

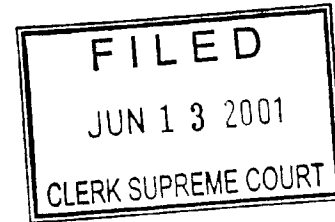
IN THE COURT OF APPEALS OF IOWA

No. 1-180 / 00-0847
Filed June 13, 2001

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JACOB KARL WISCHMEIER,
Defendant-Appellee.



Appeal from the Iowa District Court for Des Moines County, Thomas R. Brown, District Associate Judge.

The State was granted discretionary review of a trial court ruling suppressing the results of an intoxilyzer test administered to the defendant.

REVERSED AND REMANDED.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Andrew B. Prosser, Assistant County Attorney, for appellant.

Michael J. Schilling of Cahill, Dieterich & Schilling, Burlington, for appellee.

Heard by Huitink, P.J., and Streit and Hecht, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

Jacob Wischmeier's car was stopped by Des Moines County Patrol Deputy John Willis at approximately 12:45 a.m. on December 5, 1999. A preliminary breath test indicated Jacob's blood alcohol concentration was .082. Willis transported Jacob to the police station in Burlington where at 2:14 a.m. Jacob submitted to an intoxilyzer test indicating his blood alcohol concentration was .109. Jacob was arrested and charged with operating a motor vehicle while intoxicated and placed in the Des Moines County Jail.

Jacob's father, Dennis Wischmeier, telephoned the sheriff's office at 3:17 a.m. and told Deputy Willis that he wanted Jacob to have an independent chemical test to determine his blood alcohol content. Willis informed Dennis Wischmeier that Jacob would have to request the test himself. Dennis Wischmeier's request to speak with Jacob was denied. Jacob returned his father's telephone call at approx 3:45 a.m., immediately after which Jacob requested an independent chemical test. Willis denied Jacob's request citing the amount of time elapsed since his arrest and the lack of available staff to take Jacob to the hospital for the requested testing.

The district court granted Jacob's pretrial motion to suppress the results of the intoxilyzer test. The district court found that Jacob had been unreasonably denied his statutory right to an independent chemical test. The court also determined that exclusion of the intoxilyzer test result at trial was the appropriate remedy.

On discretionary review the State contends that the district court's decision to suppress the intoxilyzer test result lacks substantial evidentiary support. The State also argues that even if the district court correctly determined that Jacob was illegally denied his right to an independent chemical test, the remedy of exclusion of the test results at trial was not the appropriate remedy.

II. Standard of Review.

When the admission of evidence depends on the interpretation of a statute, we review for correction of errors of law. *State v. Kjos*, 524 N.W.2d 195, 196 (Iowa 1994). Thus, we review the district court's ruling on Jacob's motion to suppress to decide whether it was based on a correct interpretation of Iowa Code section 321J.11 (1999). Any fact findings of the district court are binding on us if supported by substantial evidence. *State v. Wootten*, 577 N.W.2d 654, 656 (Iowa 1998). Evidence is substantial if a reasonable person would find it adequate to reach the same findings. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). If we determine that the district court's findings are supported by substantial evidence, we are bound by those findings and must affirm. See *United States Cellular Corp. v. Board of Adjustment of Des Moines*, 589 N.W.2d 712, 716 (Iowa 1999).

III. The Merits.

Iowa Code section 321J.11 provides in pertinent part:

The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. . . . Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

A request for an independent test must be made within a reasonable time under the circumstances. *Wootten*, 577 N.W.2d at 656 (request made two hours after arrest and one hour after the State's test was untimely). The circumstances to be considered include, but are not limited to, the amount of time that has elapsed since the arrest and the completion of the State's test, whether the defendant has had a reasonable opportunity to make the request, and the extent to which such request unnecessarily diverts officers from other duties. *Id.*

The district court's determination that Jacob was unreasonably denied an independent chemical test was premised on the following findings:

There was no showing by the State that there was any public emergency or even any low-level calls for service that would preempt the deputy's time other than the impending end of shift. This Court is confident that if the gathering of evidence for the State in this case required the deputy to extend his shift, that it would have been done. The Defendant is entitled to no less consideration in pursuing his statutory right to the gathering of evidence for his defense.

While these findings are adequately supported by evidence of Deputy Willis's dismissive treatment of Jacob's request for an independent chemical test, they fail to consider the untimeliness of his request. The undisputed record indicates Jacob's request was not made until two and one-half hours after he was taken into custody and approximately an hour and a half after his intoxilyzer test. Even if the timeliness of the request is measured from the time Dennis Wischmeier spoke with Deputy Willis, the time elapsed is still greater than that found to be unreasonable in *Wootten*.

Because the district court's determination that Jacob was unreasonably denied his statutory right to an independent chemical test is not supported by substantial evidence, we are compelled to reverse. The matter is remanded to the district court for further proceedings in conformity with this opinion. We do not retain jurisdiction.

REVERSED AND REMANDED.

Streit, J., concurs; Hecht, J., dissents.

HECHT, J. (dissenting)

I respectfully dissent. The district court found the denial of Wischmeier's request for an independent chemical test was unreasonable. This finding includes an implicit finding the request was timely. I would affirm because I believe the district court's finding of timeliness is supported by substantial evidence.

The majority observes Wischmeier's request was not made until two and one-half hours after he was taken into custody, a time lapse exceeding that found to be unreasonable in *State v. Wootten*, 577 N.W.2d 654 (Iowa 1998). However, the holding in *Wootten* is not controlling here. In *Wootten*, the district court found the defendant's failure to request an independent chemical test until two and one-half hours after arrest to be unreasonable. On appeal, our supreme court found substantial evidence to support the finding of untimeliness, noting evidence that the delay in Wootten's request created a problem for the jailer, who had no means of transporting the defendant to a hospital, and for other law enforcement officers, who could not provide transportation without diverting attention from their duties. It must be noted the court did not decide a failure to request an independent test until more than two hours after arrest was unreasonable as a matter of law. In this case, the absence of persuasive evidence of inconvenience to law enforcement officers attending Wischmeier's request caused the district court to find the denial of an independent test unreasonable. Our standard of review requires we affirm this finding. Accordingly, I would affirm the district court's ruling on the motion to suppress.