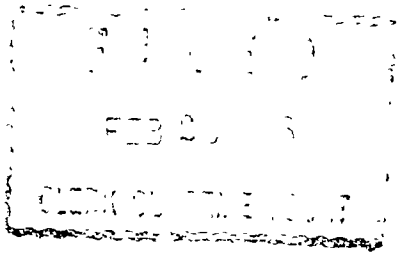
IN THE COURT OF APPEALS OF IOWA

No 6-032 / 95-715

001135



STATE OF IOWA,

Plaintiff-Appellee.

vs.

MICHAEL STEVEN PALMER,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, William G. Klotzbach, District Judge, and James D. Coil, District Associate Judge.

Defendant appeals his convictions and sentences for operating a motor vehicle while intoxicated (second offense), driving while suspended under financial responsibility law, and possession of a controlled substance (marijuana). **AFFIRMED.**

Mark E. Mershon of the Mershon Law Firm, Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kasey Wadding and Anthony Janney, Assistant County Attorneys, for appellee.

Considered by Sackett, P.J., Cady, J., and Peterson, S.J.*

* Senior judge from the First Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Defendant-appellant Michael Steven Palmer appeals his convictions and sentences for operating a motor vehicle while intoxicated (second offense), driving while suspended under financial responsibility law, and possession of a controlled substance (marijuana). Defendant contends: (1) the district court erred in failing to suppress evidence obtained following what he characterized as an illegal stop of his vehicle; and (2) the sentencing court abused its discretion by not sentencing him to a community-based facility instead of imprisonment and not giving him credit for inpatient treatment. We affirm.

An officer with the Hudson, Iowa, police department had learned in late April that defendant's driver's license was revoked. He gained the information from a memorandum circulated by another Hudson police officer. On May 5, 1994, at approximately 7:15 p.m., the first officer claimed he saw defendant driving a brown truck. The weather was rainy and gloomy. The officer testified he recognized defendant because he had once served papers on him and had seen him on other occasions. The officer also knew another officer had seen defendant drive the same truck several days earlier. The officer stopped defendant and asked for his driver's license. Defendant stated he did not have it with him. The officer checked with the Department of Transportation and confirmed defendant's driver's license was still under suspension. The officer then arrested defendant for driving while his license was revoked.

In the process of arresting defendant, the officer saw that defendant seemed to have been drinking an intoxicating beverage. When the two got to the Black Hawk County jail, the officer instructed defendant to perform field sobriety tests, which he failed. Defendant was then arrested for driving while intoxicated. The officer read the implied consent advisory to defendant and asked defendant to submit to a breath test. Defendant asked to speak to an attorney before he consented to taking the test. Defendant was given the opportunity to call his attorney, but only reached an answering machine. He was permitted to make another call to another attorney, but was unable to contact anyone. Further attempts to contact his attorneys were unsuccessful.

Defendant was asked if there were other attorneys he wished to call, and defendant said he knew no others. The officer gave defendant a telephone book and opened the book to the yellow pages under the listing for attorneys. Defendant went through the telephone book for twenty minutes. The officer then asked for a breath test again. Defendant said he wanted to contact an attorney before giving or refusing his consent. The officer again asked defendant if he would consent to a breath test, and defendant said, "no." The officer then invoked implied consent.

Defendant filed a motion to suppress all evidence seized as a result of the stop, claiming the stop was illegal and he was denied reasonable time to contact his attorney. On appeal, defendant claims the trial court should have sustained his motion.

Defendant specifically challenges the officer's ability to identify him as the driver of the truck. He advances the officer did not know him, and the weather conditions and the speed of his truck and the patrol car would have made it impossible for the officer to identify him prior to the stop.

The standard of review for this constitutional claim is de novo; this court must make an independent evaluation of the totality of circumstances shown by the entire record. *See State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993).

The officer had information defendant's driver's license was revoked, and defendant had been seen driving the same truck the officer stopped. The officer confirmed the revocation at the time of the stop. The officer testified he knew defendant and called him by name when he stopped him. There is no basis to defendant's claim the officer did not have a reasonable basis to stop him. *See State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993).

Defendant next claims the officer improperly invoked implied consent, and any evidence of his refusal to consent to a breath test should be suppressed. The trial court found defendant was given six phone calls and about twenty minutes to talk to an attorney and had been given ample opportunity to obtain a lawyer prior to the officer's last request for a breath test. We agree.

Defendant's last contention is the trial court abused its discretion in sentencing him to the Department of Corrections rather than a community-based facility, and

erred in not giving him credit for time spent as an inpatient in a substance abuse treatment center.

Prior to trial, it was stipulated defendant would be tried only on counts of operating while intoxicated and driving while suspended. Defendant also pleaded guilty to an unrelated charge of possession of a controlled substance (marijuana). At sentencing, defendant maintained he had been working at John Deere for twenty-one years and a sentence of imprisonment would result in the loss of his job. He proposed numerous methods of incarceration in residential facilities. The district court sentenced defendant to a two-year term in prison and fined him $750 on the operating while intoxicated charge, and gave him a consecutive sentence of one year and a $250 fine on the driving while his license was suspended charge. Defendant was further sentenced to a six-month jail term to be served concurrently to the operating while intoxicated charge.

Defendant advances the district court abused its discretion in sentencing him to prison terms rather than offering him probation and treatment at a residential correctional facility. Defendant maintains he will be released much sooner under a prison sentence and will receive fewer benefits from treatment.

The court reviewed available sentencing options and concluded defendant had had repeated failures to respond to efforts to rehabilitate him and incarceration was appropriate. Defendant has failed to show the trial court abused its discretion in the sentence. *See State v. Sumpter*, 438 N.W.2d 6, 10 (Iowa 1989).

Defendant's last claim is the trial court should have given him credit against his sentence for seven days of inpatient treatment. The district court denied his request for the credit Defendant voluntarily admitted himself for the treatment. The court did not order defendant in the treatment. Defendant is not entitled to the requested credit. *See State v. Wiese*, 342 N.W.2d 858, 860 (Iowa 1984).

AFFIRMED.