

IN THE COURT OF APPEALS OF IOWA

No. 7-084 / 06-0887
Filed March 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CORY MICHAEL ASWEGAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James D. Birkenholz,
Judge.

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

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, John P. Sarcone, County Attorney, and Romonda Belcher-Ford,
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Defendant-appellant Cory M. Aswegan appeals from the judgement and sentence entered upon his conviction of operating while intoxicated, first offense. Aswegan contends the procedure used to obtain a urine sample violated Iowa Code section 321J.11 (2005), therefore, the district court should have granted his motion to suppress the chemical test result.

BACKGROUND FACTS AND PROCEEDINGS.

At about 10:00 p.m. on August 20, 2005, Aswegan was involved in a head-on car accident after he lost control of his vehicle. Aswegan and the driver of the other car were both injured and taken to the hospital. A female police officer was sent to the hospital for further investigation. Upon making contact with Aswegan, the officer smelled a faint odor of alcohol on Aswegan's breath and observed that his eyes were watery and bloodshot. She also observed that Aswegan appeared to be confused, nervous, and was crying from time to time. The officer read the implied consent advisory to Aswegan. Aswegan responded, "I will take it. I am drunk." Due to the injury to Aswegan's mouth, the officer did not take a preliminary breath test, but requested a urine sample. Aswegan was unable to urinate naturally; therefore, a female nurse, at the officer's request, used a Foley catheter to collect the urine sample. The test result on the urine sample indicated an alcohol concentration of .173.

Aswegan was charged with operating while intoxicated, first offense. He filed a motion to suppress evidence, alleging that reasonable grounds to invoke implied consent did not exist and Iowa Code section 321J.11 was violated.

District court denied the motion after a hearing, holding that “unless it can be demonstrated that the test results are so unreliable as to preclude consideration, the results of the test taken by means other than those strictly prescribed by administrative regulations are admissible.” Aswegan was found guilty upon a stipulated trial on the minutes. Aswegan appeals, contending the procedure used to take his urine sample violated section 321J.11, and the test result should be suppressed.

ANALYSIS.

Our review is for errors of law. See *State v. Hornik*, 672 N.W.2d 836, 838 (Iowa 2004). The issue is whether the process in which a registered nurse uses a catheter to withdraw a urine sample complies with section 321J.11. Aswegen argues it does not. He bases his argument on *State v. Hansen*, 203 N.W.2d 216 (Iowa 1972), in which the Iowa Supreme Court held that in order to comply with Iowa Code section 321B.4 (the predecessor of section 321J.11), two conditions must be met. First, it must appear that the commissioner of public safety has approved devices and methods for administering tests under this section. *Id.* at 223. Second, the evidence must show those devices were used and those methods were followed in giving the test. *Id.* Aswegen contends (1) the commissioner of public safety has never approved any devices for urine sample taking; and (2) the approved procedure was not strictly followed, section 321J.11 was therefore violated according to *Hansen*.

We agree with the interpretation in *Hansen*. However, a careful analysis to the language of section 321J.11 shows this interpretation is not applicable to the present case.

Iowa Code section 321J.11 provides in relevant part:

Only a licensed physician, licensed physician assistant as defined in section 148C.1, medical technologist, or registered nurse, acting at the request of a peace officer, may withdraw a specimen of blood for the purpose of determining the alcohol concentration or the presence of a controlled substance or other drugs. However, any peace officer, using devices and methods approved by the commissioner of public safety, may take a specimen of a person's breath or urine for the purpose of determining the alcohol concentration, or may take a specimen of a person's urine for the purpose of determining the presence of a controlled substance or other drugs. Only new equipment kept under strictly sanitary and sterile conditions shall be used for drawing blood.

Because of the invasive nature of the blood withdrawal process, section 321J.11 requires designated trained medical personnel to withdraw blood from the subject in order to protect the subject's health and reduce the potential infection and pain. See *Jason v. Fulton*, 162 N.W.2d 438, 442 (Iowa 1968). On the contrary, taking a breath or urine sample is an external process in most cases, and there is little danger of infection or pain involved. Therefore, the requirements for taking a breath or urine sample are less strict. Peace officers can take the sample as long as they use the devices and follow the methods approved by the commissioner of public health.

Reading section 321J.11 as a whole, we also see two implied meanings. First, the sentence "any peace officers . . . may take a specimen of a person's breath or urine. . ." (emphasis added) is clearly permissive. It suggests that

peace officers are not the only persons who can take the breath or urine sample. Trained medical personnel are also authorized to do so. Second, the approved devices and procedures as set forth in Iowa Administrative Code only applies when a peace officer takes the urine or breath sample. It does not restrict how the trained medical personnel take the sample. An examination of the relevant rules in the Iowa Administrative Code supports this interpretation. Iowa Administrative Code rules 661-7.1-.9 were adopted in an attempt to comply with the mandates of Iowa Code section 321J.11. Rule 661-7.2 refers to breath sample taking; and rule 661-7.3 refers to urine sample taking. Nothing in the administrative code sets requirements for blood sample taking, which indicates that when trained medical personnel take the sample, they follow the procedure adopted in regular medical practice. The only statutory requirement is that they must use new equipment kept under strictly sanitary and sterile conditions to draw blood. Iowa Code § 321J.11. Logic dictates this requirement also applies when trained medical personnel take samples other than blood.

In the present case, the police officer did not personally take the urine sample. Instead, she requested the registered nurse do so. Therefore, the procedural requirements set forth in Iowa Administrative Code rule 661-7.3 do not apply. More specifically, it is irrelevant whether the commissioner of public safety has approved any devices. Neither does it matter that the peace officer present when the sample was taken was not the same gender as Aswegan. We examine whether the equipment met the statutory requirement, and whether the procedure complied with the regular medical practice. The registered nurse

testified that the catheter she used on Aswegan was new, and she took it out of a sealed and sanitary package. She also testified that she put the catheter in using sterile techniques pursuant to procedures adopted by Mercy Hospital. Therefore, we conclude the urine withdrawal process complies with section 321J.11 and the trial court was correct in not suppressing the results of the chemical test.

AFFIRMED.