

IN THE COURT OF APPEALS OF IOWA

No. 9-422 / 08-1076
Filed July 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHANN PHILLIP PETER VESPER, III,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Robert J. Dull,
District Associate Judge.

A defendant appeals his judgment and sentence for operating while
intoxicated, second offense, contending that the results of a urine test should
have been suppressed. **REVERSED AND REMANDED.**

David Gill, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney
General, and Coleman McAllister, County Attorney, for appellee.

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

VAITHESWARAN, P.J.

Johann Vesper appeals his judgment and sentence for OWI, second offense. He contends that the district court erred in overruling his motion to suppress the results of a urine test.

I. Background Facts and Proceedings

Vesper was involved in a truck-motorcycle accident outside Sheldon, Iowa. Officers at the scene did not suspect Vesper of being under the influence of alcohol or a controlled substance, and, accordingly, did not invoke implied consent procedures under Iowa Code section 321J.6 (2005). Nonetheless, one of the officers asked Vesper to provide a urine sample. The officer told Vesper that “if he had nothing to hide, it would only help him in the future.” Vesper agreed to provide a sample for testing. Those tests showed that Vesper had a marijuana metabolite in his system.

The State charged Vesper with operating a motor vehicle while intoxicated, second offense. Vesper moved to suppress the evidence relating to his urine test. Following a hearing, the district court denied the motion. Vesper waived his right to a jury trial and agreed to a bench trial on the stipulated exhibits. The district court found Vesper guilty as charged.

On appeal, Vesper argues that the test results should have been suppressed because his consent to the test was involuntary.¹ “When a person who has submitted to a chemical test asserts that the submission was not voluntary, we evaluate the totality of the circumstances to determine whether the decision was freely made or coerced.” *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994). Review is de novo. *Id.*

II. Analysis

“Statements are voluntary if they are the product of essentially unconstrained choice, made by a defendant whose will was not overcome or whose capacity for self-determination was not crucially impaired.” *Id.* Deception, while not condoned, does not render consent involuntary on its own. *Id.* This factor must be considered in conjunction with other factors, including:

the defendant’s age and prior criminal history, if any; whether he was under the influence of drugs or alcohol; whether he ably understood and responded to questions; his physical and emotional reaction to interrogation; and whether physical punishment was used or threatened.

Id.

As noted, one of the officers conceded he “had no reasonable suspicion to believe [Vesper] was under the influence.” Despite this concession, the officer asked Vesper for a blood, urine, or breath sample, stating he

¹ In his motion to suppress, Vesper also argued that the officers did not comply with Iowa Code section 321J.8, which requires peace officers to advise “[a] person who has been requested to submit to a chemical test” about the consequences of refusing the test and the consequences of a positive test. The district court did not rule on this argument. On appeal, Vesper noted that the officers did not comply with this provision but he did not argue that this violation required suppression of the test. Therefore, we need not decide whether this provision applies anytime an officer asks an individual to submit to a chemical test, irrespective of whether implied consent procedures are invoked.

didn't believe [Vesper] was under the influence but would—was requesting a sample from him, uh, stated that if he had nothing to hide, it would only help him in the future. That way nobody could come back and say that he was under the influence at the time and we didn't check.

Later, the officer characterized his conversation as follows:

What I—what I said is, uh, by giving a test, that—let me—um, by giving the test you will—if you have nothing to hide, you will show to the people that—then they can't come back later and say that you were under the influence and we didn't test you.

Vesper, in turn, testified that the officer came over to him and asked him whether he would submit to a urine sample, stating, “We don't suspect anything, it's just for insurance companies; they like to have these things in instances like this.”

These suggestions that a test would prove advantageous to Vesper, combined with the fact that the officers had no grounds to suspect intoxication and, therefore, no basis for requesting a test, as well as the omission of advice concerning the possible adverse consequences of a positive test, lead us to conclude the consent was involuntary. See *State v. Reinier*, 628 N.W.2d 460, 468 (Iowa 2001) (“Subtle coercion, in the form of an assertion of authority . . . by the law enforcement officers [can] make what appears to be a voluntary act an involuntary one.” (quoting *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976))); *Commonwealth v. Walsh*, 460 A.2d 767, 773 (Pa. 1983) (“[W]e conclude that if appellant can establish that he had no notice of the criminal investigative purpose of the blood test, his consent would be invalid.”).

We recognize that this was Vesper's second offense for operating while intoxicated, which could lead to an inference that he was aware of the adverse consequences of a chemical test. However, the record is devoid of details about

the prior OWI conviction. Therefore, we decline to draw that inference from his prior criminal history. The remaining factors for determining whether consent was voluntary do not apply.

Vesper's motion to suppress the results of his urine test should have been granted. We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.