IN THE COURT OF APPEALS OF IOWA

No. 2-374 / 11-1611
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MIKEL ROBERT BRILLHART,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Richard Gleason (motion to suppress) and Randall J. Nigg (trial), District Associate Judges.

Defendant appeals an adverse ruling on a motion to suppress and his subsequent conviction. **AFFIRMED.**

Gina Kramer, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Ralph Potter, County Attorney, and Brigit Barnes, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Mikel Brillhart appeals the district court's denial of his motion to suppress evidence he alleges was obtained after he invoked his right to counsel under Iowa Code section 804.20 (2009), and his subsequent conviction of operating while intoxicated. Substantial evidence supports the court's finding that the arresting officer made repeated efforts to afford Brillhart the opportunity to place a call to an attorney or relative. Brillhart either declined or failed to respond in an intelligible fashion. We affirm.

I. Background Facts and Proceedings.

The manager of McDonald's called police to report a confused and incoherent customer at their drive-through window, at 2:00 a.m. on August 12, 2010. Officer Ann Kennedy pulled over the reported vehicle. Driver Mikel Brillhart's speech was slurred; he had red, watery eyes and dilated pupils; his movements were slow; and he appeared dull and sleepy. Officer Kennedy had to request Brillhart's license and registration several times before he complied. Brillhart failed all field sobriety tests, but denied drinking alcohol. The preliminary breath test resulted in a 0.20 blood alcohol level.[1] Once Brillhart was in Officer Kennedy's car, she noticed that he smelled of urine and his shorts were damp in the center.

Officer Kennedy transported Brillhart to the Dubuque law enforcement center, gave him a *Miranda* warning, and read the implied consent warning.[2]

[1] Brillhart claims his breathalyzer results are inaccurate due to bad acid reflux disease.

[2] Brillhart denies receiving a *Miranda* warning. He testified that he wasn't sure if the implied consent warning was read. Brillhart claims he did not know the

Next, Officer Kennedy asked Brillhart if he wanted to make a phone call. Brillhart responded that he did not want to make a decision at that time.[3]

Officer Kennedy gave Brillhart thirty minutes to think before asking him a second time if he wished to contact an attorney or anyone else. Brillhart would only state that Kennedy had forgotten to ask him something. Officer Kennedy asked Brillhart a third time if he wanted to speak with an attorney. Brillhart's subsequent statements were argumentative and nonresponsive to Officer Kennedy's question. Instead, he repeated his accusation that Kennedy did not ask him if he wanted to call an attorney.

Officer Kennedy asked Brillhart a fourth time if he wanted to call an attorney or anyone else, showed him the phone book, and asked with whom he wanted to speak. Brillhart's only response was repeating his accusation that Kennedy did not ask him if he wanted to call an attorney. Brillhart then refused all testing, without the benefit of advice of counsel.

Brillhart denies Officer Kennedy's assertions that he behaved in a belligerent manner, made repeated nonsensical statements, and failed to respond in an intelligible way to her inquiries. Brillhart claims that he specifically and clearly invoked his right to speak with an attorney, but Kennedy ignored his request.[4] Brillhart contends that instead of assisting him, Kennedy repeatedly asked if he was ready to submit to testing. Brillhart allegedly believed he would

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consequences of his decision when he refused testing. However, he admitted that Officer Kennedy told him something about the possibility of having a suspended license.

[3] Brillhart says this response was in answer to the question of whether or not he would submit to testing.

[4] Brillhart does not remember the telephone or telephone book in the detention room. He contends he would not have felt comfortable using the phone without permission.

not be allowed to consult an attorney due to Kennedy's failure to assist him and the very early morning hour.

II. Error Preservation and Standard of Review.

While Brillhart's original claim was a constitutional violation, he subsequently argued a violation of his statutory rights under Iowa Code section 804.20. The district court ruled on the statutory claim and was silent on the constitutional claim. Brillhart failed to file a motion to amend or enlarge the district court's ruling for a decision on the constitutional issue. Thus, error was not preserved on the constitutional claim. *Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002).

We review interpretation of section 804.20 for errors at law. *State v. Hicks*, 791 N.W.2d 89, 93 (Iowa 2010). If the law was correctly applied, we determine whether substantial evidence supports the findings of fact. *Id.*

III. Discussion.

Iowa Code section 804.20 guarantees "any person arrested or restrained" the right "to call, consult, and see a member of the person's family or an attorney of the person's choice, or both." The statute also provides that if the arrestee is intoxicated, "the call *may* be made by the person having custody." Iowa Code § 804.20 (emphasis added). An officer is not required to inform the detainee of this right; he or she must only give the suspect a "reasonable opportunity to contact an attorney or family member." *Hicks*, 791 N.W.2d at 94. However, before the rights under section 804.20 arise, the suspect must invoke the rights. *Id.*

We liberally construe a suspect's invocation of his rights under section 804.20. *Id.* at 95. When a detained suspect "makes a statement that can reasonably be construed as a request to communicate with family members or an attorney, the suspect has invoked his section 804.20 right to communicate with family or counsel." *Id.*

After a suspect has invoked this right, "the detaining officer must direct the detainee to the phone and invite the detainee to place his call or obtain the phone number from the detainee and place the phone call himself." *Id.* at 97. If the detainee is not allowed to call his lawyer before being required to elect whether to submit to chemical testing, evidence of his refusal is inadmissible at trial. *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). If the lawyer cannot be reached promptly, the detainee may be required to decide whether to submit to testing without assistance of counsel. *Id.* at 831.

Given the disparity between the factual accounts of the events, an analysis of whether Brillhart's statutory rights were violated requires a credibility determination. With the benefit of observation of the parties, the district court determined Officer Kennedy's recitation of events was more credible than Brillhart's.

While it may be a stretch to construe Brillhart's repeated, confused accusations that Kennedy failed to ask him if he wanted to speak to an attorney as an affirmative request, we liberally construe Brillhart's statements to find that he effectively invoked his section 804.20 rights.

Brillhart's invocation of his rights required Officer Kennedy to take affirmative action to ensure that his request was honored. *Hicks*, 791 N.W.2d at

97. Section 804.20 requires the officer to "direct the detainee to the phone and invite the detainee to place his call or obtain the phone number from the detainee and place the phone call himself." *Id.* Here, Officer Kennedy did not dial the phone for Brillhart, but she sat him in a room next to a telephone and telephone book and repeatedly asked him if he wished to make a call. While the record does not indicate Officer Kennedy directly suggested Brillhart use the phone provided in the room in which he was detained, she offered him the opportunity to make a call, pointed out the phonebook, and attempted to discern whom he wished to call. Brillhart was unable or unwilling to tell Officer Kennedy what he wanted or whom he wanted to call.

Officer Kennedy's action was sufficient to provide a reasonable opportunity for Brillhart to contact an attorney. While the statute contemplates a detaining officer placing a call for an intoxicated suspect, the language is permissive not mandatory. Moreover, Officer Kennedy could not have placed a call for Brillhart without, at minimum, his identification of the individual with whom he wished to speak. Thus, Brillhart's statutory rights were not violated.

Substantial evidence also supports the district court's credibility determination. The McDonald's restaurant manager who initiated the call to police reported Brillhart was incoherent, confused, and belligerent, yelling at the drive-through staff, at 2:00 a.m. A second concerned citizen, who was behind Brillhart in line at McDonald's, confirmed Brillhart was belligerent and yelling. Officer Kennedy pulled Brillhart over and discovered that he had dilated pupils, red and watery eyes, slurred speech, and slow movements. Seven beer cans were found in his car. A strong odor of alcohol emanated from his breath.

Officer Kennedy requested his license and registration information multiple times. Brillhart failed all field sobriety tests. The preliminary breath test indicated a 0.20 blood alcohol content. Officer Kennedy's field notes state "Brillhart would ask questions that make no sense and then demand an answer."

We have also observed the video of the stop and field sobriety tests. The officer gave instructions to Brillhart on how to perform the requested field sobriety tests. Although the officer's instructions were not a picture of clarity, and some further explanations were necessary, Officer Kennedy never lost her patience with Brillhart. However, Brillhart was argumentative and quarrelsome with the officer.[5] We believe the video is supportive of Officer Kennedy's characterization of Brillhart's demeanor after the stop.

We agree there was substantial evidence to support the district court's conclusion that "the officer made repeated attempts and offers to the defendant for the opportunity to contact an attorney or relative."

IV. Conclusion.

Substantial evidence supports the district court's finding that Brillhart's arresting officer made repeated efforts to afford him the opportunity to place a call to an attorney. Brillhart either declined or failed to respond in an intelligible fashion. Thus, Brillhart's rights under Iowa Code section 804.20 were not violated. Brillhart's motion to suppress evidence of his refusal to submit to testing was properly denied, and his subsequent conviction valid.

AFFIRMED.

[5] For example, at one point Officer Kennedy asked Brillhart to walk an imaginary straight line to which Brillhart asked, "When is the imaginary line going to magically appear?"