IN THE COURT OF APPEALS OF IOWA

No. 1-650 / 00-1843
Filed December 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN B. DEVRIES,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, James D. Birkenholtz and Carol S. Egly, District Associate Judges.

Defendant appeals from the judgment and sentence entered for third-offense operating while intoxicated. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Ralph E. Marasco, Jr., Assistant County Attorney, for appellee.

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

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VAITHESWARAN, J.

Steven DeVries appeals his conviction for operating a motor vehicle while intoxicated, third offense. He claims the results of an Intoxilyzer test were invalid because a police officer did not properly operate the machine. Although we agree with him, we uphold the conviction on the basis of other evidence demonstrating he was operating the vehicle while under the influence of alcohol.

I. Background Facts and Proceedings

West Des Moines police officer Blain Brinkmeyer arrested DeVries after he failed field sobriety tests. DeVries agreed to provide a breath sample. Brinkmeyer, a certified Intoxilyzer 4011A operator, administered the test using an eleven-step operational checklist prepared by the Iowa Department of Public Safety.[1]

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[1] The checklist is as follows:

1. Turn "Power" switch to "ON" and wait for green "Ready Light" to come on (if instrument is off).
2. Observe subject for at least 15 minutes prior to testing. The subject may not smoke, eat or drink for at least 15 minutes before testing.
3. Turn mode selector to "Zero Set", depress "Zero Adjust" and adjust to read non-minus .000, .001, .002, or .003.
4. Place evidence card in card printer, connect air hose to breath hose, turn mode selector to "Air Blank" and allow instrument to run through cycle.
5. Turn mode selector back to "Zero Set" and readjust "Zero".
6. Turn mode selector to "Calibrator", place Calibration filter in slot and allow instrument to run through cycle.
7. Calibration reading 0._____ Filter Value 0._____
8. Remove Calibration filter. Turn mode selector to "Air Blank", and allow to run through cycle.
9. Turn mode selector to "Breath" mode. Disconnect air hose from breath hose, insert disposable mouth piece in breath hose, instruct subject to blow into mouthpiece for as long as possible. Green "Breath" light will turn on when proper sample is being given.
10. Breath Alcohol Concentration (grams Alcohol/210 Liters Breath) 0._____
11. Reconnect air and breath hoses, turn selector to "Air Blank", and allow instrument to run through cycle.

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Brinkmeyer ran the test three times. On the first two attempts, the machine failed to print out a breath alcohol content reading and the evidence cards were discarded. On the third attempt, Brinkmeyer placed an evidence card into the printer at the completion of step 4 rather than at the beginning of step 4 of the protocol and, as a result, did not obtain an "air blank" reading. The officer completed the balance of the checklist as prescribed, and obtained a reading of .177.

The State charged DeVries with operating a motor vehicle while under the influence of alcohol or while having .10 or more alcohol concentration. Iowa Code §§ 321J.2(1)(a),(b) (1999). DeVries moved to suppress the breath test result, claiming Brinkmeyer did not properly operate the Intoxilyzer machine. The district court denied the motion to suppress as well as DeVries' motion to reconsider. Following DeVries' stipulation to the minutes of testimony, the district court sentenced him to a prison term not exceeding five years. This appeal followed.

II. Scope of Review

DeVries claims the district court "misapplied the facts and misinterpreted the law" relating to the foundation for the admission of the breath test. The parties disagree as to whether we should review this issue for errors of law or for abuse of discretion.[2] As DeVries is challenging the district court's reading of a

[2] *Cf. State v. Shortridge*, 589 N.W.2d 76, 81 (Iowa Ct. App. 1998) (stating review of evidentiary rulings is for abuse of discretion); *State v. Geinzer*, 406 N.W.2d 457, 458 (Iowa Ct. App. 1987) (reviewing foundation for admission of breath test on error); *see also State v. Taylor*, 587 N.W.2d 604, 605-6 (Iowa 1998) (noting sufficiency of required foundation reviewed for abuse of discretion but necessity of foundation reviewed for errors of law).

statute and cases construing it, we conclude our review is on error. *See State v. Zell*, 491 N.W.2d 196, 198 (Iowa Ct. App. 1992).

III. Motion to Suppress

To establish a foundation for admission of a breath test, the State must first show the test was administered pursuant to methods approved by the Commissioner of Public Safety. Iowa Code § 321J.15; *Zell*, 491 N.W.2d at 198. Second, the State must establish the accuracy and reliability of the test result. *Geinzer*, 406 N.W.2d at 458. DeVries contends the district court erred in requiring the State to only prove the second element. We agree. Our court has framed the test conjunctively, stating, "it would be anomalous for us to hold that the mere following by rote of the prescribed methods is sufficient to render the test results admissible under [the predecessor statute]." *Id.* Therefore, the State was required to establish both elements to have the breath test admitted.

With respect to the first element, a Department of Public Safety criminalist conceded Officer Brinkmeyer did "not entirely" proceed in accordance with the department's protocol and further stated "I would always recommend the officer follow the procedure set out in the operational check list." Therefore, the State failed to prove procedural compliance with its own standards. This omission alone mandated suppression of the breath test result.[3]

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[3] We do not ignore cases holding evidence admissible despite less than literal compliance with procedural requirements, where the noncompliance did "not endanger the defendant's health" or "the accuracy of the test." *State v. Schlemme*, 301 N.W.2d 721, 724 (Iowa 1981). *See also State v. Lindeman*, 555 N.W.2d 693, 697 (Iowa 1996); *State v. Wright*, 441 N.W.2d 364, 368 (Iowa 1989). However, these cases did not address procedures associated with the machine. *Cf. Geinzer*, 406 N.W.2d at 459 (holding admission of test results was prejudicial error where Intoxilyzer registered a reading of.01 rather than .00 on "air blank" step); *State v. Wolfe*, 369 N.W.2d 458, 460 (Iowa Ct. App. 1985) (where Intoxilyzer failed to print out reading and machine was not

However, even if we were to agree with the district court that Officer Brinkmeyer's deviation from the protocol may be ignored if the test result is found to be accurate and reliable, we conclude the State failed to satisfy its burden on this second foundational element.

The State's criminalist opined that the test result was valid because readings garnered in step 7 of the protocol were within acceptable limits. Additionally, the criminalist emphasized that the test result he reviewed was the culmination of three attempts, two of which, he had been advised, were conducted pursuant to the protocol. He admitted that if the officer had not conducted two test runs before obtaining the result on the third try, he would have been forced to conclude the evidence card from the third test would not reflect a valid test result.

DeVries' expert witness disagreed with the State criminalist's opinion that the test result was valid. She opined that Brinkmeyer's failure to obtain an air blank reading at step 4, prior to calibrating the machine at step 7, invalidated the breath test result because that step 4 reading was the means for determining whether the chamber was contaminated with alcohol. She also noted that while the evidence cards from the first two tests may have afforded insight into the contamination question, those cards were not introduced.

Normally, we would defer to a district court's assessment of dueling expert witnesses because that court is in a better position to judge the credibility of

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introduced to establish it was functioning properly, State failed in its burden of establishing accuracy and reliability); *State v. DeBerg*, 288 N.W.2d 348, 350 (Iowa 1980) (reversing defendant's conviction where State failed to show only new, factory-wrapped syringes had been used to withdraw blood). We believe non-compliance with the intoxilyzer protocol outlined here directly implicates the accuracy of the test.

witnesses. *See State v. Jacobs*, 607 N.W.2d 679, 685 (Iowa 2000). However, we believe such deference is not warranted here because the State criminalist's opinion is based on a flawed assumption that the first two test runs were accurate and reliable.

Officer Brinkmeyer admitted that no reading printed out on either of the first two runs. He further admitted he had no explanation for why the readings did not print out. Although he speculated that the absence of a printout could have been caused by DeVries' failure to blow enough air into the machine, he conceded that a green light, normally indicating the sufficiency of the air sample, came on both times. Additionally, the State criminalist's assertion that the light might not have been continuously lit, as required to generate a printout, was contrary to Officer Brinkmeyer's testimony that the light was on.

The absence of evidence cards for the first two runs despite an indication that there was sufficient air in the chamber effectively means that the first two runs were not reliable. Indeed, Brinkmeyer conceded as much in electing to proceed with a third run. As the State failed to establish the accuracy and reliability of the first two runs, it could not use them to bolster the accuracy and reliability of the third test. Therefore, contrary to the district court's determination, the State did not establish the second foundational element for admission of the breath test and DeVries' motion to suppress the test and test result should have been granted. Nevertheless, we are convinced reversal is not mandated, given evidence supporting the alternate "under the influence" ground charged by the State.

IV. Under the Influence

Iowa Code section 321J.2(1)(a) provides that a person commits the offense of operating while intoxicated if the person operates a motor vehicle "while under the influence of an alcoholic beverage . . . ." Although the State does not argue that the evidence is sufficient to support the judgment on this alternate ground, we may affirm on any basis appearing in the record, whether urged or not. *State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980).

DeVries stipulated to the minutes of testimony. Those minutes contain Officer Brinkmeyer's case investigation report detailing the circumstances preceding DeVries' arrest. Brinkmeyer stated that while he was investigating the presence of an unattended vehicle on the interstate, a car drove up and parked behind him. DeVries got out of the driver's side of the car and approached Brinkmeyer. The officer "noticed a strong odor of alcohol coming from DeVries." He also noted DeVries had "watery/bloodshot eyes, and slurred speech." Brinkmeyer administered field sobriety tests. DeVries failed the "walk and turn" and the "one-leg stand" tests. We believe this evidence is sufficient to support DeVries' judgment for operating while under the influence under Iowa Code section 321J.2(1)(a). *See State v. Murphy*, 451 N.W.2d 154, 158 (Iowa 1990); *State v. Pieper*, 432 N.W.2d 701, 704 (Iowa Ct. App. 1988).

AFFIRMED.