IN THE COURT OF APPEALS OF IOWA

No. 0-787 / 99-1953
Filed February 7, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KERRY LANE BALM,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, Steven J. Oeth, District Associate Judge.

Defendant appeals from the judgment and sentence entered following his conviction of operating while intoxicated. **REVERSED AND REMANDED.**

David R. Johnson of Brinton, Bordwell & Johnson, Clarion, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Michael E. Houser, County Attorney, and John L. Kies, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Kerry Lane Balm appeals from the judgment and sentence entered following his conviction of operating while intoxicated. *See* Iowa Code § 321J.2 (1999). He contends the arresting officer failed to comply with Iowa Code section 804.20 and consequently, the district court erred by overruling his motion to suppress breath test evidence. We reverse and remand for new trial.

Background Facts and Proceedings. Balm was arrested for OWI on July 29, 1999. Officer Dennis Borrill of the Belmond Police Department explained the implied consent procedure. Balm responded: "Not everything is clear." Several exchanges then took place between the officer and Balm. Balm again expressed uncertainty and asked Borrill for his advice on what he should do. Borrill declined to give advice and once again explained the legal aspects of implied consent. Balm eventually agreed to take the test. As Balm was signing the consent form, the following discussion took place:

> Balm: When do I get to make a phone call?
>
> Borrill: Uh, we'll take care of this, then you can make a phone call. Who do you want to call now? Wife, somebody else, or . . . ?
>
> Balm: (nodding his head).
>
> Borrill: Not her, huh? I'm sure we can get somebody to come take you home tonight. You don't need to sit behind bars or anything like that because you're cooperative, you know what's going on. You're not a problem maker or anything like that. So . . . I'll just let you hang here for a second. I'll get the machine ready.[1]

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[1] Officer Borrill admitted at the suppression hearing that the two-hour time limit was not a concern in this case.

Balm took the breath test and the results were over the legal limit. He filed a motion to suppress which was overruled by the district court. The case proceeded to jury trial and Balm was found guilty. He now appeals.

Motion to Suppress. Our review of the interpretation of Iowa Code section 804.20 is for errors at law. *State v. Krebs,* 562 N.W.2d 423, 425 (Iowa 1997).

Iowa Code section 804.20 provides as follows:

> 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. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

Iowa Code § 804.20.

Balm argues this statutory mandate was violated in that he was not allowed to make a telephone call before completing the test. We agree. Balm was in the process of signing the consent form when he made his inquiry about a telephone call. The two-hour time limit was not implicated in this case. Officer Borrill should have allowed Balm an opportunity to make a telephone call at this point instead of indicating they would complete the test first and then he would be allowed the call. *Didonato v. Iowa Dep't of Transp.,* 456 N.W.2d 367, 371 (Iowa

1991); *State v. Vietor,* 261 N.W.2d 828, 832 (Iowa 1978). Balm's signature on the consent form does not constitute a final decision to take the test as he was still free to revoke his consent. *Didonato*, 456 N.W.2d at 371. The purpose behind the statute was not met in this case. We conclude the district court erred in overruling the motion to suppress.

The State argues even if the breath test evidence should have been suppressed by the district court, overwhelming evidence supported the verdict under the alternative theory of operating while under the influence. We disagree that the verdict can be upheld. The marshalling instruction in this case contained two alternative theories of Balm's guilt. The State alleged in the alternative that Balm operated a motor vehicle while under the influence of an alcoholic beverage or while having an alcohol concentration of .10 or more. We have determined the second alternative was not supported by the evidence. Under this general verdict of guilty, we have no way of determining which theory of guilt the jury accepted. Therefore, the case must be remanded for a new trial. *State v. DeWitt,* 597 N.W.2d 809, 812 (Iowa 1999); *State v. Hogrefe,* 557 N.W.2d 871, 881 (Iowa 1996).

REVERSED AND REMANDED.