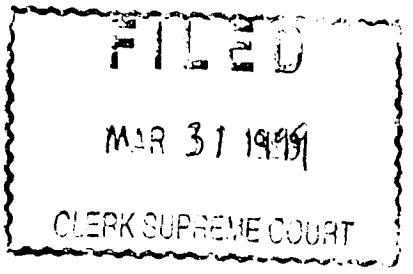
IN THE COURT OF APPEALS OF IOWA

No. 9-110 / 98-624



STATE OF IOWA,

Appellee,

vs.

LARRY KEITH YOUNG,

Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia J. Moisan, District Associate Judge.

Larry Young appeals from the judgment and sentence entered following his conviction of operating while intoxicated, second offense. **AFFIRMED.**

James A. Sinclair and Jeffrey M. Weber of Sinclair & Associates, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellant.

Considered by Huitink, P.J., Mahan, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Larry Young appeals his conviction for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (1997). He claims the district court should have granted his motion to suppress because he was not administered an intoxilyzer test within two hours and the intoxilyzer device was not certified. We affirm on appeal.

Young was stopped by a police officer on October 24, 1997. After failing field sobriety tests, Young was arrested at 2:47 a.m. He was transported to the Des Moines Police Department. At 4:06 a.m. police officer Troy Anderson read Young the implied consent advisory and requested a breath test. Young wanted to talk to his brother, but was unable to reach him on the telephone. At 4:37 a.m., Young was able to contact an attorney. At 4:47 a.m., Anderson advised Young his time was up and he needed to make a decision regarding the breath test. Young consented to the breath test. A breath test was given at 4:50 a.m. on an intoxilyzer, model 4011A, which showed a blood alcohol level of 0.180. The test result card was signed at 5:00 a.m. Young was charged with OWI.

Young filed a motion to suppress claiming his breath test was invalid because it was not given within two hours after his arrest as required by section 321J.6(2). He also claimed the intoxilyzer, model 4011A, had not been properly certified. The district court found the certification issue had not been properly raised because Young did not present evidence on that issue. The court denied the motion to suppress.

Young stipulated to a trial solely on the minutes of testimony. He was convicted of OWI, second offense. He was sentenced to seven days in the county jail and ordered to participate in an OWI program. He appealed.

I. We review for correction of errors of law. *State v. Kjos,* 524 N.W.2d 195, 196 (Iowa 1994). We review the district court's ruling on the motion to suppress to decide whether it was based on a correct interpretation of chapter 321J. *See State v. Palmer,* 554 N.W.2d 859, 864 (Iowa 1996).

II. Young contends the district court should have granted his motion to suppress because the breath test was made more than two hours after his arrest. He claims officer Anderson read him the implied consent advisory at 4:06 a.m., but did not request a breath test. Young asserts a request for a breath sample was not made until 5:00 a.m.

Section 321J.6(2) provides, in pertinent part:

> If the peace officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.

There is only a requirement that the test be made available within the two hour period.[1] *See State v. Stoneking,* 379 N.W.2d 352, 356 (Iowa 1985). The specimen

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[1] The two-hour time period is also applied in section 321J.2(7), which provides:

> The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn within two hours after the defendant was driving or in physical control of a motor vehicle is presumed the alcohol concentration at the time of driving or being in physical control of the motor vehicle.

does not need to be withdrawn within this time. *Id.* The evidence shows the request for a breath test was made within two hours after Young's arrest at 2:47 a.m. The request and notice under chapter 321J, which was signed by officer Anderson, shows a request for a breath specimen was made at 4:06 a.m. on October 24, 1997.

Even when the two-hour time period has expired, if the defendant consents to the testing and the other provisions of section 321J.6(2) are met, the test results are admissible at a criminal trial. *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 848 (Iowa 1991). The supreme court has stated:

> Further support for the conclusion the two-hour limit is not a foundational requirement may be found in the framework of chapter 321J. Section 321J.6(2), providing for the two-hour limit, does not proscribe testing after the time period had run; it merely states "a test is not required" after the two hours have expired. It then provides a refusal to consent to a test at that time shall not result in revocation of the defendant's driver's license under our implied consent law. Iowa Code § 321J.6(2) (1987). The effect of these provisions is to provide a point after which the defendant's consent to testing shall no longer be subject to a penalty for refusing to consent. That such a chronological line of demarcation had been statutorily drawn is not to say, however, the results of tests made with the defendant's consent and in conformity with the other provisions of section 321J.6 are inadmissible as lacking sufficient foundation.

State v. Kelly, 430 N.W.2d 427, 430-431 (Iowa 1988).

The appellant relies heavily on *State v. Kjos*, 524 N.W.2d 195 (Iowa 1994), to support his position for reversal. However, the *Kjos* case is readily distinguishable from the facts before us. In *Kjos*, our supreme court stated that if the test is offered more than two hours after the defendant's arrest and defendant's consent is obtained by the false threat of license revocation, then the test results must be rejected. *Id.* at

197. Here, defendant has not shown and does not argue his consent to the test was obtained by false threat of license revocation.

There is one other holding in *Kjos* that brings us to the conclusion the trial court should be affirmed. The supreme court further stated in *Kjos* that its decision "in no way" undermines its decision in *State v. Kelly,* 430 N.W.2d 427 (Iowa 1988). *Kjos,* 524 N.W.2d at 197. In *Kelly*, the supreme court held that a failure to request a chemical test within two hours of arrest does not render the results of the test inadmissible under chapter 321J. *Kelly,* 430 N.W.2d at 431. The court stated the two-hour limitation applied only to the driver's license revocation under section 321J.9. *Id.*[2]

We determine the district court properly denied the motion to suppress. The evidence showed the request for a breath test was made within two hours after defendant's arrest. However, even if the request had not been made within this time period, the test results would still be admissible at defendant's OWI trial.

III. Young asserts the intoxilyzer used in this case, model 4011A, was not properly certified under Iowa Administrative Code section 661-7.2(1). He claims the test results using this machine were invalid and illegal under Iowa law.

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[2] There is a strong dissent in *State v. Kelly,* but even in the dissent it is recognized that the test need only be offered within the two-hour period. *Kelly,* 430 N.W.2d at 431 (dissent). The dissenters, in reaching this conclusion, cited *State v. Stoneking,* 379 N.W.2d 352 (Iowa 1985), which we have referred to previously in this opinion. *Id.* The dissenters in *Kelly* took issue with the majority's finding that the two-hour period was not a foundational requirement. *Id.* at 431-432.

At the suppression hearing, the district court informed defendant he should have presented evidence on this issue if he wished to have it considered. No evidence on the certification issue was presented at the suppression hearing. After the suppression motion was denied, defendant stipulated to a trial on the minutes of testimony. The minutes provide a criminalist from the Iowa Division of Criminal Investigation would testify the intoxilyzer, model 4011A, had been examined and certified to be in proper working condition.

We find this issue has not been preserved for appellate review. The district court determined the issue had not been properly presented at the suppression hearing. In addition, for purposes of trial, defendant stipulated the intoxilyzer was properly certified.

We affirm Young's conviction for OWI, second offense. Costs of this appeal are assessed to defendant.

AFFIRMED.