FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-407 / 89-153

STATE OF IOWA,

Appellee,

444

vs.

JAMES WILLIAM JENKINS,

Appellant.

Appeal from the Iowa District Court for Webster County, Fredrick E. Breen, District Associate Judge.

The plaintiff appeals from his conviction for OWI. He contends the results of a blood test should have been suppressed because he was incapable of consent or refusal, and because there was no physician's certification to that effect as required by Iowa Code section 321J.7. **AFFIRMED.**

Dan T. McGrevey of McGrevey & Sherman, Fort Dodge, for the appellant.

Thomas J. Miller, Attorney General; Charles J. Krogmeier, Special Assistant Attorney General; Daniel W. Perkins, Assistant Attorney General; and James Koll, Assistant County Attorney, for the appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

James Jenkins was involved in a motorcycle accident. He was taken to a hospital for treatment of a head injury. While in the emergency room, Jenkins consented to a blood test to determine his alcohol level. Based on the results of the blood test, he was charged with OWI. He then filed a motion to suppress the blood test results. He alleged he had been incapable of consent or refusal due to his head injury. He argued in light of his injury, a valid blood sample could have been taken only under the provisions of Iowa Code section 321J.7. That section authorizes testing if a licensed physician has certified the person to be tested is incapable of consent or refusal. Jenkins alleged his test results were inadmissible because there had been no such certification by a physician.

The district court overruled Jenkins' motion to suppress. The court later found Jenkins guilty of OWI. Jenkins has appealed from the resulting conviction and sentence.

On appeal Jenkins contends the district court should have suppressed the blood test results. He reiterates his argument that the results were inadmissible because he was incapable of consent or refusal and because there was no certification to that effect by a physician, as required by section 321J.7.

In ruling on the motion to suppress, the trial court was required to find the facts upon which the admissibility of the evidence was to depend. State v. Laughridge, 437 N.W.2d 570, 572 (Iowa 1989). The trial court makes this determination based on the preponderance of the evidence. Id. On appeal we will uphold the trial court's ruling on the motion to suppress if there is substantial evidence in the record to support the finding of fact that it was more likely than not Jenkins was capable of consenting to or refusing a blood test. We will not reverse the trial court's ruling on the basis that the evidence is disputed or that the trial court could have reached the opposite conclusion. Id. The trial court's ruling will only be set aside if there is no substantial evidence to support its finding.

The issue involved in this case is whether Jenkins, at the time of the chemical testing, was in a condition rendering him incapable of consent or refusal. The statute at issue in this matter provides:

> 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). The State bears the burden of proof to supply foundational facts for admission of test

results conducted pursuant to Chapter 321J. State v. Schlemme, 301 N.W.2d 721, 722 (Iowa 1981).

Section 321J.7 applies only when a "person is in such a condition that the person is incapable of manifesting a choice concerning whether to withdraw the statutory implied consent to take the test." Mary v. Iowa Dept. of Transp., 382 N.W.2d 128, 132 (Iowa 1986) (construing section 321B.11, a previous version of section 321J.7). The fact that an individual is confused, equivocal, or is not fully coherent, does not mean he or she lacks the ability to manifest consent or refusal to taking the test. Id. at 133.

Jenkins raises several arguments in behalf of his claim that he was incapable of consenting to the blood test. He points to the fact that hospital records indicate he was "uncooperative" and "combative" during his treatment. Jenkins had received a severe laceration near his groin, and Officer Husske testified Jenkins became "real concerned" when he saw medical personnel were going to use a needle to inject something into that area of his body. While Jenkins may have been uncooperative and resisted treatment, the testimony of Officers Husske and Thode indicates he was coherent and reasonably cooperative when the implied consent procedures were invoked.

Jenkins claims his lack of capacity to consent to the test was also evidenced by the fact Officer Thode asked his

doctor if they needed a "green form"--a physician's certificate pursuant to section 321J.7. The doctor told the officer, "let's see what happens, then we'll go from there." Officer Thode testified he commonly asked doctors if a green form is necessary because it is the fastest and easiest way to obtain chemical tests. We do not find an officer's adherence to a routine procedure to be proof in this matter of Jenkins' inability to consent to the test.

Finally, Jenkins contends the determination by a judicial referee at 5:15 a.m. that he was "seriously mentally impaired" is indicative of his inability to consent to the blood test taken earlier that morning at approximately 2:45 a.m. This emergency hospitalization order was issued in response to Dr. Coffey's request. Jenkins had continued to resist and refuse treatment, and Dr. Coffey felt Jenkins needed to be flown to Iowa City for an operation. Obtaining this emergency order ensured that Jenkins would receive the medical treatment his doctor felt he needed.

Jenkins' refusal to submit to treatment, and his insistence on leaving the hospital, do not defeat the trial court's finding that he had earlier had the capacity to consent to the test. While Jenkins' judgment later in the morning may have been poor and irrational in light of the injuries he sustained, it does not necessarily undercut the officers' testimony with regard to his earlier demeanor and ability to consent to the test.

The evidence in this case is disputed, but substantial evidence supports the trial court's findings. The evidence reveals Jenkins was conscious while at the hospital and consented to the taking of a blood test but not a urine sample. Jenkins qualified his consent by stating he would prefer the blood be taken without the use of a needle. When his doctor informed him a needle would be used to withdraw blood for medical treatment, he consented to the implied consent procedures. Two police officers testified as to Jenkins' conscious state and ability to consent to the test. The fact that Jenkins has no memory of the incident does not impair the trial court's finding that he was capable of consenting to the test. See Mary, 382 N.W.2d at 130. Substantial evidence supports the trial court's decision, and it did not err in denying Jenkins' motion to suppress.

AFFIRMED.