



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
BRIAN LEE ADAMS,)
Defendant-Appellant.)

8-619
88-161

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Appeal from the Iowa District Court for Mahaska County
(No. CR 5692-0687), Max H. Ruschmeyer, Judge.

The defendant appeals from his conviction for
first-offense OWI. **AFFIRMED.**

William L. Wegman, State Public Defender, and Raymond
E. Rogers, Assistant State Public Defender, for
defendant-appellant.

Thomas J. Miller, Attorney General; Daniel W. Perkins,
Assistant Attorney General; and Charles A. Stream, County
Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ.

OXBERGER, C.J.

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Appellant Brien Lee Adams appeals his conviction and sentencing for first offense driving while intoxicated (OWI) in violation of Iowa Code § 321J.2 (1987). He contends the trial court erred in overruling his motion in limine seeking to exclude from evidence breath test results. After the motion was overruled, the impaneled jury was dismissed due to the possibility members had heard some of the evidence presented during the motion. Defendant waived his right to a jury trial, preserved his right to appeal the overruling of his motion in limine, and the case was submitted to the court based on the minutes of testimony and the evidence received during the motion hearing. The trial court found the defendant guilty based upon the breath test results showing a .189 blood alcohol content.

Defendant's motion in limine and appeal is based on the contention that the arresting officer failed to follow the implied consent procedures of Iowa Code § 321J.6 (1) (1987) when he altered the written request form after defendant submitted to the breath test. At the motion hearing, the arresting officer admitted making the following changes to the written request form approximately three hours after defendant submitted to the breath test:

- (1) by changing the time for request of specimen from 1:17 a.m. to 2:17 a.m.
- (2) by adding "1.56 a.m." as time of arrest or preliminary breath test.

(3) by checking the two boxes on the form showing defendant submitted to a preliminary breath test indicating an alcohol concentration of .10 or more and had been placed under arrest for OWI.

Defendant relies heavily upon State v. Richards, 229 N.W.2d 229 (Iowa 1975) as support for his proposition that the implied consent procedures set out in Iowa Code Section 321J.6 (1987) require the written request form for a specimen be filled out contemporaneously with the request and not after consent has been given and the specimen obtained. In that case the court ruled the blood test results were inadmissible because the arresting officer made only an oral request for a specimen before the nurse drew the defendant's blood sample. Id. at 233. The written request form was completed, shown to the nurse, and signed by the defendant after the defendant had submitted to the test. Id. The court held the implied consent procedures required the State to prove a written request had preceded the accused's submission to the test as a foundational requirement for admissibility of the test results. Id.

In this case testimony indicates, and defendant does not dispute, that the arresting officer did read from and present a written request form to the defendant which he signed prior to submitting to the test.

The issue is whether a completion of the form or the altering of the form as described above violates the implied consent procedures such that the test results should be deemed inadmissible. The relevant portion of the implied consent procedures of Iowa Code § 321J.6 (1987) are:

321J.6 Implied consent to test.

1. A person who operated a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration or presence of drugs, subject to this section. The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer . . .

A videotape admitted into evidence during the motion hearing shows the defendant was read the advisory request form. Defendant was given the form and signed it. The officer testified he changed the time on the form later that morning because he accidentally set his watch one hour early prior to defendant submitting to the test. There is no real dispute regarding the accuracy of the times of arrest and submission to the test which are now shown on the form. Under section 321J.6, one of five conditions must exist in addition to the officer's reasonable belief defendant is operating a vehicle while intoxicated before someone can be asked to submit to the test. Iowa Code § 321J.6 (1) (2)-(e) (1987). The trial court, sitting as a

fact-finder, found defendant had lawfully been placed under arrest for violating 321J.2 and defendant had been given a preliminary breath test which indicated an alcohol concentration of .10 or more.

In State v. Meissner, 315 N.W.2d 738 (Iowa 1982), the officer read from the implied consent form when requesting a blood test and then a urine test, both of which the defendant refused. The court held this was compliance with the statutory requirement that the demands for specimens be in writing because it was clear the officer was reading from a paper and there was no allegation the paper was misread. Id. at 740.

Henry v. Iowa Dep't of Transp., M.V.D., 426 N.W.2d 383 (Iowa 1988) is an agency driver's license revocation situation rather than a criminal OWI prosecution. This distinction does not prevent us from applying the rationale of the Iowa Supreme Court in that case to the present one. Both cases involve a determination whether or not the implied consent procedures have been complied with as a matter of law. Id. at 385.

In Henry, the officer read the advisory from the form and requested a blood specimen which the defendant refused to give. Id. at 384. The copy of the form given to the defendant showed the time and date of the request and the officer's signature, but did not reflect the officer's request for an alternative specimen. Id. at 387. The

officer filled out his copy regarding the second request after he asked for the second specimen. Id. The court held as follows:

. . . the implied consent procedure was not tainted or flawed by the timing of the completion of the request form or by the trooper's failure to complete and sign Henry's copy. The primary purpose for the statutory requirement of a written request is to provide a record of the relevant communication for subsequent review. See Meissner, 315 N.W.2d at 741. Here, a written record of the oral request and the refusal was contemporaneously made. We also note there is no statutory requirement that the written request be completed and signed before the oral request is made. In our view the aim of the statute was fulfilled. See Iowa Code § 4.6(1).

Henry, 426 N.W.2d at 387.

Such language supports our finding that the implied consent procedures were complied with in this case. Defendant was read the advisory from the form, given a copy of the form to read, and he and the officer signed the form indicating defendant consented to submit to the test. We do not face allegations the form was altered to show compliance with the procedures when such compliance did not actually exist. The statute does not require the form be filled out before the request for the specimen is made. Any changes or alterations made by the officer after the testing can always be discovered by comparing it with defendant's copy, and the officer will be subject to appropriate cross-examination.

We affirm the trial court's ruling denying defendant's motion in limine and allowing into evidence the results of defendant's intoxilyzer test. The trial court's conviction and sentence based on the results is also affirmed.

AFFIRMED.