

IN THE COURT OF APPEALS OF IOWA

No. 7-026 / 06-0418
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MITCHELL ROBERT KING,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, Peter B. Newell,
District Associate Judge.

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

Judith O'Donohoe of Elwood, O'Donohoe, Stochl, Braun & Churbuck,
Charles City, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, Marilyn Dettmer, County Attorney, and Kimberly L. Birch, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Mitchell King appeals from his conviction for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2003).

I. Background Facts and Proceedings

On July 3, 2004, Charles City Police Officer Leonard Luft arrested King for operating a motor vehicle while intoxicated. Luft invoked statutory implied consent procedures by requesting King submit to a breath test using a C.D.M. Data Master breath testing machine. King consented to the breath test by marking the appropriate box and signing a standard Iowa Department of Transportation implied consent form. Luft's arrest report includes the following version of events concerning King's breath test:

I PUT IN THE CORRECT INFORMATION INTO THE DATA MASTER. AFTER PUTTING IN THE INFORMATION I READ TO HIM THE STATEMENT ON TOP OF THE DATA MASTER. THE STATEMENT READS TO HOW HE SHOULD GIVE A CORRECT BREATH INTO THE DATA MASTER. I ASKED HIM IF HE UNDERSTOOD WHAT I HAD JUST READ HIM. HE STATED THAT HE DID UNDERSTAND. I TOLD HIM TO GIVE A BREATH. HE WAS NOT GIVING AN ADEQUATE BREATH SAMPLE. I INSTRUCTED HIM SEVERAL TIMES TO KEEP BLOWING. THE DATA MASTER FINALLY STOPPED AND STATED THAT IT WAS AN INVALID SAMPLE. I STARTED OVER AND I USED THE SAME INFORMATION THAT WAS IN THE MACHINE. I GAVE HIM A SECOND TEST. I INSTRUCTED HIM AGAIN TO KEEP BLOWING INTO THE MACHINE. I HAD HIM GIVE A BREATH. WHEN HE WAS GIVING THE SECOND BREATH HE STILL WAS NOT GIVING ENOUGH. I STATED SEVERAL TIMES FOR HIM TO KEEP BLOWING. THE MACHINE STOPPED AND I TRIED HITTING THE NV KEY BUT IT WOULD NOT PICK UP THE SAMPLE. THE SECOND TEST READ INVALID SAMPLE. I REVOKED HIM FOR 1 YEAR FOR A TEST REFUSAL.

The county attorney subsequently filed a trial information charging King with "Operating While Intoxicated, First Offense." Luft's arrest report was

included in the minutes of testimony attached to the trial information. King entered a not guilty plea, and his case was set for a jury trial.

Prior to trial, King filed a motion to suppress:

information regarding the results of the field sobriety tests, a PBT, the breathalyzer test and any statements made by the Defendant at the scene or subsequent thereto as the procedure utilized by law enforcement was contrary to provisions of Sections 321J.5 and 321J.6 of the Code of Iowa.

King's motion also alleged:

The officer assumed because the Defendant had difficulty blowing into the intoxilyzer that he was refusing although he consented to take the test. He refused to offer the Defendant an alternative test such as blood or urine which would have been unaffected by his chronic shortness of breath.

At the suppression hearing, King testified that he tried to comply with Luft's instructions during the breath test but was unable to provide an adequate breath sample. King also offered a medical report indicating he suffered from a respiratory ailment that may have interfered with his ability to provide an adequate breath sample. In addition, King offered expert testimony indicating that any invalid Data Master breath test result had nothing to do with the adequacy of King's breath sample or King's behavior during the test. King's expert also explained the various reasons why a Data Master produces an invalid test result. He specifically noted the presence of mouth alcohol, buildup of saliva in the machine's mouth piece, as well as the "subject's . . . blowing in a staccato-type fashion." Aside from excluding the adequacy of King's breath sample, King's expert did not specify which of the other possible reasons caused the invalid test results in this case.

The State's evidence included Luft's earlier-mentioned report, as well as expert testimony supporting Luft's version of King's test refusal. The State's expert testified that, based on his review of King's medical records, King was capable of providing the requisite breath sample to obtain a valid Data Master test result. He also testified that, based on his observations of the videotape of King's breath test, the Data Master produced an invalid test because King "staggered the breath."

The trial court's resulting ruling includes the following findings of fact:

The Court believes that the State has laid a proper foundation for admission of an instruction that the Defendant failed to supply an adequate breath sample to measure the alcohol concentration in his system. The Court believes that the evidence supports a finding that the Defendant refused to comply with the officer's instructions to provide an adequate breath sample. Therefore, the Court concludes that the Defendant has refused to provide a breath sample.

Mr. King had an adequate lung capacity to provide a breath sample. The State's expert, Michael Tate, testified that in his opinion the Defendant was not blowing into the machine properly. Mr. King has on a previous occasion provided a breath sample to the police. Mr. King testified that he does not have any diagnosable lung condition.

Officer Luft in his report indicates his belief that the Defendant was failing to comply with the instructions to provide an adequate breath sample.

King's motion to suppress was accordingly denied.

King thereafter waived his right to a jury trial, and the case was tried to the court on the minutes of testimony attached to the trial information. The trial court found King guilty as charged and entered a judgment of conviction and sentence.

On appeal King raises the following issues:

- I. Did the Court err in finding that the State proved the officer was qualified to administer the breath test and that he conducted it properly?

II. Alternatively, did the Court err in finding that the State proved that the aborted breath tests were a refusal?

II. Standard of Review

We review the trial court's ruling on King's motion to suppress for errors of law. *State v. Bloomer*, 618 N.W.2d 550, 552 (Iowa 2000).

III. The Merits

Iowa Code section 321J.16 states that proof of a test refusal "is admissible in any civil or criminal . . . proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle" while intoxicated. "Anything less than unqualified, unequivocal consent is a refusal." *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988). The factors bearing on this determination include the defendant's and the officer's words and conduct, as well as the surrounding circumstances. *Ginsberg v. Iowa Dep't. of Transp.*, 508 N.W.2d 663, 664 (Iowa 1993). An attempt to stall a breath test until an attorney is consulted has been held to be a refusal. *Swenumson v. Iowa Dep't of Public Safety*, 210 N.W.2d 660, 662 (Iowa 1973). A defendant's lack of cooperation has also been held to be a refusal. *Taylor v. Iowa Dep't of Transp.*, 260 N.W.2d 521, 524 (Iowa 1977).

King's motion to suppress raised issues of preliminary fact concerning King's consent or refusal to consent to a chemical test. The trial court was therefore required to resolve those issues before ruling on the admissibility of proof of King's refusal to submit to a chemical test. See Iowa R. Evid. 5.104(a). The issues as raised and litigated at the suppression hearing required the court to make a specific factual finding that King refused to submit to a chemical test

as a condition of admissibility of evidence of King's refusal. See, e.g., *State v. Weidner*, 418 N.W.2d 47, 49 (Iowa 1988). As noted earlier, the trial court resolved this factual issue against King by finding King refused to submit to a breath test. We are obliged to affirm the trial court's ruling admitting evidence of King's refusal if the court's findings of fact are supported by substantial evidence. *Id.*

The gist of King's first argument is that the particular foundation requirements for admission of a breath test result specified in Iowa Code section 321J.15 apply to admission of a test refusal under Iowa Code section 321J.16. We disagree. The latter section does not prescribe any particular foundational requirements for admission of a test refusal. Although Luft's qualifications to operate a Data Master and his compliance with approved methods for operating that device are relevant to the resolution of the factual issues raised by King's motion to suppress, those facts relate to the weight and not to the admissibility of King's test refusal. *State v. Stratmeier*, 672 N.W.2d 817, 821 (Iowa 2003).

Contrary to King's claim, the record contains substantial evidence supporting the trial court's finding that King refused to consent to a chemical test. The State's expert testified that King was able to provide an adequate breath sample. Both experts testified that a staggered breath or blowing in a staccato-type fashion can produce an invalid test result. The State's expert also testified that the invalid Data Master test results in this case were the result of King's staggered breath samples and not Luft's failure to comply with approved methods for operating that device. Lastly, we note Luft's testimony that King did

not comply with his instructions during the test and that he appeared to be stalling for time.

We have carefully considered all of King's remaining claims and find they have no merit or are controlled by the resolution of the foregoing issues. The trial court's ruling on King's motion to suppress and resulting judgment are affirmed.

AFFIRMED.

Mahan, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent.

I do not believe under the facts of this case that the defendant's aborted breath tests were a refusal.

The defendant attempted a breath test twice and did not give an adequate sample. The evidence is in dispute as to whether defendant purposely did not give an adequate sample or was unable to do so. The officer had the authority to request a different kind of test. See *State v. Nelson*, 394 N.W.2d 346, 347 (Iowa 1986). The officer at the scene does not have the necessary information to determine whether the subject cannot give an adequate sample or is intentionally not giving an adequate sample. The officer should not have to make this judgment but should offer a urine or blood test, and only if the person refuses to be subjected to one of those tests should it be determined to be a refusal.