

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

JAMES PATRICK WALLACE,

Appellant.

Filed September 21, 1978

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61279

Appeal from Polk District Court - Richard A. Strickler and A. B. Crouch, Judges.

Defendant appeals manslaughter conviction asserting the trial court erred in overruling his motion to suppress evidence of blood test results. Affirmed.

John C. Wellman, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Raymond Sullins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for appellee.

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

PER CURIAM

Defendant James Patrick Wallace appeals his conviction by jury of the crime of manslaughter in violation of § 690.10, The Code 1975. The only issue raised on appeal is whether the trial court erred in overruling defendant's motion to suppress evidence of blood test results where the blood sample was allegedly taken in circumvention and violation of chapter 321B, The Code.

Wallace was arrested after he was involved in a multiple-vehicle accident and transported to Broadlawns Hospital for examination for possible injuries sustained as a result of the accident and for the purpose of establishing his level of suspected intoxication. He was described as hostile, violent, uncooperative and/or abusive. Although defendant was handcuffed, he was transported from the scene under his own power. By the time Wallace reached the hospital, he became unmanageable. When taken for x-rays, defendant became violent and had to be physically restrained. The x-ray technician was unable to examine him. Finally, because of his behavior, Wallace was placed in leather restraints.

When Dr. Wooters, the county medical examiner, arrived at the hospital, he examined defendant and then certified Wallace was in a semi-conscious condition and unable to refuse or consent to a withdrawal of a blood sample. See § 321B.5, The Code. Thereafter, the blood sample was taken. Defendant argues that the blood sample was illegally taken and that the results of the test should have been suppressed because (1) none of the police officers attempted to get his consent for the withdrawal prior to the arrival of the medical examiner, (2) he had earlier refused to give a urine specimen that was requested (see § 321B.3, The Code), and (3) he had struggled against his restraints for up to 45 minutes, which left him tired and incapable of refusing, and was tantamount to a refusal.

Initially, we note that there is nothing in chapter 321B, The Code, which requires the police to attempt to get an individual's consent for a blood test prior to invoking § 321B.5. All that is required is that a chemical test be offered within two hours after the arrest. Section 321B.3, The Code. The primary reason defendant was taken to the hospital was for examination for possible injuries as a result of the accident. However, the evidence indicates defendant became unmanageable and was unable to be examined.

At that time, defendant had to be physically restrained and thereafter the medical examiner certified he was unable to consent to the taking of a blood test. We find no error.

Secondly, the medical examiner followed the proper procedure set out in § 321B.5, The Code, for securing blood samples from unconscious or other persons incapable of giving or refusing consent. Cf. State v. Boner, 186 N.W.2d 161 (Iowa 1971). Although defendant was in a semi-conscious condition, the evidence indicates he was unable to understand the situation. His responses to questions asked, indicated to the medical examiner that the defendant was incapable of giving or refusing consent. From a review of the various testimony, we agree with the conclusion reached by the medical examiner. See State v. Findlay, 259 Iowa 733, 145 N.W.2d 650 (1966).

Finally, defendant argues his struggling against his restraints was tantamount to a refusal to consent. He cites Buda v. Fulton, 261 Iowa 981, 157 N.W.2d 336 (1968) in support of his argument. We think Buda is factually dissimilar to the case at bar. The court stated the total failure on the part of Buda to cooperate was under the circumstances tantamount to a declination. 261 Iowa at 991. In the instant case, defendant either ignored the medical examiner's questions or indicated he did not care where he took the blood test, depending upon how the testimony is viewed. In any event, defendant's actions were not tantamount to a refusal to consent or a declination. Buda, supra.

Neither do we find defendant's refusal to give a urine specimen a violation of chapter 321B, The Code. The urine specimen was requested by hospital personnel, not by the police. As such, defendant's refusal is not a refusal to submit within the meaning of § 321B.3, and the subsequent blood test was proper. The trial court did not err in overruling defendant's motion to suppress. His conviction is affirmed.

AFFIRMED.

OXBERGER, J., dissents.

OXBERGER, J. (dissenting)

I dissent. I do not find that the record supports the majority's holding that defendant James Wallace was semiconscious and therefore unable to give his consent to the blood test. The doctor testified at the suppression motion hearing that Wallace gave him his name just prior to the extraction of blood. Wallace had refused a urine test; he repeatedly fought the leather ankle and wrists restraints. He was so violently uncooperative that x-rays could not be taken. Unquestionably this record establishes Wallace's violent hostility to the medical staff and the police. It does not establish the requisite lack of consciousness rendering him incapable of consent or refusal which allows the State to invoke § 321B.5 and deem the provisions of implied consent to test of § 321B.3 not to have been withdrawn. The record includes no evidence that Wallace was hospitalized after arrest for injuries which could cause a loss of consciousness, or that he received any medical treatment for such injuries. The doctor's testimony related no specific medical testing to establish Wallace's conscious or unconscious state. On this record I would hold that Wallace refused the blood test and ordered the results suppressed.