IN THE COURT OF APPEALS OF IOWA

No. 0-885 / 10-0663
Filed March 30, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SARA MAY CALVERT,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn, Judge.

Defendant, Sara May Calvert, appeals claiming the district court erred in denying her motion to suppress. **AFFIRMED.**

Robert Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Stephen Holmes, County Attorney, and Travis Johnson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

PER CURIAM

Defendant, Sara May Calvert, appeals from her conviction of operating while intoxicated, in violation of Iowa Code section 321J.2 (2009). She contends the trial court erred in denying her motion to suppress the results of her evidentiary chemical breath test based on the officer's refusal to inform her of the result of her preliminary breath screening test (PBT). She contends section 321J.11 required the officer to disclose the result of the PBT upon her request and also his failure to provide the results of her PBT violated her substantive due process rights under the United States and Iowa Constitutions.

I. BACKGROUND AND PROCEEDINGS. On November 29, 2009, Deputy Joel Navratil was dispatched on a report of a vehicle being driven by an intoxicated driver on Interstate 35. A description of the vehicle was provided including its location and license plate number. Deputy Navratil located the vehicle. He observed it swerving on the roadway crossing both the center and fog lines and traveling at a slow rate of speed. When he initiated a traffic stop, he observed the driver, Calvert, had bloodshot, watery eyes and smelled strongly of alcohol. Another deputy on scene, Jeff Scott, observed open containers of alcohol on the passenger side of the vehicle. Calvert admitted she had been drinking prior to driving.

Navratil administered the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test, all of which Calvert failed. Navratil administered a PBT and then placed Calvert under arrest for OWI. Calvert asked Navratil for the result of the PBT and Navratil refused to provide the result stating

he did not believe he was required to do provide it. At the police station implied consent was invoked and Calvert submitted to giving a sample of her breath for an evidentiary chemical breath test with a result of .153 BAC.

Calvert was charged on December 14, 2009, with operating while intoxicated, first offense. On January 25, 2010, Calvert filed a motion to suppress evidence seeking to suppress the result of her evidentiary chemical breath test because deputy Navratil failed to inform her of the results of her PBT upon her request. Calvert claimed this failure violated section 321J.11 and also violated her substantive due process rights. On March 3, 2010, the district court denied her motion to suppress finding the disclosure required by section 321J.11 does not include the PBT under section 321J.5 and any unfairness in the procedure used by the arresting officer does not rise to the level of a due process denial.

Calvert proceeded to a bench trial on the minutes and requested immediate sentencing on April 21, 2010. The trial court found Calvert guilty of operating while intoxicated, first offense, and ordered her to spend two days in jail and pay a fine of $1250. Calvert filed her notice of appeal April 27, 2010, and seeks this court to reverse the district court's decision denying her motion to suppress evidence.

I. SCOPE OF REVIEW. An adverse ruling on a motion to suppress preserves error for our review. *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004). We review the district court's interpretation of a statutory provision for correction of errors at law. *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003). We review

Calvert's constitutional claim de novo. *State v. Massengale*, 745 N.W.2d 499, 500 (Iowa 2008).

II. IOWA CODE SECTION 321J.11. Iowa Code section 321J.11 states:

> **Taking Sample for Test.**
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> Only a licensed physician, licensed physician assistant as defined in section 148C.1, medical technologist, or registered nurse, acting at the request of a peace officer, may withdraw a specimen of blood for the purpose of determining the alcohol concentration or the presence of a controlled substance or other drugs. However, any peace officer, using devices and methods approved by the commissioner of public safety, may take a specimen of a person's breath or urine for the purpose of determining the alcohol concentration, or may take a specimen of a person's urine for the purpose of determining the presence of a controlled substance or other drugs. Only new equipment kept under strictly sanitary and sterile conditions shall be used for drawing blood.
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> 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*.

(Emphasis added.) Calvert argues that pursuant to the final sentence of this section, the deputy was required to provide her the results of her PBT upon her request. She asserts because she was not provided with the PBT results, the court should have suppressed the subsequent evidentiary chemical breath test conducted under the implied consent procedure.

We have previously addressed the issue of whether an officer is required to provide the results of a PBT upon request in *Hager v. Iowa Department of Transportation*, 687 N.W.2d 106, 110 (Iowa Ct. App. 2004). We held that "a

peace officer is not required, as a condition precedent to implied consent, to provide PBT results to an individual." *Hager*, 687 N.W.2d at 110. In so holding, we reasoned

> that a PBT is legislatively intended simply as a preliminary investigatory device for use by peace officers to help determine if an individual has engaged in illegal activity and an arrest should be made. Peace officers are under no duty to visually reveal or verbally inform an individual of the results of a PBT. To rule otherwise would negate the legislative intent that a PBT serve as a "quick, convenient test."

Calvert seeks to avoid the rule announced in *Hager* by asserting the appellant in *Hager* did not cite, raise, or even mention Iowa Code section 321J.11 in support of his contention PBT results must be disclosed. *See id.* at 109–10 (stating "Hager cites no authority in support of his claim that an individual must be provided results of a PBT before deciding whether or not to agree to implied consent procedures"). Whether or not it was considered by the court in *Hager*, we now conclude section 321J.11 does not support the claim that PBT results must be provided to individuals under investigation.

When interpreting statutes, "'our primary goal is to give effect to the intent of the legislature.'" *State v. Anderson*, 782 N.W.2d 155, 158 (Iowa 2010). The intent of the statute is found from the statute as a whole and not just a particular part. *Id*. "When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms." *Id*. The rules of statutory construction are employed only when the statute is ambiguous. *State v. Sailer*, 584 N.W.2d 756, 760 (Iowa 1998). When a statue is ambiguous, the intent of the

legislature "will prevail over the literal import of the words." *Anderson*, 782 N.W.2d at 158.

Iowa Code section 321J.5 provides what conditions must exist before a PBT can be requested, what methods that may be used to conduct a PBT, and for what purpose the results of a PBT can be used. An officer may request a PBT only when he has reasonable grounds to believe a motor vehicle operator may be operating while intoxicated or an operator has been involved in a collision resulting in injury or death. Iowa Code § 321J.5. The officer may, but is not required to, employ a PBT and the individual under investigation does not have to consent to a PBT. *Id*. If the officer does choose to conduct a PBT, he must use a device the commissioner of public safety has approved for a PBT.[1] *Id.* Finally, the result of a PBT can only be used for deciding whether an arrest should be made or whether to request the individual submit to a chemical test. *Id.* The legislature has determined the results of a PBT are not admissible evidence because the PBT is unreliable. *Id.*; *State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987). The purpose of a PBT is to provide officers "with the tool of a quick, convenient test" so they may decide whether an arrest should be made. *Albrecht*, 657 N.W.2d at 479.

In contrast, the law governing evidentiary chemical tests is not located in one succinct code provision. The conditions that must exist before the test can

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[1] Iowa Administrative Code 661-157.5 provides the division of criminal investigation criminalistics laboratory shall maintain list of devices that are approved for PBT. This list currently includes twelve devices that have been approved as of January 1, 2009. Iowa Administrative Code 661-157.2 provides a list be kept of devices that are approved for the collection of breath samples for evidentiary purposes. This list includes only two devices, neither of these devices overlap with the PBT device list.

be requested, what methods may be used to conduct a test, and for what purpose the results of the test can be used, are spread out in a number of sections. The required pre-existing conditions are outlined in Iowa Code sections 321J.6[2], 321J.7[3], and 321J.8[4].

The purpose of an evidentiary chemical test, located in Iowa Code section 321J.6, is to determine the alcohol concentration or the presence of a controlled substance or other drug. This test, unlike the PBT, can be used as evidence at both civil and criminal trials. Iowa Code § 321J.15. In addition, a person's refusal to take the evidentiary chemical test is also admissible in both civil and criminal proceedings. *Id*. § 321J.16.

The method that can be used to determine a person's alcohol concentration or presence of a controlled substance or other drug is also found in Iowa Code section 321J.6. An officer may request a specimen of blood, breath or urine from someone under investigation upon written request. Iowa Code § 321J.6. How this specimen can be obtained and who may obtain it is found in

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[2] Iowa Code section 321J.6 provides that a officer must have reasonable grounds to believe the person operated a motor vehicle while intoxicated and must include one of the following conditions: 1) officer placed the person under arrest; 2) the person was involved a motor vehicle accident resulting in personal injury or death; 3) the person refused to take the PBT; 4) the PBT indicated a concentration equal to or in excess of .08; 5) the PBT was administered to a person operating a commercial vehicle and the result was .04 or more; 6) the PBT result was less than .08 and the officer had reasonable grounds to believe the person was under the influence of a controlled substance, a drug other than alcohol or a combination; or 7) the PBT showed an alcohol concentration between .02 and .08 and the person is under the age of twenty-one.

[3] Iowa Code section 321J.7 provides that if the person is dead or unconscious the officer must first get a certification from a medical provider that the person is incapable of giving or refusing consent before an evidentiary chemical test can be conducted.

[4] Iowa Code section 321J.8 provides that before an evidentiary chemical test can be conducted, the officer must advise the person of the consequences of refusing the test and also of the consequences of taking and failing the test.

section 321J.11. While section 321J.11 does not use the term evidentiary chemical test, the provision in this section logically apply only to evidentiary chemical tests.

As quoted above, the first paragraph of section 321J.11 provides only certain medical personnel may obtain a specimen of blood and a peace officer may obtain a specimen of urine or breath. Iowa Code § 321J.11. Since blood and urine cannot be obtained for a PBT, the provisions in this section dealing with both of these specimens cannot be held to be applicable to PBT. While it is true that under section 321J.11 an officer can obtain a specimen of breath just as he could for a PBT, the officer can only obtain the breath specimen under section 321J.11 for the purpose of determining alcohol concentration. This is not a permitted purpose for a PBT under section 321J.5. Thus, it cannot be said that the first paragraph of section 321J.11 applies to both PBTs and evidentiary chemical tests.

The second paragraph of section 321J.11 also only applies to evidentiary chemical tests. The paragraph begins by stating that a person may have an independent chemical test administered in addition to any administered at the direction of the peace officer. Iowa Code § 321J.11. This court has held that this provision applies only after the person has first submitted to an evidentiary chemical test. *State v. Mahoney*, 515 N.W.2d 47, 50 (Iowa Ct. App. 1994). The Iowa Supreme Court later approved of this interpretation. *State v. Bloomer*, 618 N.W.2d 550, 552–53 (Iowa 2000). Thus, the first sentence of this paragraph applies only to evidentiary chemical test.

The next sentence in the second paragraph of section 321J.11 also only applies to an evidentiary chemical test. The sentence provides that failure or inability of the person to obtain an independent chemical test does not preclude the admission of evidence of the results of the test administered at the direction of the peace officer. Iowa Code § 321J.11. Because independent tests are only permitted after a person has submitted to an evidentiary chemical test and because the results of PBTs are not admissible as evidence as provided in section 321J.5, the only logical interpretation of this sentence is to apply it only to an evidentiary chemical test.

Despite every other sentence in section 321J.11 applying only to evidentiary chemical tests, Calvert asks this court to pluck out the final sentence and apply it to both evidentiary chemical tests and PBTs. The intent of the statute is found from the statute as a whole and not only a particular part. *Anderson*, 782 N.W.2d at 158. If the legislature had intended to apply all but the final sentence of this code section to evidentiary chemical tests, they would have explicitly provided so.

While officers may provide PBT results to individuals under investigation for OWI, we hold that section 321J.11 does not require they provide the results. We affirm our decision in *Hager v. Iowa Department of Transportation*, that officers are under "no duty to visually reveal or verbally inform an individual of the results of a PBT." *Hager*, 687 N.W.2d at 110.

III. SUBSTANTIVE DUE PROCESS. Calvert also alleges her substantive due process rights were violated when the officer refused to inform her of her

PBT result, because it prohibited her from making an informed and knowing decision about whether to consent to or refuse the evidentiary chemical test. Calvert analogizes her case with *Massengale*, 745 N.W.2d at 502.

In *Massengale*, the defendant filed a motion to suppress the results of his evidentiary chemical test because the implied consent advisory given, as required by Iowa Code section 321J.8, misstated the consequences applicable to his commercial driver's license. *Massengale*, 745 N.W.2d at 500. The law applicable to drivers who had CDLs had changed to provide for a one-year revocation for both refusing the test and failing the test regardless of whether the person was driving a commercial or noncommercial motor vehicles at the time of the arrest. *Id.* at 503. The advisory read to the defendant had not changed to reflect the new law. *Id.* Instead the advisory read to the defendant led him to believe that because he was driving a noncommercial vehicle, if he refused the test, it would result in a one-year suspension of his CDL, but if he took the test and failed, it would result in a six-month suspension. *Id*. at 503–04. Thus, he chose to take the test believing incorrectly if he failed, his license would only be suspended for six months. *Id*.

The court found because the advisory was misleading with respect to the applicable revocation periods for his CDL, the defendant did not make a reasoned or informed decision regarding whether to consent to the chemical test. *Id.* at 505. In this case, Calvert alleges that the result of her PBT was information she needed in order to make a "reasoned and informed decision" on whether to submit to chemical testing, and thus, the failure to provide this information was a

violation of her substantive due process rights. This argument fails for a number of reasons.

When an allegation is made that a substantive due process right has been violated, we begin by first analyzing the nature of the right violated. *Id.* The level of scrutiny applicable depends on whether or not the right is fundamental. *Id.* at 501–02. The court in *Massengale*, like Calvert in this case, determined the right at issue was not fundamental, but was a statutory right. *Id.* at 502. Thus, the level of scrutiny required is for the court to determine

> whether there was a reasonable fit between the legislature's *purpose*-granting individuals arrested for OWI the right to make a reasoned and informed decision with respect to chemical testing-and the *means* chosen to advance that purpose-the implied consent advisory.

Id. (emphasis added).

Here Calvert wants us to adopt the same *purpose*—granting individuals arrested for OWI the right to make a reasoned and informed decision with respect to chemical testing—but she fails to indentify the *means* chosen by the legislature to advance this purpose. There is no statutory requirement that an officer provide a person under investigation for OWI the result of a PBT or any preliminary screening test prior to invoking implied consent. As stated above, the requirement in section 321J.11 only applies to evidentiary chemical test results, not PBT or any other preliminary screening test such as field sobriety tests.

The issue in *Massengale* was the advisory required by the statute was inaccurate or incomplete and as a result there was no reasonable fit between the legislative purpose and the means. *Id*. at 505. Here, there is no legislatively

required means to compare to the purpose advanced by Calvert. If Calvert would like the right to know the result of a PBT before implied consent is invoked, then she needs to address her concerns to the legislature to amend the requirements of section 321J to create a statutory means.

In addition, the purpose advanced by Calvert is inaccurate. The purpose of the informed consent advisory is to provide individuals with information as to the *consequences* of refusing or failing the test. *State v. Garcia*, 756 N.W.2d 216, 221 (Iowa 2008). Here, Calvert is asking the officer give her information as to her *chances* of passing the test. Calvert asserts if an officer can base his decision on whether or not to invoke implied consent based on a PBT, then she should be allowed the same opportunity to base her decision to consent or refuse the test based on the same PBT results. As the district court pointed out in this case, "Calvert's anfractuous logic seems to be that a suspect has a right to know whether she is intoxicated before consenting to a test to determine whether she is intoxicated."

The officer in conducting his investigation does not know whether Calvert had been drinking and, if so, how much; so the law requires he conduct a reasonable investigation before arresting or invoking implied consent. On the other hand, no one can know better than Calvert the amount of alcohol she consumed before driving; thus, no one can know better than Calvert her chances of passing the test. The notion of fundamental fairness is not offended by not allowing Calvert to be privy to information she should already know. We hold it

does not violate substantive due process for an officer to withhold the result of a PBT from an individual before invoking implied consent.

AFFIRMED.

Sackett, C.J., dissents in part and concurs in part.

SACKETT, C.J. (dissenting in part and concurring in part)

I respectfully dissent from the court's opinion but concur in the result. I would reverse the district court's decision denying Calvert's motion to suppress; however, I affirm the conviction as I find there is sufficient evidence to sustain the conviction without the results of the evidentiary chemical test.

Iowa Code section 321J.11 states "[u]pon 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." (emphasis added.) The legislature did not restricted the application of this sentence to evidentiary chemical tests choosing instead to use the word "test" and the word "tests," indicating one or more than one. The PBT is a test, it was administered at the direction of an officer, and Calvert made a request for the results. The results of the PBT should have been made available to her. To the extent that *Hager v. Iowa Department of Transportation*, 687 N.W.2d 106 (Iowa 2004) reaches a contrary result, it should be overruled.

Because I find section 321J.11 provides for a statutory right to be informed of the results of a PBT upon request, the appropriate remedy for the violation of that statutory right is to suppress the results of the subsequently obtained evidentiary chemical test. *See State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009) (finding the exclusionary rule the appropriate remedy for the violation of the statutory right to contact an attorney or family member following arrest). Thus, I would reverse the district court's ruling denying Calvert's motion to suppress the results of her evidentiary chemical test.

However, even though I find the district court erred in admitting the results of the evidentiary chemical test, Calvert is not automatically entitled to a new trial. *Id*. The violation of this right is a nonconstitutional error, and thus, I must determine whether the admission of the results of the evidentiary chemical test was prejudicial. *Id.* While prejudice is presumed, the error is harmless if the evidence admitted is merely cumulative. *Id*.

In this case, Deputy Navratil responded to the location after a report was made that a vehicle on the interstate was being driven by an intoxicated driver. The deputy located the vehicle and observed it swerving on the roadway. It was crossing both the center and fog lines and traveling at a slow rate of speed. After stopping the vehicle, the deputed observed Calvert had bloodshot, watery eyes and smelled strongly of alcohol. Calvert admitted she had been drinking prior to driving. Another deputy observed open containers of alcohol on the passenger side of the vehicle. Finally, Calvert failed three field sobriety tests.

This evidence alone is sufficient to sustain Calvert's conviction for OWI under Iowa Code section 321J.2(a). *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) (stating "a person is 'under the influence' when the consumption of alcohol affects the person's reasoning or mental ability, impairs a person's judgment, visibly excites a person's emotions, or causes a person to lose control of bodily actions"). This case is unlike *State v. Moorehead*, 699 N.W.2d 667, 673 (Iowa 2004), where the court held the defendant was prejudiced by the wrongful admission of his breath test result because it was clear the judge had considered and even cited the breath test result in his findings of fact. In this case, the

district court judge did not cite or even indicate he considered the evidentiary breath test in his findings, verdict, and judgment.

Based on the record before me, I find the admission of the evidentiary chemical test was harmless error, as there was sufficient evidence of Calvert's guilt for operating while intoxicated without the evidentiary chemical test result and there is no indication in the record the judge relied on the results to reach his verdict. Therefore, I concur in the result of affirming Calvert's conviction despite finding the district court erred in admitted the result of Calvert's evidentiary chemical test.