IN THE COURT OF APPEALS OF IOWA

No. 9-934 / 09-0512
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN JOSEPH HUTTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carol L. Coppola, District Associate Judge.

The State seeks discretionary review of a district court ruling granting the defendant's motion to suppress. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel Rothman, Assistant County Attorney, for appellant.

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

The State sought and was granted discretionary review of a district court ruling granting Justin Hutton's motion to suppress evidence of his blood-alcohol concentration in a prosecution for operating while intoxicated (OWI). The State claims the court erred in determining the implied consent advisory given to Hutton was inadequate. We reverse the judgment of the district court and remand for further proceedings.

I. Background Facts and Proceedings.

On December 20, 2008, at about 2:09 a.m., police officers responded to a report of an individual passed out behind the steering wheel of a white Ford Bronco parked at a convenience store. While talking to the driver, Hutton, the officers observed he had bloodshot watery eyes, slurred speech, and smelled strongly of an alcoholic beverage. He admitted he had been drinking beer that evening. He could not complete the horizontal gaze nystagmus test administered by one of the officers, and he failed two other field sobriety tests. A preliminary breath test indicated his blood alcohol concentration exceeded the legal limit.

Hutton was arrested for OWI. He was transported to the police station where he was read an "implied consent advisory" that included information regarding possible suspension of his commercial driver's license.[1] Hutton submitted to a Datamaster breath test, which showed his blood alcohol concentration was .205.

[1] At the time of his arrest, Hutton held a commercial driver's license but was found in a noncommercial vehicle.

The State charged Hutton with OWI, first offense, in violation of Iowa Code section 321J.2 (2007). He pled not guilty and filed a motion to suppress the breath test results, which the State resisted. Hutton challenged the adequacy of the implied consent advisory read to him before he submitted to the breath test. He argued the advisory was inaccurate and misleading because it informed him that his commercial driver's license would be suspended for one year if he submitted to the breath test and failed. Due to that supposed incorrect information in the advisory, Hutton argued his "'consent' to chemical testing was involuntary" and in violation of his substantive and procedural due process rights.

Following a hearing, the district court granted Hutton's motion reasoning:

> The advisory given by the officer and the code section [321J.8] differ in that "submitting to the test and failing it" is omitted in the applicable code section relating to a person such as Hutton who was operating a noncommercial motor vehicle but held a commercial driver's license. Therefore if Hutton had been advised properly he might have elected not to take the test. His refusal would still subject him to disqualification as provided in 321.208(2). However the Court cannot be confident that Hutton's decision to submit to testing was unaffected by the inaccurate advisory.

The State filed an application for discretionary review that was granted by our supreme court.

II. Scope and Standards of Review.

> When a defendant who has submitted to chemical testing asserts that the submission was involuntary, we evaluate the totality of the circumstances to determine whether or not the decision was made voluntarily. Our review is de novo. While we are not bound by the district court's factual findings, we give considerable weight to the court's assessment of the voluntariness of the defendant's submission to the chemical test.
>
> To the extent the issue presents a question of statutory interpretation, our review is for correction of errors at law.

State v. Garcia, 756 N.W.2d 216, 219-20 (Iowa 2008) (internal citations omitted).

III. Discussion.

"Iowa's implied consent statute establishes the basic principle that a driver impliedly agrees to submit to a test to determine alcohol concentration or presence of a controlled substance in return for the privilege of using the public highways." *State v. Massengale,* 745 N.W.2d 499, 501 (Iowa 2008) (internal quotation omitted); *see also* Iowa Code § 321J.6(1). Subject to certain exceptions not applicable here, *see* Iowa Code §§ 321J.10, .10A, a person nevertheless has the right to withdraw implied consent and refuse the test. Iowa Code § 321J.9; *Massengale*, 745 N.W.2d at 501.

Under Iowa Code section 321J.8 (Supp. 2007),[2] when a peace officer requests a person to submit to chemical testing, the officer "must advise the person of the consequences of refusing the test as well as the consequences of failing the test." *Massengale*, 745 N.W.2d at 501. The purpose of section 321J.8 is to provide the person with

> a basis for evaluation and decision-making in regard to either submitting or not submitting to the test. This involves a weighing of the consequences if the test is refused against the consequences if the test reflects a controlled substance, drug, or alcohol concentration in excess of the "legal" limit.

Voss v. Iowa Dep't of Transp., 621 N.W.2d 208, 212 (Iowa 2001).

The implied consent advisory that was read to Hutton informed him in relevant part that

> [i]f 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

[2] All future references to this provision will be to the version contained in the 2007 supplement to the Iowa Code, unless otherwise noted.

> other drug or controlled substance or a combination of such substances.

(Emphasis added.)

Section 321J.8 specifies what information must be conveyed in the implied consent advisory. *See Massengale*, 745 N.W.2d at 503. At the time of Hutton's arrest, that statute provided:

> A person who has been requested to submit to a chemical test shall be advised by a peace officer 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.

Iowa Code § 321J.8(1)(c)(2) (emphasis added).

The applicable period under section 321.208 (2007)[3] is as follows:

> A person is disqualified from operating a commercial motor vehicle for one year upon a conviction or final administrative decision that the person has committed any of the following acts or offenses in any state or foreign jurisdiction while operating a commercial motor vehicle or while operating a noncommercial motor vehicle and holding a commercial driver's license:
>
> *a*. *Operating a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances*.
>
> *b.* Refusal to submit to chemical testing required under chapter 321J.

Iowa Code § 321.208(2)(a), (b) (emphasis added).

[3] All future references to this code provision will be to the 2007 Iowa Code, unless otherwise noted.

Hutton argues the implied consent advisory that was read to him was inaccurate and misleading because at the time of his arrest neither section 321J.8(1)(c)(2) nor section 321.208(2) provided that a test failure is grounds for suspension of a commercial driver's license. Instead, according to Hutton, those provisions provide for revocation only if a person refused testing or is later found to be "under the influence." In support of this argument, Hutton contends, "Having a blood alcohol concentration in excess of .08 commonly referred to as 'test failure' is separate and distinct from being 'under the influence of alcohol.'"

As Hutton points out, a violation of section 321J.2 can occur by three alternative means, the first two of which are: (1) operating a motor vehicle while "under the influence of an alcoholic beverage or other drug or a combination of such substances," Iowa Code § 321J.2(1)(a); or (2) operating a motor vehicle while "having an alcohol concentration of .08 or more." Iowa Code § 321J.2(1)(b). Our supreme court has stated that a blood-alcohol content in excess of the legal limit does not necessarily mean a person is "under the influence" of alcohol. *See State v. Price*, 692 N.W.2d 1, 4 (Iowa 2005) (distinguishing the test failure alternative of section 321J.2(1) from the "under the influence" alternative); *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 355 (Iowa 1995) (rejecting an argument by an insurer that an insured was "intoxicated" as a matter of law based upon a blood alcohol content in excess of the legal limit); *see also State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) ("[A] person is 'under the influence' when the consumption of alcohol affects the person's reasoning or mental ability, impairs a person's judgment, visibly excites a person's emotions, or causes a person to lose control of bodily actions.").

However, "[a]ccurate test results, if positive, provide valuable evidence for use in criminal prosecution." *Veach v. Iowa Dep't of Transp.*, 374 N.W.2d 248, 250 (Iowa 1985). A breath test result "showing some level of alcohol in the blood makes it *more probable* that a person was under the influence of alcohol than without the evidence." *Price*, 692 N.W.2d at 4; *see also State v. Moorehead*, 699 N.W.2d 667, 673 (Iowa 2005) ("A breath test result is important evidence in prosecutions for drunk driving."); *Benavides*, 539 N.W.2d at 355 ("[T]he blood alcohol level of the insured at the time of injury will undoubtedly provide important evidence on whether the insured was intoxicated."). Given the relevancy of test results in establishing that a person was under the influence, Hutton is not necessarily correct that a test failure would not lead to revocation of a commercial driver's license under the version of section 321.208(2) in effect at the time of his arrest.

This may explain why, in discussing section 321.208(2), our supreme court in *Massengale* stated that provision provides for "a one year CDL revocation for an individual who refused *or failed chemical testing* regardless of whether the individual was operating a commercial or noncommercial motor vehicle." 745 N.W.2d at 503 (emphasis added). Later, the court again stated that under section 321.208(2), "an individual, such as Massengale, holding a CDL and driving a noncommercial vehicle will lose his commercial driving privileges for one year if he refuses *or fails chemical testing*." *Id.* (emphasis added); *see also Garcia*, 756 N.W.2d at 222 (noting the purpose of section 321J.8 "is to advise accused drivers of the consequences of submitting to *or failing the chemical test*" (emphasis added)). Hutton urges us to ignore these

statements as dicta because the issue presented in this case was not considered by the court in *Massengale*. Yet, dicta or not, we think the supreme court's clear statements of the law are binding on this court.

Our decision to follow the court's statements in *Massengale* is supported by subsequent amendments to sections 321J.8(1)(c)(2) and 321.208(2). "In construing a statute we try to find and give effect to legislative intent." *State v. Green*, 470 N.W.2d 15, 18 (1991). If a statute is ambiguous, we may, in determining the intention of the legislature, consider former and more recent versions of the statute.[4] *See State v. Ahitow*, 544 N.W.2d 270, 272 (Iowa 1996). Even where a statute is not ambiguous, our supreme court, while questioning the propriety of doing so, has considered the subsequent history of a law as a factor in its analysis of the legislature's intent. *See State v. Guzman-Juarez*, 591 N.W.2d 1, 3 (Iowa 1999).

> Statutory amendments may either clarify or modify existing legislation. We construe revisions to a statute as altering that statute if the intent to change the law is clear and unmistakable. Moreover, any material change in the language of a statute is presumed to alter the law.

Ahitow, 544 N.W.2d at 273 (internal citations omitted); *see also Guzman-Juarez*, 591 N.W.2d at 3 ("An amendment to a statute does not necessarily indicate a change in the law."). The presumption that any material change in the language

[4] Neither chapter 321 nor 321J defines "under the influence." As discussed above, the supreme court has distinguished that phrase from "test failure" in discussing section 321J.2. *See Price*, 692 N.W.2d at 4. But it has also conflated the two phrases in discussing sections 321J.8 and 321.208. *See Garcia*, 756 N.W.2d at 222; *Massengale*, 745 N.W.2d at 503. In addition, the supreme court has repeatedly emphasized the relevancy of test results in determining whether a person is "under the influence." *See Moorehead*, 699 N.W.2d at 673; *Price*, 692 N.W.2d at 4; *Benavides*, 539 N.W.2d at 355. We thus think persons might reasonably disagree as to the meaning of the phrase "under the influence" in sections 321J.8 and 321.208. *See Ahitow*, 544 N.W.2d at 272 ("Words are ambiguous if reasonable persons can disagree as to their meaning.").

of a statute alters the law is not conclusive because "the time and circumstances of the amendment may indicate that the legislature merely intended to interpret the original act by clarifying and making a statute more specific." *Guzman-Juarez*, 591 N.W.2d at 3 (citation omitted).

> If the amendment follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight. If it takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute.

Id. (citations omitted).

The version of section 321.208(2) in effect at the time of Hutton's arrest was enacted in 2005. *See Massengale*, 745 N.W.2d at 503. Section 321J.8(1)(c)(2) was amended to conform to section 321.208(2) in 2007. *Id.* at 504. Since those amendments, the State asserts controversies regarding the interpretation of sections 321J.8(1)(c)(2) and 321.208 have arisen in district court and administrative proceedings.[5] Both statutes were amended in 2009. Section 321J.8(1)(c)(2) now provides:

> 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 submits to the test and the results indicate the presence of a controlled substance or other drug or an alcohol concentration equal to or in excess of the level prohibited by section 321J.2*, the person is disqualified from operating a commercial motor vehicle for the applicable period

[5] In its brief, the State cites several district court cases that have confronted the same issue presented to us here but reached differing conclusions. Copies of these decisions are not part of the record on appeal, nor were they attached to the State's brief for our consideration. The State did present copies of three administrative decisions in support of its application for discretionary review that considered the issue and determined a test failure could be used to revoke a driver's commercial driver's license under section 321.208(2)(a). All of those decisions determined the statute's use of the phrase "under the influence" was ambiguous.

> 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.

2009 Iowa Acts ch. 130, § 14 (emphasis added). Section 321.208(2)(a) was similarly amended and now provides for revocation of a commercial driver's license upon a conviction or final administrative decision that the person was "[o]perating a motor vehicle while intoxicated, as provided in section 321J.2, subsection 1." 2009 Iowa Acts ch. 130, § 10.

Given the timing and circumstances surrounding these amendments, we believe the legislature intended to clarify the existing legislation by stating that a person's commercial driver's license may be suspended under any of the alternatives set forth in section 321J.2(1). *See Guzman-Juarez*, 591 N.W.2d at 3. The amendatory language does not evidence a clear and unmistakable intent to change the law. *See id.* Nor do the amendments materially change the law so as to give rise to a presumption that the legislature intended to alter the law. *Id.*; *cf. Ahitow*, 544 N.W.2d at 273 (determining an amendment to a criminal statute broadened the scope of the statute and altered the law).

For the foregoing reasons, we reject Hutton's argument that "Iowa law did not authorize the disqualification of a person's commercial driving privileges for one (1) year for test 'failure.'" The implied consent advisory that was read to Hutton and advised him that his commercial driver's license would be suspended if he submitted to the test and failed was not inaccurate or misleading because such a result was possible under the statutes in effect at the time. *See Green*, 470 N.W.2d at 18 ("A remedial statute, like our implied consent law, should be liberally construed consistent with its statutory purpose.").

Even assuming Hutton's commercial driver's license could not have been revoked if he failed the breath test, the "ultimate question" in cases like this "is whether the decision to comply with a valid request under the implied-consent law is a reasoned and informed decision." *State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003). "[N]ot every inaccurate depiction by law enforcement officers that might bear on a subject's election to submit to chemical testing is a basis for suppressing the test results." *Id*.

Hutton was informed of the "key revocation information" regarding his commercial driver's license in the implied consent advisory that was read to him following his arrest. *State v. Kentner*, 562 N.W.2d 431, 433 (Iowa 1997) (rejecting argument that officer was required to inform a driver when the revocation would become effective). He was advised "of the consequences of refusing to take the test and the consequences of a positive test result, including the potential periods of revocation." *Voss*, 621 N.W.2d at 211. After being informed that his commercial driver's license was subject to revocation if he refused the test or if he was operating while under the influence, Hutton does not explain how also being informed that if he submitted to the test and failed it, affected his ability to make a reasoned and informed decision.[6] *See id.* at 212-13 ("No useful purpose would be served by a rigid requirement that the implied consent advisory be reread when multiple chemical tests are requested."); *Green*, 470 N.W.2d at 18 (stating that when "the purpose of the requirement [of

[6] It appears Hutton's argument in supporting suppression of the test results is that the consent form was misleading because it overstated the potential adverse consequences of failing the chemical test. If anything, the alleged inaccuracies in the consent form should have made him more reluctant to agree to the test.

the implied consent law] has been substantially met," evidence of test results has been allowed); *cf. Massengale*, 745 N.W.2d at 505 (finding implied consent advisory was misleading and impaired defendant's ability to make a reasoned and informed decision where defendant was not adequately informed of the revocation period applicable to his commercial driver's license).

Because the advisory adequately informed Hutton of "the consequences of refusing the test as well as the consequences of failing the test," *Massengale*, 745 N.W.2d at 501, we reject Hutton's argument that his consent to the breath test was not reasoned and informed. The district court thus erred in granting Hutton's motion to suppress the breath test results.

IV. Conclusion.

The implied consent advisory that was read to Hutton before he submitted to the breath test was not inaccurate or misleading. The advisory adequately informed him of the consequences of refusing the test and the consequences of submitting to the test. We therefore reverse the district court's ruling suppressing the breath test results and remand for further proceedings.

REVERSED AND REMANDED.