IN THE COURT OF APPEALS OF IOWA

No. 2-1185 / 12-0427
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER FRANCIS FOLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, James B. Malloy, District Associate Judge.

Peter Foley appeals from his jury trial, conviction, and sentence for operating while intoxicated, third offense. **AFFIRMED.**

Bart K. Klaver of Thornton, Coy & Huss, P.L.L.C., Ames, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Jim Robbins, County Attorney, and Dan Gonnerman, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Peter Foley appeals from his jury trial, conviction, and sentence for operating while intoxicated, third offense. He contends the district court erred in admitting results of a chemical breath test because the officers failed to follow the approved methods of administering the test. We affirm, finding the district court properly admitted the test results into evidence.

I. Facts and Proceedings.

Peter Foley was arrested on suspicion of operating while intoxicated after being pulled over by police and taking part in field sobriety tests. He was taken to jail, where he made phone calls and agreed to a chemical breath test. The officer initiated implied consent procedures. Foley agreed to take a breath test but belched or hiccupped before the police administered the test.

Foley was charged by trial information with operating while intoxicated, third offense. He pled not guilty and filed a motion to suppress the results of the chemical breath test. The motion alleged the results of the test were inaccurate because he had stomach fluid in his mouth when the test was conducted. The motion was submitted with an affidavit by Foley that he "belched two or three times" and "believe[d] this affected the [breath] test results." The motion to suppress was denied.

In its order ruling on the motion to suppress, the court based its decision on the trial information and attachments, Foley's affidavit, and a DVD depicting audio and video of the implied consent procedure. The court found rather than belching, Foley hiccupped before the test and "[t]here was absolutely no evidence that Foley's hiccup resulted in any type of regurgitation of his gastric

contents." The DVD of the procedure admitted into evidence at the hearing on the motion to suppress shows the officer asked Foley "when you're burping you're not burping up any puke or anything, are you?" and Foley replied no, he was just nervous. The court concluded by denying the motion, but noting the test could be "contradicted at trial, by expert testimony or other circumstances." At trial, the State presented an expert who testified that the breath test machine readout reflected a "good breath"—a breath sample that did not reflect a recent presence of stomach contents in the mouth. The jury found Foley guilty of driving while intoxicated, third offense. He appeals, arguing the chemical breath test results should not have been admitted at trial.

II. Analysis.

We review a district court's ruling on a motion to suppress the results of a chemical breath test based on statutory interpretation for the correction of errors at law. *State v*. *Stratmeier*, 672 N.W.2d 817, 820 (Iowa 2003). In *Stratmeier*, our supreme court considered Iowa Code section 321J.15, which governs the admissibility of the result of chemical tests to detect alcohol consumption. *Id.* It wrote:

> That statute provides that a showing of compliance with administrative directives is only necessary to avoid establishing "further foundation" in the admission of alcohol-testing results. Under this statutory arrangement, unless it can be demonstrated that the test results are so unreliable as to preclude consideration, the results of a test taken by methods other than those strictly prescribed by administrative regulation are admissible. Under such circumstances, any challenge to the procedures used in obtaining the chemical test goes to the weight of the evidence rather than its admissibility.

Id. at 821. The test admitted here was not "so unreliable as to preclude consideration." The court properly denied the motion to suppress.

AFFIRMED.