

IN THE COURT OF APPEALS OF IOWA

No. 3-1088 / 12-1919
Filed December 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WAYNE WILLIS SOLOMON JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Craig M. Dreismeier, District Associate Judge.

Defendant appeals his conviction following the denial of his motion to suppress. **AFFIRMED.**

Frank Robak of Robak Law Office, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Matthew Wilber, County Attorney, and Thomas Nelson, Assistant County Attorney, for appellee.

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

TABOR, J.

Police officers found Wayne Solomon passed out in the driver seat of his truck in the middle of Sixteenth Street in Council Bluffs. The district court found him guilty of operating while intoxicated (OWI). Solomon challenges the denial of his motion to suppress—claiming invocation of implied consent for chemical testing was improper because the officer did not have reasonable grounds to believe Solomon was operating a motor vehicle under Iowa Code section 321J.6 (2011). Solomon also claims the police violated his rights under Iowa Code section 804.20 because he did not have a reasonable opportunity to call his attorney.

Because the evidence supports the district court's conclusion that Solomon was operating or had operated the truck and that the officer facilitated Solomon's request to call his lawyer, we find no grounds for suppression of his test refusal. Therefore, we affirm.

I. Background Facts and Proceedings

In the late night hours of May 2, 2011, Council Bluffs Police Officer Joshua Hughes responded to the report of a driver passed out behind the wheel of a pickup truck stopped just north of the railroad crossing at Sixteenth Street and Twenty-third Avenue. When Officer Hughes arrived at the scene he found the truck's engine running and Wayne Solomon asleep in the driver's seat. Hughes knocked on the truck's window several times.

As Solomon woke up, he "appeared confused" and "wasn't very coherent." After Solomon opened the truck door, Hughes noticed an odor of alcohol. The

officer asked Solomon if he had been drinking and Solomon responded: "a little." Solomon almost fell over as he exited the truck.

By this time, Hughes was joined at the scene by Officer Darren Budd. Officer Budd noticed Solomon had a difficult time standing. Officer Budd performed the horizontal gaze nystagmus (HGN) test, recording five of a possible six indicators for intoxication. The officers then allowed Solomon to place a call to his attorney on his cell phone, but Solomon told them he was unable to reach the attorney. After that, Solomon refused to participate in further field sobriety testing.

The officers asked Solomon to take a preliminary breath test (PBT), but "[h]e refused to blow through the straw as he was instructed to do."¹ The officers arrested Solomon at 11:41 p.m. and transported him to the jail. The officers allowed Solomon's wife to take care of his pickup truck.

At the jail, Solomon asked to call his attorney Frank Robak. At first, Officer Budd directed Solomon to the telephone and phone book, advising him to dial nine to reach outside numbers. Solomon told the officer he could not read the phone book without his glasses, so Officer Budd looked up Robak's number for Solomon. The officer then dialed the attorney's "after hours" number. Solomon informed the officer that he had misdialed, so the officer verified the number and dialed it again, correctly.

¹ Cameras inside the squad car captured a video of the officers' encounter with Solomon, but the audio recording was not working consistently. In addition, the video of the stop has a gap of more than one minute. Officer Hughes testified he was not aware of these problems, did not alter the video, and had no explanation of why either of these glitches occurred.

Solomon let the phone ring for the next thirty-one minutes. After the first fifteen minutes, the officer told Solomon he wanted to read him “his rights under Iowa law and then he could call his attorney back.” Slurring his words, Solomon said he wanted to let the phone ring “for as long as it takes.” Officer Budd said he would allow Solomon more time to reach his attorney after reading him his rights because he “respected” that Solomon wanted to get legal advice. After twenty-six minutes, the officer said, “I think he would have answered by now. . . . I’ve never let a phone ring for twenty-six minutes my entire life.”

The officer then offered to let Solomon use the restroom and come back and try again to call his attorney. Solomon refused to hang up, saying he would stay on the telephone until he was “good” and “sobered up.” Officer Budd ended the attempted call after one-half hour had passed. The officer then let Solomon use the restroom.

When Solomon returned he became belligerent with the officer, insisting he should be allowed to call his attorney. Officer Budd read Solomon the implied consent advisory. During the reading, Solomon swore at the officer and threatened to kill Budd and his family. The officer requested a breath specimen for chemical testing at 12:37 a.m. When asked if he would give a breath sample, Solomon said, “No.” When asked if he was refusing the test, Solomon said, “No,” and continued to demand a chance to talk with his attorney. The officer walked Solomon back to the phone and told him he had fifteen minutes before he considered Solomon’s response to be a refusal. Solomon told the officer, “You tell him.” To which the officer replied: “I’m not talking to your attorney.” The

officer again asked if Solomon would take the test, and he said, “No.” The officer took that as a refusal and processed Solomon into the jail.

On June 14, 2011, the State charged Solomon with first-offense operating while intoxicated in violation of Iowa Code section 321J.2(1). Solomon filed a motion to suppress on August 5, 2011. The motion alleged the stop was unlawful and the arresting officer failed to allow Solomon a reasonable opportunity to call an attorney.

The court held a hearing on the motion on March 29, 2012. Solomon testified at the hearing that he was being driven home, but the driver left when a train stopped the flow of traffic. He also said he let the phone keep ringing at the jail because he “wasn’t going to take the chance of hanging up . . . because [he] needed to talk to somebody.”

The district court denied the suppression motion on April 2, 2012. The court determined Officer Hughes had valid cause to approach Solomon’s truck.² The court also determined Officer Budd had reasonable grounds to invoke implied consent. The court made a specific finding that the officer’s recollection that the truck’s engine was running was more credible than Solomon’s version of events. Finally, the court found no violation of Iowa Code section 804.20.

On September 25, 2012, Solomon waived his rights and consented to a stipulated bench trial on the minutes of testimony. The court found him guilty on that same day. Solomon was sentenced to thirty days in jail, with all but two

² Solomon does not pursue a challenge to the stop on appeal.

days suspended, one year of supervised probation, and a fine of \$1250 plus surcharge and court costs. Solomon now appeals.

II. Standard of Review

We review the district court's interpretation of statutes like sections 321J.6 and 804.20 for errors at law. See *State v. Hicks*, 791 N.W.2d 89, 93 (Iowa 2010). If the court correctly applied the law, we determine if substantial evidence supports its findings of fact. *Id.*

III. Analysis

A. Was Solomon operating the truck when police found him passed out behind the wheel with the engine running?

Under Iowa's implied consent law, an officer may request a breath sample for chemical testing if the officer has reasonable grounds to believe the defendant has been operating a motor vehicle in violation of Iowa Code section 321J.2 and the defendant refused a PBT, has been placed under arrest for OWI, or other enumerated conditions exist. Iowa Code § 321J.6.

Solomon argues he was not operating his truck when the police found him at the railroad crossing. He testified that although he was in the driver's seat, the engine was not turned on and the keys were not in ignition.

The motor vehicle chapter defines the word operator as "every person who is in actual physical control of a motor vehicle upon a highway." Iowa Code § 321.1(48). A motor vehicle is not being operated within the terms of the OWI statute unless the vehicle is in motion or the engine is running. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998); *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d

722, 724–25 (Iowa 1994) (holding that officer who found defendant asleep in his vehicle with radio on and engine not running did not have reasonable grounds to believe defendant was “operating” vehicle while intoxicated).

Officer Hughes testified Solomon was in the driver’s seat and the engine was running when he came upon the truck. The district court decided the officer’s testimony was more credible than that of Solomon. “Determinations of credibility are in most instances left for the trier of fact, who is in a better position to evaluate it.” *State v. Weaver*, 608 N.W.2d 797, 804 (Iowa 2000). The district court was able to view the video *and* listen to the witnesses. The video shows the headlights of Solomon’s truck were on as Hughes approached the vehicle. The video also shows the tail lights were on until Hughes reached into the truck to turn off the ignition. Because the video is not definitive without sound, the district court relied on the witnesses and simply found Hughes to be more believable.

Alternatively, even if the engine was not running, circumstantial evidence establishes Solomon had operated while intoxicated when driving to the location where the vehicle was parked. See *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). Circumstantial evidence

is the proof “of one fact, or a set of facts, from which the existence of the fact to be determined may reasonably be inferred.” Circumstantial evidence involves two things: (1) “the assertion of witnesses as to what they have observed,” and (2) “a process of reasoning, or inference, by which a conclusion is drawn.” Circumstantial evidence “must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion.”

Brewster v. United States, 542 N.W.2d 524, 528 (Iowa 1996) (citations omitted). Circumstantial and direct evidence are equally probative. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

Solomon testified at the suppression hearing that because he was having problems with his heart medication “another guy gave me a ride.” According to Solomon, that guy’s girlfriend followed them and when they were stopped by train Solomon told them, “Well, I only live three or four blocks away. I will just wait for the train.” So they left. Solomon said he then called his wife to come get him. In his suppression testimony, Solomon was unable to provide the name of the “guy” who gave him a ride. He also did not explain why he was in the driver’s seat. Solomon also could not explain why he did not tell this story to the officers at the scene or at the jail.

Like the district court, we disbelieve Solomon’s story about how he came to be stopped in the street. Responding to a dispatch, police found Solomon passed out in the driver’s seat of his car with no one else around. The truck was stopped in a traffic lane with no other vehicles nearby and no oncoming train warning system activated. When he was awakened by Officer Hughes, Solomon was confused and incoherent. Hughes detected an odor of alcohol coming from the truck. Solomon’s speech was slurred and he admitted to the officers that he had been drinking that evening. The evidence in the suppression record supported the district court’s determination that the officer had reasonable grounds to invoke implied consent based on his belief Solomon had been operating his truck and for his arrest for violating section 321J.2.

B. Did Solomon have a reasonable opportunity under Iowa Code section 804.20 to contact his attorney when the officer looked up the phone number, dialed, and allowed Solomon to let the phone ring for thirty-one minutes before proceeding with the implied consent advisory?

Solomon also contends the court erred in denying his motion to suppress because the officer did not give him a reasonable opportunity to call his attorney. A person under arrest has a statutory right to contact a family member or attorney.

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. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, . . . , the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

Iowa Code § 804.20. The right guaranteed by section 804.20 is "a limited one and only requires a peace officer to provide the suspect with a reasonable opportunity to contact an attorney or family member." *State v. Hicks*, 791 N.W.2d 89, 94 (Iowa 2010). But an officer's failure to provide a reasonable opportunity to contact an attorney requires exclusion of any evidence gathered after the violation. *Id.* at 98.

The factual situation in this case is analogous to *Bromeland v. Iowa Department of Transportation*, 562 N.W.2d 624 (Iowa 1997). In *Bromeland*, the

motorist refused to take a breath test until he spoke with his attorney. *Bromeland*, 562 N.W.2d at 625. The officer found the attorney's number, dialed it, and let the phone ring fifteen to twenty times, but no one answered. *Id.* When asked if he would like to select another attorney Bromeland declined. *Id.* The Supreme Court held section 804.20 does not confer an "absolute right to counsel" only a "reasonable opportunity" to contact an attorney. *Id.* at 626.

Here, police allowed Solomon to use his cell phone while still at the scene to call his attorney, but he told police he did not receive an answer. Solomon also was able to contact a family member while at the scene to arrange to have his truck driven home.

Once at the jail, Solomon renewed his request to call his attorney. Officer Budd directed Solomon to the phone and found an after-hours number for attorney Robak. After inadvertently misdialing the attorney's number, Officer Budd redialed and allowed Solomon to wait for an answer for more than thirty minutes.

On appeal, Solomon asserts the second phone call "was again obviously to a wrong number." But Solomon did not take that position at the time of his arrest. He repeatedly refused to hang up the phone, even when the officer assured him he could try again to call his attorney after he was read the implied consent advisory and before deciding whether to give a breath sample. While the phone was ringing, Solomon said he wanted to stay on the line "however long it takes." Solomon was told to end the call after thirty minutes so Officer Budd could give the informed consent advisory and potentially obtain a sample within

the statutory time frame. See Iowa Code §§ 321J.2(12)(a); 321J.6(2). After Budd read the implied consent advisory, he allowed Solomon another chance to call attorney Robak, saying he would not count Solomon's response as a refusal for another fifteen minutes. But Solomon said he wanted Budd to talk to his attorney, and ultimately when the officer asked if he would take the test, Solomon said, "No."

We apply section 804.20 in a "pragmatic manner, balancing the rights of the arrestee and the goals of the chemical-testing statutes." *State v. Shaffer*, 774 N.W.2d 854, 856 (Iowa Ct. App. 2009) (quoting *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005)). The arrestee's right to consultation must not "materially interfere" with the process of obtaining a bodily specimen for testing. *State v. Garrity*, 765 N.W.2d 592 (Iowa 2009) (quoting *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)).

The district court correctly determined the officer gave Solomon a reasonable opportunity to contact counsel. When there was no answer at attorney Robak's after-hours number, Solomon was content to let the phone ring in hopes that he would "sober up." Solomon did not take Officer Budd up on his offer to dial Robak's number again, nor did Solomon ask to try a different attorney.

Even if Solomon did not have a reasonable chance to contact his attorney, we conclude the district court's failure to suppress Solomon's refusal was harmless error.

A violation of section 804.20 constitutes nonconstitutional error. *Garrity*, 765 N.W.2d at 597. Thus, we ask whether it sufficiently appears that Solomon's rights have been injuriously affected by the error or whether he has suffered a miscarriage of justice. *Id.* We presume prejudice unless the record affirmatively establishes otherwise. *Id.* Error is harmless when evidence obtained following a violation of section 804.20 would be cumulative to properly admitted evidence. *Id.*

Responding to a dispatch call, police found Solomon's pickup turned on and parked in the middle of the street. When they approached the truck, they found Solomon in the driver's seat, passed out. When the officer knocked on the window, Solomon was incoherent. When Solomon opened the door, the officer smelled alcohol. Solomon was unstable on his feet—almost falling when he stepped out of the truck. Solomon admitted drinking. He recorded five of six indicators of intoxication on the HGN test. Solomon showed heightened emotions at the jail. *See State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992) (listing signs a person is under the influence). The fact that there was no one else around the truck when the officers arrived and Solomon was passed out in the driver's seat provides circumstantial evidence Solomon drove while intoxicated. Moreover, the court does not state in its finding of guilt that it considered Solomon's test refusal.

We find that any violation of Solomon's rights under Iowa Code section 804.20 was harmless error.

AFFIRMED.