IN THE COURT OF APPEALS OF IOWA

No. 1-098 / 00-0559
Filed April 11, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID NANCE CORREY,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Peter A. Keller, and Darrell Goodhue, Judges.

Defendant appeals from the judgment and sentence entered upon his conviction for second-offense operating while intoxicated in violation of Iowa Code section 321J.2 (1999). **AFFIRMED.**

James A. Sinclair of Sinclair & Associates, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Wayne Reisetter, County Attorney, and Kelli J.A. Olson, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

David Correy appeals from the judgment and sentence entered upon his conviction for second-offense operating while intoxicated in violation of Iowa Code section 321J.2 (1999). He contends (1) he was denied an independent test in violation of section 321J.11, and (2) denial of this right requires suppression of the State's test evidence. We affirm.

I. Factual Background and Proceedings. On July 29, 1999, Deputy Steven Bandy arrested Correy for operating while intoxicated ("OWI"). After his arrest, Correy submitted to an intoxilyzer test, which revealed he had a blood alcohol level above .10%. After the State charged him with OWI second-offense, Correy filed a motion to suppress alleging he had been denied his right to independent testing of his blood alcohol level. Bandy and Correy had differing versions of the events the night of Correy's arrest. Bandy described the exchange as follows:

> Q: And while all this was going on, did the defendant ask you any questions? A: . . . As I proceeded to leave the jail facility, he asked . . . "Am I entitled to an independent test?"
>
> Q: What was your response, Deputy Bandy? A: Absolutely, and I proceeded to tell him how we would accommodate him to do that.
>
> Q: Okay. And how is it that you would have accommodated him? A: Allow him to make as many phone calls as necessary to have somebody come to the jail and do that independent test.
>
> Q: At that point, what did you do then? A: I advised him of that, and I said that the jailer wasn't there at that time, and I said that when the jailer returns, she will allow you, again, to make as many phone calls as you need to achieve that. He asked if I would transport him out of the facility, and I said, "No, I'm not going to transport you out of here. You'd have to have somebody come here, and it would be at your own cost."
>
> Q: When the defendant said, "Am I entitled to an independent test?" and you responded, "Yes." what did you think

> the defendant was asking you? A: As I stated in the report, he was asking questions about the independent test.
>
> Q: Did he indicate to you that he wanted to have an independent test? A: Not at any time did he indicate or ask that he wanted an independent test.

Correy described the incident as follows:

> Q: Please tell the Judge what you did to try – in an attempt to secure an independent test. A: I asked the officer, and he told me he wasn't going to transport me anywhere, so pretty much I was in jail. I didn't know what to do, so I made my phone calls. I mean, it was late, so I was getting answering machines, so I just requested with my friends to – you know, when they got this message to try to get a doctor out there for me and that I didn't really know what to do. I was kind of dumbfounded when he told me that he wouldn't transport me. I thought they'd have a procedure there where I would be able to get one.
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> *****
>
> Q: Okay. So [the jailer] was in the room with you; right? A: Yes.
>
> Q: Okay. And did you indicate to that person that you wanted an independent test? A: Yes.

The district court denied Correy's motion to suppress finding Bandy's version of the events was more believable than Correy's. The court also noted, "even if the court accepts Defendant's version of the events as the more accurate account, Defendant cannot prevail on his motion as neither Deputy Bandy's actions nor his inactions constitute a frustration or denial of Defendant's right to have the independent test."

II. Standard of Review. Our review is for the correction of errors at law. Iowa R. App. P. 4; *State v. Cooley,* 587 N.W.2d 752, 754 (Iowa 1998). The district court's findings of fact are binding on us if supported by substantial evidence. *State v. Wootten,* 577 N.W.2d 654, 656 (Iowa 1998).

III. Merits. Correy sought suppression of the test administered by the deputy based on his right to have an independent blood test under section 321J.11. The section provides in relevant part:

> The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

Iowa Code § 321J.11. A defendant is not entitled to an independent test until after he has taken the test requested by the officer. *State v. Mahoney,* 515 N.W.2d 47, 50 (Iowa Ct. App. 1994). Officers are not required to advise a defendant of the statutory right to an independent test. *State v. Epperson,* 264 N.W.2d 753, 756 (Iowa 1978).

Correy testified he requested to take an independent test from both Bandy and the jailer. Bandy testified Correy never specifically requested an independent test. We need not decide whether the exchange between Correy and Bandy constituted a request for independent testing because, even if we were to conclude Correy did make the request, his statutory right to obtain the test was not illegally frustrated by Deputy Bandy's actions.

Section 321J.11 does not prescribe a procedure to be followed by law enforcement officers after an arrestee requests an independent chemical test. The Iowa appellate courts have not defined the scope of an officer's duties when faced with such a request. However, in *State v. Wootten,* our supreme court

indicated the standard should be one of "reasonableness" under the circumstances of the case. *Wootten,* 577 N.W.2d at 656. The court ultimately declined to apply the standard to the facts in *Wootten* because the defendant had not made a timely request for the test. *See id.* The court stated:

> In the present case, the timing of the defendant's request created a problem for the jailer, who had no means of transporting [the defendant] to the hospital, and for the [ ] police officers, who would be called away from their other duties to retrieve him and take him there. While inconvenience to officers should not be the controlling factor, the unnecessary diversion of officers from other duties should be considered on the issue of reasonableness, along with the timing of the request and [the defendant's] opportunity at the police station to make the request.

Id. In short, law enforcement officers do not have an absolute duty to transport an arrestee from the jail for the purpose of securing an independent chemical test when requested to do so by an arrestee.

Using a "reasonableness" standard to determine the scope of the officer's duties when a request for an independent chemical test is made comports with the standard used when other statutory rights are invoked by a defendant arrested for OWI. Iowa Code section 804.20, which provides a statutory right to counsel, does not provide an absolute right to counsel, but requires a peace officer to provide the arrestee with a *reasonable opportunity* to contact an attorney. *Bromeland v. Iowa Dep't of Transp.,* 562 N.W.2d 624, 626 (Iowa 1997) (emphasis added). Ordinarily the statutory right to counsel is satisfied if the arrestee is allowed to make a phone call to a lawyer. *Ferguson v. Iowa Dep't. of Transp.,* 424 N.W.2d 464, 466 (Iowa 1988).

In the present case, Correy was allowed to make two phone calls from his jail cell. While Correy argues he should have been allowed access to a telephone book, there is no evidence in the record indicating he asked to use a phone book or asked for assistance in finding a telephone number that might have furthered his ability to obtain an independent test. There is also no evidence Correy asked to make additional phone calls and was denied access to a telephone. We conclude Correy was allowed a reasonable opportunity to obtain an independent chemical test. Any failure to obtain such a test was due to circumstances other than Bandy's actions. The district court's finding Bandy's actions did not frustrate the exercise of Correy's right to independent testing is supported by substantial evidence in the record. Accordingly, we affirm the district court's denial of Correy's motion to suppress the results of the intoxilyzer test taken at the police station.

AFFIRMED.