

IN THE COURT OF APPEALS OF IOWA

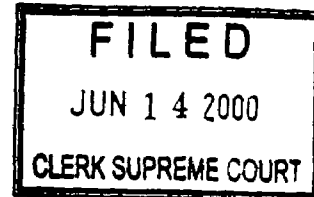
No. 0-263 / 99-1260

Filed June 14, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT ALLEN ANDERSON,
Defendant-Appellant.



Appeal from the Iowa District Court for Cedar County, J. Hobart Darbyshire and David H. Sivright, Judges.

Defendant appeals from the judgment and sentence entered upon his conviction of operating while intoxicated. **AFFIRMED.**

James K. Weston II of Tom Riley Law Firm, P.L.C., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Lee W. Beine, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

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HUITINK, J.

I. Background Facts and Proceedings.

Anderson was charged with operating while intoxicated and interference with official acts following his arrest by a Clarence police officer. At the Cedar County Jail Anderson was read an implied consent advisory requesting chemical testing to determine his blood alcohol content. Based on Anderson's reply, the state trooper who made the request determined Anderson refused to submit to the requested testing.

On February 27, 1998, Anderson timely filed a motion to suppress evidence concerning his refusal to submit to chemical testing. In his motion Anderson alleged the arresting officer had "no probable cause or reasonable and articulable suspicion that the defendant [Anderson] was engaged in criminal activity" and as a result all evidence subsequently obtained should be excluded at trial. Anderson amended his motion on June 9, 1998, by adding the additional allegation that he was denied the right to consult with a lawyer or family member upon his arrival at the Cedar County Jail.

The district court rejected Anderson's claims, and evidence of his refusal to submit to chemical testing was admitted at trial. Anderson was convicted on both counts and sentenced accordingly.

On appeal Anderson contends the district court erred by denying his motion to suppress. The State claims Anderson's assertion in his amended motion to suppress was untimely and, even if timely filed, was properly denied.

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II. Timeliness of Amended Motion to Suppress.

We review this issue for errors at law. Iowa R. App. P. 4.

Motions to suppress evidence on the ground it was illegally obtained must be filed before trial. Iowa R. Crim. P. 10(2)(e). Like other pretrial motions, a motion to suppress must be filed no later than forty days after arraignment. Iowa R. Crim. P. 10(4). Failure to timely file a motion to suppress constitutes a waiver of the right to challenge the admissibility of evidence on the ground it was illegally seized. Iowa R. Crim. P. 10(3). We may affirm the district court's ruling admitting evidence based on the untimely filing of a motion to suppress even though the State did not raise the issue below and the trial court did not rely on the untimeliness of the motion to support. *State v. Rhiner*, 352 N.W.2d 258, 261 (Iowa 1984).

The State argues Anderson has waived any suppression claim based on denial of the right to counsel because he failed to raise that issue in a timely filed motion to suppress. This argument is premised on the notion that Anderson's amended motion to suppress raised new claims distinct from those raised in his timely filed motion to suppress. We disagree.

Although Anderson's motion raised new grounds supporting his suppression claim, it nevertheless was directed at the same evidence as his original timely filed motion. Under these circumstances, we fail to see how the purpose of rule 10 is frustrated by treating Anderson's amended motion to suppress as timely filed. Whether the same result would follow an amended motion to suppress targeting different evidence presents a question we are not

required to resolve in this case. We accordingly decline to affirm the district court's ruling admitting evidence of Anderson's refusal to consent to chemical testing on the basis that his amended motion to suppress was untimely.

III. Motion to Suppress.

Because Anderson's motion to suppress is based on a violation of his limited right to counsel afforded by Iowa Code section 804.20, our review is for errors of law. *State v. Krebs*, 562 N.W.2d 423, 425 (Iowa 1997). We will affirm the trial court's ruling if there is substantial evidence supporting it. *Id.* Section 804.20 provides:

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.

As the State correctly notes, the remedy for a violation of the statutory right is exclusion of evidence subsequently obtained. *State v. Viator*, 261 N.W.2d 828, 832 (Iowa 1978).

The suppression record includes the following exchange between Anderson and the state trooper who read him the implied consent advisory:

[STATE TROOPER] MILLER: Okay. I'm going to read to you here the Implied Consent law. The time is –
 DEFENDANT: – what you want to read to me –
 MILLER: – 10:49.
 DEFENDANT: – doesn't make any difference.
 MILLER: Well, I'm required to read it to you.
 DEFENDANT: I don't have to say or do anything unless there's an attorney present. There's no attorney here, so I don't have to say or do anything.

[Officer reads Implied Consent form]

MILLER: Having read to you the appropriate Implied Consent advisory, I hereby request a specimen of your breath on 12-12-97 at 10:40 – or 10:50 p.m. Having been read the Implied Consent advisory, you need to check "consent" or "refuse" and sign, please.

DEFENDANT: I ain't going to check or do anything unless there's an attorney present. I have not violated any law.

MILLER: Is that a refusal, then?

DEFENDANT: What I'm telling you is –

MILLER: I'm going to count it as a refusal. Are you consenting or refusing?

DEFENDANT: Count it as whatever you want, lady. Don't play Barney Fife with me, okay? I did not violate any law, none. I'm sitting in my own privately-owned vehicle, my lights are on. Big deal.

[Officer continues to read Implied Consent advisory]

DEFENDANT: [unintelligible] –because I'm going to sue this county, and I guarantee you I'm going to win. I don't have to do shit, lady.

[Officer continues to read Implied Consent advisory concerning revocation of license]

DEFENDANT: Don't waste your breath.

[Officer continues to read Implied Consent advisory]

MILLER: Do you want to call anyone?

DEFENDANT: No.

MILLER: Pardon?

DEFENDANT: Don't have to.

[Officer gives Defendant *Miranda* warnings]

MILLER: Do you understand these rights?

DEFENDANT: (No response.)

MILLER: Do you want to call someone?

DEFENDANT: (No response.)

MILLER [to third party]: You can go ahead and take him because he's not – are you going to answer any questions for me?

DEFENDANT: Lady, you don't listen very well.

MILLER [to third party]: Go ahead and take him.

DEFENDANT: I said I don't have to.

MILLER [to third party]: I'm done.

DEFENDANT: Don't play Barney Fife with me, all right?

This evidence sufficiently supports the district court's findings that Anderson was offered a chance to telephone an attorney and that by his conduct he declined to do so. Miller's statements also support the district court's finding that he refused to consent to the requested testing.

We have considered all of Anderson's arguments raised on appeal and find them to be without merit. The judgment of the district court is affirmed.

AFFIRMED.