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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-267 / 88-755

STATE OF IOWA,

Appellee,

730

vs.

WALTER DUANE AXLINE,

Appellant.

Appeal from the Iowa District Court for Tama County, Van D. Zimmer and Kristin Hibbs, Judges.

Defendant appeals his conviction and sentencing, following a jury trial, for one count of vehicular homicide and one count of OWI. **REVERSED AND REMANDED FOR NEW TRIAL.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Christie J. Scase, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Defendant Walter Duane Axline appeals his conviction and sentencing, after a jury trial, for one count of vehicular homicide and one count of OWI. Defendant raises three issues for our consideration on appeal: 1) the trial court erred by overruling his motion to suppress the results of an improperly-obtained blood test; 2) he was denied effective assistance of counsel because his trial attorney failed to request a jury instruction that OWI is a lesser-included offense of vehicular homicide; and 3) the trial court erred by sentencing him on both the OWI and vehicular homicide. We reverse and remand.

On May 8, 1987, the defendant and his friend, John Miller, were driving from Fort Riley, Kansas, to LaPorte City, Iowa, when the car flipped over. Miller was thrown from the car. The Tama County Medical examiner was called to the scene where he pronounced Miller dead. He then examined the defendant to ascertain the nature of his injuries. The defendant complained of pain in his left side, left abdomen, and left shoulder. However, his breathing was adequate and he was at all times conscious and talking. He repeatedly asked about his friend. Blood pressure readings taken at the scene remained within normal limits and did not cause the medical examiner concern. Dr. Mallory assessed the defendant's condition as stable immediately prior to the departure of the ambulance to the hospital.

Because the injuries were to defendant's lower chest and abdomen, the possibility of internal hemorrhage existed. At the scene of the accident, an I.V. was started, oxygen given, and blood pressure monitored. Defendant was then taken to the Marshalltown Hospital and placed in a trauma room.

X-rays and peritoneal dialysis were performed, the latter to determine if there was internal bleeding. A peritoneal tap is performed by inserting a needle partially filled with fluid into the abdominal cavity and flushing the fluid into the abdomen. The fluid is then collected through an abdominal catheter. This procedure only requires a topical anesthesia with zylocain, not a general anesthetic.

Myron Oberheu, a deputy sheriff for Tama County, had been at the scene of the accident. Because alcohol was detected on the defendant's breath, Deputy Oberheu went to the hospital to get a blood sample. He waited outside the trauma room a few minutes before the medical examiner came out. When Oberheu asked the doctor if the defendant was in a condition to give consent, the doctor responded "He's in no shape to understand or give consent." The deputy then requested the doctor to complete the certification form required by Iowa Code chapter 321J.7 in which the doctor certifies the person is dead, unconscious, or otherwise

incapable of consent to or refusal of a blood test.[1] The doctor certified the defendant was critically injured and incapable of consent, and then withdrew a sample of defendant's blood. The blood sample analysis revealed a blood alcohol level of .077.

Prior to trial, defendant moved to suppress the blood alcohol test results because they were withdrawn in violation of his statutory and constitutional rights. Defendant maintained he neither consented to the withdrawal of a blood sample nor was unconscious or otherwise incapable of consenting to or refusing the withdrawal. The trial court overruled the defendant's motion, concluding the defendant was conscious but incapable of consent. The jury found defendant guilty of one count of homicide by vehicle and one count of operating a motor vehicle while under the influence of alcohol.

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1. **321J.7 Dead or unconscious persons.**

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.

86 Acts, ch. 1220, § 7.

On appeal the defendant initially claims the trial court erred in overruling the suppression motion because there was not substantial evidence in the record to support the finding he was otherwise incapable of consent or refusal as required by section 321J.7.

Defendant further claims his trial counsel's failure to request a jury instruction that operating while intoxicated was a lesser-included offense of vehicular homicide was ineffective assistance of counsel. This omission, defendant alleges, denied him the opportunity to have the jury consider OWI as an alternative to convicting him of vehicular homicide.

Lastly, he asserts, the trial court erred by imposing sentence for both vehicular homicide and OWI, the greater and lesser-included offenses. This, defendant argues, is a violation of an Iowa statute, Iowa Rule of Criminal Procedure 6(2) and constitutional protections against double jeopardy.

The State, although contesting defendant's other arguments, concedes Iowa Code section 701.9 and the double jeopardy clause preclude sentencing on both vehicular homicide and OWI charges. The State recommends vacating defendant's conviction on the OWI charge.

Our review is for correction of errors at law. Iowa R. App. P. 4. Our scope of review on issues involving violation of basic constitutional safeguards is an

independent evaluation of the totality of the circumstances; this is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683 (Iowa 1984). In an appeal of a ruling on a motion to suppress, the trial court's ruling will only be set aside if there is not substantial evidence to support its finding. State v. Laughridge, 437 N.W.2d 570, 572 (Iowa 1989).

I. Physician's Certification. The supreme court unequivocally limited the weight which may be given a physician's certification of incapacity for consent or refusal of a blood alcohol test pursuant to section 321J.7. It rejected the notion a certification is conclusive evidence. State v. Weidner, 418 N.W.2d 47, 48 (Iowa 1988). Citing Mary v. Iowa Dep't of Transportation, 382 N.W.2d 128, 132 (Iowa 1986), Justice Carter wrote:

> We think it is essential in order for the test to be validly obtained under this statute that the conditions authorizing withdrawal of blood in fact be shown to have existed. . . . Although the required certificate is strong evidence that this is the case, it is not conclusive evidence. (Emphasis added.) (Citations omitted.)

State v. Weidner, 418 N.W.2d at 48.

Before ruling on a motion to suppress a certification, the trial court must make a specific finding of fact upon which the admissibility of the evidence is to depend. Id. at 49; Iowa R. Evid. 104(a). The trial court's finding will be set aside only if there is not substantial evidence

to support its finding. State v. Laughridge, 437 N.W.2d at 572.

In the instant case, the trial court found the defendant was conscious but was in a condition making him incapable of consent or refusal, and further "that unrebutted medical evidence indicates that permitting the defendant to be subjected to the implied consent procedure would have been detrimental to his condition."

As directed by Weidner, we must determine if there is substantial evidence the condition authorizing withdrawal of blood in fact is shown to have existed. We turn to the transcript of the suppression motion hearing to ascertain these facts.

The medical examiner told the police deputy it would not be possible to see the defendant because he wasn't competent. However, the medical facts provided by all the medical personnel involved, which includes the medical examiner himself; the trauma room physician, Dr. Kosinski; as well as the emergency room nurse, do not support this conclusion.

A. On cross-examination, the medical examiner testified about the defendant's vital signs recorded at the scene of the accident.

> A. They [vital signs] did not cause me any concern at that time. It's always important to ascertain when the accident occurred, how long it had been since his initial injury and the accident. I felt that had been 30 minutes or so based upon what law enforcement had told me. He

had been walking around and sitting; and when I took his blood pressure, had been sitting in the ambulance for a few minutes. It's difficult to say whether that's three minutes or five minutes, or what, but these readings are not unusual, no; they are almost normal.

Q. They are not indicative of a person who is in shock, are they? A. Not at this time, no.

B. The doctor testified the defendant's condition was stable when he was taken to the hospital.

Q. Now when you--on the bottom of your progress notes I note that you indicate that his condition is stable. IS that what you indicate on the bottom of your progress notes? A. That's correct.

Q. So at that particular time when--what, that would have been when the ambulance was leaving for the Marshalltown Hospital? A. Yes.

Q. You didn't feel he was in any danger of dying at that point? A. I felt he was stable.

Q. Well, did you feel he was in any danger of dying at that point, realistically? A. Well, no. If I would have felt that his condition was deteriorating based on the information I had we would have stayed and put him in mass trousers and perhaps called for a helicopter, but I felt his condition was stable enough that I felt he could be transported by a ground ambulance for a hospital trip.

C. The ambulance service record recorded defendant's mental status as conscious, awake, and responsive to questions. Dr. Mallory agreed a detailed checklist of readings of other body areas on the ambulance service record were within the normal range.

D. Dr. Mallory testified about the emergency room nurse's evaluation of defendant's condition upon arrival.

Q. Does that history indicate that Mr. Axline was alert and answered questions appropriately?

A. Yes, and that's indicated--There's a dash, and just prior to that it says "neurols." That means she has a protocol to follow in asking questions about his name, reference, time and place, et cetera, and she indicated that his answers to questions were appropriate, and he appeared alert.

Q. Do the emergency room notes also indicate that Mr. Axline was responding to commands? A. Yes. Now, those are Dr. Kosinski's, that's his writing which means that he asked him to grasp his hand; and, again, it's a further neurological exam.

Q. The emergency room record would have covered the period of time from 23:05 until what time? A. About 20 minutes after midnight, which is indicated in the bottom right-hand corner "discharge time." Usually that indicates the time that he leaves the emergency department for surgery, or the floor, or other definitive care.

Q. And is his condition listed as "fair" at that time? A. Yes.

E. The readings obtained while the defendant was monitored in the emergency room were within the range of normal and nothing in the emergency room records indicated defendant's condition suddenly worsened. Dr. Mallory agreed defendant's condition was stable upon arrival at the emergency room as well as when he was transferred.

Q. I just handed you Defendant's Exhibit No. 4, and ask if you can identify that for us? A. This appears to be a copy of the discharge summary, yes.

Q. In that summary does Dr. Kosinski indicate that when he first observed Mr. Axline he was alert and cooperative? A. Yes, he does.

Q. And would you agree with that assessment? A. Yes, I would.

Q. Does his discharge summary also indicate that Mr. Axline responded appropriately on command? A. In the emergency room notes, yes, and also in his discharge summary.

> Q. Is there anything in the discharge summary that would indicate that Mr. Axline's condition suddenly took a turn for the worse while he was in the emergency room? A. No, there isn't.

The supreme court has defined the term "otherwise incapable" as a condition which renders the person incapable of manifesting a choice concerning whether to withdraw the statutory implied consent. Mary v. Iowa Dep't of Transportation, 382 N.W.2d at 132. The fact Mary was not fully coherent and appeared confused was insufficient evidence to convince the court he was incapable of manifesting consent. Id. at 133.

Subsequent cases dealing with this issue have turned on the specific medical condition of each individual. State v. Laughridge, 437 N.W.2d 570 (Iowa 1989); State v. McQuillen, 420 N.W.2d 488 (Iowa App. 1988); State v. Weidner, 418 N.W.2d 47 (Iowa 1988).

In Laughridge, the defendant appealed denial of his motion to suppress blood test results for the same reason as Axline. Laughridge, 437 N.W.2d at 570. The supreme court affirmed the district court because there was substantial evidence in the record to support the trial court's ruling. Id. at 572. However, Laughridge was unable to answer simple questions asked by the emergency room nurse and the doctor, although "he appeared to understand what was said." Id. He failed to respond to three separate attempts by the arresting officer to advise him of his implied consent rights. Id.

The defendant in McQuillen signed the consent form and provided a blood sample at the hospital. State v. McQuillen, 420 N.W.2d at 488. At trial he moved to suppress the results because he was incapable of giving consent and he should, therefore, have been certified incapable by a physician. Id. at 489. This court upheld the trial court's determination the consent was voluntary. Id. The treating physician's medical report described the defendant as stable, alert, and oriented. Id. Although there was evidence of grogginess, the doctor stated "the defendant's answers to questions were all appropriate except when we started talking about the accident." Id.

In Weidner, defendant also was contesting trial court's admission of tests obtained subsequent to a physician's certification. State v. Weidner, 418 N.W.2d at 48. The supreme court affirmed. Id. The medical examiner testified Weidner was semi-conscious and thus, unable to give consent. Id. The emergency room nurse thought the defendant was beginning to come out of his unconsciousness when admitted to the hospital. Id.

In the above cases there is evidence of incapacity to support the trial court's denial of a suppression motion.

In the instant case the trial judge wrote in the ruling on the motion to suppress "The evidence indicates that at the time the physician's certification was signed by Dr.

Mallory, the defendant was, in fact, conscious and reasonably alert." The judge's ruling seems to be based on evidence of the doctor's concern for his patient's condition, rather than conditions which in fact must be shown to exist.

We find there was not substantial evidence in the record to support the trial court's ruling denying defendant's motion to suppress. Therefore, we reverse and remand for a new trial consistent with this opinion, which includes sentencing in accordance with Iowa Rule of Criminal Procedure 6(2). The defendant may be sentenced on OWI or vehicular homicide, but not both.

REVERSED AND REMANDED FOR NEW TRIAL.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. In doing so and as it relates to the three grounds urged by the defense for reversal, I would (1) affirm the trial court except as it relates to the conviction and sentence of the OWI charge; (2) reserve for postconviction relief the question of ineffective assistance of counsel (trial counsel should be given an opportunity to explain his reasons, particularly under the circumstances here where the "all or nothing rule" may have some application); and (3) as conceded by the State, vacate defendant's conviction of the OWI charge.

As the majority points out, in an appeal of a ruling on a motion to suppress, the trial court's ruling will only be set aside if there is substantial evidence to support its findings. In this respect, findings of fact by the court on preliminary evidentiary issues must be sustained if supported by substantial evidence. State v. Weidner, 418 N.W.2d 47, 48 (Iowa 1988).

Like in Weidner, where it is stated, "Although the medical examiner's conclusions concerning defendant's capability of consenting to the test were challenged, there was substantial evidence to support the district court's finding that the certificate correctly reflected his incapability of so doing," I find there is substantial evidence to support the district court's finding.

Dr. Mallory arrived at the scene of the accident at about 10:00 p.m. on May 8, 1987. He immediately examined the defendant. He determined that the defendant suffered probable blunt trauma to the chest and abdomen. He feared that the defendant might be suffering internal hemorrhaging, and he had the defendant transferred to the Marshalltown Hospital after starting an IV and administering oxygen. He radioed ahead and requested that an emergency room surgeon be available at the hospital.

The surgeon, Dr. Kosinski, and Dr. Mallory both feared that the defendant might be hemorrhaging internally and determined that a peritoneal tap should be performed to investigate the possibility of internal bleeding. At the time the peritoneal tap was being administered, Dr. Mallory stepped out of the emergency room and observed Deputy Oberheu. Deputy Oberheu advised Dr. Mallory that he desired a sample of the defendant's blood. Dr. Mallory told the deputy that the defendant was "in no shape to understand or give consent." Dr. Mallory, at the suppression hearing, further testified that he did not believe the defendant was competent at the time of the deputy's request, stating that he "did not feel the patient was physically and mentally able to respond to questioning or understand his rights."

Dr. Mallory was concerned about his patient. He testified:

> We felt that he had multiple blood trauma to the chest and abdomen with probable internal bleeding. It was questionable initially whether or not he had a cervical spine injury. We did not feel that he had any other fractures at that time. We ordered x-rays and we felt we should order a peritoneal dialysis, which is a test to determine whether or not he was bleeding internally.

In response to the following questions by the prosecution, the record reveals that Dr. Mallory gave the following testimony:

> Q. [Prosecutor] What were your reasons for telling Deputy Oberheu that he was not competent--that is, Mr. Axline was not competent; that you did not want Deputy Oberheu to see him at that time? A. [Dr. Mallory] I did not feel that the patient was physically or mentally able to respond to questioning or understand his rights. The reason we were doing the peritoneal dialysis was to determine the extent of shock or internal bleeding. At that point in time I believed that Mr. Axline was bleeding profusely internally and was in serious need of perhaps further care and on the way to the operating room, and I did not want to take the time with the law enforcement officer to read him his rights.
>
> Q. By what you told Deputy Oberheu, were you telling him that he could not see the patient, that is, Mr. Axline? A. That's correct.
>
> Q. Did you certify to Deputy Oberheu that Mr. Axline was critically injured in an accident? A. Yes, I did.
>
> Q. Did you certify that Mr. Axline was in a condition rendering him incapable of consent or refusal to a blood test? A. Yes I did.

The testimony further reveals that the results of the peritoneal tap were equivocal; when the defendant was released from the emergency room, he was admitted to the hospital's intensive care unit with the diagnosis that included the possibility of a ruptured spleen.

The trial court, in its ruling, set forth the specific findings of fact on which it based its ruling. Weidner, 418 N.W.2d at 49. It determined that the defendant was incapable of giving or refusing consent. This finding was fully consistent with the conclusions of Dr. Mallory, who so certified.

I agree with the majority that the certification of a physician of incapacity for consent or refusal of a blood alcohol test under section 321J.7 is not conclusive. Weidner, 418 N.W.2d at 48. However, the "required certificate" is strong evidence that this is the case; Weidner, 418 N.W.2d at 48.

And so in this case we not only have the certificate of the licensed physician, we also have his testimony as to the basis for that decision. In summary, the physician was concerned about the health of the defendant; the defendant was a patient in the emergency ward of the hospital; at the time crucial to this case, the defendant was undergoing the peritoneal tap; the doctor believed the defendant was "bleeding profusely internally and was in serious need of perhaps further care" and on the way to the operating room; and the defendant was later admitted to the intensive care ward.

Dr. Mallory determined that the defendant's condition was so serious that he refused the deputy's request to see the defendant. It cannot go unnoticed that Dr. Mallory, to

whom the defendant entrusted his care, declined the deputy's request to see and converse with the defendant.

I realize there is conflicting evidence contrary to the doctor's diagnosis and observations. Nonetheless, when I review the record, I find substantial evidence to support the district court's findings that the certificate of the doctor correctly reflected the defendant's incapability of giving consent or refusal.

Therefore I would affirm the trial court except in the instances which I set forth in paragraph one of this dissent.