IN THE COURT OF APPEALS OF IOWA

No. 3-801 / 12-2221
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY GENE LUKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for O'Brien County, Charles K. Borth, District Associate Judge.

Tony Lukins appeals from his conviction for driving while intoxicated, second offense. **REVERSED AND REMANDED.**

David R. Johnson of Brinton, Bordwell & Johnson, Clarion, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Anthony Garcia, Student Legal Intern, and Micah J. Schreurs, County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

Tony Lukins appeals from his conviction for driving while intoxicated, second offense. He argues he was denied an independent chemical analysis in violation of Iowa Code section 321J.11 (2011). We reverse and remand for new trial, finding his repeated requests constituted a request for an independent chemical analysis.

I. Facts and Proceedings.

On February 9, 2012, Tony Lukins was pulled over while driving by Officer Rohrbaugh of the City of Sutherland. Lukins was arrested after he failed several field sobriety tests and admitted to drinking at a local bar. Once Rohrbaugh and Lukins arrived at the police station, Rohrbaugh reviewed the implied consent procedure with Lukins and Lukins provide a breath sample into the Datamaster machine. The test result showed Lukins' alcohol content was .207. After learning the results of the breath test, Lukins repeatedly asked for a re-test.

> Lukins: Can I get a re-check or anything? The way I'm bleeding[1]
> Rohrbaugh: A rain check?
> Lukins: A re-check, with this blood and that?
> Rohrbaugh: You want your blood checked?
> Lukins: No can I get a re-check?
> Rohrbaugh: A re-check on this? [gestures to Datamaster machine]
> Lukins: Yeah
> Rohrbaugh: What's the blood going to make any difference?
> Lukins: I don't know. I'm just . . . I didn't know I was bleeding this bad. . . .
> Rohrbaugh: . . . I don't think we need to do another check because I don't think the blood or bleeding had anything to do with your breath.
> Lukins: . . . I don't know what the heck to really check to tell you the truth.

[1] Lukins was bleeding from a cut under his chin for reasons unrelated to his arrest.

> . . . .
> Lukins: Can I ask for a re-blow by the way?
> Rohrbaugh: It isn't gonna be any different.
> Lukins: Cause that seems really . . . high. . . . For a six pack that seems really high.
> Rohrbaugh: You are required by law to surrender . . . all Iowa driver's licenses . . . .
> Lukins: . . . Can I get a re-blow please Rohrbaugh?
> Rohrbaugh: It isn't going to be any different.
> Lukins: You don't think so?
> Rohrbaugh: No.
> Lukins: Can we try it?
> Rohrbaugh: (laughing) no.
> . . . .
> Lukins: (to jail staff member) Can I get a re-breathalyzer test by the way? For a point two oh?
> Jail staff member: That's not my call, that's up to the officer.

Lukins was never informed of his right to an independent chemical test under Iowa Code section 321J.11. He was charged by trial information with operating while intoxicated, second offense, on April 5, 2012.

Lukins filed a motion to suppress the Datamaster results, arguing his requests for a re-check constituted a request for an independent chemical analysis under Iowa Code section 321J.11. A hearing on the motion was held August 16, 2012. Rohrbaugh testified at the hearing, stating he did not ask Lukins if he was requesting an independent chemical analysis as he interpreted his questions as requesting another blow into the Datamaster.

The court denied the motion to suppress, agreeing with Rohrbaugh that Lukins's request was for another blow on the Datamaster, which is not available as of right under Iowa Code section 321J.11. After the motion to suppress was denied, Lukins stipulated to a trial on the minutes of testimony. The court found Lukins guilty of operating while intoxicated, second offense, without referring to the breath test or any particular evidence in the minutes. Lukins appeals.

II. Analysis

In this appeal, Lukins asks us to review the interpretation of a statute. Our review is therefore for the correction of errors at law. *State v*. *Hutton*, 796 N.W.2d 898, 901 (Iowa 2011). Iowa Code section 321J.11 reads in relevant part as follows:

> The person [whose breath, urine, or blood is being examined for purposes of determining alcohol concentration] may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

"Officers are not required to advise a defendant of the statutory right to an independent test." *State v*. *Wootten*, 577 N.W.2d 654, 655 (Iowa 1998). However, once an arrestee requests an independent test, an officer's response is measured by a standard of reasonableness. *Id*. at 656.

The Iowa Supreme Court has not yet articulated what factors should apply to determine whether an arrestee has made a request for an independent test under section 321J.11. However, it has considered whether a request for a blood or urine test constituted a refusal to consent to a breath test or a request under 321J.11.

> The statements and conduct of the arrestee and police officer, as well as the surrounding circumstances, are considered in determining if a chemical test has been refused. The record contains no evidence that [the arrestee] was uncooperative or abusive, only that he requested a blood or urine test. Iowa Code section 321J.11 states a "person may have an independent test or tests administered at the person's own expense in addition to any administered at the direction of the peace officer." When [the

> arrestee] requested that his blood or urine be tested in addition to his breath, the peace officer should have explained that, after the requested breath test had been completed, [the arrestee] would be able to have other substances tested.

Ginsberg v. *Iowa Dep't of Transp*., 508 N.W.2d 663, 664 (Iowa 1993) (internal citation omitted). The court concluded that by requesting he have his blood or urine tested as well, that "[the arrestee] was attempting to assert his right to independent testing and did not refuse the test requested by the police." *Id*. While in that case Ginsberg had contacted his attorney just before making his statement, we think the analysis should also apply here, where the arrestee repeatedly requested additional testing. *See id*.

Looking to the statements and conduct of Lukins, it was clear he doubted the accuracy of the Datamaster reading and was seeking another test—whether on the breathalyzer or another form of testing. While Rohrbaugh's question, "[Y]ou want your blood checked?" may be construed as asking Lukins if he wanted another, different type of testing, we find the question ambiguous in context. The two were discussing Lukins's bleeding face and his concern the blood contaminated the breath test results. Lukins requested further testing several times, noting he wasn't sure what he wanted tested. Though Rohrbaugh initially was not required to inform Lukins of his right to independent testing, looking to both individuals' behavior and the surrounding circumstances, we find Lukins's repeated requests reasonably triggered a duty to inform him of his rights under section 321J.11.

Lukins analogizes his situation to our cases decided under Iowa Code section 804.20 regarding an OWI arrestee's right to make a phone call to an

attorney or relative from jail. The State responds that the analogy to section 804.20 is inappropriate, as there are constitutional overtones to section 804.20 involving the right to contact a family member *or counsel*. *See State v*. *Hicks*, 791 N.W.2d 89, 94–95 (Iowa 2010) (noting the Sixth Amendment right to counsel, but distinguishing statutory right to call family or counsel and finding invocation need not rest on the clarity of the arrestee's request). Though we have never expressly considered the constitutional implications of Iowa Code section 312J.11, our court has previously noted that this section does have constitutional overtones regarding a defendant's due process right to present a meaningful defense. *State v*. *Mahoney*, 515 N.W.2d 47, 50 (Iowa Ct. App. 1994). Specifically in that case we considered other states' laws when deciding whether Iowa Code section 321J.11 required a defendant to submit to a police-administered chemical test before requesting an independent test. *See id*. We quoted the South Dakota Supreme Court in *State v*. *Zoss*, 360 N.W.2d 523, 525 (S.D. 1985), which held, "There is nothing fundamentally unfair in this procedure, nor did it deny her a 'meaningful opportunity to present a complete defense.' In fact, she would have had two chances at getting possible exculpatory evidence." *Mahoney*, 515 N.W.2d at 50.

We find Lukins's analogy to section 804.20 persuasive. Like the right to independent testing, an officer is also not required to affirmatively inform an arrestee of his right to the section 804.20 call. *Id*. Likewise, the officer must make reasonable efforts to afford the arrestee the opportunity to exercise his or her rights under the phone call statute. *Id*.; *see Wootten*, 577 N.W.2d at 655–56 (holding officer is not required to affirmatively inform arrestee of right to

independent test and once right is invoked, officer's behavior is measured by a standard of reasonableness).

Our supreme court has discussed what language by a detainee is sufficient to invoke the right to call a relative or attorney under section 804.20. *See Hicks*, 791 N.W.2d at 94. The court has held that the invocation should not depend on the "grammatical clarity of the detainee's request." *Id*. Instead, "the best way to further this statutory purpose is to liberally construe a suspect's invocation of this right." *Id*. The court concluded that once the arrestee invokes his rights (applying the liberal standard of invocation), "the detaining officer must direct the detainee to the phone and invite the detainee to place his call or obtain the phone number from the detainee and place the phone call himself." *Id*. at 97. "In analyzing the sufficiency of [a request under section 804.20 to contact a family member], we apply an objective consideration of the statements and conduct of the arrestee and peace officer, as well as the surrounding circumstances." *State v*. *Moorehead*, 699 N.W.2d 667, 672 (Iowa 2005) (internal citations and quotation marks omitted).

This totality-of-the-circumstances test as applied to the request for an independent breath test under section 321J.11 also comports with other states' interpretation of similar laws. In Georgia, "[a]n accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test." *Ladow v*. *State*, 569 S.E.2d 572, 574 (Ga. Ct. App. 2002). In *Avery v*. *State*, 716 S.E.2d 729, 732 (Ga. Ct. App. 2011), the Georgia appellate court applied the totality-of-the-circumstances test to an

incident where a person who was pulled over and administered field sobriety tests requested "more tests" before taking the State's chemical test, sought release to his father instead of arrest, and had just mentioned the field sobriety tests which he thought did not indicate impairment.

North Dakota also applies a totality-of-the-circumstances test. *See State v. Messner*, 481 N.W.2d 236, 240 (N.D. 1992) ("Whether the accused has made a reasonable request for an independent test and whether police have interfered by denying the accused a reasonable opportunity to obtain that test depend on the totality of the circumstances."); *but see Lange v. N. Dakota Dep't of Transp.*, 790 N.W.2d 28, 32 (N.D. 2010)[2] ("If a law enforcement officer believes an arrestee is asking for an independent test, but the arrestee has not specifically said 'independent test,' the circumstances should prompt the officer to follow up with the arrestee. However, if the law enforcement officer does not inquire into the arrestee's intentions, the arrestee cannot rely on ambiguous statements.").

We conclude, much like the court in *Ginsberg* found, that once Lukins made it repeatedly clear that he wished additional testing, "the peace officer should have explained that . . . [Lukins] would be able to have other substances tested" at his own expense. *See Ginsberg*, 508 N.W.2d at 664. "To construe section 321J.11 otherwise would render meaningless the requirement of the statute that the arrestee be given the opportunity to obtain an independent chemical analysis." *See Casper v. Iowa Dep't of Transp.*, 506 N.W.2d 799, 803 (Iowa Ct. App. 1993) (Habhab, J., specially concurring) (noting "[w]here the

[2] In *Lange*, 790 N.W.2d at 30, the arrestee asked "if she could go to a hospital to take a blood test" and the officer replied that blood tests were conducted at the jail; the arrestee made no further request. 790 N.W.2d at 30.

defendant does not obtain an independent test because he is denied a reasonable opportunity to do so, there is neither a 'failure' nor an 'inability' to obtain a test under the statute").

We have previously described (though never held) the proper procedural remedy for a denial of a request under section 321J.11: "In a criminal prosecution for driving under the influence, proof of that denial would require suppression of any police-administered chemical test. Any other interpretation would render meaningless the requirement of the statute that the arrestee be given the opportunity to obtain an independent chemical analysis." *Id*. We conclude the breath test was inadmissible.

The State argues that, despite suppression of the breath test, any error was harmless and therefore remand is unnecessary.

> In cases of nonconstitutional error, reversal is required if it appears the complaining party has suffered a miscarriage of justice or his rights have been injuriously affected. We presume prejudice unless the record affirmatively establishes otherwise. A breath test result is important evidence in prosecutions for drunk driving. This is especially true when the breath test is high—in this case nearly twice the legal limit. . . . Mindful of a defendant's right to a fair trial and just application of our rules, it cannot be fairly said that the breath test result did not injuriously affect Moorehead's rights. The district court's error in admitting this evidence clearly prejudiced Moorehead. Admission of the breath test result into evidence was therefore not harmless error. We vacate the decision of the court of appeals and remand for a new trial without use of the breath test result.

Moorehead, 699 N.W.2d at 672–73 (internal citations omitted).[3] Our supreme court extended the rationale of *Moorehead* in a case involving the refusal of a private meeting place for the detainee to consult with counsel. State v. Walker,

[3] In *Moorehead*, evidence of guilt was greater than that obtained in Lukins's case—Moorehead admitted he was "drunk as hell." *See id.* at 672.

804 N.W.2d 284, 296 (2011) (noting "The remedy for this violation is suppression of the breath test results, regardless of prejudice or lack thereof). Because the breath test is such important evidence, and its improper admission into evidence is so clearly prejudicial, we conclude the proper remedy is to remand for a new trial without the breath test result.

We find that Lukins's repeated requests for re-testing invoked his right under Iowa Code section 321J.11, and the failure to inform him of the right to obtain an independent test requires suppression of the breath test result.

REVERSED AND REMANDED.