FILED
MAY 26 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-107 / 93-532

STATE OF IOWA,

Appellee,

vs.

DALE ALLEN HARTMAN,

Appellant.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Dale Allen Hartman appeals his conviction, following a bench trial on stipulated evidence, of operating while under the influence of alcohol, third offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, Denver Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HAYDEN, P.J.

On June 21, 1992, Cedar Rapids police officer Mike Wallerstedt arrived at the I-380 off ramp at Highway 30 and found a pickup truck upside down with Dale Hartman seatbelted into the driver's seat. Paramedics extricated Hartman from the truck and placed him in an ambulance. Officer Wallerstedt (Wallerstedt) drove the ambulance because both paramedics were needed to treat Hartman.

Hartman arrived at Mercy Medical Center at 2:58 a.m. Because he had noticed Hartman smelled of alcohol, Wallerstedt asked the attending physician, Dr. Griffith, to certify whether Hartman was capable of consent or refusal for a blood sample. Wallerstedt made the request at 3 a.m. Dr. Griffith certified Hartman was incapable of giving consent. A blood sample was taken resulting in a blood alcohol content of .316.

The State charged Hartman with operating a motor vehicle while under the influence of alcohol, third offense. Hartman filed a motion to suppress the blood test results, claiming the withdrawal of the sample pursuant to Iowa Code section 321J.7 (1991) was improper because he was fully capable of consenting or refusing the specimen request.

At the suppression hearing, Dr. Griffith testified his initial assessment of Hartman's condition showed he had suffered a possible concussion, a fractured left scapula and clavical, multiple fractured ribs, acute intoxication,

and other injuries. He stated Hartman's speech was somewhat slurred and he feared Hartman might have suffered a severe head injury. He did state Hartman was alert and able to participate in conversation. A subsequent CT scan of Hartman's head revealed no significant abnormality.

Wallerstedt testified he spoke with Hartman at the scene. Hartman was able to answer "some questions," indicating he had just gotten off work and had drank two beers. Wallerstedt testified he determined he would question the doctor regarding Hartman's ability to consent after the paramedics asked him to use the lights and siren on the way to the hospital. He claimed this indicated the injuries were serious. He denied asking Hartman if he would consent to providing a specimen.

Hartman's mother testified she talked to him at 3:20 a.m. on the morning of the accident and he was able to answer her questions. Hartman testified he was capable of consenting or refusing to provide a specimen. He also claimed an officer had asked him to consent to a test but he refused.

The district court denied the motion to suppress. Hartman waived jury trial and agreed to a bench trial on stipulated evidence. The district court found him guilty, entered judgment, and sentenced him to a prison term of up to five years.

Hartman appeals.

In ruling on the motion to suppress, the trial court was required to find the facts upon which the admissibility of the evidence was to depend. State v. Weidner, 418 N.W.2d 47, 49 (Iowa 1988). The trial court makes this determination based on the preponderance of the evidence. State v. Florie, 411 N.W.2d 689, 695 (Iowa 1987). On appeal, we will uphold the trial court's ruling on the motion to suppress if there is substantial evidence in the record to support the finding of fact it was more likely than not defendant was incapable of consenting or refusing a blood test. State v. Laughridge, 437 N.W.2d 570, 572 (Iowa 1989).

Iowa Code section 321J.7 provides as follows:

> A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given if a licensed physician certifies in advance of the test that the person is dead, unconscious, or otherwise in a condition rendering that person incapable of consent or refusal.

A trial court's determination the defendant was unconscious or otherwise unable to consent to or refuse testing will be upheld if there is substantial evidence in the record to support the trial court's finding. State v. Laughridge, 437 N.W.2d 570, 572 (Iowa 1989). The trial court makes its determination based on the preponderance of the evidence. This court will not reverse the trial court's ruling on the basis the evidence is disputed or the trial court could have reached the opposite conclusion. The

trial court's ruling will be set aside only if there is no substantial evidence in the record to support its finding. Id.

In the case at bar, the trial court's determination defendant was incapable of making a decision regarding testing was supported by substantial evidence. Officer Wallerstedt testified it was his impression the defendant had been seriously injured in the accident. The paramedics had requested he drive the ambulance so both paramedics could ride in the back and attend to defendant. He additionally testified he was authorized to utilize the ambulance's light and sirens en route to the hospital. Wallerstedt indicated it was his impression when the lights are authorized, it generally means the patient's condition is "fairly serious."

The officer then testified when they arrived at the hospital he waited while defendant was attended to by medical personnel. Wallerstedt stated he knew he wanted to have a test done because he smelled alcohol on defendant's breath, defendant had indicated to him he had been drinking, and because of the accident itself. Wallerstedt further stated he was concerned about defendant's ability to consent or refuse testing because of the injuries he had sustained. He therefore requested the treating physician, Dr. Griffith, determine if defendant was capable of consenting to or refusing the test. Dr. Griffith determined defendant was incapable of making such a

decision and signed the physician's certificate Wallerstedt had provided him. Dr. Griffith testified he is a certified trauma specialist employed at Mercy Medical Center in Cedar Rapids, Iowa. He testified defendant was transported to the hospital at approximately 3 a.m. on June 21, 1992, and he was the examining doctor. He further testified his examination and assessment of defendant revealed defendant had suffered "significant physical trauma." He indicated this trauma included a concussion, fractured scapula and clavicle, fractured ribs, and various abrasions and lacerations.

Dr. Griffith testified he was worried about the extent of defendant's injuries and was particularly concerned with the trauma inflicted on defendant's head. Dr. Griffith said the defendant was complaining of pain and he believed defendant was incapable of giving his consent or refusal to chemical testing. Dr. Griffith indicated he felt defendant "could have suffered a fairly serious injury to the head." He further testified he believed anyone with a probable concussion was incapable of deciding whether to consent to testing.

Our supreme court has held "a physician's certification of incapacity is not conclusive, however, it is strong evidence of that fact." State v. Axline, 450 N.W.2d 857, 859 (Iowa 1990).

There is sufficient evidence the defendant was incapable of making a decision regarding chemical testing

following his accident. The decision of the trial court is affirmed.

AFFIRMED.