



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA	)	
Plaintiff-Appellee,	)	Filed October 21, 1980
vs.	)	
DEBORAH NANNETTE WESTON,	)	<u>0-215</u>
Defendant-Appellant.	)	64299

Appeal from Black Hawk District Court - George L. Stigler, Judicial Magistrate.

Defendant appeals from her conviction for OMVUI in violation of section 321.281, The Code 1979. - AFFIRMED.

Gary J. Boveia, Waverly, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant, Deborah Weston, appeals from her conviction of OMVUI in violation of section 321.281, The Code 1979, alleging error in admission into evidence of a blood specimen and test results. We affirm.

Defendant was charged with OMVUI following her involvement in a traffic accident on July 4, 1979. She consented to a chemical test of blood to determine the alcoholic content of her blood. A registered nurse at Good Shepard Hospital drew the blood specimen upon written request of the officer and authorization of the licensed physician on call. The specimen was offered and admitted, over objection, into evidence. The jury found the defendant guilty. The defendant moved for new trial which motion was overruled. The defendant essentially asserts the State did not comply with the procedures of chapter 321B. This failure would render the blood specimen and test results inadmissible.

I. The constitutionality of chapter 321B containing the implied consent provisions has been established but only when the procedural requirements are performed for the protection of the accused. Chapter 381B insures the free and voluntary choice in submitting or refusing chemical testing and the safety and accuracy of the tests. See State v. Richards, 229 N.W.2d 229 (Iowa 1975).

Defendant alleges testimony of the arresting officer shows defendant was improperly advised as to revocation of her driver's license which would result from her refusal to submit to a blood test pursuant to section 381B.3.¹ Such "misstatement" of the law renders any evidence obtained under the statute, namely, the blood specimen test, inadmissible.

We find the entire officer's testimony does not reveal error in the required procedures. The officer testified he read from a card prepared in accordance with the law when he requested a chemical test and when he explained the consequences of a refusal. An officer has the option of determining which chemical test to request. § 321B.3. He is not obligated to inform an accused of alternative tests. Morgan v. Iowa Department of Public Safety, 227 N.W.2d 155, 157 (Iowa 1975). Defendant's written

¹ Presumably, the officer's advice had a coercive effect on her choice to submit to the test, although voluntariness was never put in issue. At any rate, the required statement of any officer has been held not to be coercive. § 381B.6; State v. Johnson, 257 Iowa 1052, 1062, 135 N.W.2d 518, 525 (1965).

consent in this case to the blood test obviated further advice from the officer.²

In answer to the court's own inquiry, the officer defined his actions and cured whatever defect appeared in other inconsistent answers. See State v. Janssen, 247 N.W.2d 260, 262 (Iowa 1976) (where the State remedied inconsistent testimony after defendant's objection). When, in the instant case, the defendant later objected to the admissibility of the specimen, the court properly decided this preliminary fact question had been resolved upon witness' own reparation of foundation evidence. See id.

II. The defendant next alleges the blood specimen and test results were inadmissible because of improper foundation due to lack of the nurse's authorization to withdraw the specimen. The nurse testified she was authorized by the licensed physician on call. Defendant objected to this evidence on the basis of hearsay. The objection was overruled because the question asked for the fact of a communication and not an assertion that out-of-court declarant's statement was true. We find this ruling to be correct. See McCormick on Evidence § 246 (2nd Ed. 1976). Therefore, the admission of the specimen and test results was proper as the foundation required in section 381B.4 was satisfied. State v. Binkley, 201 N.W.2d 917, 919 (Iowa 1972).

Finding no error, we affirm the lower court's judgment.

AFFIRMED.

² The right to refuse a blood test is primarily accommodation to those persons whose religious beliefs or physical condition make the blood test unsuitable, but all others may take advantage of that right. Rodriguez v. Fulton, 190 N.W.2d 417, 419 (Iowa 1971). However, we do not know whether defendant wished to refuse the blood test and submit to any other chemical test for those reasons.