IN THE COURT OF APPEALS OF IOWA

No. 2-499 / 11-1231
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ALEXANDER MARK POTHAST,
Defendant-Appellee.

Appeal from the Iowa District Court for Bremer County, Stephen P. Carroll, Judge.

On discretionary review, the State challenges a district court ruling suppressing defendant's blood alcohol test results. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, and Kasey E. Wadding, County Attorney, for appellant.

Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellee.

Heard by Vaitheswaran, P. J., and Bower, J. and Huitink, S.J.*

*Senior Judges assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, P.J.

The State takes issue with a district court ruling suppressing Alexander Pothast's blood alcohol test results.

I. Background Facts and Proceedings

Early one morning, deputy sheriffs responded to a report of a rollover accident near Waverly, Iowa. They discovered an overturned car in a ditch and two young men standing in the roadway. One of them, seventeen-year-old Alexander Pothast, admitted he was drinking and driving when he lost control of the car. His friend told an officer they were speeding and Pothast, as well as a third friend, were not wearing seatbelts. Both Pothast and his friend asked about the condition of the third friend, who they believed was still in the car. On further investigation, the deputies found that he had been ejected from the car and was lying in a fetal position in the ditch. This friend later died.

Pothast was transported to a hospital where he was immobilized on a backboard and fitted with a C-collar and oxygen mask. A police sergeant arrived at the hospital and spoke to Pothast, who again admitted drinking and driving. He agreed to take a preliminary breath test, which he failed.

At this point, the sergeant asked Pothast to provide a blood sample and read him an advisory that stated if he refused to submit to the chemical test, his driver's license would be revoked for one year. Pothast agreed to furnish blood and a technician proceeded to withdraw two samples, one for diagnostic and treatment purposes and the other for alcohol testing.

Before any testing could be performed, Pothast sent the testing lab a letter purporting to withdraw his earlier consent. Law enforcement officials secured a

search warrant and proceeded with testing under the authority of the warrant. The tests revealed a blood alcohol content close to twice the legal limit.

The State charged Pothast with homicide by vehicle. Pothast moved to suppress the test results, arguing one sample was inadmissible pursuant to the physician-patient privilege and the other was inadmissible because it was obtained in the wake of inaccurate advice about the effect of a test refusal on his driver's license. Following a hearing, the district court granted the motion.

The State filed an interlocutory application for discretionary review, which the Iowa Supreme Court granted. The case was transferred to this court for disposition.

The State seeks reversal of the suppression ruling on the grounds that (1) "Pothast voluntarily consented to provide a blood sample," and (2) "the State legally seized a sample of Pothast's blood originally drawn for medical purposes." We find the first issue dispositive and, accordingly, we do not reach the second issue.

II. Consent

A person who operates a motor vehicle while intoxicated is deemed to have consented to the withdrawal of a bodily substance for alcohol testing. Iowa Code § 321J.6(1) (2009). A person has the right to withdraw this deemed consent and refuse to have the substance extracted for testing. *See id.* § 321J.9(1) ("If a person refuses to submit to the chemical testing, a test shall not be given . . . ."); *State v. Overbay*, 810 N.W.2d 871, 876 (Iowa 2012). A refusal, however, is not without consequences, and the person has to be apprised of these consequences. *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) (stating

the person must be told of "the effect on [the person's] driving privilege of a refusal to take the test"). Specifically, the person must be told "of the potential periods of license revocation associated with refusal to take the test or with a positive test result." *Overbay*, 810 N.W.2d at 876; *see also* Iowa Code § 321J.8(1)(a).

The advisory read to Pothast informed him that if he refused to submit to the test, his driver's license would be revoked for one year. *See* Iowa Code § 321J.9(1)(a) (prescribing one-year revocation period for person with no previous revocation). This advisory would have been accurate if the bodily substance sought to be tested was urine or breath. *See* Iowa Code § 321J.6(2) ("Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit, and section 321J.9 applies."). The advisory was not accurate for the testing of blood. *Id.* ("A refusal to submit to a chemical test of blood is not deemed a refusal to submit . . . .").

Where blood is the substance of choice, "[a]n accused driver has an 'absolute right to refuse'" the test. *Overbay*, 810 N.W.2d at 877 (citation omitted). At the point of refusal, "the peace officer shall then determine which one of the other two substances shall be tested and shall offer the test." Iowa Code § 321J.6(2).

Pothast was not apprised of this absolute right to refuse a blood test. He argued, therefore, that his initial reaffirmation of the deemed consent to the withdrawal of blood samples was not fully informed and accordingly was involuntary. The district court agreed.

After the court entered its suppression ruling, the Iowa Supreme Court filed *Overbay*, 810 N.W.2d at 880, which held that a defendant's consent, given under virtually identical factual circumstances, was voluntary. The court specifically stated that "voluntariness [of consent to a blood test] is not undermined by inaccurate information if the record indicates the information would not have affected the motorist's decision to submit to or refuse chemical testing." *Overbay,* 810 N.W.2d at 880; *accord State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003) ("[N]ot every inaccurate depiction by law enforcement officers that might bear on a subject's election to submit to chemical testing is a basis for suppressing the test results."). The court expressed confidence that Overbay "was not induced to take the blood test because of anything incorrect in the advisory." *Overbay*, 810 N.W.2d at 879. In the court's view, "[h]ad Overbay declined the blood test, she would have been immediately presented with the same choices with respect to a urine test" and her decision process would have been no different. *Id.*; *accord Bernhard*, 657 N.W.2d at 472 (concluding consent to chemical testing was voluntary because if "defendant had refused to provide a sample of blood the implied consent procedure would have merely shifted to a request for a urine or breath sample. Defendant would have been required to provide a sample of one of those substances or face the revocation of his license").

In a supplemental brief filed after *Overbay*, and again at oral argument, Pothast made a valiant effort to distinguish *Overbay*. He cited several facts unique to this case, including the sergeant's testimony that a blood test was the "only feasible test." He acknowledged, however, that the sergeant later qualified

his answer about the feasibility of a blood test by stating he would have requested a urine sample had Pothast refused to provide a blood sample.

Pothast also pointed to the absence of evidence that the officer would have been able to obtain a urine test.[1] While this argument carried weight before *Overbay*, the court there considered and rejected a virtually identical argument, characterizing it as "House That Jack Built" reasoning. 810 N.W.2d at 878–79.

We are left with the following facts. Though Pothast was only seventeen years old at the time of the accident, his parents were by his side when the sergeant sought a blood sample. Pothast's consent was immediate and unequivocal, as was his cooperation at the scene and immediately thereafter. While he was strapped to a backboard and covered with an oxygen mask, he responded to the officer's questions and apparently showed no signs of delirium. Based on this record, we conclude the incomplete advisory "would not have affected [Pothast's] decision to submit to or refuse chemical testing." *Id.* at 880.

We reverse the district court ruling that suppressed the blood test results obtained from the implied consent blood samples, and we remand for further proceedings.

REVERSED AND REMANDED.

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[1] The officer conceded it would have been difficult to obtain a breath test because the testing machine was elsewhere, and Pothast could not be transported in his condition.