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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | |
| vs. | ) | |
| **GERALD W. LAUGHRIDGE,** | ) | 8-373<br>87-1484 |
| Defendant-Appellant. | ) | |

Appeal from the Iowa District Court for Benton County (No. CR 2806) - Thomas M. Horan, Judge.

The defendant appeals his conviction, following a stipulated trial to the court, for second offense OWI. **REVERSED AND REMANDED.**

Lowell Forte, Cedar Rapids, for the defendant-appellant.

Thomas J. Miller, Attorney General; Mark Hunacek, Assistant Attorney General; and Thomas E. Noonan, County Attorney, for the plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

**OXBERGER, C.J.** 203

Defendant Gerald W. Laughridge appeals his conviction for second offense OWI. Defendant contends the district court erred in failing to suppress the result of a blood test which he claims was taken without his consent. Our scope of review is on errors assigned. The trial court's findings of fact are binding upon this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We reverse and remand.

On June 20, 1987, the defendant was observed by the Benton County Deputy Sheriff driving at 72 miles per hour in a 55 mile per hour speed zone. The deputy sheriff stopped the defendant for speeding and after observing him administered preliminary sobriety tests and a preliminary breath test which indicated that the defendant was intoxicated.

The defendant was arrested for operating a motor vehicle while intoxicated. Upon his arrest he began to complain of chest pains and was taken to the hospital. While the defendant was at the hospital, the arresting officer attempted to advise defendant of his rights under the Iowa Implied Consent Law on three occasions without success. On each occasion, the defendant complained of pain and turned away without answering whether he would consent. After numerous attempts to communicate with the defendant, the deputy requested the doctor in attendance,

Dr. Musgrave, make a determination as to whether or not the defendant could consent or refuse a blood test to determine alcohol content. Dr. Musgrave concluded that the defendant was incapable to consenting or refusing to take a blood test. A blood sample was then withdrawn. The sample revealed an alcohol concentration of .15.

The defendant moved to suppress the blood test results on the ground that there was no evidence to support the doctor's certification that he was incapable of consent or refusal. The district court overruled the motion. The defendant was then convicted after a stipulated trial to the court. Defendant appeals that conviction on the basis of the denial of defendant's motion to suppress the blood test results.

The authority to perform chemical testing of body substances of those suspected of driving while intoxicated is provided in Iowa Code chapter 321J. Section 321J.6 provides that a person who operates a motor vehicle under circumstances in which there are reasonable grounds to believe the person has been driving while under the influence of alcohol, is deemed to have consented to the withdrawal of certain body substances from him or her for chemical testing of alcohol concentration. Iowa Code § 321J.6 (1987). However, the driver has a right to refuse to submit to the test pursuant to sections 321J.6(1)(c) and 321J.9. If the person refuses to submit to the chemical

testing, and the peace officer had reasonable grounds to believe the person had been operating a motor vehicle in violation of Iowa Code section 321J.2, the person's license to drive is revoked. Iowa Code § 321J.9 (1987). Further, implied consent to chemical testing continues even though the driver is dead, unconscious, or is otherwise in a condition rendering him incapable of refusing or consenting, subject to a certification from a physician. Iowa Code § 321J.7 (1987).[1] This provision has been held to apply only when the person is in such a condition that the person is incapable of manifesting a choice concerning whether to withdraw the statutory implied consent to the test. Mary v. Iowa Dep't of Transp., 382 N.W.2d 128, 132 (Iowa 1986). However, a physician's certification is strong evidence but not conclusive of the State's right to withdraw blood without the defendant's consent. State v. Weidner, 418 N.W.2d 47, 48 (Iowa 1988).

The defendant asserts that Dr. Musgrave's determination of defendant's incapability of making a decision was based on a more strict standard of the defendant not being able to understand the lengthy and intricate implied consent advisory. The doctor's testimony indicates that his

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1. **Dead or unconscious persons.** A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given if a licensed physician certifies in advance of the test that the person is dead, unconscious, or otherwise in a condition rendering that person incapable of consent or refusal. Iowa Code § 321J.7 (1987).

determination was, in fact, based upon such a strict standard.

Our standard of review with respect to agency findings involving refusal of chemical testing is described in length in McCrea v. Iowa Department of Transportation, 336 N.W.2d 427 (Iowa 1983). We applied the standard of section 17A.19(8). In so doing we observed:

> [I]t is not enough, as McCrea contends, that his subjective intentions were to comply with the officer's request. The determination of compliance must be based on objective standards: "[t]he licensee's words, acts, overall conduct and other manifestations of a willingness or unwillingness to take the [chemical] test will be considered. . . ."

Hoppe v. Iowa Dep't of Transportation, 402 N.W.2d 392, 393 (Iowa 1987). (Quoting Hoban v. Rice, 25 Ohio St.2d 111, 117, 267 N.E.2d 311, 315 (1971)). In Swenumson v. Iowa Department of Public Safety, 210 N.W.2d 660, 662 (Iowa 1973), and Buda v. Fulton, 261 Iowa 981, 988, 157 N.W.2d 336, 342 (1968), we recognized that noncooperation may constitute refusal. Hoppe at 393.

On cross-examination the doctor testified:

> Q. Am I correct that the reason that you signed the certification form was because it was your belief he just did not completely understand all the intricacies of the implied consent? A. Well, the main reason was he would not give consent either way. Okay. And if he had, you know, if he had, then it wouldn't have become a problem. However, because again because of the length of passage and since he did not appear to be listening to this long passage, I didn't believe he was actually paying attention to the ramifications of refusing or consenting.

Clearly, the doctor applied a standard that required the defendant to cooperate and to fully understand the intricacies of the advisory. Such a standard is contra to McCrea and the cases which follow.

The testimony from the Suppression Motion Hearing reveals the defendant was in pain, clutching his chest and moaning during the officer's advisory. However, the defendant was actually coherent and in fact understood the blood test inquiry when phrased to him in more simple language by the doctor. The defendant's statement in answer to the doctor's request for permission to draw blood was as follows: "Yes, you can get it after you get the chest x-ray." We find this to amount to conditional consent and tantamount to a de facto refusal. In Hoppe, the court found de facto refusal where the motorist had signed the consent form where testimony from the officer indicated that when the motorist was told to sit down and proceed with the test he became abusive and combative. Hoppe v. Iowa Dep't of Transportation, 402 N.W.2d 392 (Iowa 1987).

We find the defendant's overall acts and conduct to manifest an unwillingness to consent to chemical testing. Accordingly, we find the trial court erred in denying the motion to suppress the blood test results.

**REVERSED AND REMANDED.**