IN THE COURT OF APPEALS OF IOWA

No. 0-342 / 99-1424
Filed July 12, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN KEITH COLHOUN,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

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

On appeal from his conviction for operating while intoxicated, first offense, the defendant argues he was denied his statutory right to counsel and the district court erred in denying his motion to suppress. **AFFIRMED.**

James A. Sinclair and Brian J. Nelson of Sinclair & Associates, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Stephen Homes, County Attorney, and Angelina Newman, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

The district court adjudged Brian Colhoun guilty of operating a motor vehicle while intoxicated (first offense). On appeal, Colhoun contends he was denied his statutory right to counsel. We affirm.

I. Background Facts and Proceedings

At approximately 2:32 A.M. on April 8, 1999, Deputy Russell Belz arrested Colhoun for operating while intoxicated and took him to the Story County jail. Before he was arrested, Colhoun had asked if he could call an attorney. Belz advised him he would be given an opportunity to do so. After the initial booking procedures were completed, Belz read the implied consent advisory to Colhoun and, at 2:57 A.M., said he could call an attorney. Colhoun identified the name and telephone number of a Des Moines lawyer. Belz placed the call, identified the attorney, and gave the phone to Colhoun. After two or three minutes, the attorney asked to speak to Belz, and advised him he would have an associate come to the jail to meet with Colhoun. Belz responded that was fine, but he would renew his request for a breath sample after the phone call ended. The call ended at 3:22 A.M. and Belz renewed his request, as promised. Colhoun consented to the test and signed the implied consent form. The test revealed a breath alcohol concentration of .164.

The State charged Colhoun with operating a motor vehicle while intoxicated (first offense), in violation of Iowa Code section 321J.2 (1997). Colhoun moved to suppress the test results on the ground he was denied his right to counsel. The district court overruled the motion and, following trial to the bench, found Colhoun guilty. The court sentenced him to a one-year jail term

with all but two days suspended, placed him on probation, and imposed a $1000 fine. This appeal followed.

II. Standard of Review

Colhoun contends our review is de novo. The State counters we must review his claim for errors of law. We agree with the State that this case does not implicate a constitutional right to counsel, but rather a limited statutory right to an attorney. *See* Iowa Code § 804.20; *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). The question we must decide is whether the State afforded Colhoun "a reasonable opportunity to contact an attorney." *Bromeland v. Iowa Dep't. of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). This is a question of statutory interpretation which we review for errors of law. *State v. Krebs*, 562 N.W.2d 423, 425 (Iowa 1997); *State v. Palmer*, 554 N.W.2d 859, 864 (Iowa 1996).

III. Statutory Right to Counsel

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 private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

This statutory right to counsel is generally satisfied if a person is allowed to telephone his or her attorney. *Bromeland*, 562 N.W.2d at 626. We have stated "[t]he right is limited to circumstances which will not materially interfere with 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) (citing *Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa App. 1990)). The two-hour time frame has not been construed to afford every arrestee two full hours to consent to testing. *Id.*

In *Moore*, we held Moore was not deprived of his statutory right to counsel where: (1) the State allowed him to speak to his attorney on the telephone for at least twenty minutes; (2) his attorney had to travel from Ankeny to Newton; and (3) the attorney did not arrive at the station until about thirty-seven minutes before the statutory two hour period expired and after the test had been administered. *Id.* at 231-32.

We find this case virtually indistinguishable from *Moore* in all material respects. *Id.* Colhoun spoke to his attorney on the telephone for more than twenty minutes. Belz estimated it would take the attorney approximately forty minutes to travel from Des Moines to the Story County jail for an in-person consultation, leaving only about thirty minutes until the two-hour testing period expired. Additionally, we note Colhoun's attorney never arrived at the jail and Colhoun consented to the breath test. There is no contention that Colhoun was coerced into signing the consent form. Under these circumstances, Belz acted reasonably in invoking the implied consent procedures immediately after Colhoun ended the conversation with his attorney. We conclude Colhoun was not

deprived of his statutory right to counsel and we affirm his judgment and sentence.

AFFIRMED.