

IN THE COURT OF APPEALS OF IOWA

No. 3-201 / 11-1091
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TREVOR JEROME ABBEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price,
District Associate Judge.

Defendant appeals his conviction for operating while intoxicated, first
offense. **AFFIRMED.**

Michael B. Oliver of Oliver Law Firm, P.C., Windsor Heights, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and David M. Porter, Assistant
County Attorney, for appellee.

Considered by Tabor, P.J., Mullins, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.**I. Background Facts & Proceedings.**

On August 21, 2010, at about 11:30 p.m., Officer Colin Boone was on routine patrol in Des Moines when he noticed a vehicle fail to stop at a stoplight. He pulled behind the vehicle and observed it was traveling forty-five miles per hour in a thirty-mile-per-hour zone and it failed to obey another traffic control device. He stopped the vehicle, which was driven by Trevor Abbey. Abbey did not have a valid driver's license.¹

The officer, a drug recognition expert, observed Abbey had signs of alcohol or drug use. Abbey had bloodshot, watery eyes; he was restless or fidgety and moving around a lot; he mumbled, had a slow kind of slurred speech; and he smelled of alcohol. The officer looked inside Abbey's mouth and saw he had heat bumps and a green film on his tongue, which he believed could be consistent with marijuana usage.

Abbey failed the horizontal gaze nystagmus test and the Romberg test. Although Abbey's preliminary breath test (PBT) showed a blood alcohol level of .067, the officer felt the result was inconsistent with Abbey's level of impairment.

Abbey was transported to the Des Moines Police Department for the traffic violations and further investigation into whether he had been driving while under the influence of alcohol or a drug. Officer Boone believed Abbey was under the influence of a combination of alcohol and marijuana. At the police station, Officer

¹ Abbey was handcuffed as soon as it was determined he did not have a driver's license.

Boone invoked implied consent pursuant to Iowa Code section 321J.6(1)(f) (2009).

Abbey's breath test at the police station showed a blood alcohol level of .074. His urine test showed the presence of alcohol and marijuana.

Abbey was charged with operating while intoxicated (OWI), first offense, in violation of section 321J.2, a serious misdemeanor. He filed a motion to suppress, claiming the officer did not have reasonable grounds to invoke implied consent. A suppression hearing was held at which Officer Boone testified as outlined above. The district court denied the motion to suppress, finding "this was essentially a textbook case of invoking implied consent both as to the breath and urine specimens." The court determined the officer had fully complied with section 321J.6.

Abbey waived his right to a trial by jury. The court found him guilty of operating while intoxicated. Abbey was sentenced to 365 days in jail, with all but ten days suspended, and he was placed on probation for one year. Abbey now appeals his conviction.

II. Standard of Review.

"We review the district court's decision to deny a motion to suppress based on interpretation of a statute for correction of errors at law." *State v. Madison*, 785 N.W.2d 706, 707-08 (Iowa 2010). This case involves the statutory interpretation of section 321J.6, and we review the district court's decision for the correction of errors of law. See *State v. Thompson*, 815 N.W.2d 55, 57 (Iowa Ct. App. 2012).

III. Merits.

Abbey contends the district court erred by denying his motion to suppress because Officer Boone did not have reasonable grounds to invoke implied consent. He claims that at the time the officer invoked implied consent there were insufficient facts to provide the officer with reasonable grounds to believe Abbey was under the influence of alcohol and/or a drug. He claims the field sobriety tests did not provide any indication of marijuana usage. Abbey states the heat bumps and green film in his mouth could have been caused by things other than marijuana, such as unfiltered cigarettes or green candy.

Under the implied consent procedure found in section 321J.6, “persons who drive vehicles are deemed to consent to a chemical test to determine the alcohol or drug content of their blood when reasonable grounds exist to believe they were driving while intoxicated.” *State v. Fischer*, 785 N.W.2d 697, 699 (Iowa 2010). In order to show the implied consent procedures found in section 321J.6 were properly invoked, “the State must show (1) the withdrawal of bodily substances and the chemical test were ‘administered at the written request of a peace officer having reasonable grounds to believe that the [defendant] was operating a motor vehicle in violation of section 321J.2’ and (2) one of six specified conditions exists.” *State v. Demaray*, 704 N.W.2d 60, 63 (Iowa 2005) (citation omitted).

One of these conditions is:

The preliminary breath screening test was administered and it indicated an alcohol concentration less than the level prohibited by section 321J.2, and the peace officer has reasonable grounds to believe that the person was under the influence of a controlled

substance, a drug other than alcohol, or a combination of alcohol and another drug.

Iowa Code § 321J.6(1)(f).

The reasonable grounds requirement is an objective test. *Ramsey v. Iowa Dep't of Transp.*, 576 N.W.2d 103, 107 (Iowa 1998). "The reasonable grounds test is met 'when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief that an offense had been committed.'" *State v. Satern*, 516 N.W.2d 839, 841 (Iowa 1994) (citation omitted). "The reasonable grounds test is determined under the facts and circumstances known to the officers at the time the implied consent law is evoked." *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). "In other words, the existence of reasonable grounds is a condition precedent to imposition of implied consent." *State v. Christianson*, 627 N.W.2d 910, 913 (Iowa 2001).

Officer Boone saw Abbey fail to stop for a stoplight, drive forty-five miles per hour in a thirty-mile-per-hour zone, and fail to yield to another traffic control device. He noticed Abbey "had bloodshot, watery eyes, he was real what I'd call restless or fidgety and moving around a lot. He had mumbled, slow kind of slurred speech and he smelled of alcohol." Abbey's had heat bumps and a green film on his tongue. On the horizontal gaze nystagmus test Abbey scored five out of six clues, when a failing score is four out of six clues. On the Romberg test, Abbey estimated thirty seconds had passed after only twenty-four seconds, another indication of impairment.

At the time implied consent was invoked, we conclude a prudent person in the officer's position, knowing the facts and circumstances the officer knew at

that time, would have believed Abbey had been operating a motor vehicle under the influence of alcohol and/or a drug. Abbey's PBT results were not consistent with the officer's observance of Abbey's level of impairment. The officer stated that when a person has five or six clues on the horizontal gaze nystagmus test, the person's blood alcohol level was usually higher than the results of Abbey's PBT at .067. The officer also noted that while the presence of heat bumps plus a green film on the tongue could have an innocent origin, such as unfiltered cigarettes and green candy, usually it indicated marijuana usage.

Under the facts and circumstances present in this case, we determine the officer had reasonable grounds to believe Abbey had been operating while under the influence of alcohol and/or a drug, and the implied consent procedures of section 321J.6 were properly invoked. We conclude the district court did not err by denying Abbey's motion to suppress.

AFFIRMED.