

IN THE COURT OF APPEALS OF IOWA

No. 9-688 / 08-1858
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOBY JOE KELLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Casey D. Jones, District Associate Judge (motion to suppress) and Jane F. Spande, District Associate Judge (trial).

A defendant appeals his conviction and judgment for driving while intoxicated, contending that the district court erred in denying his motion to suppress the results of a chemical test. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Harold Denton, County Attorney, and Laurie Craig, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

We must decide whether the district court acted appropriately in denying a motion to suppress a breath test result.

I. Background Facts and Proceedings

Cedar Rapids police officer John McDaniel arrested Toby Kelley for operating a motor vehicle while intoxicated. At the time of his arrest, Kelley was driving a noncommercial vehicle but also possessed a commercial driver's license (CDL).

Officer McDaniel took Kelley to jail and read him an implied consent advisory in the presence of Deputy Sheriff Robert Amos. McDaniel also gave Kelley an implied consent form, which Kelley signed. Kelley provided a breath sample for chemical testing. The test revealed a breath alcohol concentration above the legal limit. See Iowa Code §§ 321J.1(1), .2(1)(b) (2007).

The State charged Kelley with operating a motor vehicle while under the influence. *Id.* § 321J.2. Kelley pleaded not guilty and filed a motion to suppress the test results on the ground that the implied consent advisory read to him was "inadequate and misleading regarding the applicable revocation periods for his CDL." Following a hearing, the district court denied the motion. The court found: "The implied consent advisory read to the Defendant contained a paragraph informing the Defendant of the repercussions to a person holding a CDL who either submits to or refuses a chemical test." The court concluded Kelley was "accurately informed regarding the implied consent prior to consenting to take the breath test."

Kelley agreed to have the charge tried to the court on stipulated facts. The district court found him guilty and imposed sentence. This appeal followed.

II. Analysis

A peace officer is required to advise a person from whom a chemical test is sought of the consequences of refusing to take the test and the consequences of failing the test. *Id.* § 321J.8. In situations like the present one, the officer must advise the person from whom a chemical test is sought of the following:

If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and either refuses to submit to the test or operates a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances, the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

Id. § 321J.8(1)(c)(2) (Supp. 2007). The "applicable period [of disqualification] under section 321.208" is one year. *Id.* § 321.208 (2007).

Kelley argues that he "was not able to make a reasoned and informed decision as to giving a requested sample because neither [McDaniel] nor Amos advised [him] of the implied consent consequences of a person with a CDL driving a non-commercial vehicle." Although the right to refuse a chemical test is not constitutionally based, see *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981), our review is de novo. *State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003); *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994).

Officer McDaniel testified that he read Kelley the entire advisory printed on a laminated sheet, including the implied consent advisory relating to CDLs. He

stated the implied consent language on the back of the form Kelley signed appeared to be the same language he read aloud. That form stated:

If you hold a commercial driver's license the department will disqualify your commercial driving privilege for one year if you submit to the test and fail it, you refuse to take the test, or you were operating while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances. The disqualification shall be for life if your commercial driving privilege was previously disqualified. These actions are in addition to any revocation under Iowa code Chapter 321J.

Deputy Amos confirmed that the advisory on the back of the form Kelley signed was indeed the same advisory as the one on the laminated sheets. While the officers disagreed on whether Officer McDaniel also read Kelley an additional paragraph relating to commercial vehicle operators, it matters little whether that paragraph was in fact read to Kelley, as the paragraph related to individuals who were operating commercial vehicles at the time of the arrest. See *State v. Massengale*, 745 N.W.2d 499, 502 n.2 (Iowa 2008). Additionally, although Kelley testified that McDaniel did “[n]ot specifically” mention the CDL, he acknowledged that “one of the things that was checked was that I was going to lose my license for one year.” This was the key language from the advisory. See *id.* at 503 (noting law was changed in 2005 with respect to revocation period and prior advisory was misleading).

Based on our de novo review, we agree with the district court that Kelley was read an advisory that included the applicable disqualification period for a CDL. Accordingly, we affirm the district court's denial of Kelley's motion to suppress.

AFFIRMED.