IN THE COURT OF APPEALS OF IOWA

No. 0-713 / 99-1836
Filed January 10, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR JOHNSON COUNTY,
Defendant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard, II, District Associate Judge.

Plaintiff petitioned for a writ of certiorari from a district court ruling granting the defendant a deferred judgment on his guilty plea to operating while intoxicated in violation of Iowa Code section 321J.2 (1999), and its petition was granted. It contends the district court erred in granting a deferred judgment based on the defendant's preliminary breath test and on the first two digits of an intoxilyzer test. **WRIT SUSTAINED IN PART, ANNULLED IN PART. JUDGMENT AFFIRMED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, J. Patrick White, County Attorney, and Linda M. Paulson, Assistant County Attorney, for plaintiff.

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for defendant.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

The plaintiff-appellant, State, petitioned for a writ of certiorari from a district court order granting the defendant-appellee, Seth Matthew Scott, a deferred judgment on his guilty plea to operating while intoxicated in violation of Iowa Code section 321J.2 (1999). The State contends the district court erred in granting a deferred judgment (1) based on the defendant's preliminary breath test (PBT) of .13; (2) by disregarding a .153 visual reading of the intoxilyzer test administered to the defendant; and (3) considering only the printed evidence card of the intoxilyzer test reading .15. Defendant contends (1) the district court ruled properly based on the statutory requirement of a just result in Iowa Code section 4.4(3); (2) Iowa Code section 321J.5 allows consideration of the PBT to determine whether a chemical test was properly requested and (3) the use of the third-digit of a Intoxilyzer test would violate his constitutional right to due process. Wesustain in part, annul in part. Judgment affirmed.

Our review on certiorari is for the correction of errors at law. *State v. Iowa District Court for Polk County*, 581 N.W.2d 640, 643 (Iowa 1998). In this case we are confronted with both statutory and constitutional claims. On the statutory claim we are bound by the trial court's supported factual findings, but not its conclusions of law. *See Iowa Coal Min. Inc. v. Monroe County*, 494 N.W.2d 664, 668 (Iowa 1993). The existence of a constitutional issue requires us to review de novo the evidence bearing on that claim. *Id.*, *Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980).

Defendant entered a written plea of guilty to the charge of operating while intoxicated. The district court deferred judgment pursuant to Iowa Code section

901.5 and 907.2(1). In granting the deferred judgment the district court reasoned that the PBT indicated defendant's blood alcohol concentration was .13 and the visual reading of .153 on the Intoxilyzer should be disregarded and the printed evidence card bearing a reading of only two digits (.15) should be used.

The State first contends the district court erred in using defendant's PBT result of .13 in considering his eligibility for a deferred judgment. We address this issue though defendant's counsel conceded this issue to the State at oral argument. Iowa Code section 321J.5(2) provides guidance by establishing the evidentiary use of preliminary breath tests. Iowa Code section 321J.5(2) provides:

> The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5(2) (1999).

The statute plainly states the PBT may not be used in any court action except to prove a chemical test was properly requested of a person. The statute does not provide district courts with the authority to use PBT results in determining sentencing options. *See State v. Iowa Dist. Court. for Johnson Co.*, 617 N.W.2d 33, 35 (Iowa App. 2000). By considering the results of the preliminary breath test in determining eligibility for a deferred judgment, the district court exceeded the scope of permissible use of PBT results as established by Iowa Code section 321J.5(2).

The State next contends defendant was not eligible for a deferred judgment under Iowa Code section 321J.2(3)(a)[1] because of the .153 reading.

The district court improperly considered the PBT result in granting the defendant a deferred judgment however the district court did not err in considering the two-digit intoxilyzer result of .15 over the visual display result of 153.

The State correctly argues a three-digit Intoxilyzer reading which increases the result above .15 can preclude the granting of deferred judgments. *See State v. Rettinghaus*, 591 N.W.2d 15, 16 (Iowa 1999) (rejecting claim that test results of .152 and .156 should be reduced by the margin of error in determining eligibility for deferred judgments); *see also State v. Guzman-Juarez*, 591 N.W.2d 1, 4 (Iowa 1999) (holding the margin of error need not be subtracted from test results of .154 when considering defendant's eligibility for a deferred judgment). However, in both *Rettinghaus* and *Guzman-Jaurez* there was no challenge made to the reliability of the third digit reading. In this case the district court specifically said:

> The Defendant at a later time provided a second sample of breath, which was tested pursuant to the provisions of Iowa Code Section 321J.6, under the implied consent rules. The results of that test as analyzed by an Intoxilyzer model 4011A was a visual reading of

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[1] Iowa Code § 321J.2(3)(a)(1) provides in relevant part:

> "...[t]he court shall not defer judgment or sentencing, or suspend execution of any mandatory minimum sentence of incarceration applicable to the defendant under subsection 2, and shall not suspend execution of any other part of a sentence not involving incarceration imposed pursuant to subsection 2, if any of the following apply:
>
> (1) If the defendant's alcohol concentration established by results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn in accordance with this chapter exceeds .15..."

> .153. The evidence in this case as indicated by the evidence card produced by the Intoxilyzer machine is that the test result was a .15. This Court takes judicial notice of the manufacturer's manual for operation of the Intoxilyzer model 4011A and notes that the manufacturer did not intend the visual readout to be used as a determinative effect with a test result and intended that the test result be the result printed on the evidence card.

The question we need to address is whether these findings are supported by substantial evidence. The user manual of the Intozilyzer 4011A states, "[i]n test positions, air blank, breath and calibrate, only the first two digits are used." The breath position is one of the four operational modes of the Intoxilyzer 4011A. The manual states in reference to the breath mode, '[t]his mode is used when a subject is tested for alcohol in his breath." Furthermore, the specifications of the Intoxilyzer 4011A indicate the accuracy of the device is better than +/- .01 percent BAC. The sum of this evidence from the manual provides substantial support for the district court's finding that the manufacturer of the Intoxilyzer 4011A did not intend the visual reading to the thousandths place (.000) to be used with determinative effect. Therefore, the district court did not exceed the authority granted by statute in giving defendant a deferred judgment. Accordingly, we deny the State's writ of certiorari.

WRIT SUSTAINED IN PART, ANNULLED IN PART. JUDGMENT AFFIRMED.