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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellant,	)	Filed November 26, 1986
vs.	)	245
DOUGLAS DEAN BARBER,	)	6-184 85-826
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Dickinson County (No. 4800) - Cameron B. Arnold, District Associate Judge.

In this discretionary review, the State of Iowa appeals the trial court's order suppressing evidence of defendant's urine sample in an OWI prosecution. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellant.

James L. Clarity and Lonnie B. Saunders of Narey, Barbee, Clarity & Chozen, Spirit Lake, for defendant-appellee.

Considered by Oxberger, C.J., Snell and Hayden, JJ.

HAYDEN, J. 246

The State was granted discretionary review for this appeal by the Iowa Supreme Court. The State claims the trial court abused its discretion in sustaining defendant's motion to suppress on grounds which were not raised by defendant in his motion and to which the State was not afforded notice or an opportunity to respond, and there are no valid alternative grounds to uphold the ruling. We affirm.

From the evidence and testimony presented at the hearing on defendant's motion to suppress, the trial court found as follows: The defendant was involved in an automobile accident occurring in Dickinson County, Iowa, on August 4, 1984. The defendant was severely injured in the automobile accident and was taken to Dickinson County Memorial Hospital in Spirit Lake. He was later interviewed by Trooper Loebach who requested a sample of his blood and the appropriate request and consent were made under Chapter 321B of the Code. Due to the defendant's injuries; it was impossible to draw a sample of his blood. Following this attempt, the defendant was going in and out of consciousness and was apparently in severe pain due to his injuries. There was no request to draw any further substances, but the officer observed that the defendant had been fitted with a catheter to his urinary tract and a urine sample would be possible. The officer removed a vial from the blood alcohol kit, and, at the request of the officer, the nurse dumped urine from the catheter bag into the container in the blood kit. The defendant was not asked for a sample of his urine, and he did not consent to the removal of his urine.

The trial court found and held the provisions of section 321B.11 were not followed whereby the physician could have certified the person incapable of consent. Dr. Don Rodawig, Jr. was present in the emergency room and could have made such certification.

In addressing the State's argument at the hearing, the trial court stated, in his ruling, and we quote:

> The State contends primarily that the urine was in plain view and was, thus, subject to seizure.
>
> Chapter 321B, The Code, provides for the procedure and the withdrawal of a body substance for chemical testing to determine blood alcohol levels. Four substances are authorized: breath, blood, saliva, or urine. Section 321B.15 provides that, "...any Peace Officer, using devices and methods approved by the Commissioner of Public Safety, may take a specimen of a person's breath or urine for the purpose of determining the alcohol concentration or the presence of drugs." The provisions of Section 321B are for the purpose not only of satisfying the search-seizure requirements of the United States Constitution, but to also provide that the appropriate scientific method is used in the withdrawal of the test, and that the appropriate safeguards are taken in securing the test sample, and in its care following removal of the same from the body of the defendant.
>
> The State's argument, relative to plain view herein, ignores the latter function of Chapter 321B. There is no showing that the devices and methods used for the removal of the urine sample were those approved by the Commissioner. Accordingly the evidence cannot be used if for no other reason than that.

In his motion to suppress defendant did not claim the manner of taking the test, the devices or the methods were not in accordance with those approved by the Commissioner of Public Safety. He raised the issue of the State's failure to have a physician certify in advance of the urine test defendant was unconscious or otherwise incapable of consent.

We note the trooper removed the anticoagulant from the vial used to collect the urine specimen; however, there was no evidence presented that the container used was clean, dry, and free from any visible contamination, as required in 680 Iowa Admin. Code Sections 7.3(2), 7.3(5) (1984) (emphasis added).

The State argues that defendant failed to specifically set out in his motion to suppress where the State was lacking in the method of removing the urine sample. The State relies upon State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977), which holds "[o]ne attempting to exclude evidence, whether by objection or motion, has a duty to alert the court to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible." The Washington court went on to hold, "When this is not done, there is no proper basis for reversal unless the grounds of the objection are obvious." (emphasis added).

We hold here the defendant's grounds for excluding the urine sample were obvious and affirm the trial court on this issue.

On the collateral issue, we agree with the trial court that the provision of section 321B.11 (The Code) was not followed by the State in not having a physician certify the defendant was incapable of consent or refusal before the urine sample was taken.

The trial court did not abuse its discretion in suppressing defendant's urine sample.

AFFIRMED.

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

OXBERGER, C.J. (dissenting)

I respectfully dissent. Because the defendant in his motion to suppress did not raise the issue the trial court ruled on, there was no evidence introduced on the subject. Nor was there any evidence as to what were the regulations of the Commissioner of Public Safety concerning the test procedures.

I can not concur with the majority "the grounds by the objection are obvious."