

IN THE COURT OF APPEALS OF IOWA

No. 3-748 / 12-1617
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SPENCER LEE COLVIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carol L. Coppola,
District Associate Judge.

Defendant appeals his conviction and sentence for third-offense operating
while intoxicated as a habitual offender. **AFFIRMED.**

Jesse A. Macro Jr. of Gaudineer, Comito & George, L.L.P., West Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, John Sarcone, County Attorney, and Kevin Bell, Assistant County
Attorney, for appellee.

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

DANILSON, J.

Spencer Colvin appeals his conviction and sentence for operating a motor vehicle while intoxicated, third offense, as a habitual offender. He contends his right to call a family member after being arrested, as guaranteed by Iowa Code section 804.20 (2011), was violated. He argues any evidence obtained after the violation, specifically his refusal to submit to a breath test, should have been suppressed by the district court. He asks that we suppress the evidence and reverse his conviction. Upon review, we affirm.

I. Background Facts and Proceedings.

On January 4, 2012, at approximately 12:25 a.m., Des Moines Police Officer Andrew Becker stopped Spencer Colvin's vehicle after witnessing him take a left turn at a red light. Colvin exited the vehicle and told Officer Becker he was on his way to the Hickman Pub. The officer testified he could smell the odor of alcoholic beverage on Colvin's breath and noted he had bloodshot and watery eyes. Suspecting Colvin was under the influence, Officer Becker radioed for another officer to assist him in his investigation. Officer Mock, an officer with OWI training and a certified drug recognition expert, responded. He was briefed by Officer Becker and then took over the investigation.

Officer Mock also believed Colvin to be under the influence. Besides smelling the odor of alcoholic beverage emitting from him and noting watery, bloodshot eye, Officer Mock also testified that Colvin's speech was slurred and lethargic. Colvin admitted he had consumed "a couple beers" and agreed to participate in field sobriety tests. At some point during the tests, Colvin informed

Officer Mock that his brother was “one of them.” Officer Mock understood that to mean Colvin’s brother was a police officer and asked him his brother’s name. Colvin stated he did not remember his brother’s name. He was also unable to tell Officer Mock which department his brother worked for. At some point, Officer Mock established that Colvin’s brother’s first name was Tony and began offering possible last names. Colvin ultimately agreed that his brother was Sergeant Tony Knox, another Des Moines police officer. Officer Mock then completed the field sobriety tests. He testified that Colvin scored six out of six possible clues in the horizontal gaze nystagmus test (HGN), indicating that he failed. Colvin also was unable to complete the walk-and-turn test. Officer Mock then placed Colvin under arrest and transported him to police station.

Once at the police station, Officer Mock read the implied consent advisory to Colvin and advised him of his right to call a friend or family member. Colvin requested to call his wife. Officer Mock escorted Colvin to the phone and, after receiving the number from him, helped dial the number. She did not answer the phone. Colvin then requested to call Sergeant Knox. Officer Mock told Colvin he would be allowed to do so if he was able obtain the number. Officer Mock offered Colvin the phone book and told him he was allowed to call another friend or family member to obtain the number if he would like to do so. Officer Mock testified that, although he did have access to Sergeant Knox’s personal number through a police database, he did not provide Colvin with the number. At the suppression hearing, he explained that he believed there may be safety and security concerns with providing a detainee an officer’s personal number,

especially since he had doubts whether Sergeant Knox was actually Colvin's brother.¹ He also testified he chose not to call Sergeant Knox and ask him whether Colvin was his brother due to the late hour.

Officer Mock asked Colvin several times whether he would consent to a breath test. Colvin refused to answer and continued asking to call Sergeant Knox. After repeatedly inquiring whether he wanted to consent or refuse the test, without an affirmative answer either way, Officer Mock eventually considered Colvin's failure to answer a refusal to submit to testing.

On March 27, 2009, after being charged and arraigned, Colvin filed a motion to suppress his test refusal. The district court heard Colvin's motion on April 17, 2012, and ultimately denied it. Colvin then filed a motion to reopen and reconsider, which was also denied.

The matter was tried before a jury on June 25, 2012. The jury found Colvin guilty of operating a motor vehicle while impaired or intoxicated, third offense, as a habitual offender. He was sentenced to a term of incarceration not to exceed fifteen years. He appeals.

II. Standard of Review.

We review the district court's interpretation of section 804.20 for errors at law. *State v. Hicks*, 791 N.W.2d 89, 93 (Iowa 2010). If the district court applied the law correctly, we determine whether there is substantial evidence to support the court's findings of fact. *Id.*

¹ It remains unclear whether Sergeant Knox is in fact the brother of Colvin. Colvin refers to Sergeant Knox as his brother throughout his brief, but the pre-sentencing report does not list him as a family member.

III. Discussion.

On appeal, Colvin maintains that his statutory right to call a family member while being detained was violated. See Iowa Code § 804.20.² He further contends that all evidence obtained after the violation, specifically his refusal to submit to a breath test, must be suppressed. See *Hicks*, 791 N.W.2d at 98 (“The remedy for a violation of section 804.20 is exclusion of any evidence gathered after invocation of the right.”).

Colvin relies on *Hicks* to support his argument. 791 N.W.2d at 89. In *Hicks*, the supreme court held that police officers must take affirmative action to permit the detainee’s requested phone call to family members or counsel. *Id.* at 96. Colvin argues this holding required Officer Mock to provide him with the phone number of Sergeant Knox because he had clearly invoked his right to call him and because Officer Mock was in a position to obtain the number for him. The State concedes that Colvin did invoke his statutory right as required. The dispute involves whether Officer Mock provided Colvin with a “reasonable opportunity to contact” his brother, as is required by section 804.20. See *id.*

We believe Officer Mock did provide Colvin with a reasonable opportunity. The supreme court specified what actions officers are required to undertake in order to provide detainees with such a reasonable opportunity, stating, “We hold that once section 804.20 is invoked, the detaining officer must direct the detainee

² The pertinent language of section 804.20 states:

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.

to the phone and invite the detainee to place his call *or obtain the number from the detainee* and place the phone call himself.” *Id.* (emphasis added).

Hicks does not stand for the proposition that officers must take any and all possible affirmative actions to facilitate the detainee’s request to contact a family member. See *id.* at 97 (“The guarantee right 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.”). We agree Officer Mock was under no obligation to retrieve Sergeant Knox’s telephone number from the police department’s directory or otherwise provide it under these facts. Officer Mock testified that he declined to provide Sergeant Knox’s telephone number because of security and safety reasons. Officer Mock was not acquainted with Colvin and did not know if Sergeant Knox was his brother. At the scene of the stop, Colvin could not even remember the name of his “brother” and their surnames differ. Officers may—but are not obligated to—use other department resources or research a phone number when someone claims to be a relative or a friend of another officer or any other individual.

Here, Officer Mock fulfilled the duty section 804.20 requires of him. Upon Colvin’s request, Officer Mock escorted him to the phone and, after receiving the telephone number from him, helped him or allowed him to dial it so he could place a call to his wife. After she did not answer, Officer Mock advised Colvin he could try to call another family member if he wished. Colvin expressed that he would like to call Sergeant Knox but did not know the number. Officer Mock offered him a phone book to reference and even suggested to him that he could

call another family member to obtain his brother's number if he wished. It was Colvin who chose not to pursue any of the options offered to him.

With respect to the argument that Officer Mock's power disparity was even greater due to Colvin's mental functioning, Officer Mock only suspected that Colvin may suffer from some mental handicap. Further, the officer made reasonable efforts to speak slowly and precisely and to repeat his directions as necessary.

While Officer Mock could have provided Colvin with the telephone number of Sergeant Knox, he had justifiable reasons for not doing so, and neither the language of section 804.20 nor the court's holding in *Hicks* required him to do so.

Because we find that Colvin's section 804.20 rights were not violated, we affirm the district court.

AFFIRMED.