IN THE COURT OF APPEALS OF IOWA

No. 2-513 / 11-1886
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN MIKKAEL SCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Randy S. DeGeest, District Associate Judge.

Justin Scott appeals his conviction for operating while intoxicated, third offense, arguing the district court erred by denying his motion to suppress a blood test result showing his blood alcohol content to be over the legal limit. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Rose Ann Mefford, County Attorney, and Tyler L. Eason, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

The question in this appeal is whether the State complied with Iowa Code section 321J.7 (2011) in obtaining evidence of the defendant's blood alcohol concentration. In challenging his operating-while-intoxicated conviction, Justin Scott argues the district court should have suppressed his blood test result because the physician did not properly certify that he was incapable of refusing or consenting to chemical testing. The district court concluded that the physician's "inadvertence" in signing the request form rather than the certification form did not require exclusion of the test results.

Scott argues that *State v. Boner*, 186 N.W.2d 161 (Iowa 1971), requires literal compliance with statutory certification when a defendant lacks the capacity to refuse or consent to a chemical test. The State distinguishes *Boner* and advocates for a substantial compliance standard for section 321J.7. Assuming without deciding that substantial compliance with section 321J.7 will suffice, we conclude the physician's evaluation of Scott's condition did not satisfy the reasonable objectives of the certification statute.

I. Background Facts and Proceedings

In the eight o'clock hour of February 19, 2011, Justin Scott was driving on 275th Street in Oskaloosa, when he sped over railroad tracks, was unable to remain on the curving road and crashed into a tree. The impact injured Scott and badly damaged his truck. Before law enforcement arrived, friends pulled Scott out of his vehicle and transported him to Mercy Hospital in Des Moines. After being informed of Scott's accident, and that he may have been intoxicated, Iowa

State Patrol Trooper Durk Pearston arrived at the hospital just before 10:00 that same night to obtain a bodily specimen for chemical testing.

Scott told the trooper he left the scene because of his injuries, but when further questioned, admitted he departed because he and some friends had consumed a case and a half of beer before the accident. During their conversation, Trooper Pearston perceived a strong smell of alcohol and noticed Scott's eyes were bloodshot and watery. Scott had slurred speech, and he stumbled and muttered. Scott failed the horizontal gaze nystagmus (HGN) test, and his preliminary breath test (PBT) results exceeded the legal limit.[1] Despite Scott's apparent intoxication, the trooper did not believe Scott lacked the capacity to consent to testing.

At 10:17 p.m., Trooper Pearston read Scott the implied consent advisory, as well as his *Miranda* rights. Scott remained conscious and conversed with the trooper for about five minutes. Trooper Pearston then requested a sample of Scott's blood for chemical testing and informed Scott that he could first contact a friend, family member, or attorney. According to the trooper's testimony, Scott responded that he "didn't know what was going on" and he "didn't want to do anything." Trooper Pearston said Scott's behavior changed abruptly and he suddenly did not recognize Pearston as a trooper despite the fact he was wearing a uniform.

At 10:30 p.m., the trooper asked Dr. Jason Spjut whether the medication administered to Scott could have caused the patient's sudden confusion. Scott

[1] The trooper explained Scott was unable to perform the walk-and-turn and one-legged-stand tests because he was strapped to a backboard.

had received 150 mg of Fentanyl, a powerful narcotic, and 11 mg of Etomidate, a sedative. Dr. Spjut, who was finishing his first-year residency, told the trooper that those medications "could easily have made [Scott] incapable of giving an informed consent or refusal." On this basis, Trooper Pearston provided the doctor with two forms: the first was entitled "REQUEST TO MEDICAL PERSONNEL" and the second was headed "CERTIFICATION – PERSON IS DEAD, UNCONSCIOUS, OR OTHERWISE UNABLE TO CONSENT OR REFUSE." (These forms can be viewed as attachments to this opinion.) These standard forms are used by the Iowa State Patrol to request a specimen of blood or urine from a driver suspected of operating while intoxicated, but who is unable to consent or refuse. Dr. Spjut signed the request form but did not sign the certification. The doctor did mark a box on the unsigned certification acknowledging Scott was "[o]therwise in a condition rendering the person incapable to consent or refusal, as follows:" and listed the dosage of both drugs prescribed on the lines provided.

The trooper then received a sample of Scott's blood and submitted it to the Division of Criminal Investigation's crime lab for testing. The toxicology report showed Scott's blood alcohol content on February 19, 2011 was .209. On June 9, 2011, the State filed a trial information charging Scott with operating while intoxicated, third offense.

On August 12, 2011, Scott filed a motion to suppress the blood test result. The district court held a suppression hearing later that month, during which both Trooper Pearston and Dr. Spjut testified. Trooper Pearston recalled Scott

appeared cogent earlier in their conversation, but that Scott's personality changed immediately after the trooper invited him to contact a friend, family member, or attorney:

> At that time he looked at me, he told me he didn't know what was going on. He didn't know who he was, said he didn't want to do anything. It was a completely different person from who I was talking to. He was very confused, didn't recognize me as a State Trooper; and at that time I made a decision to talk to a doctor and find out what kind of medication he was on and see if this is consistent with either head injuries or the medicine that he would become confused.

On cross examination, Scott's counsel broke down the interaction between his client and the trooper. The trooper estimated five to eight minutes passed between the initial sobriety testing and when he requested a blood sample. At 10:16 p.m., Trooper Pearston had no concerns about Scott's ability to understand and consent to the HGN and PBT. "He answered all of my questions. He had no problems understanding it, answered it right away; and like I said, towards the end, then his demeanor and everything changed." At 10:17 p.m., the trooper read him the implied consent advisory, and at 10:20 p.m. he read him his *Miranda* warnings. The trooper believed Scott understood both advisories. Trooper Pearston testified the moment he asked Scott to submit to a blood test, Scott acted like a completely different person:

> Q. But he did tell you he didn't want to do anything after you requested the blood sample? A. Yes.
> Q. And after he said "I don't want to do anything" after you requested the blood sample, that's when you went and got the certifications from the doctor? A. That's when I went and talked to the doctor. He seemed very confused. It was almost like he was a different person, didn't recognize me as a trooper. That's what I talked to the doctor about whatever medicine he was on plus the effects of the alcohol; and that's when the doctor decided that,

> yeah, he was unable to consent or refuse. And the doctor made the decision.
> Q. But just so I'm clear, you had clearly asked him to do a blood test? A. Yes.
> Q. And he told you he didn't want to do anything? A. Correct.
> Q. And then that's when you went and talked to the doctor? A. A little after that. We had a little more conversation in there than just those words and going to find somebody else.

On redirect, the trooper explained that Scott was not "fully coherent" and seemed "confused throughout" their interaction.

On August 31, 2011, the district court denied the motion to suppress. On November 14, 2011, Scott agreed to a stipulated trial on the minutes of evidence. Four days later, the district court found him guilty of OWI third offense, in violation of section 321J.2.[2]

II. Scope and Standard of Review

When the admissibility of evidence depends upon statutory interpretation, we review for correction of legal error. *State v. Albrecht*, 657 N.W.2d 474, 478–79 (Iowa 2003). Accordingly, we review this suppression ruling to determine whether the district court correctly interpreted and applied chapter 321J. *State v. Demaray*, 704 N.W.2d 60, 62 (Iowa 2005). We are bound by the district court's findings of fact if they are supported by substantial evidence. *State v. Green*, 680 N.W.2d 370, 372 (Iowa 2004).

The State bears the burden of showing compliance with the foundational requirements of chapter 321J. *State v. Zell*, 491 N.W.2d 196, 198 (Iowa Ct. App. 1992).

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[2] His first two OWI convictions were on March 19, 2001, and October 3, 2005.

III. Analysis

Any person operating a motor vehicle in Iowa under circumstances providing reasonable grounds to believe he or she is operating while intoxicated consents to the withdrawal of his or her breath, blood, or urine, as well as a chemical test of those specimens to determine the alcohol concentration or presence of a controlled substance or other drug. Iowa Code § 321J.6. The legislature intended this so-called "implied consent" law to safeguard the traveling public from intoxicated drivers. *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011) (tracing the legislation's origin to 1963, and providing the public policy reasoning for its enactment). Chapter 321J embodies "the basic principle that a driver impliedly agrees to submit a test in return for the privilege of using the public highways." *State v. Hitchens*, 294 N.W.2d 686, 687 (Iowa 1980). "In reality, however, the statute normally requires the express consent of the driver before a test is administered." *State v. Palmer*, 554 N.W.2d 859, 861 (Iowa 1996) (citing section 321J.9). An exception to the express consent requirement arises when a driver is incapacitated. *Id*.

Motorists who are dead, unconscious, or otherwise in a condition rendering them incapable of consent or refusal are not deemed to have withdrawn their consent provided in section 321J.6. Iowa Code § 321J.7. A sample of their blood may be tested if a licensed physician, physician assistant, or advanced registered nurse practitioner certifies in advance of the test that the motorist was unconscious or otherwise in a condition rendering them incapable of consent or refusal. *Id*; *see State v. Weidner*, 418 N.W.2d 47, 48 (Iowa 1988)

(holding that required certification is strong, but not conclusive, evidence that conditions existed to authorize withdrawal of blood).

In this case, the state trooper invoked implied consent based on his belief that Scott had been driving while under the influence and was "involved in a motor vehicle accident or collision resulting in personal injury or death." *See* Iowa Code § 321J.6(1)(b). Scott does not contest the trooper's reasonable grounds for invoking implied consent. Rather, he argues that the trooper improperly obtained a specimen of his blood. First, he argues the physician's certification stating he was incapable of consenting or refusing does not comply with section 321J.7. Scott alternatively alleges his "verbal assertions" to the trooper constituted a refusal and precluded the trooper from seeking the physician's certification under section 321J.7. Because we find Scott's first argument to be meritorious, we do not reach his second ground for suppression.

We start with the undisputed point that the certification in this case did not literally comply with section 321J.7. Trooper Pearston presented Dr. Spjut with two standard state patrol forms: a request to medical personnel and a certification of the inability to consent or refuse. The doctor mistakenly signed the request form, but not the certification. The request form contained no language regarding certification.

On the certification form, Dr. Spjut indicated he was a physician and was consulted at Mercy Hospital for the purpose of determining the condition of Justin Scott. Dr. Spjut also checked a box indicating that he found Scott to be "[o]therwise in a condition rendering the person incapable to consent or refusal."

Where the form asked for a description of the patient's condition, the doctor listed two medications: "Etomidate 11 mg" and "Fentanyl 150mg." Immediately below those lines, the form provided a signature block for the physician that he left unsigned.

Scott relies on *State v. Boner* to assert that his alcohol test results must be suppressed if the State cannot show strict compliance with the certification requirements in section 321J.7. In that case, our supreme court examined section 321B.5 of the 1966 Iowa Code, an earlier iteration of the certification requirement now found at section 321J.7. *Boner*, 186 N.W.2d at 163. The court held that although the record left no question that Boner was incapable of refusal or consent, because law enforcement failed to seek, in writing, a certification from the physician confirming that fact, the blood test result was inadmissible. *Id.* at 163–64. The court accepted Boner's argument that literal compliance with the certification statute was required. *Id*. at 164. The court acknowledged its previous pronouncements that substantial compliance with the implied consent law was sufficient but distinguished the situation where a defendant was capable of consenting to the withdrawal of a bodily specimen. *Id*. The State argued in *Boner* that section 321B.5 did not require the certificate of the doctor to be in writing before the withdrawal of the bodily substances. The court disagreed, explaining that "certification" could not take place without an endorsement in writing.[3] *Id.* at 165.

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[3] Since the decision in *Boner*, the legislature added a final sentence to the provision at issue, permitting oral certification by qualified hospital personnel, so long as written

In this appeal, the State argues that *Boner's* discussion of "literal versus substantial compliance" was "referring to the difference between certification and no certification at all." The State contends we should indulge a substantial compliance standard here because the trooper presented the physician with a request form and a certification form, and the physician believed he was signing a single document "certifying that the defendant was unable to consent to or refuse chemical testing." The State goes on to argue that "the purposes of section 321J.7 were not undermined: a physician determined the defendant was incapable of consent to or refusing chemical testing, and he memorialized that determination in writing." In support of its position that the blood test should be admitted if law enforcement substantially complied with the certification provision, the State analogizes to cases interpreting section 321J.6. *See, e.g., State v. Lindeman*, 555 N.W.2d 693, 696 (Iowa 1996) (finding substantial compliance with implied consent law although arresting officer did not qualify as a "peace officer," where qualified officer personally observed signs of intoxication); *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991) (declining to require literal compliance with written request requirement in section 321J.6 when person sought to be tested is incapable of consenting or refusing).

It is possible to read *Boner* and its progeny as foreclosing the State's argument for a substantial compliance standard in cases where motorists are unable to refuse or consent to testing. *See Boner*, 186 N.W.2d at 164 (distinguishing substantial compliance case in which defendant requested

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certification is completed "within a reasonable time of the test." *See* 1997 Iowa Acts ch. 147, § 4.

testing). In *State v. DeBerg*, 288 N.W.2d 348, 350 (Iowa 1980), the court cited *Boner* and held that where a specimen is taken pursuant to the implied consent statute from a motorist who has not consented to the test, "the State must show literal compliance with the statute in accordance with the specifications set forth by the legislature." *DeBerg* highlighted *State v. Shelton*, 176 N.W.2d 159, 161 (Iowa 1970), for the proposition that the foundational requirements for withdrawing a defendant's blood sample when he was incapable of consent were "not [] difficult to establish" and concluded "[i]t would not serve the cause of justice for us to make extended inferences to correct a faulty foundation and thereby dilute the statutory protection afforded the defendant." While *DeBerg* and *Shelton* address the designation of the person to take the specimen and the type of syringe to be used (procedures now outlined in section 321J.11), we perceive the requirements for obtaining a physician certification in section 321J.7 as equally straightforward. Given this line of cases, we do not believe that we can "lightly excus[e] non-compliance with the law." *See State v. Wallin*, 195 N.W.2d 95, 98 (Iowa 1972).

But even if we assume without deciding that the State need only show substantial compliance, we believe the physician's certification in this case falls short of satisfying the purpose of section 321J.7. Our supreme court has allowed the admission of blood alcohol test results where law enforcement has not literally complied with section 321J.6 if the deficiencies have not compromised the purposes underlying the implied consent procedures. *See State v. Satern*, 516 N.W.2d 839, 841 (Iowa 1994). Those purposes include protecting the health

of the person being tested, assuring the accuracy of the test results, and preventing citizens from being indiscriminately tested or harassed. *Id*. If those purposes are jeopardized by the procedural shortfalls in a given case, the State cannot show substantial compliance. *See Palmer*, 554 N.W.2d at 867 (holding that officer's lack of qualifications for administering implied consent "directly impacts attainment of the legislative goal to protect citizens from indiscriminate testing and harassment").

As part of the overall implied consent scheme, section 321J.7 presupposes that an unconscious or otherwise incapacitated driver has not withdrawn consent but requires a physician (or a similarly trained medical professional) to certify that the driver is unable to refuse or consent before a bodily specimen is tested. This certification requirement guards against the indiscriminate testing of drivers suspected of being incapable of consent or refusal. The goal of the statute is for a medical assessment to act as a buffer between the law enforcement investigation and the incapacitated driver. Where, as in this case, the physician does not actually certify that the defendant's condition rendered him incapable of consent or refusal, the statutory purpose is undermined.

In its appellate argument, the State seeks to remedy the incomplete certification by pointing to Dr. Spjut's testimony at the suppression hearing. Specifically, the State quotes the physician's response on direct examination that by signing the request form he believed he was certifying that Scott was incapable of consenting to or refusing chemical testing.

In determining whether the physician's actions substantially complied with section 321J.7, we believe it is necessary to look at his testimony as a whole. During his direct examination, Dr. Spjut discussed the medications given to Scott in the emergency room. Scott received the sedative, Etomidate, so that the doctor could reset his hip. The doctor described the sedative as "pretty quick acting, usually eight to ten minutes," but noted that the drug can have lingering effects. After Scott woke up from the sedation, he was taken for a CT scan, a procedure which takes approximately thirty minutes. The doctor last saw Scott when he was returned to the emergency room after the scan. When asked on cross examination whether he was sure of Scott's condition at the time that he signed the paperwork, the doctor revealed that there was an eight- to ten-minute lapse between his last contact with the patient and when he was asked by the trooper to sign the form.

> Q. So it's safe to say then you weren't sure what kind of condition Mr. Scott was in at the actual time that you signed the form and the time that the blood was taken because you hadn't seen him for ten minutes?
> A. Yes, that's very safe to say. Yeah, it was within that ten-minute period.

The State's reliance on the physician's testimony concedes that his signature on the request form alone does not show compliance with the certification requirement in section 321J.7. To show substantial compliance, the State must demonstrate that the physician assessed Scott's condition and determined that he was incapable of consent or refusal, and that the physician's errant signature documented that assessment. The physician's testimony when viewed in its entirety does not allow the State to meet that burden. While the

physician testified that he intended to certify that Scott could not consent or refuse, his responses on cross examination do not instill confidence that Dr. Spjut had sufficient information about his patient's condition to actually verify such a lack of capacity.

The district court concluded that "the certification form was completed by the doctor." We disagree that the physician provided enough detail on the certification form to satisfy section 321J.7. Dr. Spjut wrote his name and title on the form, but when it came to describing Scott's condition in the space provided, the physician merely listed two medications and the dosage given to the patient. The doctor did not indicate on the certification how the prescribed drugs affected Scott's ability to consent to or refuse chemical testing. At the suppression hearing, the prosecutor could not prompt Dr. Spjut to confirm that Scott was incapable of consenting or refusing at the time the physician filled out the form:

> Q. In your medical opinion at the time that you signed the document, Mr. Scott was in a condition that rendered him incapable to consent or refuse to implied consent?
> A. Given the—I'm not an expert. Every person metabolizes things differently. Given my assessment at the time with his condition, I felt the medications I prescribed him could easily have made him incapable of giving an informed consent or refusal. Anyone can give consent or refusal, but it was informed consent.

Dr. Spjut explained, "[t]hat's the way I felt, and that's why I signed the form."

The blood test result is admissible under section 321J.7 only if Dr. Spjut "certifies that [Scott] *is* unconscious or otherwise in a condition rendering [him] incapable of consent or refusal." It is not enough for the physician to believe that hypothetically someone who was prescribed the same drugs as the defendant *could have possibly* been rendered "incapable of giving an informed consent or

refusal." On its face, the certification form falls short. And Dr. Spjut's testimony makes clear his intended certification was only to the possibility that Scott could have been unable, and that it was "very safe to say" he did not know Scott's condition at the actual time he signed the request form—ten minutes after he last saw his patient. Because the certification failed to substantially comply with section 321J.7, and the physician could not "make known or establish as a fact" that Scott was incapable of consent or refusal, the blood sample is inadmissible. *See Boner*, 186 N.W.2d at 164 (defining the term certify in the context of what is now chapter 321J as meaning "to make known or establish as a fact").

Our decision is based on the certification's failure to comply with section 321J.7, and not whether the defendant can offer extraneous evidence of his mental competency to overcome the weight of the doctor's testimony. Our supreme court has held that a competent certification from a physician generally trumps other evidence presented. *See, e.g.*, *Hafits v. Iowa Dep't. of Transp.*, 605 N.W.2d 1, 3 (Iowa 2000) (finding strong evidence of physician's certificate required affirming agency's finding of incapacity); *State v. Axline*, 450 N.W.2d 857, 859–60 (Iowa 1990) (upholding district court's admission of test because certificate constituted substantial evidence, despite conflicting testimony); *State v. Laughridge*, 437 N.W.2d 570, 572-73 (Iowa 1989) (refusing to second-guess a physician's good faith medical opinion); *Weidner*, 418 N.W.2d at 48-49 (affirming district court's reliance on physician's certification).

We are not second-guessing Dr. Spjut's conclusion that Scott's medications could have clouded his ability to consent or refuse. Instead, we are

deciding whether the physician's flawed certification can be excused because the deficiencies do not compromise the underlying purpose of section 321J.7. We find the lack of compliance in this case detracts from the legislative goal to protect citizens from being subject to chemical testing without an accurate medical assessment of their ability to give consent or refusal. The physician signed a form that did not mention certification; he filled out the certification form by listing medications without any explanation of their impact on his patient; he testified that those medications could potentially render someone unable to consent, but that he could not be sure of his patient's actual condition at the time that the physician signed the form. Viewing the request and certification forms in conjunction with Dr. Spjut's testimony, we do not find substantial compliance with section 321J.7. The district court should have suppressed Scott's blood alcohol test result.

Accordingly, we reverse Scott's conviction and remand for further proceedings consistent with this decision.

REVERSED AND REMANDED.

Bower, J., concurs; Vogel, P.J., concurs specially.

VOGEL, P.J.

I specially concur without opinion.

IOWA STATE PATROL

DISTRICT 1, 260 N.W. 48th Place, Des Moines, IA 503[illegible]

REQUEST TO MEDICAL PERSONNEL

To: Jason Sprunt Physician
(Title)

Date: 2-19-2011 Time Of Request: 10:32 County of Request: [redacted] Polk

Location Of Request: Mercy Hospital - Des Moines

I, TROOPER DURK PEARSTON #168, a peace officer, having reasonable cause to believe that Justin Mikkael Scott (8-27-80) (Name & DOB) operated a motor vehicle in this state while under the influence of an alcoholic beverage or other drug or a combination of such substances, or while having an alcohol concentration of .08 or above, or while having a controlled substance in the person's body, in violation of Iowa Code Section 321J.2, or while in violation of Iowa Code Section 321J.2A and having (check appropriate space):

☒ Reason under Iowa Code Chapter 321J
☐ A search warrant

for the withdrawal of a blood or urine specimen, do hereby request that
☒ A specimen of the named person's blood be withdrawn
☐ A specimen of the named person's urine be collected

for the purpose of chemical testing to determine the alcohol, drug, or controlled substances content thereof.

Signed: TROOPER DURK PEARSTON #168
(Signature of Officer Making Request)

**********Information Below May Be Required**********

Requesting Officer & Agency: TROOPER D. PEARSTON - IOWA STATE PATROL
(If applicable)

If making request in hospital setting you will need to know the Name of Licensed Physician, Physician's Assistant, or Advanced Registered Nurse Practitioner overseeing the subjects care even if verbal consent is obtained from suspect:

Jason Sprunt MD
(Name of Licensed Physician, Physician's Assistant, or Advanced Registered Nurse Practitioner)

ISP Form 28 (11/2009)

IOWA STATE PATROL

DISTRICT 1, 260 N.W. 48th Place, Des Moines, IA 50313

CERTIFICATION - PERSON IS DEAD, UNCONSCIOUS, OR OTHERWISE UNABLE TO CONSENT OR REFUSE

STATE OF IOWA
COUNTY OF Polk (Where certified)

DATE: 2-19-2011

I, Jason Spjut, certify that I am a(n) Physician

I further certify that on the 19 day of February, 2011, I was consulted at Mercy Hospital Des Moines for the purpose of determining the condition of Justin Mikkael Scott (8-27-1980)
(Name/DOB)

I do further certify that I find/have found such person is:

- ☐ Dead
- ☐ Unconscious
- ☒ Otherwise in a condition rendering the person incapable to consent or refusal, as follows:

Etomidate 11 mg
Fentanyl 150 mcg

Signed: _____
(Signature of licensed physician, physician assistant, or advanced registered nurse practitioner)

At 1630 a.m./(p.m.) on February 19, 2011, the licensed physician, physician's assistant or advanced registered nurse practitioner certified this person to be dead, unconscious or otherwise in a condition rendering the person incapable of consent or refusal.

At _____ a.m./p.m. on _____, 20_____ the licensed physician, physician's assistant or advanced registered nurse practitioner completed this form.

Signed: TROOPER DURK PEARSTON #168
(Signature of Requesting Officer)

(Completion of DPS Form 28, *Request to Medical Personnel*, is also required when using this form.)

ISP Form 29 (11/2009)