IN THE COURT OF APPEALS OF IOWA

No. 9-257 / 98-875
Filed June 23, 1999

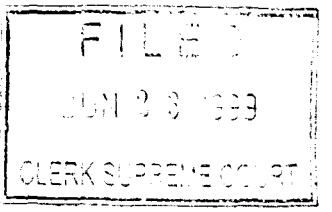
STATE OF IOWA,

Appellee,

vs.

THOMAS MERLE THOMPSON,

Appellant.



Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Judge.

Thomas Thompson appeals from the judgment and sentence entered following his conviction, after a jury trial, for operating while intoxicated, first offense. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Barbara A. Edmondson, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Defendant-appellant Thomas Merle Thompson appeals his conviction for operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321J.2 (1997). Thompson claims the trial court erred in admitting into evidence an implied consent form which contained the results of his preliminary breath test. We hold the admission of such evidence is reversible error.

On April 2, 1997, a Washington, Iowa police officer observed defendant's vehicle traveling along side another vehicle in a manner that suggested the two vehicles were preparing to drag race. One of the vehicles turned on to another street, so the officer continued to follow only the defendant's car. After pacing defendant's vehicle for a short distance, the officer determined Thompson was traveling at sixty miles per hour in an area where the posted speed limit was thirty miles per hour. The officer then stopped defendant's vehicle.

Based on his contact with Thompson after defendant's vehicle was stopped, the officer concluded the defendant had been drinking. The officer asked the defendant to perform five field sobriety tests: the horizontal gaze nystagmus test, the alphabet test, the walk and turn test, the one leg stand test, and the finger count test. In the officer's opinion, Thompson failed all of the tests except the alphabet test. The officer also administered a preliminary breath test which showed that Thompson's alcohol concentration was more than ten hundredths (.10) of one percent by weight of alcohol in the blood.

Defendant was arrested for operating while under the influence and taken to the county jail where he was processed under the provisions of the implied consent law. *See* Iowa Code ch. 321J (1997). The officer read Thompson the implied consent advisory and requested a breath specimen for an intoxilyzer test. The defendant refused to provide a breath sample and requested to be taken to a hospital for a blood test.

I. Admissibility of Preliminary Breath Screening Test Results. Thompson claims the trial court erred by admitting into evidence over his objection the implied consent form which revealed he had submitted to a preliminary breath screening test which indicated an alcohol concentration of ten hundredths (0.10) or more. He argues such evidence is inadmissible under Iowa Code section 321J.5.

Section 321J.5 provides a peace officer may request a breath sample for a preliminary screening test when the officer has reasonable grounds to believe the driver is operating a vehicle while under the influence of alcohol or that the driver has been in a motor vehicle collision resulting in injury or death. *See* Iowa Code § 321J.5(1) (1997). The statute further provides:

> The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized in this chapter, but shall not be used in any court action *except to prove that a chemical test was properly requested of a person pursuant to this chapter.*

Iowa Code § 321J.5(2) (1997) (emphasis added).

In this case, the trial court ruled the implied consent form which disclosed the results of Thompson's preliminary breath test to the jury was admissible to prove a

chemical test was properly requested of the defendant. The State urges this evidence falls within the exception provided for in the last sentence of section 321J.5(2). We disagree.

In *State v. Thompson*, our supreme court held a document that included the results of the preliminary screening test which indicated ten hundredths or more of one percent by weight of alcohol in the blood, was inadmissible under section 321B.3 (now section 321J.5(2)) when the foundational facts necessary for the admission of the later intoxilyzer test were not in issue. *See State v. Thompson*, 357 N.W.2d 591, 593 (Iowa 1984). The supreme court's ruling in *Thompson* addressed the admissibility of the actual test score, rather than admissibility of the fact that the test showed the presence of some alcohol without showing the quantity. *See State v. DeShaw*, 404 N.W.2d 156, 158 (Iowa 1987). The supreme court subsequently expanded the *Thompson* ruling in holding a positive showing on a preliminary screening test — indicating the pre ence of some alcohol — is a "result" of the test within the meaning of the statute and may not be used as evidence in court. *See id.* In both *Thompson* and *DeShaw* the court held the admission of such evidence was not harmless error and granted a new trial.

A person commits the offense of operating while intoxicated by operating a motor vehicle in either of the following conditions: (1) while under the influence of alcohol; or (2) while having an alcohol concentration of .10 or more. *See* Iowa Code § 321J.2(1). In the present case, the defendant refused to submit to an intoxilyzer test. As a result, he was prosecuted pursuant to the "under the influence" alternative.

Thompson claims under this alternative, the validity of the officer's request for a chemical test was not an issue and the district court erred in admitting the implied consent form which contained the results of Thompson's preliminary breath test. We agree.

Because this case did not involve intoxilyzer test results, the validity of the officer's request for a chemical test was not an issue. We conclude there was no issue in this case regarding the foundational facts necessary for the admission of an intoxilyzer test. Consequently, it was error for the trial court to admit the results of the defendant's preliminary breath test.

II. Harmless Error Analysis. The State claims even if the implied consent form containing the results of the preliminary breath screening test should not have been admitted, admission in this case did not prejudice Thompson. "When trial court error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected." *State v. Thompson*, 357 N.W.2d at 594.

In addressing a similar issue in *State v. DeShaw*, our supreme court made the following the observation:

> In enacting this section the legislature's underlying purpose was to provide peace officers with the tool of a quick, convenient test to assist officers in determining whether an arrest should be made. The problem with this quick, convenient test is unreliability. To guard against this problem, the legislature chose to make the "results" inadmissible in evidence.

State v. DeShaw, 404 N.W.2d at 158.

The test is inherently unreliable in two respects: (1) it may register an inaccurate numerical percentage of alcohol present in the breath; and (2) it may also be inaccurate as to the presence or absence of any alcohol at all. *See id.*

In this case, the defendant refused to submit to an intoxilyzer test. Accordingly, he was not charged with operating a motor vehicle while having an alcohol concentration of .10 or more and the jury was instructed solely as to the "under the influence" alternative for operating while intoxicated. Nevertheless, information found on the implied consent advisory informed the jury defendant submitted to a preliminary breath screening test and the results of that test indicated an alcohol concentration of ten hundredths or more. It is reasonable to conclude the jury could infer that the results of the breath screening test were of some significance or that an alcohol concentration of ten hundredths or more was the legal limit. Given the inherent unreliability of a preliminary breath testing device, admission of the test result was prejudicial to the defendant and amounted to more than harmless error. As a result, a new trial is required.

REVERSED AND REMANDED.

No. 98-875. [9-257] STATE v. THOMPSON

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Judge. **REVERSED AND REMANDED.** Heard by Sackett, C.J., and Vogel, and Zimmer, JJ. Opinion by Zimmer, J. (6 pages $2.40)

Thompson appeals his conviction for operating a motor vehicle while intoxicated, first offense. Thompson claims the trial court erred by admitting into evidence over his objection the implied consent form which revealed he had submitted to a preliminary breath screening test which indicated an alcohol concentration of ten hundredths (0.10) or more. He argues such evidence is inadmissible under Iowa Code section 321J.5. **OPINION HOLDS:** A person commits the offense of operating while intoxicated by operating a motor vehicle in either of the following conditions: (1) while under the influence of alcohol; or (2) while having an alcohol concentration of .10 or more. In the present case, the defendant refused to submit to an intoxilyzer test. As a result, he was prosecuted pursuant to the "under the influence" alternative. The trial court ruled the implied consent form which disclosed the results of Thompson's preliminary breath test to the jury was admissible to prove a chemical test was properly requested of the defendant. Thompson claims, however, that under the "under the influence" alternative, the validity of the officer's request for a chemical test was not an issue and the district court erred in admitting the implied consent form which contained the results of Thompson's preliminary breath test. We agree. Because this case did not involve intoxilyzer test results, the validity of the officer's request for a chemical test was not an issue. We conclude there was no issue in this case regarding the foundational facts necessary for the admission of an intoxilyzer test. Consequently, it was error for the trial court to admit the results of the defendant's preliminary breath test. The State claims even if the implied consent form containing the results of the preliminary breath screening test should not have been admitted, admission in this case did not prejudice Thompson. However, information found on the implied consent advisory informed the jury defendant submitted to a preliminary breath screening test and the results of that test indicated an alcohol concentration of ten hundredths or more. It is reasonable to conclude the jury could infer that the results of the breath screening test were of some significance or that an alcohol concentration of ten hundredths or more was the legal limit. Given the inherent unreliability of a preliminary breath testing device, admission of the test result was prejudicial to the defendant and amounted to more than harmless error. As a result, a new trial is required.