

**IN THE COURT OF APPEALS OF IOWA**

No. 2-363 / 11-1051  
Filed May 23, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JOHN J. PERRY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris (motion to suppress), Thomas N. Bower (trial), and George L. Stigler (sentencing), Judges.

John Perry appeals his convictions for operating while intoxicated, first offense, and possession of marijuana. **AFFIRMED.**

Robert W. Thompson of Thompson Law Office, Reinbeck, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Kirby D. Schmidt, County Attorney, and Erika L. Allen, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ. Bower, J., takes no part.

**MULLINS, J.**

John Perry appeals his convictions for operating while intoxicated, first offense, and possession of marijuana. See Iowa Code §§ 321J.2, 124.401(5) (2009). He contends the district court erred in denying his motion to suppress because the arresting officer violated his statutory right to call an attorney as guaranteed by Iowa Code section 804.20. We find Perry was afforded a reasonable opportunity to contact an attorney without unnecessary delay. Therefore, we affirm.

**I. Background Facts and Proceedings.**

At about 9:50 p.m. on October 16, 2010, Deputy William Jorgenson of the Grundy County Sheriff's Department stopped the vehicle driven by Perry after observing it run a stop sign, drive over to the other side of the road, and almost hit a parked car. As Jorgenson spoke with Perry, he observed Perry's speech was slurred, his eyes were blood shot and watery, and he emitted a strong smell of an alcoholic beverage. Perry was unable to perform field sobriety tests, and refused a preliminary breath test. Perry was placed under arrest, and was transported to the Grundy County Law Enforcement Center.

A video captured the events that occurred at the county jail. The video begins with Perry and Jorgenson entering the booking room. Jorgenson informs Perry that he will be reading some information, that Perry will need to follow along, and that he is going to request a test. As Jorgenson prepares the paperwork, Perry repeatedly asks Jorgenson "to give him a break." Jorgenson states he cannot do that. Jorgenson then shows Perry what he is going to read

to him and asks Perry to follow along and listen carefully. Perry replies that he is “not going to do that.”

Jorgenson begins reading the implied consent advisory about two and a half minutes after arriving in the booking room. While Jorgenson is reading the advisory, Perry takes his cell phone from his front right pocket and begins to mess with it. Jorgenson stops reading and asks Perry to “please turn that off.” Perry responds, “I’m calling my lawyer.” Jorgenson replies, “In a second, let me read first. Put your phone right here.” Perry again states, “I’m calling my lawyer.” Jorgenson states “set your phone down right here please. You can call your lawyer when I’m done reading.” Perry continues to mess with his phone, so Jorgenson takes it from Perry and sets it on the desk next to him. Jorgenson then tells Perry, “You can call a lawyer when I’m done reading.” Perry then begins to beg Jorgenson to “let me go please.” Jorgenson again replies, “You can call your lawyer when I’m done reading.” Perry then states “You’re f---ing with me” and stands up. Jorgenson immediately stands and sternly tells Perry to sit down. Perry does. Jorgenson continues,

I’ve been nothing but polite with you since we started. I don’t want to hear a word out of your mouth, J.P. Now, I’m going to read this to you and you can call your attorney when I’m done reading. Ok. I’m not going to let you go. Ok. I don’t want to get angry. You can call your attorney when I’m done reading so you will know what to talk to him about.

After a brief conversation about why Perry cannot have his phone, Jorgenson continues to read the advisory.

Perry again stands requiring Jorgenson to tell him to sit. Perry sits and Jorgenson again returns to reading the advisory. Perry then reaches for his

phone, but Jorgenson grabs it and places it in his lap. Jorgenson continues on with the advisory. Perry then interrupts, "I want to talk to my lawyer." Jorgenson ignores the request and completes the advisory moments later. It took Jorgenson approximately four minutes to read the advisory due to the numerous interruptions.

At this point, Jorgenson explains to Perry that he is requesting a breath specimen. Perry responds "no" and accuses Jorgenson of denying him his phone call. Perry then asks if he is on camera, and Jorgenson replies "yes." Jorgenson informs that Perry can now make his phone calls and asks if his attorney's number is in his phone. Perry responds "no." Jorgenson then hands Perry his cell phone and informs him that he can call his attorney or a family member or a friend and ask for advice. Perry replies, "You've already denied that. You stole my phone from me." Jorgenson responds, "You weren't paying attention to me. I'm letting you call your attorney now." Perry again responds, "Well you took it away from me," and Jorgenson replies "Well, I gave it back." Jorgenson then asks, "Who is your attorney?" Perry answers "You're not going to know him." Jorgenson then asks, "Well, are you going to call him?" Perry replies "No. Not now. I'll talk to him after he sees this [referring to the booking video]."

Jorgenson then reaffirms that he is seeking a breath test, and Perry refuses. Jorgenson again asks if Perry wants to consult with an attorney, but Perry refuses claiming Jorgenson already denied him that right by taking his phone away. Jorgenson then explains,

I was reading you the implied consent advisory and you weren't listening or paying attention and you were going to use your phone. I did. I took away your phone from you because I wanted to finish reading the implied consent so you would understand what you need to talk to your attorney about. Now I'm giving you the opportunity to call an attorney. I'm giving you the opportunity to call a family member or friend for advice. Now is the time. What would you like to do? I'm asking for a breath test for chemical testing.

Perry again refuses to take the test and then refuses to sign the form.

Jorgenson again asks, "You don't want to call your attorney?" Perry replies, "I want to, but you denied my chance." Jorgenson denies that he is denying him his right, but Perry continues to assert he did by taking his phone away from him. Jorgenson restates, "Now is the time to call your attorney. Now you know what to talk about." Perry again states Jorgenson "already denied that." After this exchange, Perry again refuses any testing.

At this point, Jorgenson proceeds to work on paperwork. During this time, Perry still has his cell phone in his hands. Perry eventually states, "I'll call my wife though." Although Perry messes with his phone, he does not call anyone. Instead, Perry says, "You know, people said that you were a nice guy."

When Jorgenson completes the paperwork, he asks Perry to empty his pockets. Perry proceeds to place a tin container on the desk. Inside the container, Jorgenson discovers two marijuana cigarettes.

On November 22, 2010, the State charged Perry by trial information with operating while intoxicated, first offense, and possession of marijuana. Perry subsequently filed a motion to suppress all of his statements, the implied consent, his refusal, and the marijuana cigarettes. The basis of Perry's motion was that Jorgenson violated his right to consult with an attorney, because "Iowa

Code section 804.20 gives the Defendant the absolute right to conduct (sic) his attorney, not when the officer decides but when the request is made.”

On March 14, 2011, the district court denied the motion to suppress. Perry waived his right to a jury trial and proceeded to a bench trial. The district court found Perry guilty as charged. Perry now appeals the district court’s denial of his motion to suppress.

## **II. Standard of Review.**

We review the district court’s interpretation of section 804.20 for errors at law. *State v. Hicks*, 791 N.W.2d 89, 93 (Iowa 2010).

## **III. Analysis.**

In this case, the record shows Perry invoked his right to contact an attorney and was afforded several opportunities to do so. *See id.* (discussing these two distinct inquiries). Rather, the question presented in this appeal is whether the section 804.20 right to contact an attorney requires an officer to provide the right immediately upon request. We believe this answer to this question is found in the plain language of the statute providing the right. Iowa Code section 804.20 provides, in pertinent part:

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.

According to the statute, the right to call, consult, or see a family member or attorney must be provided “without unnecessary delay after arrival at the place

of detention.” *Id.* Here, Perry was given the opportunity to contact an attorney approximately seven minutes after arriving in the booking room. Those seven minutes would have been much shorter if Perry had stopped interrupting Jorgensen. Although Jorgenson did not allow the phone call until after he had completely read the implied consent advisory, we do not find under these facts that the reading of the advisory resulted in an “unnecessary delay.” Rather, any unnecessary delay in this case was caused by Perry and the interruptions he caused by his inability to sit still and listen to or follow along with the implied consent advisory. Because we agree with the district court’s finding that Perry was provided multiple opportunities to contact an attorney without unnecessary delay by Jorgenson, we affirm the district court’s decision denying Perry’s motion to suppress.

**AFFIRMED.**