OCT 19 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed October 19, 1978
vs.	)	
DONALD LEROY AKERS,	)	634 / 6142
Appellant.	)	

Appeal from Lee District Court - Joel J. Kamp, Judicial Magistrate.

Defendant appeals OMVUI conviction claiming his motion to suppress should have been granted because he was denied his § 755.17, The Code, right to consult with an attorney before consenting or refusing chemical testing under chapter 321B, The Code. - Affirmed.

Barry M. Anderson, of Anderson & McMurray, Kookuk, for Appellant.

Richard C. Turner, Attorney General of Iowa, Ray Sullins, Assistant Attorney General, and James P. Hoffman, Lee County Attorney, for Appellee.

Submitted to Donielson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Donald Leroy Akers appeals his OMVUI conviction claiming the testimony of the arresting officer should have been suppressed because he was denied his right to consult counsel before consenting or refusing chemical testing under chapter 321B, The Code. We affirm.

Akers argues State v. Vietor, 261 N.W.2d 828 (Iowa 1978) disapproved of the exact language read to him from the implied consent form by the arresting officer: "... you are not entitled to consult an attorney prior to consenting or refusing to the withdrawal of a body specimen." 261 N.W.2d at 831. Therefore, Akers claims his motion to suppress the testimony of the arresting officer should have been sustained. In response, the State argues Akers failed to make and preserve proper objection under § 755.17, The Code, in the trial court as required of defendants seeking the protection of Vietor. 261 N.W.2d at 832.

Akers' motion to suppress sought to exclude the entire testimony of the arresting officer because he was denied his constitutional right to consult an attorney in connection with taking chemical tests offered after his arrest on the OMVUI. Vietor reaffirmed the court's previous ruling there is no such constitutional right. 261 N.W.2d at 830. Alternatively, Akers urged in the second paragraph of his motion:

> 2. That the Defendant was effectively denied his right to counsel at all proceedings after his arrest due to the fact that the Defendant was advised that he did not have a right to consult with an attorney at the early stages of the arrest of Mr. Akers, the Defendant.

Akers now argues this portion of the motion sufficiently raised his § 755.17 statutory right to counsel recognized in Vietor.

Our question is whether these words adequately informed the trial judge that Akers was relying on § 755.17, The Code, as the grounds for suppression. The language of paragraph 2 is but a paraphrase of Akers' right to counsel at all proceedings after arrest; paragraph 3 seeks to suppress any evidence obtained by the police officer in direct violation of the constitutional rights of Akers. If Akers had been claiming the statutory right additionally or alternatively to the constitutional right it would have appeared in paragraph 3. The trial judge was not

apprised that Akers' claimed denial focused on a deprivation under § 755.17 occurring when the implied consent form was read to him. It was Akers' duty to ". . . indicate the specific grounds so as to alert the court to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible." State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977). The trial court properly overruled the motion to suppress.

There is no merit in Akers argument there was insufficient evidence to submit the case to the jury. State v. Pardock, 215 N.W.2d 344, 346 (Iowa 1974) held evidence that a defendant was engaging in erratic driving, was unsteady on his feet, smelled of alcohol and admitted to consuming a quantity of liquor and beer was sufficient to carry the case to the jury. In addition to this type of evidence, the instant record contains field sobriety test performances by Akers. The case was for the jury.

Akers did not submit to the requested chemical testing. We find no error in the jury instruction couched in language that Akers ". . . declined to submit himself to such a test."

AFFIRMED.