However, he later filed a motion for leave to strike the issue after the supreme court filed a controlling decision on the matter. The supreme court ordered that his motion be submitted with the appeal. We grant the motion and do not address this argument.

Id. The advisory provides an individual who has been requested to submit to chemical testing

> 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.

Id. (quoting *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 212 (Iowa 2001)).

At the time of Sharp's arrest, section 321J.8(1)(c)(2)[2] 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 . . . and either refuses to submit to the test or operates a motor vehicle while under the influence of an alcoholic beverage . . . the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 . . . .

Section 321.208(2)[3] (2007) contains the applicable period:

> A person is disqualified from operating a commercial motor vehicle for one year upon a conviction or final administrative decision that the person has committed any of the following acts . . . while operating a noncommercial motor vehicle and holding a commercial driver's license:
>
> *a.* Operating a motor vehicle while under the influence of an alcoholic beverage . . .
>
> *b.* Refusal to submit to chemical testing required under chapter 321J.

Sharp argues the implied consent advisory given to him was misleading and inaccurate because at the time of his arrest, neither section 321J.8(1)(c)(2) nor section 321.208(2) provided that a test failure would be grounds for suspension of a CDL.

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[2] All references to this code section refer to the 2007 supplement to the Iowa Code.
[3] All references to this code section refer to the 2007 Iowa Code.

Our supreme court in *Massengale* stated that section 321.208(2) provided "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 vehicle." 745 N.W.2d at 503 (emphasis added). Later, the court stated that under section 321.208(2) "an individual . . . 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). Sharp urges us to ignore the statements in *Massengale* as dicta, asserting this issue was not considered by the *Massengale* court. The district court rejected this argument and so do we.

Our decision to follow *Massengale* is supported by amendments to section 321J.8(1)(c)(2) and 321.208(2) in 2009. Section 321J.8(1)(c)(2) was amended to provide disqualification from operating a commercial motor vehicle for the applicable period when an individual "submits to the test and the results indicate . . . an alcohol concentration equal to or in excess of the level prohibited by section 321J.2" 2009 Iowa Acts ch. 130, § 14. Section 321.208(2) was similarly amended and now provides for revocation of a CDL for one year upon conviction or final administrative decision of OWI "as provided in section 321J.2, subsection 1." *Id.* at § 10.

We find the timing and circumstances surrounding the 2009 amendments support a conclusion that the legislature intended these amendments to clarify the existing legislation. Where a statute is ambiguous, we may consider more recent versions of the statute in determining the legislature's intent. *State v. Ahitow*, 544 N.W.2d 270, 272 (Iowa 1996). A material change in the statutory

language gives rise to a presumption that the drafters intended to change the law. *State v. Milom*, 744 N.W.2d 117, 121 (Iowa Ct. App. 2007). "This presumption is not conclusive, however: 'the time and circumstances of the amendment . . . may indicate that the legislature merely intended to interpret the original act by clarifying and making a statute more specific.'" *State v. Guzman-Juarez*, 591 N.W.2d 1, 3 (Iowa 1999). "[O]ne well recognized indication of legislative intent to clarify, rather than change, existing law is doubt or ambiguity surrounding a statute." *Barnett v. Durant Cmty. Sch. Dist.*, 249 N.W.2d 626, 629 (Iowa 1977).

> If [the amendment] follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight. If it takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute.

Guzman-Juarez, 591 N.W.2d at 3 (quoting *People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N.Y. 574, 591-92 (1883)). We therefore reject Sharp's argument that Iowa law did not authorize the disqualification of his commercial driving privileges for test failure.

Further, we find that even if Sharp's CDL could not have been revoked if he failed the breath test, he was still informed of the "key revocation information" regarding his CDL in the implied consent advisory he received. *See State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003) ("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. Kentner*, 562 N.W.2d 431, 433 (Iowa 1997) (rejecting defendant's claim that an officer's failure to inform her of the

commencement date of her license revocation constituted a failure to comply with section 321J.8, finding such a requirement would obscure the key revocation information required by 321J.8). "[N]ot every inaccurate depiction by law enforcement officers that might bear on a subject's election to submit to chemical testing is a basis for suppressing the test results." *Bernhard*, 657 N.W.2d at 473.

We therefore find Sharp's consent was informed and voluntary, and he was not denied due process or his statutory right to receive the implied consent advisory.

AFFIRMED.