

IN THE COURT OF APPEALS OF IOWA

No. 8-630 / 97-2007

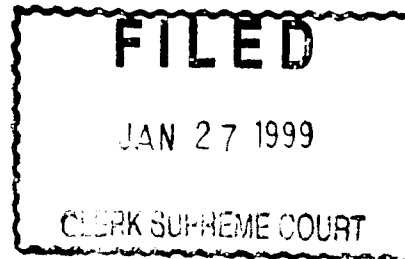
STATE OF IOWA,

Plaintiff-Appellant,

vs.

TROY ALAN RUPE,

Defendant-Appellant.



Appeal from the Iowa District Court for Wapello County, Robert Bates and Daniel F. Morrison, Judges.

Troy Rupe appeals from his conviction for homicide by vehicle. **AFFIRMED.**

Thomas M. Walter and Robert E. Breckenridge of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Victoria Siegel, County Attorney, and Ron Kelly, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.
Zimmer, J., takes no part.

MAHAN, J.

Defendant Troy Alan Rupe appeals from his conviction for vehicular homicide of five-month-old Taylor Steele. Rupe contends the district court: (1) should have granted a change of venue; (2) should not have admitted into evidence his refusal to submit a specimen of blood or urine for chemical testing; and (3) should have granted a change in the order of verdict forms. We affirm.

On Saturday, February 10, 1996, Rupe went to a bar at which he was a regular customer. He drank from about 10:00 a.m. until he left the bar around noon. Rupe was driving his girlfriend's white truck at an estimated sixty to sixty-five miles an hour in a thirty-five mile-per-hour zone when he drove through a curve into the path of an oncoming S-10 Chevrolet pickup. Bill Steele, the driver of the S-10, saw Rupe driving at him and drove off the road to the right. Rupe also drove off the road and the two vehicles collided.

Deputy Mark Miller was the first officer to arrive at the scene. He requested assistance from the state patrol, with whom his department commonly works on personal injury accident investigations. Rupe, Steele, and Steele's five-month-old daughter, Taylor, were en route to the hospital by the time Troopers Douglas Coiner and Brian Meeker responded to the scene. Deputy Miller told them the collision had caused personal injury and may have involved a drunk driver. He asked the troopers to check into it.

On their way to the hospital, Troopers Coiner and Meeker heard the radio traffic between the ambulance and the hospital. One of the patients in the ambulance was reportedly combative and ripping off his C-collar. Upon arrival at the hospital, Trooper Meeker asked about the combative patient from the accident and was directed to Rupe in the emergency room.

Trooper Coiner observed a strong odor of alcohol coming from Rupe. He also noted Rupe's bloodshot eyes and slurred speech. Rupe was using profanity and told Trooper Coiner, in response to a question, he had consumed a six-pack of beer. Rupe later stated he had only consumed one-and-one-half beers.

At 2:00 p.m. Trooper Coiner read the implied consent to Rupe and his girlfriend, Phyllis Baldridge. Rupe and Baldridge wanted to speak to an attorney before Rupe decided what to do, so Baldridge left the room and made several phone calls. Baldridge returned about fifteen minutes later and stated she had been unable to contact an attorney. Trooper Meeker located an Ottumwa phone book for Baldridge, who proceeded to call every attorney listed without success.

Trooper Coiner requested a blood specimen for chemical testing from Rupe at 2:20 p.m. Rupe indicated he was unwilling to provide a specimen. Trooper Coiner requested a urine specimen for chemical testing from Rupe at 2:21 p.m. Again, Rupe declined to provide a specimen. Trooper Coiner then revoked Rupe and placed him under arrest at 2:24 p.m. for operating a motor vehicle while intoxicated.

Later that afternoon, assistant county attorney Ken Duker arrived at the hospital. Duker asked a defense attorney, Timothy James, to come to the hospital. James spoke to Rupe privately, then left the room indicating he was not representing Rupe. The troopers were then told to give Rupe another chance to decide whether to consent or refuse. At 3:33 p.m., Rupe responded, "I ain't signing jack shit."

Steele and his daughter, Taylor, had been transported to UIHC after preliminary treatment at the local hospital. Several days after the accident, Taylor's doctors at UIHC made the diagnosis of brain death. Rupe was charged, by trial information, with vehicular homicide and second offense OWI on March 25, 1996.

Rupe's motion for a change of venue and motion to suppress evidence of his refusal to provide a blood or urine specimen were denied. The case was tried August 12-14, 1997. Rupe's objection to the order of the verdict forms was overruled and the jury returned a guilty verdict on both charges.

I. CHANGE OF VENUE. Our review of a refusal to grant a motion for change of venue is de novo. *State v. Veal*, 564 N.W.2d 797, 803 (Iowa 1997). We recognize, however, the decision to grant or refuse a change of venue primarily rests in the discretion of the trial court and we will reverse that decision only when the discretion has been abused. *Id.*

Our rules of criminal procedure require venue to be changed when "such degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial jury cannot be preserved with a jury

selected from that county." Iowa R. Crim. P. 10(10)(b). To obtain a reversal of a conviction based on the denial of a motion for change of venue, the publicity attending the case must be so pervasive and inflammatory prejudice is presumed.¹ *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989).

In order to determine whether the publicity in this case was so pervasive and inflammatory that jury prejudice must be presumed, we examine the tone and accuracy of the articles or broadcasts, the passage of time between publication and the date of trial, and the impact of the publicity on the jurors' ability to render an impartial verdict. *Veal*, 564 N.W.2d at 806. The basis of Rupe's motion seems to be five articles published in the Ottumwa Courier in the week following the accident in February 1996 and seven identical affidavits. The five articles include Taylor's obituary and an article stating a memorial fund had been started for the Steeles; neither of these articles do more than indicate there had been an automobile accident. The other articles are short, factual, and fair, and all of the articles were published almost a year before the district court denied a change of venue, and one and one-half years before the trial actually began. Finally, the district court noted "[t]he affidavits do not cite specific factual incidents in which general or widespread prejudice is exhibited." We agree and find the denial of Rupe's motion for a change of venue was not an abuse of discretion.

¹ Rupe makes no claim of actual prejudice.

II. EVIDENCE OF REFUSAL TO SUBMIT SPECIMENS FOR TESTING. The district court's decision to admit evidence is ordinarily reviewed for an abuse of discretion. *State v. Rains*, 574 N.W.2d 904, 912 (Iowa 1998). To the extent admission of certain evidence turns on the interpretation of a statute, however, our review is for errors of law. *Id.*

Iowa's implied consent statute is codified in chapter 321J. Proof of a defendant's refusal to submit to a chemical test is admissible in a criminal proceeding arising out of the operation of a motor vehicle in violation of section 321J.2 if the officer obtained the refusal after complying with implied consent law procedure. Iowa Code § 321J.16; see *State v. Pettyjohn*, 436 N.W.2d 65, 67 (Iowa App. 1988)(citing *State v. Jennings*, 216 N.W.2d 369, 372 (Iowa 1974); *State v. Hall*, 203 N.W.2d 375 (Iowa 1973)).

A peace officer may make a written request for blood, breath, or urine specimens when the officer has reasonable grounds to believe the person was operating a motor vehicle while intoxicated in violation of Iowa Code section 321J.2 and if any of the listed conditions exist. Iowa Code § 321J.6(1). One of these conditions is the person has been involved in a motor vehicle accident or collision resulting in ~~personal~~ injury or death. Iowa Code § 321J.6(1)(b). Troopers Coiner and Meeker were aware occupants of the vehicles had sustained personal injury during the crash; Deputy Miller informed them of this fact, which was confirmed at the hospital.

Thus, Rupe contends the implied consent procedure was deficient because: (1) the troopers did not have reasonable grounds to believe he had been operating a motor vehicle; (2) they did not have reasonable grounds to believe he had been intoxicated while operating a motor vehicle; and (3) he was denied a reasonable opportunity to consult an attorney. We disagree.

A. Reasonable Grounds. The offense of operating while intoxicated consists of two essential elements: (1) the operation of a motor vehicle (2) while under the influence of alcohol. Iowa Code § 321J.2; *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996). The reasonable grounds test is met when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief that an offense has been committed. *State v. Braun*, 495 N.W.2d 735, 738-739 (Iowa 1993) (citing *State v. Owens*, 418 N.W.2d 340, 342 (Iowa 1988)); *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682, 685 (Iowa 1976). Defendant's operation of a motor vehicle while intoxicated may be proven by direct or circumstantial evidence. *Boleyn*, 547 N.W.2d at 205.

Rupe's argument the troopers did not know he was the driver of one of the vehicles involved in the accident is unconvincing. Rupe told Deputy Miller he had been driving the truck and he was identified to the troopers at the hospital as one of the drivers involved in the accident.

Rupe's contention Trooper Coiner did not have reasonable grounds to believe he was intoxicated at the time he had been driving is equally unconvincing. Trooper

Coiner had been told it may have been a drunk driving accident; he knew Rupe was combative; ~~he~~ personally observed Rupe smelled of alcohol, had bloodshot eyes and slurred speech, and was using profanity; and Rupe admitted he had consumed a six-pack of beer.² Under the facts and circumstances known to be existing, we find the requirements of Iowa Code section 321J.6 were satisfied and informed consent was properly invoked.

B. Reasonable Opportunity to Consult an Attorney. A person arrested for OWI has a limited right to contact an attorney, prior to deciding whether to consent or refuse chemical testing, under Iowa Code section 804.20. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997) (citing *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)). The right is limited to circumstances which will not materially interfere with the administration of testing within the two-hour time limit imposed by Iowa Code section 321J.6(2). *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa App. 1991). However, the two-hour period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing. *Id.*

Generally this right to counsel is satisfied by allowing the arrestee to make a telephone call. *Bromeland*, 562 N.W.2d at 626 (citing *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988); *Short v. Iowa Dep't of Transp.*, 447

² Rupe repeatedly points out a preliminary breath test was not administered to him. Preliminary screening tests are not required; an officer may request a breath sample from a motor vehicle operator to meet one of the conditions listed in Iowa Code section 321J.6(1)(c)-(f). Iowa Code § 321J.5. Trooper Coiner proceeded under subsection (b).

N.W.2d 576, 578 (Iowa App. 1989)). Section 804.20 has never been interpreted as providing **an** absolute right to talk to one particular attorney if that person is unavailable or unable to be reached. *Id.*

Rupe asserts he was denied a reasonable opportunity to contact an attorney because he had to decide whether to consent or refuse to submit to chemical testing twenty minutes after Trooper Coiner invoked the implied consent law. We disagree.

First, in the case at bar Trooper Coiner had a legitimate concern about the dissipation of the evidence of Rupe's blood alcohol content; almost two hours had passed from the time of the accident to the time Trooper Coiner requested specimens from Rupe. *See* Iowa Code 321J.2(7) (alcohol concentration established by analysis of a specimen withdrawn *within two hours after defendant was driving* presumed to be the alcohol concentration at the time of driving) (emphasis added); *see also Moore*, 473 N.W.2d at 232 (it is common knowledge the human body dissipates alcohol rapidly).

Second, Trooper Coiner allowed Rupe time to try to contact an attorney. Trooper Coiner did not make the request for a specimen of blood until after Baldrige returned from her first series of phone calls and notified them she had been unable to reach **anyone** because it was a Saturday. In all, Baldrige spent approximately forty-five minutes making phone calls to no avail.

Third, Rupe actually spoke to an attorney, in person, then declined his representation. Following Rupe's meeting with the attorney, the troopers were

directed to give Rupe another opportunity to consent or refuse.³ At that time, one-and-one-half hours after Trooper Coiner invoked implied consent, Rupe again refused to provide a specimen of blood or urine for chemical testing.

We find Rupe had a reasonable opportunity to contact an attorney prior to deciding whether to submit to chemical testing; his refusal to provide a blood or urine specimen was properly admitted into evidence.

III. THE ORDER OF VERDICT FORMS. Rupe asserts the district court erred in presenting verdict forms to the jury on which the guilty verdict was in the first position, followed by the not guilty verdict. The Iowa Supreme Court soundly rejected Rupe's "presumption of innocence" argument that the not guilty verdict should appear before the guilty verdict. *State v. Alford*, 260 Iowa 939, 944, 151 N.W.2d 573, 576 (1976). *Alford* is good law and we find Rupe's contention to be meritless.

For these reasons, we affirm Rupe's vehicular homicide conviction.

AFFIRMED.

³ Presumably, the troopers would have respected a consent given at that time, had Rupe given one; assistant county attorney Duker was present and the troopers had given Rupe another opportunity to consent or refuse at Duker's request.