FILED
AUG 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-187 / 88-1475

STATE OF IOWA,

Appellee,

vs.

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JEROME F. FRAKE,

Appellant.

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

Defendant appeals his conviction, following a bench trial, of driving while intoxicated, second offense. **REVERSED AND REMANDED.**

Paul R. Huscher, Des Moines, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark Hunzcek, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Defendant appeals his conviction of driving while intoxicated, second offense. He contends the district court erred in overruling his motion to suppress evidence obtained after his request to call his attorney was refused.

A police officer, who had observed a pattern of erratic driving, stopped a car being operated by the defendant, Jerome Frake, and administered certain field sobriety tests, which Frake failed. The officer then arrested Frake and took him to the Clive police station where he was read the implied consent advisory and asked to provide a urine specimen. Frake complied, but he testified that he did so only after his request to make a phone call to his attorney was refused. Alleging a violation of his statutory right to consult counsel before electing whether or not to submit to chemical testing, Frake subsequently moved to suppress the result of his test, which indicated a blood alcohol content of .152.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

It has been clearly stated in State v. Vietor, 261 N.W.2d 828, 831 (Iowa 1978), that ". . . a limited right to counsel exists before making the important decision to take or refuse a chemical test under implied consent procedures." The "limit" that is usually placed on this right is that it must not interfere with the taking of the test itself, which usually must be done within the space of two hours. There is no contention in this case that counsel could not have been obtained within that time.

The State contends that even if such a right to counsel exists, the defendant is not entitled to suppression of the test results when consent for the test has been given. It is clear that suppression of defendant's statement of refusal to take the test is required when he is not allowed access to counsel. State v. Remakel, 281 N.W.2d 445, 446-447 (Iowa 1979). However, the State argues that suppression of the test results was not intended by the legislature under Iowa Code chapter 321J. The intention of the legislature has, in effect, already been determined by the Iowa Supreme Court. In Vietor, the court held that Iowa Code chapter 321J created a limited right to counsel "before making the decision to take or refuse the test." Vietor, 261 N.W.2d at 831. In Remakel, the court held suppression of evidence was required when that right is violated. Remakel, 281 N.W.2d at 446. The court did not specifically hold test results suppressible, but Vietor

requires counsel before the decision is even made and therefore the results of that decision must also be suppressible.

Defendant contends that the trial court placed the burden of proof in the suppression hearing upon the defendant, and required the defendant to prove the violation of his rights by proof beyond all doubt. The statement that led the defendant to this conclusion was as follows: "If I was a hundred percent sure that's what happened, I would have thrown the case out, but I'm not sure that happened." However, no objection was made after the court made this statement. In order to preserve error for appeal, the objection must be specific and timely made. State v. LeCompte, 327 N.W.2d 221, 223 (Iowa 1982). Defendant has failed to preserve this issue for appeal.

Defendant next contends that the district court incorrectly refused to consider the testimony of one of the witnesses at the suppression hearing and that this refusal was based on the trial court's mistaken belief that hearsay evidence is inadmissible in a suppression hearing.

The findings of fact in jury-waived cases have the effect of a special verdict. Iowa R. App. P. 4. The weight to be given to a witness rests within the discretion of the fact finder.

The witness testified that defendant complained that his right to counsel was refused. The trial court did not

consider the testimony because the witness was not present at the time the events occurred. The statement by the trial court, that the testimony would not be considered because the witness was not there, was not an expression of the rule against hearsay. It was merely an expression of the lack of credibility it gave to a person who did not witness anything and therefore did not constitute error.

The final contention of defendant is that the findings of fact and ruling of the trial court at the suppression hearing were not supported by substantial evidence. There were only three witnesses that presented evidence. The defendant stated that he asked to call an attorney. Officer Woller did not deny Frake asked for an attorney, but was only unable to recall whether he asked for one. Dale Gilbert's testimony was consistent with Frake's. The only evidence in opposition to Frake was the trial judge's disbelief that a police officer would deny someone their right to counsel.

The ruling was not supported by substantial evidence and cannot be saved by the trial court substituting its own personal beliefs for a lack of evidence. The judgment is reversed and remanded for a new trial with instructions to suppress all evidence obtained directly or indirectly as a result of the violations of defendant's statutory right to counsel.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. The majority concludes that the trial court's decision is not supported by substantial evidence. I disagree. The issue here is whether there is substantial evidence to sustain the trial court's determination that Frake never requested to speak to an attorney. "Substantial evidence" means evidence which would convince a rational trier of fact that defendant did not request to speak with an attorney. Cf. State v. Freie, 335 N.W.2d 169, 171 (Iowa 1983); State v. Epps, 322 N.W.2d 288, 289 (Iowa 1982). We must be mindful that "[e]vidence need not be believed even when it is not contradicted." Mosier v. Brown, 249 N.W.2d 612, 616 (Iowa 1977); see Nadler v. City of Mason City, 387 N.W.2d 587, 591 (Iowa 1986). Here, the trial court simply did not believe defendant's nor Dale Gilbert's testimony. Absent such evidence, there is nothing in the record to indicate that defendant requested to speak with an attorney.

As it relates to Officer Woller's testimony, he testified as follows:

> Q. Okay. Do you recall whether or not Mr. Frake asked if he could call his attorney at any point during your contact with him? A. I don't recall exactly if he wanted to call his attorney. I believe he stated he wanted to make a phone call. We always allow them to make a phone call.
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> Q. Where -- At what point in this whole process were you when he asked if he could make a phone call? Was that before the implied consent or after? A. I don't recall if it was before or after. The implied consent, I believe, was read to him around 2320 hours, and the phone call he made was made at 2327 hours.

Officer Woller's testimony reveals that defendant's sole request was to make a phone call. I would find that there is substantial evidence to support the trial court's decision. The majority's decision implies that where a defendant testifies that he requested an attorney, the State then must come forward with contradictory evidence, no matter how unreliable the trier of fact finds the defendant. I do not believe Iowa law so requires. I concur in the balance of the majority's holding.