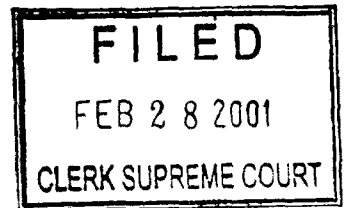


IN THE COURT OF APPEALS OF IOWA

No. 0-789 / 99-1980
Filed February 28, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD DEAN SABLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Thomas A. Renda,
District Associate Judge.

Defendant appeals from the judgment and sentence entered following his
conviction of second-offense operating while intoxicated. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney
General, John P. Sarcone, County Attorney, and Christine Gonzales, Assistant
County Attorney, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Richard Dean Sable appeals from the judgment and sentence entered following his conviction of second-offense operating while intoxicated. See Iowa Code § 321J.2 (1999). He contends the arresting officer violated Iowa Code section 804.20 by denying his request to call an attorney, and consequently, the district court erred by overruling his motion to suppress breath test evidence. We affirm.

I. Factual Background and Proceedings. On May 1, 1999, Polk County Sheriff's Deputy Cass Bollman arrested Sable for operating while intoxicated ("OWI"), second offense and transported him to the Polk County Jail. Sable requested an opportunity to make a phone call to his sister in West Des Moines. He informed Deputy Bollman his sister's husband, Kenneth Benhart, was an attorney. When Sable called his sister's residence, Benhart answered the phone and Sable asked him for advice. Benhart informed Sable of his lack of expertise in the practice of criminal law and his inability to provide legal advice. Benhart gave him the phone number of another attorney, Joseph Bertogli, who is experienced in OWI cases. Sable requested a piece of paper and a pencil from Deputy Bollman and wrote down Bertogli's number. Sable then signed the implied consent form and took the intoxilyzer test. The breath test indicated a blood alcohol level of .211. On July 7, 1999, Sable filed a motion to suppress requesting the district court to exclude the results of the breath test because he had not been afforded his right to speak with an attorney pursuant to Iowa Code section 804.20. The district court denied the motion on August 2, 1999. After a

trial to the court on the minutes of testimony, the district court found Sable guilty, sentenced him to two years in prison, all but seven days suspended, and fined him \$1500. Sable appeals.

II. Standard of Review. The review of section 804.20 is for errors at law. See *State v. Krebs*, 562 N.W.2d 423, 425 (Iowa 1997). We will uphold the trial court's ruling on a motion to suppress if there is substantial evidence to support the court's findings of fact. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Id.*

III. Merits. Sable contends the deputy violated his right to call an attorney by not allowing him a reasonable opportunity to place a call to a second attorney after speaking to his brother-in-law. Iowa Code section 804.20 states in relevant part:

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 of the person's choice, or both. Such a person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney.

Iowa Code § 804.20. A person arrested for OWI has a limited right to contact an attorney under this section. *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). Generally, this right to contact counsel is satisfied by allowing the person arrested for OWI to make a telephone call. *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576, 578 (Iowa Ct. App. 1989). Section 804.20 does not provide an absolute right to counsel, but requires a peace officer to provide the arrestee with

a reasonable opportunity to contact an attorney. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). Any request for counsel must be made in good faith. *Id.* We determine whether the request was made in good faith by an objective consideration of the statements and conduct of the arrestee and the peace officer, as well as the surrounding circumstances. *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988).

The applicable standard of review requires us to determine whether the district court's finding Sable was afforded a reasonable opportunity to contact counsel is supported by substantial evidence in the record. At the hearing on his motion to suppress, Sable testified after he spoke with his brother-in-law, he asked Deputy Bollman to make another phone call. However, he could not say with certainty whether he advised the deputy the reason he needed to make another call was because the attorney he had contacted was not able to give him legal advice. Deputy Bollman testified he could not remember "one way or the other" whether Sable told him he wanted to call another attorney because the first attorney was unable to advise him. He further testified if Sable had explained the situation to him, he probably would have given him another phone call. Sable was afforded an opportunity to call an attorney. The record is not sufficiently clear to establish as a matter of law that Sable explained to the officer his reasons for needing to call another attorney. In addition, there is strong evidence in the record that Sable was intoxicated at the time of his conversation with the deputy who invoked the implied consent procedure. After an objective consideration of the testimony of both Sable and Deputy Bollman and of the

surrounding circumstances, we find substantial evidence supporting the district court's finding Sable was afforded a reasonable opportunity to call an attorney under section 804.20. Therefore, we affirm the district court's denial of Sable's motion to suppress and affirm his conviction.

AFFIRMED.