



164

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,)
v.)
RANDY OLESEN,)
Appellant.)

Filed May 20, 1977

137
59741

Appeal from Guthrie District Court - M. C. Herrick, Judge.

Appeal from OMVUI conviction and resulting sentence.

Reversed and remanded.

R. E. Feilmeyer, Taylor, Taylor & Feilmeyer, of Guthrie Center, for appellant.

Richard C. Turner, Attorney General, Richard H. Doyle IV, Assistant Attorney General, and Coral F. Greenfield, Guthrie County Attorney, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Defendant, Randy Olesen, appeals his conviction for OMVUI contending trial court committed reversible error in admitting into evidence the circumstances surrounding and the results of a blood alcohol test because of the State's failure to show compliance with the provisions of section 321B.5, The Code.

Defendant was involved in an automobile accident on November 15, 1975, in which he was seriously injured and rendered unconscious. At the hospital in Jefferson, Iowa, defendant regained sufficient consciousness to tell hospital personnel his name, age, address and the location of his pain. Darrell Keast, a state trooper, having reasonable grounds to believe defendant was intoxicated, made a written request for withdrawal of a specimen of defendant's blood for chemical analysis. The physician attending defendant, Dr. Knosp, executed a certificate pursuant to § 321B.5 stating the defendant was "semi conscious - and or possibly inebriated." Consequently, the procedures outlined in §§ 321B.3, 4, 6, The Code, were not utilized. An analysis of the blood withdrawn from defendant showed a blood alcohol level of .267 milligrams.

Defendant's first assertion of having been placed in "double jeopardy" by this prosecution following his conviction of failing to have his motor vehicle under control is without merit. The elements of the offenses are not the same nor is one necessarily included within the other. *State v. Stergion*, 248 N.W.2d 911, 912 (Iowa 1976); *State v. Stewart*, 223 N.W.2d 250, 251-253 (Iowa 1974), cert. denied, 423 U.S. 902, 96 S.Ct. 205, 46 L.Ed.2d 134 (1975); *see also*, *State v. Cabbell*, ___ N.W.2d ___ (Iowa, April 20, 1977).

In his major assertion defendant urges that Dr. Knosp's certificate did not comply with § 321B.5, and, therefore, the

withdrawal of his blood was impermissible. The State initially contends error was not preserved by defendant. An examination of the record discloses that during the trial testimony when the State was attempting to lay a foundation for admission of the specimen of defendant's blood and the resulting test, defendant repeatedly objected that the foundation was lacking for want of compliance with § 321B.5. Any question concerning the specificity of the objections is resolved by defendant's objection to State's exhibit 3, the specimen of his blood: ". . . the certificate of Dr. Knosp that the defendant was either semi conscious or inebriated does not conform to statute, which requires that the doctor certify that the defendant was either unconscious or incapable of rendering consent or refusal." The gravamen of the State's argument is that since defendant did not object when the actual testimony of the results of the blood test was received, the error was waived since it is the result of the test which is the damaging evidence rather than the faulty certificate. The test of preservation of error is whether the objection is sufficiently specific and timely such that trial court is alerted to defendant's complaint in a manner that he can intelligently rule on it before error is inadvertently committed. *State v. Nimmo*, 247 N.W.2d 228, 230-231 (Iowa 1976); *State v. Clay*, 213 N.W.2d 473, 476-477 (Iowa 1973). To draw the distinction between error and harm as the State urges would be judicial hairsplitting and we believe would promulgate an unworkable standard for preservation of error. Defendant persistently, specifically and timely pointed out the defect in the State's foundation regarding the withdrawal of the blood specimen. Having repeatedly been overruled, he was required to do no more. *See State v. Kidd*, 239 N.W.2d 860, 863 (Iowa 1976).

Turning to the merits of defendant's contention, we hold Dr. Knosp's certificate failed to comply with the mandates of § 321B.5. The relevant portion of the statute states:

Any person who is dead, unconscious, or who is otherwise in a condition rendering him incapable of consent or refusal shall be deemed not to have withdrawn the consent provided by section 321B.3, and the test may be given; provided that a licensed physician *shall certify in advance of such test that such person is dead, unconscious or otherwise in a condition rendering him incapable of consent or refusal.* (Emphasis added.)

The only significant Iowa case interpreting this section merely has held that the doctor's certification must be in writing. State v. Boner, 186 N.W.2d 161 (Iowa 1971). There is no Iowa case deciding what this certificate must contain.

We agree with the State's interpretation that the language "or otherwise in a condition rendering him incapable of consent or refusal" is a catch-all phrase intended to apply to relatively common situations in which a person's injuries or physical condition are such that he is incapable of understanding the implied consent procedures even though he is not unconscious.

Certainly the legislature need not attempt to individually define the myriad of situations in which this incapacity may occur, in fact, it is doubtful it could reasonably do so. Instead, the legislature provided a common nexus to recognize these situations so that a peace officer can know when § 321B.5 is to be invoked. That nexus is the medical conclusion that the condition of the person, regardless of its cause, renders him incapable of intelligently giving consent or refusal. Therefore, it is not the person's medical condition or diagnosis that is crucial but it is the attending physician's medical conclusion concerning the person's capacity to consent or refuse. In short, the legislature wisely has delegated the task of defining those situations where

a person is incapable of understanding the implied consent procedures to the attending physician with his firsthand knowledge.

In this case, Dr. Knosp's certificate merely stated that defendant was "semi conscious - and or possibly inebriated", his medical diagnosis. The certificate, however, does not state his medical conclusion such that a reviewing court can ascertain that this presents a situation in which the legislature intended § 321B.5 to apply. We can not say that in every case in which a person is "semi conscious - and or possibly inebriated" that he is incapable of giving consent no more than we can say he always is capable of giving consent. Such is a medical, rather than legal, opinion which the code clearly mandates the attending physician to conclude in writing before § 321B.5 is invoked in a particular case.

We do not believe this result places the State in a "no-win" situation in such cases, but rather, merely places upon the State the burden of showing that the literal provisions of § 321B.5 were strictly followed. *See State v. Richards*, 229 N.W.2d 229, 233-234 (Iowa 1975). It follows trial court erred in overruling defendant's objections to exhibit 3. Our resolution of the issue in this manner renders unnecessary consideration of defendant's contention that he may challenge the validity of the doctor's findings even if the certificate was properly executed.

We have examined defendant's other contentions and have found them to be without merit or unlikely to occur again in light of our disposition of this case. Trial court's judgment is reversed and remanded for new trial.

SNELL and OXBERGER, JJ., concur; DONIELSON and CARTER, JJ., dissent.

DONIELSON, J. (dissenting)

I dissent. The majority states that 321B.5 was not complied with and this creates a reversible error. It is my contention that 321B.5 was strictly complied with and the case should be affirmed. (See attached Exhibit #2)

It is conceded the officer made a written request for a withdrawal of the defendant's blood for purposes of chemical analysis. The attending physician, Dr. Alton Knosp, executed pursuant to 321B.5, Exhibit #2, entitled "Certification of Licensed Physician".

A licensed physician under 321B.5 shall certify in advance of a blood test that the person is *"dead, unconscious, or otherwise in a condition rendering him incapable of consent or refusal"* then blood may be taken. Dr. Knosp's certificate meets this requirement. There is absolutely no wording in that statute which requires the doctor to state with particularity the reason nor does it require any definite diagnosis, but in fact, the form itself provides for the appropriate certification to comply with 321B.5.

The words *"semiconscious and/or possibly inebriated"* are merely additional verbiage on the form which is already designated to certify that the defendant is in a condition rendering him incapable of consent or refusal. Whether or not a defendant can impeach the certificate by independent evidence of his condition is another issue which does not go to the fact of certification. Here, Dr. Knosp testified at the trial and confirmed the certification in all respects.

The holding that the doctor's notes of *"semiconscious and/or possibly inebriated"* destroys the validity of the certification produces a result that does not comply with the rules of statutory interpretation, §4.6, The Code. The rule is well

settled in the construction of penal statutes as set forth in State v. Robinson, 165 N.W.2d 802, 805 (Iowa 1969):

"In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it."

See also State v. Lindsey, 165 N.W.2d 807, 810 (Iowa 1969) where it states:

"In construing section 322.3(9) it is proper for us to consider the purpose and the object to be attained by its enactment. Dingman v. City of Council Bluffs, 249 Iowa 1121, 1127, 90 N.W.2d 742, 747, and citations. Although penal statutes are to be strictly construed, they must be given a reasonable construction to accomplish the evident legislative intent."

I see nothing in State v. Boner, 186 N.W.2d 161, 164 (Iowa 1971) applicable to this case other than it affected the written medical certification pursuant to 321B.5. I further believe that the literal interpretation standards set forth in State v. Richards, 229 N.W.2d 229, 233-234 (Iowa 1975) are reasonable and necessary.

Note should be made that State v. Richards, *supra*, requiring literal interpretation is not in conflict in the slightest with the statutory construction §4.6, State v. Robinson, *supra*, or State v. Lindsey, *supra*. The accommodation of these purposes is best illustrated in State v. Boner, *supra*, at 164:

"The term 'to certify * * * means to testify to a thing in writing; and in the absence of statutory provision declaring the particular form of certification any form which affirms the fact in writing is sufficient.' (italics supplied)" (cites omitted) (emphasis added)

In 321B.5, however, it presents no requirement that Dr. Knosp do more than he did by the written certification by a licensed physician. The majority's opinion fails to specify those specific words in the statute from which this interpretation is derived. The addition on that form by Dr. Knosp that the defendant was "*semiconscious and/or possibly inebriated*" does not destroy the validity of the certification. To so hold or to suggest that this notation was some equivocation by Dr. Knosp voiding his certification is strained and beyond these reasonable statutory rules of construction.

Carter, J., joins in this dissent.

CERTIFICATION OF
LICENSED PHYSICIAN

STATE OF IOWA

COUNTY OF Green

} ss.

I, Alan Kung MD, certify that I am
a licensed physician of the State of Iowa. That on the 15 day of November,
1975, I was called to _____

(LOCATION OF STATION)

for the purpose of withdrawing body substances from the subject, Randy Olsen
(NAME AND ADDRESS)

to determine the alcoholic content of his blood.

I do further certify that I now find that such person is SEMI CONSCIOUS
(DEAD, UNCONSCIOUS, OR OTHERWISE)

IN A PHYSICALLY INEPT/INCAPABLE
IN A CONDITION RENDERING HIM INCAPABLE OF CONSENT OR REFUSAL)

and that I shall withdraw a specimen of (his) (her) blood under the provisions of Chapter 321B.5 Code
of Iowa.

Alan Kung MD
(NAME OF LICENSED PHYSICIAN)

(ADDRESS)

EX. 2
6-2-76
R.M.E.