IN THE COURT OF APPEALS OF IOWA

No. 8-227 / 97-1494

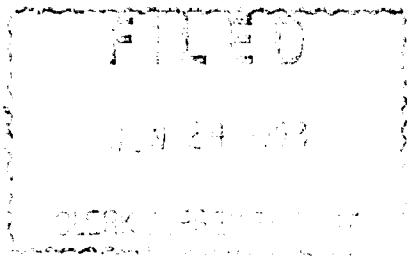
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL DAVID DOHNALEK,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Thomas A. Renda, District Associate Judge, A. Patricia Houlihan, District Associate Judge, and Gregory D. Brandt, District Associate Judge.

Defendant appeals from judgment and sentence entered for operating while intoxicated. **AFFIRMED.**

James A. Sinclair, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Teresa A. Vens, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Michael Dohnalek appeals his conviction for operating while intoxicated. He alleges the trial court erred when it determined: (1) Dohnalek was not denied his right to counsel under Iowa Code section 804.20; and (2) Dohnalek had not been coerced into giving consent to a breath test. We affirm.

Dohnalek was one of several drivers involved in an automobile accident. At 7:35 p.m. Officer Dennis Evans conducted a preliminary breath test on Dohnalek at the scene. Evans then arrested Dohnalek and took him to the Clive police station. Evans read the complied consent to Dohnalek, who requested to speak to an attorney. Dohnalek made at least two, but possibly three, attempts to call his attorney. Dohnalek left a message. Evans then allowed Dohnalek to attempt to reach a second attorney. Two attempts were made, but Dohnalek also failed to reach the second attorney. He also left a message for this attorney. Dohnalek then called his wife and talked with her.

Dohnalek claims he told his wife to find an attorney and to get the attorney to the police station. Evans claims he did not hear this conversation. Evans invoked implied consent and began to administer the breath test at 9:02 p.m. with thirty-three minutes left before the expiration of the two-hour period. Evans indicated he had given Dohnalek ample opportunity to consult an attorney and had other duties to attend to at the police station.

I. PRESERVATION OF ERROR. The State contends Dohnalek waived his right to file a motion to suppress because he filed it forty-four days after he filed the written arraignment. Dohnalek claims he timely filed the motion to suppress because, "[T]he forty-day time period starts to run from the day the Arraignment Following Trial Information is signed by the Judge in Polk County." Under Dohnalek's timetable, he filed the motion to suppress on the thirty-ninth of the forty days allowed.

> Unless otherwise ordered by the court, a defendant represented by an attorney may waive the formal arraignment contemplated by this rule and enter a plea of not guilty by executing and filing a written arraignment form that substantially complies with form 10.1 included in the appendix to these rules. The arraignment form must assure the court that the defendant has been advised of, and is aware of, all the rights and matters specified in this rule and that the full purposes of an arraignment have been satisfied.

Iowa R. Crim. P. 8(1). The rules further provide, "If a written arraignment under [rule] 8(1) is used, the date of the arraignment is the date *the arraignment is filed.*" Iowa R. Crim. P. 10(4). Thus, a motion to suppress must be filed within forty days of the filing of a written arraignment. Iowa R. Crim. P. 10(2)(c) , 10(4).

We find the rules are clear, and the forty-day time period does not wait to begin running until the judge signs the written arraignment. The rules speak of unilateral action by the defendant. If the rules expected the time period to begin running upon signing, they would say so. Thus, Dohnalek's motion to suppress was untimely.

However, even though we have ruled the motion was untimely filed, we will address the merits of his claims.

II. RIGHT TO COUNSEL UNDER IOWA CODE SECTION 804.20.

When the admission of evidence depends on the interpretation of a statute, we review for correction of errors of law. *State v. Palmer*, 554 N.W.2d 859, 864 (Iowa 1996). Thus, we must decide whether the district court's ruling was based on the correct interpretation of Iowa Code section 804.20. *Id.*

Section 804.20 provides:

> 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 or 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.

Iowa Code § 804.20 (1997).

> 1. When a person arrested for operating a motor vehicle while under the influence of an alcoholic beverage asks to call his lawyer, he shall be afforded a right to do so under § [804.20] before being required to elect whether he shall submit to a chemical test.
> 2. If he is denied that opportunity, evidence of his refusal to take a chemical test shall be inadmissible at a later criminal trial.
> 3. His right to prior consultation with an attorney is limited to circumstances when that course will not materially interfere with the taking of the test within the [two hours] specified in § [321J.6(2)].

State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978). The right to counsel provided by section 804.20 is not absolute. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997); *Vietor*, 261 N.W.2d at 831. The two-hour period during which

the testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing. *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa 1991).

> It is common knowledge that the human body dissipates alcohol rapidly . . . . Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene . . . . If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel.

Vietor, 261 N.W.2d at 831.

Generally, the right to counsel is satisfied by allowing the arrestee to make a telephone call. *Bromeland*, 562 N.W.2d at 626. Additionally, any request for counsel must be made in good faith. *Id.* Whether the request is made in good faith is determined by an objective consideration of the statements and conduct of the arrestee and peace officer, as well as the surrounding circumstances. *Id.* Dohnalek argues *State v. Short* supports his argument the officer should have allowed him more time to contact his attorney. In *Short* this court stated:

> Deputy Stout requested Mr. Short submit to the breath test at 2:05 a.m. at which time Mr. Short told the officer his attorney had been called and was going to come down to the jail. Mr. Short said he wanted to talk to his attorney in person prior to deciding whether or not to take the test. Deputy Stout treated this as a refusal, when at least forty-five minutes remained of the statutory two-hour period.

Short v. Iowa Dep't of Transp., 447 N.W.2d 576, 579 (Iowa App. 1989). The court

further stated:

> [The cases relied upon by the State] should not be read so broadly as to stand for the proposition that an individual arrested for OWI, *who promptly has an attorney contacted and wants to confer with that attorney in person* will be considered to have refused to submit to testing.

Id. (emphasis added). These statements show this case is distinguishable from the case at bar. Dohnalek did not have an attorney located. He made a total of four to five calls to two different attorneys and was unable to locate them. He also talked with his wife. We find this is far different from the situation in *Short*. Officer Evans gave Dohnalek a reasonable opportunity to locate an attorney and it was reasonable for Evans to believe he needed to perform the test and Dohnalek would be unable to reach an attorney. For this reason, we find Dohnalek was not denied his statutory right to counsel.

III. COERCION.

> 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. Although we are not bound by the trial court's factual findings, we give considerable weight to the court's assessment on the question of voluntariness.
>
> It is well settled that for a consent to be valid, it must be voluntary and uncoerced. When coercion is alleged, the State must prove by a preponderance of the evidence the absence of undue pressure or duress. 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.

State v. Gravenish, 511 N.W.2d 379, 381 (Iowa 1994).

Dohnalek contends the police coerced him into consenting to the test. He contends Evans told him either he took the test or it would be construed as a refusal and it would be in Dohnalek's best interests to take the breath test, considering he was in an accident. Dohnalek claims had Evans not misled him regarding the right to counsel, he would not have given his consent to the test unless his attorney so advised him.

At the suppression hearing, Evans testified he allowed Dohnalek to call an attorney. When that attorney could not be reached after three attempts, he allowed Dohnalek to attempt to call a second attorney. Evans also stated Dohnalek talked with his wife, although Evans testified he did not hear their conversation because he was in another room. According to Evans, he did not tell Dohnalek it would be in his best interests to take the test. Evans did admit he told Dohnalek, "ultimately he was going to have to make the decision to take the test or I would take that as a refusal." However, he told Dohnalek this only after he was unable to reach an attorney.

After a review of the totality of the circumstances, we find Evans did not tell Dohnalek it would be in his best interest to take the breath test. Evans correctly told Dohnalek his options. We find Dohnalek was not coerced into taking the breath test.

For these reasons, we affirm the conviction.

AFFIRMED.