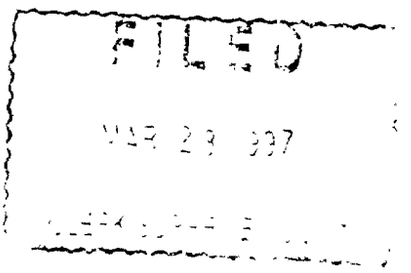
IN THE COURT OF APPEALS OF IOWA

No. 7-093 / 96-701



STATE OF IOWA,

Appellee,

vs.

JAMES ALLEN STONE,

Appellant.

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, Judge.

The defendant appeals the district court's denial of his motion to suppress evidence. **AFFIRMED.**

Trevor T. Hook of Sinclair & Associates, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Mary E. Richards, County Attorney, and Ronald Sotak, Assistant County Attorney, for appellee.

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

CADY, J.

James Stone appeals the district court's denial of his motion to suppress evidence. Stone argues he was denied his right to contact counsel in violation of Iowa Code section 804.20 (1995).

On the evening of November 1, 1995, James Stone was arrested by Officer David Arkovich of the Ames police department after Stone was observed driving without lights. Stone was ultimately charged with driving while intoxicated. Stone asked Officer Arkovich if he could call a friend to drive his truck away from the scene. Arkovich said no and proceeded to take Stone to the police department. At the department, Arkovich invoked the implied consent procedure and asked Stone for a breath specimen. The results indicated a blood alcohol content over the .10 legal limit. Following the breath test, Stone signed a jail log indicating he had been offered a telephone call and had it. Arkovich reminded Stone of his *Miranda* rights and asked whether he needed them repeated. Stone was questioned by Arkovich for about one-half hour more.

According to Arkovich, Stone never requested to use the telephone to call an attorney while at the police department. He testified there was a telephone not more than fifteen feet away from where Stone was processed. He maintained if someone had requested an attorney, he would have provided a telephone book and the opportunity to speak to one.

To the contrary, Stone testified he saw the telephone at the police station and asked if that was where he made his telephone call. Stone stated Arkovich asked if there was someone he needed to call, to which he responded "Well, I don't know, but I wouldn't mind calling an attorney." He further stated Arkovich told him there were a few details to iron out before he could make a call. Stone admitted he consented to a breath test, and did not request an attorney because he believed there was nothing to gain at that point. Stone maintained he consented to the breath test to be as cooperative as possible.

Prior to trial, Stone filed a motion to suppress the breath test results claiming his right to counsel pursuant to Iowa Code section 804.20 (1995) and the Sixth Amendment had been violated by Arkovich's failure to allow him to make a telephone call. The district court ruled Stone had not made a clear request to contact an attorney and therefore his rights had not been violated. Stone has appealed.

He contends his statement "I wouldn't mind calling an attorney" was sufficient to trigger his right to counsel under section 804.20. He asserts no argument on appeal based on the Sixth Amendment. He claims the State's position is an argument based purely on semantics. He additionally notes the two hour testing period outlined in section 321.J6(2) would not have been jeopardized by a telephone call.

Scope of Review

Stone's appeal is based solely upon his limited right to contact counsel or a family member before being required to submit to a chemical test following arrest for

operating while intoxicated. This is a statutory right conveyed under Iowa Code section 804.20. Since no constitutional issues are involved, our review is on error. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990).

In ruling on a motion to suppress the trial court must determine the facts upon which the admissibility of evidence depends. *State v. Laughridge*, 437 N.W.2d 570, 572 (Iowa 1989). On appeal, we uphold the trial court's ruling if there is substantial evidence in the record to support the court's findings of fact. *Frake*, 450 N.W.2d at 818.

Iowa Code section 804.20

Iowa Code section 804.20 states:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in the private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

Under this statute an officer having custody of an arrested person must afford the person an opportunity to call counsel or a family member upon the person's request. *Didonato v. Iowa Dept of Transp.*, 456 N.W.2d 367, 370 (Iowa 1990). The statute

does not, however, require an officer to tell an arrested person he has a right to counsel. *Id.* at 371. *Miranda* rights do not apply to implied consent proceedings. They apply to interrogation and the implied consent procedure relates to submission of a bodily substance to chemical testing. *Swenumson v. Iowa Dept. of Public Safety*, 210 N.W.2d 660, 663 (Iowa 1973).

After a person asks to call a lawyer and is denied the opportunity to make a phone call, evidence concerning a chemical test is inadmissible in a later criminal trial. *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). This right to consult with an attorney is limited to circumstances when it will not materially interfere with the taking of a chemical test within two hours as required under Iowa Code section 321J.6(2). *Id.*

The issue in this case is whether Stone made a request to contact an attorney sufficient to invoke his rights under Iowa Code section 804.20. The testimony provided by the custodial officer at the hearing on the motion to suppress directly conflicts with Stone's testimony. The officer testified no request was made. Stone, on the other hand testified:

> A. As soon as I walked through the door, I says, "This where I get my phone call?" He says, "there's some one you need to call?" I said, "well, I don't know, but I wouldn't mind calling an attorney" And he said, "We got a couple things to do. I'll give you your phone call, so"--

The trial court found:

> While the officer has no specific recollection whether the conversation referred to by the defendant took place, the evidence as to

> repeated Miranda Warnings as well as the signed acknowledgment by the defendant that he had been offered a telephone call and had not made a phone call more clearly supports a conclusion that the defendant did not request such a phone call.
>
> Moreover, even assuming the defendant's recollection of his purported request is correct the defendant at best indicated to the officer that he did not know whether he wished to make a telephone call but would not mind contacting an attorney. This statement coupled with the other evidence, does not establish that the officer failed to "permit" the defendant to make a telephone call within the terms of Section 804.20, Iowa Code.

We find there was substantial evidence to support the trial court's finding the evidence supported the conclusion Stone did not request a phone call. Further, we also agree the statement "well, I don't know, but I wouldn't mind calling an attorney", which Allen asserts was his request, was ambiguous and not sufficient to invoke his statutory right under Iowa Code section 804.20. *See Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994).[1] We find the trial court correctly denied the motion to suppress. We affirm the conviction and sentence.

AFFIRMED.

Vogel, J., concurs; Sackett, P.J., specially concurs.

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[1] In *Davis v. United States*, the Supreme Court examined the clarity required for a request for a lawyer sufficient to invoke *Miranda*. The Court found there must be a clear, unambiguous request for counsel. A similar clarity is required to invoke the right to contact counsel under Iowa Code section 804.20, a right much more limited than the *Miranda* right in those situations where *Miranda* is applicable.

SACKETT, P.J. (concurring specially)

I concur specially. I would affirm. I agree, as did the trial court and the majority, the defendant never said, "I would not mind calling an attorney." Having determined the defendant never said the words, the effect of that statement is not an issue and I do not concur with the majority's decision to address it.