

IN THE COURT OF APPEALS OF IOWA

No. 8-786 / 08-0330
Filed October 15, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAUL ANTHONY GARRITY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton,
District Associate Judge.

Defendant appeals the district court's denial of his motion to suppress in an OWI prosecution, claiming that evidence should have been suppressed because the arresting officer failed to inform him of his rights under Iowa Code section 804.20 (2007). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Meredith Friedman, Student Legal Intern, Michael J. Walton, County Attorney, and Marc Gellerman, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

A Davenport police officer stopped the vehicle Paul Garrity was driving and saw signs that he was intoxicated. Garrity told the officer he knew he was in trouble. He asked the officer to call an Iowa State narcotics officer to confirm Garrity's knowledge of a large drug bust. Garrity's hope was to strike a deal to avoid jail. The officer at the scene refused to call the narcotics officer. After performing field sobriety tests, he arrested Garrity for operating a motor vehicle while intoxicated.

At the jail, Garrity refused a breath test. Garrity again asked the officer to contact the narcotics officer. The contact was not made.

The State charged Garrity with operating while intoxicated, third offense, as well as other crimes. Garrity moved to suppress evidence of his refusal to submit to a breath test. He asserted that the officer violated his statutory right to telephone his attorney. Garrity and the State stipulated that Garrity was not informed of his statutory right to call an attorney or family member. The court subsequently denied the motion to suppress.

The case was submitted to the court on the minutes of testimony, exhibits, stipulation, and the record made during the motion to suppress hearing. The district court found Garrity guilty on all counts.

On appeal, Garrity raises a single issue: whether the district court erred in overruling his motion to suppress. Garrity specifically maintains that the arresting officer violated Iowa Code section 804.20 (2007) "when he failed to inform defendant of the purposes for which a call was permitted after defendant's request to contact the narcotics officer had been refused."

Section 804.20 states:

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. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

Iowa Code § 804.20. This provision affords a person arrested for the offense of operating a motor vehicle while intoxicated a limited statutory right to confer with a family member or attorney before deciding whether to submit to a chemical test. *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). If this right is denied, evidence that the arrestee refused to submit to such testing is inadmissible at a later criminal trial. *Id.*

In denying Garrity's motion to suppress, the district court stated,

It is clear from the facts of this case that Defendant did not wish to seek the advice or counsel of an attorney. His request was specific and he repeatedly stated he wanted to talk to that officer to cut a deal to avoid arrest. He was not vague in his request. He left no room for speculation as to the reason he wanted to talk to [the narcotics officer]. He did not ask to speak to anyone else and he informed the officer of his decision to not take the test even before the officer finished reading the implied consent. In fact, defendant did not repeat his request to have the arresting officer call [the narcotics officer] until well after implied consent and even after he had been questioned. Also of note is the fact that Defendant was advised of his right to an attorney when he was mirandized at the beginning of his contact with law enforcement. The arresting officer fulfilled his duties under 804.20 as he did not deny Defendant the right to consult with an attorney or immediate family member.

Substantial evidence supports the court's findings. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990). Garrity did not ask the arresting officer to contact an attorney or family member. Instead, he asked the arresting officer to contact a narcotics officer to arrange for a deal to avoid jail.

The more difficult question is the effect of Garrity's request to call the narcotics officer. In *Didonato v. Iowa Dept. of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990), the Iowa Supreme Court stated that when an arrested person asks to telephone a friend rather than an attorney or family member, the officer has a duty to inform the arrestee "for what purpose a phone call is permitted under the statute." However, in a more recent opinion, the court appeared to place the onus on the defendant to ask for a second phone call. See *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005). Like Garrity, Tubbs was arrested for operating a motor vehicle while intoxicated. *Id.* at 913. Officers asked him if he would consent to chemical testing. *Id.* Tubbs said he wished to contact his wife. *Id.* Officers refused Tubbs's request because they were aware of a no-contact order that prohibited the call. *Id.* Tubbs did not ask to contact any other family member or an attorney. *Id.* On appeal, Tubbs asserted that the officers violated his statutory right to a telephone call under section 804.20. *Id.* The court concluded the officers were not obligated to afford Tubbs a telephone call to another family member or to an attorney because "Tubbs failed to ask to talk to an attorney or to anyone besides his wife." *Id.* at 914.

While *Didonato* and *Tubbs* may seem at odds, we believe the opinions can be reconciled. It is established that a police officer is not required to affirmatively inform an arrestee of the right to contact an attorney or a family

member. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). However, an officer may not tell the arrestee he does not have such a right. *Id.* Additionally, “once the right is invoked the officer must give the defendant the opportunity to call or consult with a family member or attorney.” *Id.*

In *Didonato*, the arrestee asked to speak to a friend. The court held the officers were obligated to tell him that he could not speak to a friend but could speak to his attorney or a family member. This is consistent with the obligation not to mislead an arrestee into believing there is no statutory right to a phone call. *Id.* In *Tubbs*, the arrestee asked to speak to his wife. Therefore, he was presumably aware of his statutory right under section 804.20. When the right was denied due to a legal impediment, the court effectively held the officers did not have to re-inform him of the right.

Applying these opinions to the facts at hand, we conclude the officer was not required to tell Garrity he had a right to contact a family member or attorney. As noted, Garrity asked the arresting officer to talk to a narcotics officer solely to strike a deal to avoid the consequences of his arrest. He did not intimate he wished to call or consult a friend, family member, or attorney. Therefore, the officer’s obligation to inform him of section 804.20 was not triggered, and the district court did not err in declining to find a violation of Iowa Code section 804.20. *Moorehead*, 699 N.W.2d at 671 (reviewing for errors of law).

AFFIRMED.