IN THE COURT OF APPEALS OF IOWA

No. 4-371 / 93-806

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

COREY RAY ABBOTT,

Appellant.

Appeal from the Iowa District Court for Polk County, Vincent Hanrahan and Jack D. Levine, Judges.

Defendant appeals judgment and sentences, following jury trial, entered upon his convictions of possession of marijuana and operating while under the influence, in violation of Iowa Code sections 204.401(3) (now codified at Iowa Code section 124.401(3) (1993)) and 321J.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, John Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

DONIELSON, C.J.

Defendant Corey Ray Abbott appeals from his convictions for possession of marijuana and operating while intoxicated. He contends the trial court erred in denying his motion to suppress evidence seized from his vehicle and in failing to suppress the results of a breath test taken at the West Des Moines Police Department. We have reviewed the parties' arguments, briefs and the relevant law and affirm the trial court's rulings in their entirety.

I. Consent to Search Vehicle.

Abbott filed a motion to suppress evidence seized in a search of his automobile. This issue raises constitutional questions and we make an independent evaluation of the totality of the circumstances. See State v. Campbell, 326 N.W.2d 350, 352 (Iowa 1982).

Abbott's car was stopped after Officer Ouverson observed several equipment violations and had seen the vehicle make a wide turn and weave. Prior to stopping Abbott's vehicle, Ouverson received a dispatch indicating Abbott was reported to be driving while intoxicated and was possibly suicidal and armed.

Ouverson believed Abbott was impaired and had him perform several field sobriety tests. Abbott performed poorly on the tests and Ouverson decided to arrest him for operating while intoxicated. Prior to formally arresting Abbott, Ouverson asked him for permission to search his

car. Backup officer, Officer Jess, was present when Ouverson requested permission to do the search. Both officers testified Abbott gave permission for a search of his car. Among other things, an open container of beer, and marijuana were found in the vehicle.

Warrantless searches and seizures are unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. State v. Myer, 441 N.W.2d 762, 764-65 (Iowa 1989). Granting authorities the consent to search is an exception to the warrant requirement. Id. at 765. The consent to search must be given voluntarily, and the State bears the burden to establish consent was voluntarily given. State v. Erickson, 362 N.W.2d 528, 530 (Iowa 1985).

Abbott contends Officer Ouverson did not obtain a signed "consent to search form" before conducting the search. Abbott cites no authority, and we are aware of none, which would require his consent be written rather than verbal in nature. Abbott also argues Ouverson did not advise him he did not have to give him consent to search the vehicle. While knowledge of the right to refuse is a factor to be considered in determining the voluntariness of the consent given, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854, 862-63 (1973).

Abbott contends he did not give consent for the search and two officers testified he did. There may be substantial evidence to support either the existence or nonexistence of a fact. State v. Frake, 450 N.W.2d 817, 818 (Iowa 1990). In such a case, the factual determination would likely be based upon the credibility of the witnesses. Id. at 819.

From our review of the totality of the circumstances, we conclude Abbott voluntarily consented to a search of his vehicle. Officers Ouverson and Jess were both present when the request was made and heard Abbott's affirmative response. We reject the argument Abbott's intoxication, state of mind or prior head injuries interfered with his ability to consent. At the time in question Abbott had the presence of mind to try and avoid impoundment of his vehicle by proceeding to his home rather than immediately stopping when he saw Officer Ouverson's red lights. Abbott's faculties were not so impaired as to render him unable to consent to a search of his vehicle. The trial court properly denied the motion to suppress evidence found in the search of his car.[1]

II. **Motion to Suppress Breath Test.**

Pursuant to Iowa Code section 321J.6 Abbott was subjected to a chemical breath test at the West Des Moines

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1. Since we find consent to search was given in this case, we need not reach the State's alternative arguments in support of the lawfulness of the search.

Police Department. Regulations issued by the Iowa Department of Public Safety require the operator of an intoxilyzer device to administer the test in accordance with instructions furnished by the Iowa Department of Public Safety's Criminalistics Laboratory. 661 Iowa Admin. Code 7.2(1). The instructional checklist utilized in this case specifically required Officer Ouverson to --

> 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.

Abbott contends the results of the test should have been suppressed because proper procedures for administration of the test were not followed. The State is obliged to show compliance with the checklist procedures. State v. Hershey, 348 N.W.2d 1, 2 (Iowa 1984). Our review is for an abuse of discretion. Id.

Abbott asserts during the fifteen-minute period preceding the administration of the test he belched and his belch could have skewed the test results. Abbott did not advise the officers he had belched and they testified they did not hear or see him do so.

The fifteen-minute observation requirement was designed to insure an arrestee did not smoke, eat or drink prior to the chemical testing. See Morgan v. Iowa Dept. of Transp., 428 N.W.2d 677, 678-79 (Iowa App. 1988). It is not necessary to demonstrate a fifteen-minute period of continuous observation to satisfy the requirement. Hershey, 348 N.W.2d at 3. Any reasonable likelihood an

arrested person had anything to smoke, eat or drink can be negated by circumstantial as well as direct evidence. Id.

We conclude the results of the test were properly admitted. The observation requirement does not specifically prohibit a subject from belching during the fifteen-minute period preceding testing. Dicta in Anson v. Iowa Dept of Transp., 477 N.W.2d 695, 96-97 (Iowa App. 1991) should not be read to otherwise impose such a requirement. Other jurisdictions have similarly held a defendant's alleged belch will not invalidate the results of a breath test. See Gunderson v. Municpality of Anchorage, 769 P.2d 436, 441-42 (Alaska 1989) (where defendant did not assert regurgitation and belching were synonymous, officer was not required to observe him for belching prior to administration of test); People v. Johnson, 148 Ill. App. 3d 4, 5, 499 N.E.2d 66, 68 (3rd Dist. 1986) (alleged belch did not invalidate test where governing regulation did not proscribe belching during the observation period).

Abbott's concerns about the effect of a belch on the test result goes to the weight of the evidence, not the foundational basis for admitting it. To the extent he wished to challenge the test on this basis, it was his obligation to introduce evidence regarding the effect of belching upon the test results. See e.g., DeBoer v. Commissioner of Public Safety, 406 N.W.2d 43, 45 (Minn. App. 1987); Columbus v. Ziegler, 78 Ohio App.3d 819,

822-23, 605 N.E.2d 1360, 1362-63 (1992). Abbott attempted to elicit such evidence from a prosecution witness, Dr. Wooters, but the evidence was inadequate to establish ahis belch would have skewed the actual test results.

The record reflects Abbott was observed by law enforcement officers for at least 15 minutes prior to administration of the test and did not eat, drink or smoke during that period. Officer Ouverson fully complied with the operational checklist, and we find no abuse of discretion in admitting evidence of the results of the intoxilyzer test.

AFFIRMED.