IN THE COURT OF APPEALS OF IOWA

No. 3-078 / 92-848

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

DANNY FAY CASPER,

Appellant.

Appeal from the Iowa District Court for Monroe County, E. Richard Meadows, District Associate Judge.

Defendant appeals his conviction of operating while intoxicated. Defendant claims the district court erred in denying his motion to suppress the results of his breath test. **AFFIRMED.**

John A. Pabst of Clements, Pabst, Hansen & Maughan, Albia, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; and William S. Owens, County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

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HABHAB, J.

The defendant, Danny Casper, appeals his conviction of operating while intoxicated ("OWI"). Casper asserts the district court erred in denying his motion to suppress the results of the breathalyzer test. Casper maintains the evidence should have been suppressed because the State denied his request for an independent blood test and thereby prevented him the opportunity to obtain exculpatory evidence. We affirm.

On June 30, 1991, Albia police officer Kurt E. Van Wyk observed Danny Fay Casper driving his motor vehicle at a speed of sixty-seven miles per hour in a fifty-five mile per hour speed zone in Monroe County, Iowa. Officer Van Wyk stopped Casper's vehicle. Casper submitted to a preliminary breath screening test that indicated a positive result. Casper was placed under arrest for OWI. The officer read Casper the implied consent advisory and requested that Casper submit to a breath test for chemical analysis. Casper consented and the breath result indicated Casper's blood alcohol concentration to be .118.

The parties dispute whether Casper thereafter requested an independent chemical test after he submitted to the breath test.

On July 24, 1991, Casper participated in a telephone conference concerning an administrative revocation of his driving privileges. The administrative hearing officer

believed that Casper had requested an independent chemical test after he submitted to the breath test.[1]

On July 25, 1991, the State charged Casper with the crime of operating while intoxicated in violation of Iowa Code section 321J.2 (1991). Prior to trial, Casper filed a motion to suppress the results of the breath test. In support of his motion, Casper submitted a copy of the administrative law judge's decision.

The district court denied Casper's suppression motion, finding that Casper had not requested any independent test. Thereafter, the district court found Casper guilty as charged and denied his motion in arrest of judgment and motion for a new trial. Casper appeals.

On appeal, Casper argues that because Officer Van Wyk did not give him an opportunity to obtain an independent blood test, the State violated 1) his statutory rights under Iowa Code section 321J.11 (1991) and 2) his due process rights by denying him an opportunity to obtain possible exculpatory evidence.

In considering the statutory question here, our scope of review is for the corrections of errors of law. State v. Owens, 418 N.W.2d 340, 342 (Iowa 1988); Iowa R. App. P. 4. Our review of the constitutional issue, however, is de novo, which involves an independent evaluation of the

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1. It is settled law in this state that issue preclusion does not apply. State v. Goodon, 443 N.W.2d 74, 75 (Iowa App. 1989).

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totality of the circumstances as shown by the entire record. Id.

I. **Motion to Suppress.**

Casper claims the district court erred in overruling his motion to suppress the breath test. Casper argues we should reject the district court's finding that Casper did not request an alternate test and instead adopt the administrative law judge's finding. We disagree.

We find ample evidence in the record to support the district court's finding. At the suppression hearing, Officer Van Wyk testified to the following version of the facts: Prior to submitting to the intoxilyzer test, Casper asked to speak to counsel. Van Wyk could not understand the name of the attorney Casper was requesting. Van Wyk repeatedly asked Casper to either spell or write the name down. After Van Wyk obtained the name and number Casper told Van Wyk he didn't want to speak to his attorney anymore, he wanted to speak to his wife. Van Wyk attempted to find the wife's number. Van Wyk later found the Caspers did not have a telephone. Van Wyk then contacted counsel for Casper. After speaking with an attorney, Casper submitted to the breath test. Then, the subject of an alternative test was brought up.

> MR. OWENS: What did you advise Mr. Casper with regards to an alternate specimen? A. Either by blood or urine at his expense.
> Q. Did Mr. Casper indicate that he wanted a blood test? A. He indicated he did not want a blood test.

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> Q. Did he advise you why he did not want a blood test? A. He advised me that he didn't want a blood test because he didn't like needles.
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> Q. And what was your response to his statement that he did not want a blood test because of his apparent fear or uncomfortableness of needles? A. I informed him that if he didn't want a blood test that would only leave a urine test.
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> Q. Did he indicate to you that he wanted to have a urine test done? A. No, he didn't. I made a statement that if he wanted to provide a urine specimen, he should wait until he could properly do that properly. He told me that he had to use the bathroom now and if I did not allow him to use the restroom, he would urinate on the floor and all over me.

Van Wyk further testified that after Casper went to the restroom, he did not indicate a desire to obtain an alternate specimen of either blood or urine.

Casper testified he specifically requested a blood test prior to taking the breath test. Officer Van Wyk informed him it would be at his own expense. Casper stated he repeated his request after taking the breath test. According to Casper, Officer Van Wyk responded, "This is the test they use. This is the test we are going to use." Officer Van Wyk then took Casper to fill out his paperwork and put him in jail.

The district court decided that of the conflicting testimony, Van Wyk's was more credible and therefore found Casper did not request an alternate test. We affirm the district court on this issue.

II. **Ability of Casper to Obtain Exculpatory Evidence.**

Casper next argues the district court erred in not dismissing the charges because the State suppressed exculpatory evidence. Casper claims that because the police officer did not give him an opportunity to obtain an independent blood test, the State violated his due process rights because he was denied an opportunity to obtain possible exculpatory evidence. From our de novo review we disagree.

After reviewing the record of both the district court suppression hearing and the administrative license revocation hearing, we find that Casper did not request an independent blood test. We therefore find Officer Van Wyk did not violate his statutory or due process rights in failing to give him an independent test. We affirm the district court's refusal to suppress the blood-alcohol test results. Accordingly, we allow Casper's conviction of OWI to stand.

AFFIRMED.