

IN THE COURT OF APPEALS OF IOWA

No. 8-724 / 08-0226
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellant,

vs.

RICHARD G. BINNING,
Defendant-Appellee.

Appeal from the Iowa District Court for Decatur County, Gary G. Kimes,
Judge.

The State appeals a district court ruling granting Richard G. Binning's
motion to suppress. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, and Lisa Hynden-Jeanes, County Attorney, for appellant.

Ward Rouse of Berg, Rouse, Spaulding & Schmidt, P.L.C., Des Moines,
for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

The State appeals from the district court's grant of Richard G. Binning's motion to suppress the results of Binning's chemical test administered during an OWI investigation. The State contends the peace officer had reasonable grounds to invoke implied consent. We reverse and remand for further proceedings.

I. Background Facts and Proceedings.

On August 18, 2007, at approximately 3:32 a.m., Decatur County Deputy Sheriff Steven Barney responded to a call from dispatch reporting an accident. It had not rained that morning, and the surface of the roads was dry. Because Deputy Sheriff Barney had been in the area of the accident at 2:27 a.m., it was deduced the accident occurred between 2:27 a.m. and 3:32 a.m.

When Deputy Sheriff Barney arrived at the scene of the accident at approximately 3:53 a.m., he found Binning's truck rolled over on its top. Binning was outside the truck, and Deputy Sheriff Barney asked Binning if Binning was the only occupant of the vehicle. Thereafter, Deputy Sheriff Barney found a crushed can of beer in the zone that the vehicle took leaving the roadside. Deputy Sheriff Barney did not smell any alcohol on Binning's person; rather, he detected a minty odor upon Binning's breath, which he likened to "Spearmint gum, Doublemint gum, something like that." Deputy Sheriff Barney did not administer any field sobriety tests at the scene as he felt he was somewhat restricted from doing so because of Binning's injuries.

Binning was transported to the hospital, and Deputy Sheriff Barney followed. At the hospital, Deputy Sheriff Barney asked Binning, "You usually

don't drink too much? And is that the case tonight?" Deputy Sheriff Barney stated that Binning's answer was difficult to understand and unclear, though he thought Binning answered with an "I usually don't very much' kind of response." While speaking with Binning, Deputy Sheriff Barney had an occasion to look at Binning's right eye. Deputy Sheriff Barney noticed "at maximum deviation it was flickering," which he testified was one of the clues to intoxication in a horizontal gaze nystagmus (HGN) field sobriety test, but he did not administer the HGN test to Binning. Deputy Sheriff Barney did conduct a preliminary breath-screening test (PBT), which indicated an alcohol concentration in excess of 0.08.

After the PBT reading, an officer at the scene called Deputy Sheriff Barney and related that a partially full and cold-to-the-touch can of Busch Light beer had been found in tall grass about five feet away from the truck. Thereafter, the officer called Deputy Sheriff Barney to advise a full can of cold Busch Light had been found inside a plastic sack in Binning's vehicle. After Deputy Sheriff Barney's conversations with the officer, Deputy Sheriff Barney invoked implied consent based upon the fact there was an injury accident and his observations of Binning's eye fluttering at maximum deviation, the PBT result, and the finding of an open container of cold beer, along with a cold full container and a crushed can of beer at the scene. Binning's chemical test registered a blood alcohol level in excess of 0.08.

On September 14, 2007, Binning was charged with operating while intoxicated in violation of Iowa Code section 321J.2 (2007). Binning entered a plea of not guilty, and thereafter filed a motion to suppress the results of his chemical test. Binning asserted that the peace officer lacked reasonable

grounds to believe that Binning had been operating a motor vehicle while intoxicated, prior to the invocation of implied consent, and the State resisted. Following an evidentiary hearing, the district court granted Binning's motion, concluding:

No field sobriety tests were performed and there were no observations of the defendant by the deputy indicating the defendant was operating a motor vehicle while under the influence. . . . The PBT test alone cannot serve as a basis for finding reasonable grounds to believe the defendant was operating a vehicle while intoxicated.

The State appeals.

II. Scope and Standards of Review.

Our review is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Demaray*, 704 N.W.2d 60, 62 (Iowa 2005).

III. Discussion.

On appeal, the State argues Deputy Sheriff Barney properly invoked the implied consent procedures of Iowa Code section 321J.6 because he had reasonable grounds to believe Binning was operating while intoxicated or under the influence in violation of section 321J.2. Therefore, the State argues the district court erred in granting Binning's motion to suppress the test results. We agree.

Our implied consent law, section 321J.6, authorizes a peace officer to request the withdrawal and testing of bodily substances when (1) the officer has reasonable grounds to believe the person was operating while intoxicated and (2) one of seven additional conditions listed in section 321J.6(1) is met. *State v.*

Braun, 495 N.W. 2d 735, 738 (Iowa 1993).¹ A person having been involved in a motor vehicle accident or collision resulting in personal injury or death meets one of these conditions. Iowa Code § 321J.6(1)(b); *State v. Satern*, 516 N.W.2d 839, 841 (Iowa 1994). “The reasonable grounds test is met when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person’s belief that an offense had been committed.” *Owens*, 418 N.W.2d at 342. “[I]t is well established that when police officers are acting in concert, the knowledge of one is presumed shared by all.” *Id.* Use of a PBT result has been approved to establish, in part, reasonable grounds to invoke implied consent procedures in an accident-resulting-in-injury case. *Id.* at 343; *cf. Braun*, 495 N.W.2d at 738 (stating PBT results cannot serve both as a basis for finding reasonable grounds under section 321J.6(1) and as one of the additional conditions in a case that did not involve a motor vehicle accident or collision).

Here, the State contends that Deputy Sheriff Barney properly invoked the implied consent procedures of section 321J.6. There is no question that Binning had been involved in a motor vehicle collision resulting in his personal injury, therefore satisfying the second criteria of section 321J.6. Thus, the question before us is whether the district court erred in determining reasonable grounds did not exist for Deputy Sheriff Barney to believe Binning was operating while intoxicated.

The State points out that Deputy Sheriff Barney knew many facts that would have warranted a prudent person to believe that Binning had operated his

¹ We note that at the time *Braun* was decided, the applicable code section listed only six additional conditions. See *Braun*, 495 N.W.2d at 738. A seventh condition not at issue in this case was added in 1995. See 1995 Acts ch. 48, § 14.

vehicle while intoxicated. Deputy Sheriff Barney knew that an accident had occurred on a dry roadway and at a late hour. He also knew that three beer cans, two with varying amounts of cold liquid, were found at the scene. He detected a minty odor on Binning's breath, which he believed was similar to "Spearmint gum, Doublemint gum, something like that," and observed his right eye fluttering at maximum deviation. Deputy Sheriff Barney found Binning's response to his question regarding whether Binning usually drinks very much to be difficult to understand and unclear. Although rather thin, we believe these facts and circumstances, even exclusive of the PBT results, established reasonable grounds for Deputy Sheriff Barney to believe Binning was operating while intoxicated or under the influence.

We are mindful that the fact a defendant was under the influence at the time of arrest, without showing more, will not support a *finding* that he or she was in that condition when driving a motor vehicle at some earlier time. See *State v. Creighton*, 201 N.W.2d 471, 473 (Iowa 1972) (reversing defendant's conviction for operating while intoxicated because there was no evidence presented at trial that he was under the influence of an alcoholic beverage while operating a motor vehicle). But here, at the suppression hearing stage, the State's burden was to only establish the officer had reasonable grounds, under all the facts and circumstances known to the officer at the time action was required, to believe, as a prudent person, that Binning had been operating his motor vehicle while under the influence. See *Owens*, 418 N.W.2d at 342-43. The State met its burden in this respect. The court therefore improperly granted the motion to suppress and we reverse.

IV. Conclusion.

Because we find that Deputy Sheriff Barney did have reasonable grounds to believe Binning was operating while intoxicated or under the influence, we reverse the ruling of the district court and remand for further proceedings

REVERSED AND REMANDED.