IN THE COURT OF APPEALS OF IOWA

No. 7-489 / 06-1612
Filed August 22, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS JAY TRACY,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Virginia Cobb, District Associate Judge.

The defendant appeals from his conviction, following a bench trial, for operating while intoxicated, first offense. **REVERSED AND REMANDED.**

Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Wayne Reisetter, County Attorney, and Sean P. Wieser, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

At approximately 1:00 a.m. on March 6, 2006, Thomas J. Tracy was stopped for a traffic violation in Waukee. Tracy was stopped because he was swerving and traveling 62 MPH in a 45 MPH zone. The officer noticed that Tracy had watery, bloodshot eyes and his speech was slightly slurred. The officer also smelled alcohol, so he asked Tracy to perform several field sobriety tests. After failing these tests, Tracy made two requests to call a family member. The context of these requests centered around whether Tracy could call a family member to come get his vehicle—a van owned by his employer. The following conversation was documented by the officer's on-board camera and microphone system:

> OFFICER: Do you have a family member that can come pick it up?
> TRACY: Yeah.
> OFFICER: That's the only person we can release it to. They've got to be here within five or ten minutes . . . to pick it up.
> TRACY: Can I call 'em?
> OFFICER: Here in a minute.

Approximately thirty seconds later, Tracy again asked, "Can I call someone to come and get it?" The officer replied, "In a little bit, hold on." Ultimately, the officer did not allow Tracy to call a family member until after he had completed the chemical breath test at the police station.

Tracy was charged with operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2005). Tracy filed a timely motion to suppress, arguing the officer had denied him his statutory right to contact a family member pursuant to section 804.20. The district court denied

this motion, concluding his requests were insufficient to trigger his rights under section 804.20.

Subsequent to this ruling, Tracy waived his right to a jury trial, and the case proceeded to a trial on the minutes of testimony. The court issued a brief ruling finding Tracy guilty of operating a motor vehicle while intoxicated. This ruling restated the officer's observations at the time of the arrest and also noted that Tracy's blood-alcohol content was .172.

Tracy appeals, claiming the court erred in denying his motion to suppress.

II. Standard of Review.

Our review of a claim brought pursuant to section 804.20 is for the correction of errors at law. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). If the district court properly applied the law and there is substantial evidence to support its findings of fact, we will uphold its ruling on a motion to suppress. *Id.* Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Id.*

III. Iowa Code section 804.20.

Iowa Code section 804.20 provides:

> 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. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney.

Once this right is invoked by the detainee's request, the officer must give him or her the opportunity to consult with a family member or attorney. *See Moorehead*,

699 N.W.2d at 671. If this statutory right is violated, the exclusionary rules apply, and evidence of chemical testing will be suppressed. *Id.* at 672.

In his motion to suppress, Tracy argued his two requests to call a family member invoked his rights under section 804.20. The district court disagreed, finding Tracy did not invoke his statutory right to call a family member because Tracy:

> [could not] separate his questions about being able to call someone from the context of his trying to prevent his vehicle from being towed. His repeated attempts to have the van taken to the parking lot clearly indicate that the van was his concern, not his personal situation with a potential OWI charge.

On appeal, Tracy contends the district court erred because it misapplied our supreme court's holding in *State v. Moorehead* when it found he had to show a more sufficient *reason* to contact a family member.

Moorehead involved an eighteen-year-old defendant apprehended for operating a vehicle while intoxicated. *Id.* at 669. A key point in the case was the following discussion between the defendant and a deputy at the scene:

> DEPUTY: Well, Josh, you've been drinking a lot more than one beer tonight. By all the tests that I've done, you're definitely over the legal limit . . . . I'm going to have to take you with me [to the police station] to do one more test.
>
> MOOREHEAD: That's fine, sir.
>
> DEPUTY: What do you want done with the car?
>
> MOOREHEAD: Um . . . .
>
> DEPUTY: Do you [have] some parents that can get it or anything? That can come get you after awhile?
>
> (In an inaudible portion of the tape, at this point Moorehead presumably indicates the deputy should contact his mother.)
>
> MOOREHEAD: Would it be possible for me to talk to my Mom when you call her to come pick it up?
>
> DEPUTY: Not right now, because I just have to call my dispatcher and have her call her.
>
> MOOREHEAD: All right, that's fine . . . .

> DEPUTY: I'll probably have to wait here until she comes anyway . . . .
> MOOREHEAD: Yeah, that's fine.

The court goes on to note that the deputy contacted the dispatcher, and the dispatcher contacted Moorehead's parents. *Id.* When Moorehead's parents arrived at the scene, his mother asked to speak with him. *Id.* at 670. The deputy told her he had to take Moorehead to the police station and the dispatcher would call her when she could pick him up. *Id.*

On appeal, Moorehead challenged the district court's denial of his motion to suppress under section 804.20. *Id.* The State's primary rebuttal argument was that Moorehead's request to talk to his mother was not an unequivocal request to ask his mother *for advice* about the predicament, but instead an inquiry about what to do with the car. *Id.* at 672. Because there was no "clear request to seek advice," the State argued this was insufficient to invoke section 804.20. *Id.*

The Iowa Supreme Court rejected the State's argument in one brief paragraph:

> In analyzing the sufficiency of Moorehead's request, we apply "an objective consideration of the statements and conduct of the arrestee and peace officer, as well as the surrounding circumstances." Although Moorehead's request to talk to his mother arose in the context of a discussion about the disposition of his mother's car, Moorehead specifically, separately, and unequivocally requested to talk to his mother. Moorehead's request was sufficient to invoke the statute. As a consequence, the police were obligated to honor Moorehead's request "without unnecessary delay after arrival at the place of detention," in this case the police station. Because the police did not do so, they violated Moorehead's statutory right to contact a family member.

Id. (internal citations omitted).

We find *Moorehead* applicable to the case at hand. Although Tracy's requests to speak with a family member arose in the context of a discussion about the disposition of his van, an objective review of the evidence clearly indicates he made two separate and unequivocal requests to speak to a family member. We, like the court in *Moorehead*, will not discount these specific requests simply because Tracy did not intimate that the phone calls would necessarily involve advice about what to do in his predicament. Because the police did not honor his requests "without unnecessary delay after arrival at the place of detention," they violated his statutory right to contact a family member under section 804.20. Therefore, we conclude the district court erred in overruling his motion to suppress.[1]

IV. Harmless Error.

The State argues that even if the breath test evidence should have been suppressed by the district court, the error was harmless because the district court convicted Tracy under Iowa Code section 321J.2(1)(a) rather than (b). The State also contends the error was harmless because the court did not give any significant weight to the test result and there was other evidence to prove he was driving while impaired.

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. *Moorehead*, 699 N.W.2d at 672. We presume prejudice unless the record affirmatively establishes otherwise. *Id.* at 673.

[1] The State did not challenge the timing of the requests.

Iowa Code section 321J.2(1), subsections (a) through (c), provides that a person commits the offense of operating while intoxicated if they operate a motor vehicle in any of the following conditions:

> *a.* While under the influence of an alcoholic beverage or other drug or a combination of such substances.
> *b.* While having an alcohol concentration of .08 or more.
> *c.* While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

On appeal, the State argues the court's ruling "suggests" that the district court found Tracy guilty under subsection (a), rather than subsection (b). The State contends the following language in the court's "Conclusions of Law" supports its argument:

> The State has established beyond a reasonable doubt that on the 26th day of March 2006, the Defendant, Thomas Jay Tracy, did operate a motor vehicle in the State of Iowa *while under the influence of alcohol* and that this event took place in Dallas County, Iowa.

(Emphasis added.)

We disagree. In its ruling, the district court did not reference these three alternative methods of proof and made no attempt to distinguish between the differing subsections set forth in section 321J.2. Instead, it referred to section 321J.2 as a whole, and found Tracy guilty of violating section "321J.2." In doing so, it referenced Tracy's blood-alcohol content at the time of the incident and other evidence describing Tracy's appearance, actions, and mannerisms. Based upon the overall tenor of the court's written decision, we find no reason to believe it limited its decision solely to subsection (a).

We also reject the State's arguments that the error was harmless because the court did not give any significant weight to the test results in light of the other

"substantial" evidence. As noted in *Moorehead*, "A breath test result is important evidence in prosecutions for drunk driving" and "[t]his is especially true when the breath test is high." *Moorehead*, 699 N.W.2d at 673. In the present case, the blood test considered by the court was more than twice the legal limit. In light of the strength of this evidence, we cannot conclude its admission did not injuriously affect Tracy's rights. Therefore, we find the admission of the breath test result was not harmless error. We reverse and remand for a new trial so that Tracy may be tried without the use of the breath test results.

REVERSED AND REMANDED.