IN THE COURT OF APPEALS OF IOWA

No. 0-952 / 10-0525
Filed April 13, 2011

STATE OF IOWA,
Plaintiff-Appellant,

vs.

CARSON MICHAEL WALKER,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, James D. Birkenholz, Judge.

Following the granting of discretionary review, the State requests reversal of a district court order suppressing the results of a breath test administered to the defendant. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellant.

Daniel J. Rothman and William G. Brewer of McEnroe, Gotsdiner, Brewer, Steinbach & Henrichsen, P.C., West Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Following the granting of discretionary review, the State requests reversal of the district court's ruling granting Carson Michael Walker's motion to suppress breath test results based on an alleged violation of Iowa Code section 804.20 (2009). Upon our review, we conclude the Ankeny police afforded Walker an opportunity for private consultation with his attorney under reasonable security measures and the need to maintain the sanctity of the evidence. We therefore reverse the district court's order suppressing the results of the breath test administered to Walker and remand for further proceedings consistent with this opinion.

I. Background Facts and Proceedings.

At approximately 2:23 a.m. on December 6, 2009, Ankeny police officer Travis Grandgeorge observed a vehicle driving down the center dividing line. Officer Grandgeorge stopped the vehicle. Walker, the sole occupant of the vehicle, exhibited physical symptoms of intoxication and failed several field sobriety tests. Officer Grandgeorge arrested Walker at 2:39 a.m. and transported him to the Ankeny police station.

At the station, Officer Grandgeorge read Walker the implied consent advisory, requested a breath sample at 3:19 a.m., and offered Walker the opportunity to make telephone calls. Walker made eight phone calls, with at least one call to an attorney. West Des Moines attorney Daniel Rothman arrived at the station at 4:42 a.m. Officer Grandgeorge escorted Attorney Rothman to a small detention area adjacent to the lobby to meet with Walker. The detention

area contains three booths, each booth containing a glass partition with phone receivers for communication. The room is video-recorded, but is not audio-recorded. A glass security camera "bubble" is clearly evident in the room. The video recording can be observed contemporaneously, or up to one month later.[1]

Although none of the booths were in use at the time, Attorney Rothman requested a different room to consult with Walker. Attorney Rothman observed the security camera bubble and was also concerned that the conversation through the phone receiver would be recorded.[2] He informed Officer Grandgeorge that he wanted to meet with Walker in person, in a room without a divided glass window. Attorney Rothman made three requests to this effect. Officer Grandgeorge checked with his supervisor and advised Attorney Rothman that the Ankeny Police Department's policy does not allow "people that are not in custody into the detention area," or "personal contact between someone in custody and someone not in custody." Attorney Rothman consulted with Walker in the detention booth for approximately fifteen minutes, and at 5:02 a.m., Walker provided a breath sample.

Walker was charged with operating while intoxicated in violation of Iowa Code section 321J.2. Walker filed a motion to suppress, challenging the admissibility of the breath test results. He alleged that law enforcement failed to comply with the portion of section 804.20 that permits an attorney to "consult confidentially" with his or her client "alone and in private" at the jail, because a

[1] The video is recorded on a "loop," and is recorded over after one month.

[2] Attorney Rothman did not voice these concerns to the officers, or question whether the area/conversations were video or audio recorded.

glass window physically separated Walker from his attorney, and they had to speak through phone receivers. The State resisted the motion.

An evidentiary hearing took place, and the court heard testimony from Officer Grandgeorge and Attorney Rothman. At the hearing's conclusion, the court determined the methodology used by the Ankeny police department did not comply with section 804.20 and, therefore, granted Walker's motion to suppress.

The State filed an application for discretionary review of the district court's suppression ruling. Our supreme court granted discretionary review and transferred the case to this court.

II. Scope and Standard of Review.

We review the district court's interpretation of Iowa Code section 804.20 for errors at law. *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009). If the court applied the law correctly and there is substantial evidence to support the findings of fact, we will uphold the motion-to-suppress ruling. *Id.* Evidence is considered substantial when reasonable minds could accept it as adequate to reach a conclusion. *Id.*

III. Invocation of section 804.20.

Iowa Code section 804.20 states:

> 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.* A violation of this section shall constitute a simple misdemeanor.

(Emphasis added.) "One purpose of Iowa Code section 804.20 is to allow the arrestee to call an attorney before making the decision to submit to chemical testing." *Garrity*, 765 N.W.2d at 596. This right to counsel is not absolute and may be satisfied with a phone call. *See Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997); *State v. Vietor*, 261 N.W.2d 828, 831-32 (Iowa 1978). The arrestee "shall be permitted to make a reasonable number of telephone calls" to reach an attorney "in the presence" of a law enforcement officer. Iowa Code § 804.20; *Bromeland*, 562 N.W.2d at 626. The attorney/client privilege does not apply to statements made during such calls in the presence of an officer. *State v. Craney*, 347 N.W.2d 668, 679 (Iowa 1984).

The facts in this action are largely undisputed. There is also no dispute that section 804.20 was invoked. The officer asked Walker if he wanted to make any phone calls, and Walker was allowed to make numerous telephone calls, at least one of which was to secure an attorney. Attorney Rothman was also entitled to "consult confidentially with [Walker] alone and in private at the jail . . . without unreasonable delay." Iowa Code § 804.20.

IV. Section 804.20's "Alone and in Private" Provision.

Attorney Rothman arrived at the Ankeny police department at 4:42 a.m. For his consultation with Walker, Attorney Rothman was provided a detention booth with a glass partition between attorney and client. Communication was

facilitated using phone receivers. Attorney Rothman asked to meet with Walker in person in a different room without a divided glass window. He wanted to evaluate Walker's level of intoxication, if any, by the smell of Walker's breath, and by conducting his own field sobriety tests on Walker including the Horizontal Gaze Nystagmus test, one-leg stand, and the walk-and-turn test. Officers denied Attorney Rothman's request due to the department's security policy.

The district court concluded the Ankeny police department's conduct did not comply with section 804.20 because Walker's consultation with Attorney Rothman was not "alone and in private." The district court noted concerns about the possibility of the consultation being video or audio recorded, and determined it had a chilling effect on Attorney Rothman's ability to ask questions and personally gauge Walker's sobriety. Specifically, the district court stated:

> In this case there was no signage to say "by the use of the telephone communication this is not being recorded."
>
> Would that have a chilling effect on an attorney in communication with his client when there is no information given to the attorney, when clearly the bubble is visible, and we all know what is behind a bubble. It's Uncle Sam looking. There's no information given to the people using the required communication devices that the audio is not being recorded.
>
> . . . .
>
> In this case we have an experienced attorney who clearly understands field sobriety tests, and the video itself would be a chilling effect on requesting the defendant to perform a one-leg stand or a walk-and-turn type of test. Because if he failed, he would be giving the Government additional evidence.
>
> . . . .
>
> And these are attorney/client rights, and the legislature has placed such an import on them that if it's violated, it constitutes a crime.
>
> . . . .
>
> I am finding that there was a 804.20 violation, and the defendant's motion to suppress on that ground will be granted.

The State contends the district court erred in its findings and alleges Walker had an opportunity to consult with Attorney Rothman "in confidence under reasonable security conditions prior to deciding to provide a breath sample." The State argues the presence of recording equipment did not have "chilling effect" on Attorney Rothman's ability to consult with Walker and notes that Attorney Rothman's concerns about the presence of video or audio recording devices could have been alleviated with a simple question (i.e., asking whether the conversations were being video and audio recorded). According to the State, "[t]he proper focus should be on whether Walker had a reasonable opportunity to discuss the pros and cons of submitting to chemical testing with an attorney in person."

Our supreme court has yet to interpret the "alone and in private" portion of section 804.20 and particularly whether it bars the presence of security camera surveillance or requires the defendant the opportunity to meet with counsel without physical separation. Because section 804.20 provides for private communications between a defendant and counsel, the attorney/client privilege is implicated. *See Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999) (noting that communications between a lawyer and client are "absolutely privileged").

Our supreme court has explained that "utilitarian justification" for the attorney/client privilege rests on three major propositions:

> First, the law is complex and pervasive in today's society and lawyers are needed to help others manage their affairs and resolve disputes. Second, lawyers need full knowledge of all of the facts to properly discharge this important function. Third, a client would be reluctant to reveal all of the facts to a lawyer without assurance that the lawyer will not reveal those confidences.

Id. (citing 1 McCormick on Evidence § 87, at 314 (4th ed. 1992)).

The court has further stated that "[i]n the context of a criminal case, these three propositions take on special significance." *Id*.; *see also Fisher v. United States,* 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L. Ed. 2d 39, 51 (1976) (noting that without the attorney/client privilege, the client may be reluctant to confide in counsel and it would be difficult to obtain fully-informed advice).

> While the attorney/client privilege is not derived from the constitution, violation of the privilege may implicate the Sixth Amendment right to counsel. Adequate legal representation can depend upon the full disclosure of the facts by the client to counsel. Thus, if a criminal defendant is to receive the full benefits of the right to counsel, the confidence and privacy of communications with counsel must be assured.

Wemark, 602 N.W.2d at 815-16; *State v. Coburn,* 315 N.W.2d 742, 748 (Iowa 1982) (noting that the attorney/client privilege impacts a defendant's right to counsel).

Generally speaking, our supreme court has applied section 804.20 "in a pragmatic manner, balancing the rights of the arrestee and the goals of the chemical-testing statutes." *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005). Such application has included weighing the arrestee's right to counsel against the practical consideration that a breath test must be administered within two hours of the time of arrest. *Vietor*, 261 N.W.2d at 832. Another consideration to be weighed against the arrestee's right to completely private communication with counsel is the "mandatory fifteen-minute suspect-observation time" immediately prior to the administration of a breath test. *State v. Stratmeier*, 672 N.W.2d 817, 819 (Iowa 2003); *State v. Hershey*, 348 N.W.2d 1, 3 (Iowa 1984) (noting that

police officer is to observe arrestee for fifteen minutes prior to testing to ensure arrestee does not eat, drink, or smoke anything within that time period that could compromise test results); *see also* Iowa Admin. Code r. 661—157.2(4) (requiring operator of breath testing device to follow checklist furnished by the Iowa department of public safety's criminalistic laboratory providing that arrestee be observed for a fifteen-minute "deprivation" period).

Security concerns on behalf of the police department may also justify according less than absolute privacy to an arrestee seeking legal advice regarding a breath test. Safety issues are inherent in any arrest, and particularly so where there is reason to believe the arrestee is intoxicated. *See, e.g.*, *Slager v. HWA Corp.*, 435 N.W.2d 349, 357 (Iowa 1989) (acknowledging "the unpredictable behavior of intoxicated persons"); *McCrea v. Iowa Dep't of Transp.*, 336 N.W.2d 427, 430 (Iowa 1983) (noting that the defendant "was combative and belligerent when arrested").

Upon our review of the facts and circumstances in this case, we agree with the State's contention that Walker was provided an opportunity to consult with Attorney Rothman in confidence under reasonable security conditions imposed by the police department. As Officer Grandgeorge testified during cross-examination:

> A. [OFFICER GRANDGEORGE] We don't allow personal contact between someone that is in custody and someone that is not.
>
> Q. [DEFENSE COUNSEL] Why is that? A. That's our department policy.
>
> . . . .
>
> Q. And Mr. Rothman asked to go into that room with his client, and he was again denied access to that room; is that correct? A. That's a safety issue. Yes, he was denied.

> Q. Safety issue? A. We don't allow people that are not in custody into our detention area.
>
> Q. For safety purposes? A. That's one of the main reasons, yes. It's our policy we don't allow people to go in there.

We believe Walker's right to a private consultation with his attorney must be balanced with the department's need to maintain safety and security. Here, Walker was allowed to speak to Attorney Rothman in a booth through a large glass window using phone receivers. The room is equipped with a security camera, but no officers were present. No officers were within earshot of the conversation. The conversation was not audio-recorded, and Attorney Rothman's concern in that regard could have been alleviated by merely asking officers if the phones were recorded.

We also note that Officer Grandgeorge was required to observe Walker for the fifteen-minute deprivation period prior to the administration of the breath test, and the security camera (without audio) was likely the least intrusive means to fulfill this requirement. Any "chilling effect" the camera had on Attorney Rothman's ability to effectively counsel Walker must be balanced with "the necessity for preserving society's interest in the administration of criminal justice." *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 667-68, 66 L. Ed. 2d 564, 568 (1981) (noting that cases involving deprivations of a right to counsel "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests").

Although Officer Grandgeorge testified that no one watched the video, had Officer Grandgeorge been concerned about the integrity of the impending breath

test, he could have observed Walker on the security camera without hearing the conversation. The degree of privacy an arrestee should be given to communicate with counsel must be determined by balancing the arrestee's right to consult privately with counsel against the public's strong interest in obtaining accurate and timely evidence. *Vietor*, 261 N.W.2d at 832; *see also Tubbs*, 690 N.W.2d at 914.

Further, we do not interpret the phrase "alone and in private" to mean "out of sight," because a defendant at all times remains in the State's custody unless authorized to be released upon bail conditions. Our supreme court has recognized that peace officers who arrest persons suspected of a crime owe a special duty to aid and protect them. *Hildenbrand v. Cox*, 369 N.W.2d 411, 415 (1985). We believe the State satisfies the mandates of section 804.20 so long as the attorney-client conversations are held in private.

We also do not believe communication through a glass partition or a phone or intercom system prevents either the attorney or client from speaking freely with each other. Section 804.20 guarantees a confidential consultation—not the ability to smell or touch the client, or the space to perform field sobriety tests.

Here, Walker's consultation with Attorney Rothman could not be heard, but could be observed, had officers felt the need to do so (either for safety reasons or for the sake of maintaining the sanctity of the evidence). Although the statutory right to consult an attorney requires reasonable efforts to assure that

confidential communications will not be overheard, observation of the arrestee may be maintained,[3] and physical separation or visual isolation is not required.

V. Transmittal of Inculpatory Evidence.

Even if a violation of section 804.20 occurred, the results of the breath test should not be excluded because no inculpatory evidence was viewed or captured during Walker's meeting. Our supreme court has noted that a violation of the attorney/client privilege (and resulting violation to the defendant's constitutional right to counsel) can be found only where the defendant "shows that conversations between attorney and client were overheard" and information from the conversations was transmitted to the prosecutor. *State v. Coburn*, 315 N.W.2d 742, 748 (Iowa 1982). As the court explained:

> There must be the actual gaining, rather than mere opportunity for gaining, of information relative to a charge against the defendant, and the information must be obtained by the informant from an intrusion into the attorney/client relationship. Prejudice will not be presumed unless the intrusion can be called "gross." Transmittal of the information to the prosecutors is a significant, if not conclusive, factor in determining the grossness of the intrusion. Absent grossness, prejudice must be shown.

Id.

As the State contends, Walker would be entitled to relief only if he was able "to demonstrate that the substance of the overheard conversations was used against him." *Clark v. Wood*, 823 F.2d 1241, 1249-50 (8th Cir. 1987); *see generally Morrison*, 449 U.S. at 366, 101 S. Ct. at 669, 66 L. Ed. 2d at 569 (noting that even where a violation to right to counsel is deliberate, dismissal is an appropriate remedy only where the defendant shows that the violation

[3] In this regard, we agree with the district court that whether officers actually observe the arrestee should be determined on a case-by-case basis.

resulted in prejudice or a substantial threat of prejudice). Even then, the State argues, the proper remedy would be exclusion of any inculpatory statements made by Walker and obtained in violation of the attorney/client privilege. We agree.

We acknowledge in *Coburn*, there was no allegation that the defendant or his attorney had any suspicion their conversations were being overheard by law enforcement officials; and thus, there was no allegation of a chilling effect or impairment of the attorney/client consultation. 315 N.W.2d at 748. Unlike *Coburn*, Attorney Rothman has alleged there was a chilling effect on his conversation with Walker. Nonetheless, the chilling effect, if any, could have been entirely alleviated by Rothman's inquiry regarding the recording capabilities in the room. The chilling effect arose only due to Rothman's own suspicions. We also note that Walker does not allege that he did not freely converse with Rothman. Further, there was no prejudice as the video recording was never transmitted to the prosecutor and no audio recording occurred. We are not inclined to reward Walker by the suppression of his breath test for his attorney's suspicions, or the mere opportunity to intrude on the attorney/client relationship, where there has been no actual intrusion and no prejudice shown.

VI. Conclusion.

Under these facts, there was no actual gaining of information from the attorney/client consultation and no prejudice shown. Accordingly, we conclude in this case the Ankeny police department did not violate Iowa Code section 804.20. We reverse the district court's order suppressing the results of the

breath test administered to Walker and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Eisenhauer, J., concurs; Vaitheswaran, P.J., concurs specially.

VAITHESWARAN, J. (concurring specially)

I specially concur. I disagree with the majority that the physical environment in which Walker and his attorney were placed satisfied the "alone and in private" requirement of Iowa Code section 804.20 (2009). "Alone" means "separated from others: isolated." Merriam-Webster's Collegiate Dictionary 34 (11th ed. 2004). "Private" means "withdrawn from company or observation." *Id.* at 988. In my view, these terms do not encompass videotaped booths such as the ones Walker and his attorney were forced to use. *See Case v. Andrews*, 603 P.2d 623, 627 (Kan. 1979) (finding video surveillance unreasonable).

I recognize that some jurisdictions have found the attorney/client privilege subject to reasonable regulation. *See id.* at 625. The problem here is that the officer did not articulate a case-specific reason for denying the attorney's request for a private room. Instead, he simply stated: "We don't allow personal contact between someone that is in custody and someone that is not." When asked why, he responded, "That's our department policy." Later, when explaining why the attorney was not allowed to use a separate room used to conduct OWI tests, he stated that people not in custody were not allowed into the detention area. When asked to elaborate, he said it was mainly "a safety issue" and he reiterated, "It's our policy." In my view, the officer's statements are insufficient to justify the intrusion on Walker's attorney-client privilege created by the videotape and the open booths. *Id.* at 627 ("Absent a showing of any risk to the order or security of the jail, the practice of visually monitoring an attorney-client conference when privacy is requested, is unreasonable.").

That said, I agree with the majority that, in this case, there was no showing of prejudice resulting from the officer's refusal to provide a private consultation room. *See People v. Dehmer,* 931 P.2d 460, 464–65 (Colo. Ct. App. 1996) ("[T]he record is clear that the video camera did not generate an audio recording, and there is no evidence in the record suggesting that any of defendant's conversation was overheard by prison guards. Likewise, no evidence in the record indicates that defendant's lip movements actually were observed by anyone able to discern the substance of his statements. In short, no evidence was obtained as a result of the lack of privacy."). The videotape did not have an audio component, the tape was not viewed or used, and the booths were empty save for Walker and his attorney. Walker's general claim that there might have been a chilling effect on his attorney-client privilege is too speculative to establish prejudice. *See id.* at 465 ("[B]ecause no communication was overheard or recorded, defendant's assertion of prejudice depends entirely upon his claim that his attorney-client relationship was compromised by his concern that such a breach of confidentiality might occur. The record does not support such a claim."). For this reason, I concur in the result.