IN THE COURT OF APPEALS OF IOWA

No. 8-673 / 07-2146
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellant.

vs.

RYAN JOHN MCKIBBIN,
Defendant-Appellee.

Appeal from the Iowa District Court for Jasper County, Thomas A. Renda, Judge.

The State was granted discretionary review of the district court's grant of the defendant's motion to suppress evidence based on an alleged violation of Iowa Code section 804.20 (2007). **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger and Mary Tabor, Assistant Attorneys General, Steve Johnson, County Attorney, and Susan A. Wendel, Assistant County Attorney, for appellant.

Rick L. Olson, Des Moines, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

The State was granted discretionary review of the district court's grant of the defendant's motion to suppress evidence of his alcohol concentration based on an alleged violation of Iowa Code section 804.20 (2007). We reverse and remand.

At approximately 2:14 a.m. on July 14, 2007, Jasper County Deputy Sheriff Travis Stout stopped a vehicle driven by McKibbin after observing it "swerving on the wrong side of the highway." McKibbin failed three field sobriety tests, and a preliminary breath test indicated his alcohol concentration exceeded the legal limit. Deputy Stout arrested McKibbin for operating while intoxicated (OWI) and transported him to the Jasper County jail.

After arriving at the jail, Deputy Stout read McKibbin the implied consent advisory and asked if he would submit to a chemical test. McKibbin asked to speak with Eric Nation, a lieutenant with the Jasper County Sheriff's office. Deputy Stout advised McKibbin he needed to continue "reading the rest of these forms [to McKibbin] first" and then advised him of additional matters, including his "right to contact an attorney or family member of his choice before making any decisions whether or not to give a breath test." McKibbin again asked to call Eric Nation. Lieutenant Nation is neither related to McKibbin nor is he an attorney. McKibbin described Nation as "a friend."

After McKibbin's second request to call Nation, Deputy Aaron Groves advised McKibbin he could not call Nation but could only call an attorney or family member. McKibbin subsequently called his cousin, assisted by Deputy

Groves who provided a phone book and by Deputy Stout who allowed McKibbin to use his desk phone. After McKibbin finished his call, Stout asked if he wanted to make any additional phone calls and McKibbin responded in the negative. However, he refused to sign a telephone log indicating he did not want to make any more calls, indicating he still needed to make a call to Eric Nation. He was not allowed to call Nation. McKibbin made a fourth request to call Nation and Deputy Stout again told him he could not call Nation, he could call only a family member or an attorney. McKibbin then consented to a chemical test which indicated an alcohol concentration of .243.

The State charged McKibbin, by trial information, with OWI, first offense, in violation of Iowa Code section 321J.2 (2007). McKibbin filed a motion to suppress the result of his chemical testing, alleging a violation of his limited right to counsel before being required to submit to a chemical test under section 804.20. Following a hearing on the motion the district court granted McKibbin's motion to suppress. In granting the motion, the district court interpreted *Didonato v. Iowa Dep't of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990), as imposing

> a duty on the arresting officers to inform the arrestee for what purpose of the phone call is permitted when an arrestee requests to call a friend. After giving such advice, if the arrestee insists to make the phone call, the arresting officer must honor the request.

Accordingly, the district court concluded McKibbin should have been allowed to call Lieutenant Nation, and the deputies violated section 804.20 by denying his statutory right to do so.

The State filed an application with the Iowa Supreme Court for discretionary review of the district court's grant of the suppression motion and our

supreme court granted the State's application. The State contends on appeal that the district court misinterpreted section 804.20 and case law applying that provision, and the deputies here complied with the requirements of that section.

This issue involves the court's interpretation and application of a statute to the facts. We review issues of statutory interpretation and application for errors at law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000). "This court is not bound by the trial court's determinations of law." *Id.*

Section 804.20 provides, in pertinent part:

> 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.

This section "is to be applied in a pragmatic manner, balancing the rights of the arrestee and the goals of the chemical-testing statutes." *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005). Under this provision a person has a limited statutory right to counsel before being required to take or refuse a chemical test. *State v. Vietor*, 261 N.W.2d 828, 831-32 (Iowa 1978). However, the statute does not provide an absolute right to counsel. *Bromeland v. Iowa Dep't of Transp*., 562 N.W.2d 624, 626 (Iowa 1997). Police have no duty to advise an arrestee of this right. *See State v. Meissner*, 315 N.W.2d 738, 740 (Iowa 1982). However, when a defendant invokes the statutory right, the officer must allow the defendant the opportunity to call or consult with an attorney or family member. *Vietor*, 261 N.W.2d at 831.

In *Didonato*, our supreme court stated:

> We have held, however, that the statute does not require an officer to tell an arrested person that he has a right to counsel. But when a request to make a phone call is made we do not believe the statutory purpose is met if the officer stands mute and refuses the request. Nor would there be any difference if the request is to call a friend. In these circumstances the statute is implicated and the officer should then advise for what purpose a phone call is permitted under the statute. If the individual still wants to make a phone call, subject to the limitations announced in [*State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)], the officer must allow the call, or place it for the arrested individual pursuant to the terms of section 804.20.

Didonato, 456 N.W.2d at 371 (citations omitted). The district court here apparently read this portion of *Didonato* as requiring an officer to honor a defendant's request to call a friend if the defendant insists on such a call. We do not agree with the court's interpretation. Rather, we read *Didonato* to say that when an arrested person requests to make a call *not* permitted by section 804.20, such as a call to anyone other than a family member or attorney, an officer is required to advise the arrested person of, and allow the person to make, the calls that *are* permitted by the statute. Such action by the officer would satisfy *Didonato*'s requirement that the officer advise the arrested person "for what purpose a phone call is permitted under the statute" and ensure that the person expressing a desire to make a phone call will know the scope of, and be able to exercise, his or her statutory right. However, merely repeating a request for, or insisting on making, a call not permitted by the statute does not somehow transform such a call into a mandated call or give the person requesting the call a right to make it.

We conclude the district court's interpretation of *Didonato* was incorrect and inconsistent with the express language of section 804.20. McKibbin was afforded a reasonable opportunity to call a family member or attorney as permitted by the statute. When he requested to make a call to a friend, a call which is not mandated by section 804.20, the officers did not violate his statutory right by declining to allow him to do so and properly reiterating that he could call an attorney or a family member. Because the officers here did not violate McKibbin's statutory rights under section 804.20, the district court erred by suppressing the results of his chemical testing. We reverse the district court's suppression order and remand the case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.