IN THE COURT OF APPEALS OF IOWA

No. 1-348 / 00-1021
Filed July 18, 2001

FILED
JUL 18 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CRAIG ALLEN LANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, T. W. Mott, District Associate Judge (motion to suppress) and Carol Greta, District Associate Judge (trial and sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his conviction for operating while intoxicated in violation of Iowa Code section 321J.2 (1999). **AFFIRMED.**

John M. Trewet of Rutherford, Trewet & Knuth, Atlantic, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Steve Johnson, County Attorney, and Michael Jacobsen, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

Craig A. Lang appeals his conviction for operating a motor vehicle while intoxicated, a violation of Iowa Code section 321J.2 (1999). Lang asserts there was an inadequate showing of probable cause to arrest him. He also claims the district court erred in denying his motion to suppress following a violation of his statutory right to consult with a family member. We reject both contentions and affirm.

I. Factual Background and Proceedings. From the record, a reasonable fact-finder could have found the following facts. On January 21, 2000, Lang was involved in a single vehicle rollover accident near Monroe, Iowa. A witness traveling four car lengths behind defendant had observed Lang's truck move back and forth between lanes before veering to the right shoulder, proceeding back across two lanes, spinning into the median and rolling over. Upon arriving at the scene, Trooper Neil Wellner noted Lang's slurred speech, poor balance, difficulty following directions, and a general odor of alcohol upon his person. Lang admitted to drinking beer earlier in the day. Lang failed the horizontal gaze nystagmus test, refused further field sobriety tests, and was arrested for operating a motor vehicle while intoxicated. While en route to the Jasper County Jail, Lang asked Trooper Wellner whether he would be permitted to place phone calls to two family members. The trooper's response assured Lang there was a phone at the jail and Lang could use it. At the Jasper County Jail, Wellner read Lang an implied consent form and requested a breath specimen. Following four failed attempts by Lang to provide a specimen, Wellner deemed the effort a refusal.

Lang was charged with operating while intoxicated, in violation of Iowa Code section 321J.2. At a pretrial suppression hearing, he contended his arrest was not justified by probable cause. Lang also sought suppression on the ground his right to a telephone call under Iowa Code section 804.20 had been violated. The district court overruled the suppression motion on both bases, concluding the evidence established a "reasonable articulable suspicion" for detaining Lang, and the defendant failed to make an effective request to consult an attorney or family member. The court found Lang guilty following a trial on the minutes of testimony. On appeal, Lang claims the district court erred in overruling the motion to suppress.

II. Probable Cause for Arrest. Because the defendant asserts violation of a Fourth Amendment safeguard, our review is de novo. *State v. Brecunier*, 564 N.W.2d 365, 367 (Iowa 1997).

Lang claims Trooper Wellner lacked probable cause to arrest him for operating while intoxicated, and the district court should have sustained his motion to suppress. To be valid, a warrantless arrest must be supported by probable cause. *State v. Ceron,* 573 N.W.2d 587, 592 (Iowa 1997) (quoting *State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992)). Probable cause exists when the facts and circumstances within the arresting officer's knowledge would warrant a person of reasonable caution to believe an offense is being committed. *Id.* The officer must have a reasonable ground for believing the arrestee committed the offense. *See* Iowa Code § 804.7(3) (1999). The "reasonable ground for belief" standard within section 804.7(3) is tantamount to probable cause. *State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992).

For the reasons that follow, we conclude Trooper Wellner had probable cause to make a warrantless arrest in this case. Lang's inability to control his vehicle, as described by a disinterested eyewitness, and the nature of the accident itself tend to prove defendant was operating while intoxicated. The trooper's testimony detailed Lang's poor balance, his difficulty following directions, his red, watery eyes and slurred speech, the smell of alcohol on his person, and his marked failure of the horizontal gaze nystagmus test. Lang himself admitted to drinking earlier in the day.

Lang contends the odor detected by Trooper Wellner originated from peppermint chewing tobacco rather than an alcoholic beverage. We reject this argument and conclude, even in the absence of the evidence of the odor of alcohol, the remaining facts and circumstances in the record supply sufficient evidence of probable cause to support the arrest.

III. Statutory Right to Contact a Family Member. Our review of Lang's claim the district court should have suppressed evidence obtained following a violation of Iowa Code section 804.20[1] is for correction of errors at law. *State v. Krebs*, 562 N.W.2d 423, 425 (Iowa 1997). The district court found Lang made no discernible request to call a family member. We will uphold this finding if there is

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[1] Iowa Code section 804.20 ("Communications by Arrested Persons") provides, in pertinent part:

> 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. . . . A violation of this section shall constitute a simple misdemeanor.

substantial evidence to support it. *Id.* Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Id.* Lang argues his section 804.20 rights were violated in the following exchange between he and Trooper Wellner en route to the Jasper County Jail:

> **Lang**: Will I get, will I get, will somebody call my mom.
> **Trooper Wellner**: Oh absolutely, you'll be able to call your mom. It'd be easier if she's had some medical problems for you to talk to her than for me to call her up and scare her right off the bat. Be easier if you visit with her.
> **Lang**: Could call my sister in Wiota, I get to call her probably, huh.
> **Trooper Wellner**: There's a phone there.
> **Lang**: I can call her.
> **Trooper Wellner**: Sure.

If in this colloquy Lang made a proper request to contact a family member and it was denied, evidence of his refusal to submit to chemical testing was inadmissible at trial. *State v. Campbell*, 294 N.W.2d 803, 805 (Iowa 1980); *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). Characterizing his conversation with the trooper as a clear request for communications, Lang contends the State failed to offer him an opportunity to place a call after he arrived at the jail. The district court, finding no discernible request by Lang, described the dialogue as merely on the topic of making phone calls. We apply objective considerations to determine whether the arrestee has made a good faith request. *Ferguson v. State, Dep't of Transp., Motor Vehicle Div.*, 424 N.W.2d 464, 466 (Iowa 1988).

Although Lang's statements to Trooper Wellner might have been framed more assertively, we believe they clearly constitute a request for communications sufficient to implicate section 804.20. Viewed objectively, Trooper Wellner's responses clearly anticipate Lang would make one or more calls from the sheriff's office. In addition to identifying the two individuals to be contacted, the

discussion of a preferred strategy for calling Lang's mother makes this conversation more than a hypothetical inquiry. We do not find substantial evidence in the record supporting the district court's finding Lang failed to make an effective request to make a phone call to a relative. We therefore conclude Lang's right to contact a family member was violated by the State's failure to offer him a telephone call within a reasonable time after his arrival at the jail. The exclusionary rule applies to violations of this right, and evidence of Lang's chemical testing should have been suppressed. *See Krebs*, 562 N.W.2d at 425.

However, prejudice must be shown before an error requires reversal. *See Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). We conclude Lang suffered no prejudice from the district court's error. The results of the chemical test aside, there remains sufficient evidence in the record to support Lang's conviction. The eyewitness testimony describing the erratic movement of Lang's vehicle immediately preceding the rollover, taken together with evidence of Lang's slurred speech, poor balance, difficulty following directions, admitted consumption of beer, and failure of the horizontal gaze nystagmus test, cumulatively constitute overwhelming evidence of guilt. Accordingly, we conclude Lang has failed to demonstrate prejudice from the district court's ruling and therefore find no reversible error.

AFFIRMED.