

IN THE COURT OF APPEALS OF IOWA

No. 7-686 / 97-144

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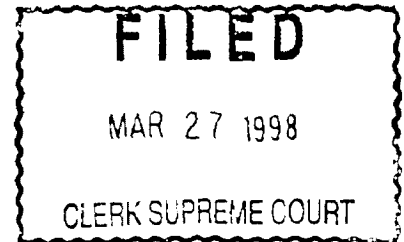
STATE OF IOWA,

Appellee,

vs.

MARK ALAN KENNEDY,

Appellant.



Appeal from the Iowa District Court for Jasper County, John P. Crouch,
District Associate Judge and Thomas W. Mott, District Associate Judge.

Mark Alan Kennedy appeals his conviction for operating while intoxicated.

AFFIRMED.

Joseph G. Bertogli, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, Steven Johnson, County Attorney, and John Heinicke, Assistant County
Attorney, for appellee.

Considered by Cady, C.J., and Sackett, and Vogel, JJ.

CADY, C.J.

Mark Kennedy appeals his conviction for operating while intoxicated. He claims the district court erred by failing to suppress his breath test results because the police officer did not afford him an opportunity to speak to his wife pursuant to Iowa Code section 804.20 (1995). He also asserts the officer did not inform him of the applicable periods of revocation regarding his motor vehicle license suspension. We affirm.

A police officer stopped Kennedy after determining Kennedy's vehicle was traveling at fifty-five miles per hour in a thirty-five mile per hour zone. The officer followed Kennedy's vehicle until he turned into a residential driveway. As he talked to Kennedy, the officer smelled alcohol and observed Kennedy had bloodshot and watery eyes. Kennedy informed the officer he had consumed approximately five or six beers that evening. The officer performed three field sobriety tests. Kennedy performed poorly on all of the tests. The officer also administered a preliminary breath screening test which Kennedy failed.

Kennedy was subsequently arrested and transported to the police department where an officer read him the implied consent advisory. The officer then requested a breath specimen for testing. The officer did not advise Kennedy if he took the breath test and failed he would be ineligible for a temporary restricted license and would suffer a suspension of his motor vehicle license for one year, or, alternatively,

if he failed to take the breath test, he would be ineligible for a temporary restricted license for one year of the 540-day revocation.

Kennedy requested and was allowed to call his attorney. Kennedy maintains he then requested to call his wife and the officer told him he could call her after the administration of the breath test.¹ The officer testified at the suppression hearing Kennedy made no request to call family members, although he acknowledged he testified at an earlier administrative hearing he could not specifically remember whether Kennedy asked to call his wife. Kennedy subsequently took the breath test which produced a result of .117.

Kennedy was charged with operating while under the influence or while having a blood alcohol level in excess of the statutory amount. He filed a motion to suppress the results of the breath test. The district court summarily denied the motion. Kennedy was subsequently convicted following a bench trial. Kennedy stipulated to the minutes of testimony. The district court then sentenced Kennedy.

On appeal Kennedy maintains the district court erred by overruling his motion to suppress the results of his breath test because the officer did not allow him to speak to his wife. He also contends the officer did not inform him of the applicable periods of revocation regarding his motor vehicle license revocation.

¹ In response to questioning by defense counsel, Kennedy testified he requested to telephone his wife after talking to his attorney to get "her opinion" and "gain insight" whether or not to take the breath test. The officer's only specific recollection of the event was Kennedy mentioned his wife was going to be upset with him over his arrest.

I. Motion to Suppress

We will uphold the trial court's ruling on a motion to suppress if substantial evidence exists to support the trial court's findings of fact. *See State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990). Substantial evidence exists when a reasonable mind would accept it as adequate to reach the same findings. *See State v. Krebs*, 562 N.W.2d 423, 425 (Iowa 1997).

Iowa Code section 804.20 provides:

Any peace officer or other person having custody of any person arrested or restrained of the person's liberty...shall permit that person, without unnecessary delay...to call, consult, and see a member of the person's family or an attorney of the person's choice, or both....

This statutory right is limited to persons arrested for operating while intoxicated. *See State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). If the right is violated, the exclusionary rule applies. *See Krebs*, 562 N.W.2d at 426. Additionally, the right to contact a family member is neither more nor less qualified than the right to contact an attorney. *Id.*

Kennedy asserts he expressly requested the opportunity to call his wife. He maintains because the officer would not allow him to call his wife until the administration of the breath test, the results of the breath test should be excluded and his conviction reversed. The arresting officer denied Kennedy made the request.

When the facts underlying a motion to suppress are in conflict, it is the role of the trial court to resolve the conflict and determine the operative facts. *See State v.*

Laughridge, 437 N.W.2d 570, 572 (Iowa 1989). In this case, the trial court made no specific finding whether Kennedy requested to call his wife prior to submitting to the breath test. Instead, it simply entered a written ruling denying the motion to suppress “as to each and every ground urged.” Nevertheless, we presume the trial court decided facts necessary to support its decision in favor of the non-movant. See *Bankers Trust Co. v. Fidata Trust Co. New York*, 452 N.W.2d 411, 413 (Iowa 1990). Moreover, there is substantial evidence to support a finding Kennedy did not request to make a telephone call to his wife. Accordingly, we conclude Kennedy was not denied his statutory rights under Iowa Code section 804.20.

Kennedy further claims the officer erroneously failed to properly advise him concerning the ramifications of taking or refusing to take the breath test. The Iowa Supreme Court has recently resolved this issue in an analogous case involving an administrative license revocation. See *Primm v. Iowa Dep’t of Transp.*, 561 N.W.2d 80, 81-82 (Iowa 1997) (implied consent statute does not require advice concerning driver’s period of ineligibility for issuance of work permit). The court in *Primm* rejected claims similar to Kennedy’s arguments. The court observed: “[T]here is no hint in the explanation to the legislative act or in the language of the statute itself suggesting that the legislature intended to expand the content of the advisory notice to include advice about ineligibility for a temporary license.” *Id.* at 82. We find

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Kennedy was given proper notice pursuant to Iowa Code section 321J.8 (Supp. 1995)

and affirm the district court.

AFFIRMED.