

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

LARRY LEE WRIGHT,)

Defendant-Appellant.)

8-293
87-1347

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Appeal from the Iowa District Court for Linn County
(AG 4988), John F. Siebenmann, District Associate Judge,
and Robert E. Sosalla, Judge.

Defendant appeals from his conviction, following a
trial to the court, for the crime of OWI. **REVERSED AND
REMANDED.**

David S. Nelson, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark J.
Zbieroski, Assistant Attorney General, for
plaintiff-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

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The defendant, Larry Lee Wright, appeals from his conviction, following a stipulated trial proceeding, for the crime of operating while intoxicated (OWI). Wright contends the results of a breath test should have been suppressed because implied consent procedures were not invoked by a qualified peace officer. Defendant contends this officer, a reserve peace officer, had not been appointed or supervised in accordance with the requirements of Iowa Code chapter 80D, and therefore was not a "peace officer" within the meaning of Iowa Code section 321J.1(7). For the foregoing reasons, we reverse the decision of the trial court.

I.

On December 26, 1986, Wright was arrested for OWI by two "reserve peace officers" for the City of Center Point, Iowa. A preliminary breath test administered by a Linn County Deputy Sheriff indicated an alcohol content in excess of the statutory limits. One of the "reserve peace officers," Richard McLaud, thereupon invoked the provisions of Iowa's implied consent statute pursuant to Iowa Code chapter 321J.

Wright was later tried to the court for the crime of OWI, second offense. The court found him guilty, and he has appealed from the resulting conviction.

II.

The defendant contends the district court should have suppressed the evidence of breath test results. He argues the reserve peace officers had not been appointed or supervised according to Iowa Code chapter 80D and were therefore without authority to invoke implied consent procedures pursuant to Iowa Code section 321J.6 because they could not be included in the statutory definition of peace officers.

Where there is no factual dispute, we review trial court's conclusions as a matter of law; in reviewing law issues we are not bound by the trial court's ruling. Dickinson Co. v. City of Des Moines, 347 N.W.2d 436, 439 (Iowa App. 1984).

III.

Our analysis here is two-fold. First, we determine whether the City of Center Point adequately complied with Iowa Code chapter 80D when it commissioned two "reserve peace officers" to supplement the City's regular force. We hold they did not.

Chapter 80D constitutes the only procedure under Iowa law for appointing reserve peace officers. The chapter defines a reserve officer as a:

A volunteer, nonregular, sworn member of a law enforcement agency who serves with or without compensation, has regular police powers, or functioning as an agency's representative and participates on a regular basis in the agency's activities, including those of crime prevention and control, preservation of the peace and enforcement of the law.

Iowa Code § 80D.1 (1987). The defendant argues ³⁹²the City failed to comply with the statutory mandates articulated in section 80D.9 which states in pertinent part:

Reserve peace officers shall be subordinate to regular peace officers, shall not serve as peace officers unless under the direction of regular peace officers, . . . each department for which a reserve force is established shall appoint a regular force peace officer as the reserve force coordinating and supervising officer. The regular peace officer shall report directly to the chief of police, sheriff, or director of public safety or the director's designee as the case may be.

Iowa Code § 80D.9 (1987).

The defendant contends the reserve peace officers in question were not properly supervised, nor were they under the direction of a regular peace officer of the City of Center Point. The State counters by arguing the officers were properly supervised by Palo, Iowa, Police Officer Russ Swain, who was sworn in by Center Point Mayor T.J. Neenen to be the City's "senior consulting officer."

Testimony at the evidentiary suppression hearing indicated Officer Swain did not engage in the supervisory acts of setting regular meetings or scheduling work hours for the reserve force. Officer Swain was not paid a salary by the City nor was his appointment confirmed by the city council. Instead, he was appointed by Mayor Neenen through his authority as "acting police chief." Testimony indicated Officer Swain did not always know when the reserve officers were on duty, but that he was usually

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within radio or telephone contact. In addition, from the transcript it does not appear Officer Swain had developed a training schedule appropriate to meet the requirements of section 80D.4. We agree with the defendant that the supervision of these officers falls short of the requirements of the statute.

In addition, the State asserts the language of section 80D.9 does not require the "regular force peace officer" be from the same community but simply be a regular force peace officer in any jurisdiction. We disagree.

The intent of the legislature is the polestar in construing a statute. State v. Luppess, 358 N.W.2d 322, 324 (Iowa App. 1984). However, we will not construe a statute if its meaning is clear from the language employed. Id. Here, the statute states "each department for which a reserve force is established shall appoint a regular force peace officer as the reserve force coordinating and supervising officer." Iowa Code § 80D.9 (1987). From this language it can be clearly ascertained the regular force peace officer is to be appointed from the department which the reserve force was to benefit, in this case the Center Point Police Department. Thus, the use of Officer Swain as the supervising police officer was inappropriate under the terms of the statute.

We note this ruling does not create an undue hardship on the City of Center Point, because it currently has one

full time officer in its department, but for whatever reasons, she was not asked to act in a supervisory relationship to the City's reserve force.

The second prong of our analysis centers on determining whether the officers here could invoke implied consent procedures pursuant to chapter 321J, despite the City's shortcomings and complying with chapter 80D. Under chapter 321J only a peace officer may invoke implied consent procedures. Iowa Code § 321J.6 (1987). A peace officer is defined in section 321J.1(7) as:

7. "Peace officer" means:

- a. A member of the highway patrol.
- b. A police officer under civil service as provided in chapter 400.
- c. A sheriff.
- d. A regular deputy sheriff who has had formal police training.
- e. Any other law enforcement officer who has satisfactorily complete an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety.

The State argues subsection (e) gives the "reserve officers" here authority to invoke implied consent. Because we have determined the requirements of chapter 80D were not adequately complied with, thus leaving the reserve force unauthorized, we cannot say these officers were "law enforcement officers" for the purposes of invoking implied consent. The results of the breath test should have been suppressed. We therefore reverse and remand for a new trial.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., dissents.

I respectfully dissent.

The defendant was placed under arrest for OWI. A breath test was administered. The breath sample contained alcohol corresponding to a blood alcohol level of .212 grams of alcohol/210 liters of breath. He was charged with OWI, second offense.

Thereafter, defendant filed a motion to suppress the results of the breath test. At the suppression hearing held on March 10, 1987, before the Honorable John Sieberman, District Associate Judge, the defendant contended, among other things, that Officer McLaud, a reserve peace officer for the City of Center Point, Iowa, and the person who invoked the implied consent procedure under Chapter 321J did not qualify under Chapter 80D as a reserve peace officer. His motion to suppress was later overruled.

The fact question of defendant's guilt or innocence was submitted to the Honorable Robert E. Sosalla, District Associate Judge, on July 13, 1987, as a stipulated trial. The stipulation agreed to by the State and the defendant was that the judge could reach his decision based on the minutes of testimony. The trial judge found that the minutes of testimony established the defendant's guilt beyond a reasonable doubt. Judgment of guilt was entered against the defendant on September 3, 1987. He timely filed a notice of appeal.

The defendant seeks reversal on the ground that the results of the breath test should have been suppressed. The majority agrees. I disagree.

I believe that Officer McLaud is a qualified police officer within the meaning of Chapter 321J.6 of the Code. In pertinent part, section 321J.6 states: "The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer" Iowa Code § 321J.6 (1987). Section 321J.1(7) provides that the definition of a "peace officer" includes a "law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety." Iowa Code § 321J.1(7)(e) (1987).

The defendant concedes that Officer McLaud was properly certified by the Iowa Department of Public Safety. The defendant also concedes that reserve peace officers may invoke the implied consent procedures. This concession finds its support in section 80D.6, which in part provides "While in the actual performance of official duties, reserve police officers shall be vested with the same rights, privileges, obligations, and duties as any other peace officers."

Although the defendant admits that Officer McLaud has been properly certified and that reserve peace officers can invoke implied consent, he argues that Officer McLaud is not a reserve peace officer within the meaning of Iowa statutes, for the reserve peace officer force was not properly established by the City of Center Point. He argues further that even if properly established, Officer McLaud was not supervised as required by Iowa Code section 80D.9.

The authority to establish a force of reserve peace officers stems from section 80D.1 of the Code. That section provides in part: "The governing body of a city, county or the State of Iowa may provide for the establishment of a force of reserve peace officers and may limit the size of the reserve force."

The record is clear that Officer McLaud was hired by the city council of Center Point as the reserve peace officer in June of 1986. Three council members and the mayor so testified. The mayor, who is also the acting police chief, testified further that he witnessed the taking of the oath by Officer McLaud on June 14, 1986.

Although the record does not reveal that the City, either by resolution or ordinance, formally provided for the establishment of a force of reserve peace officers, I believe for the reason hereafter stated and under the circumstances of this case, that such omission, if indeed it is a statutory requirement, is not of significance.

The hiring of Officer McLaud was before the city council, who employed him specifically as a reserve peace officer. He took his oath of office as such. Having clothed him with this authority, he had at least de facto status, if not de jure.

A discussion of the law relating to the difference between de facto and de jure is not necessary, but the following is pertinent. "Insofar as third persons are concerned, de facto officers may act officially in all respects as though they were de jure officers." 67 C.J.S. Officers § 274 (1978); and "The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure." 67 C.J.S. Officers § 276 (1978); see also Murphy v. Lentz, 131 Iowa 328, 109 N.W. 530 (1906) (one orally designated a deputy county auditor, to whom the usual oath is orally administered and who thereafter performs the duties of the auditor, is a de facto officer).

A person acting as a deputy under appointment by a sheriff may be a de facto officer even though he has not qualified as prescribed by law. 70 Am. Jur. 2d Sheriffs, Police, & Constables § 16 (1987). As the Indiana Appellate Court in Carty v. State, Ind. Ct. App., 421 N.E.2d 1151 (1981), stated at page 1154:

One who holds office under the color of an election or an appointment and discharges the purported duties of office in full view of the

public without being an intruder or usurper, is at least a de facto official. The authority of a de facto official cannot be collaterally attacked. The validity of a de facto officer's acts may only be challenged directly against the individual who purports to hold the office. For the protection of the public who deal with him, the acts of a de facto officer are as valid as the acts of a de jure officer. [citations] All that is required to make an officer de facto is: that he claim the office, be in possession of it, and perform its duties under the color of election or appointment. [citations] If their election or appointment were valid they [de facto officers] would be de jure officers. [citations] A person whose election is irregular and void because he is ineligible is nevertheless an officer, de facto, if he discharges the duties of his office under the color of an election.

Id. at 1154.

The defendant further argues that Officer McLaud is not a reserve peace officer because he was not properly supervised as required by 80D.9. I need not reach that question, for once Officer McLaud is vested with de facto status, his act under the implied consent procedure is valid as to the defendant. The defendant, as the third-party, is unable to collaterally attack his authority.

I would affirm for one other reason. As noted above, this case was tried under a stipulation that the trial court could reach a decision based on the minutes of testimony. The trial court did just that.

I recognize that where a defendant's pretrial suppression motion is overruled, appellate review will be accorded despite the absence of testimonial objections by

the defendant during the course of trial. State v. Vest, 225 N.W.2d 151 (Iowa 1975). But here, where you limit the trial court's evidence to the minutes of testimony and ask the trial judge to rule accordingly, it occurs to me that such limitation constitutes a withdrawal of the suppression motion.

This is particularly so here for Judge Sieberman's ruling did not necessarily bind the trial court. Judge Sosalla, the trial judge, had the authority to change Judge Sieberman's ruling if he determined it to be incorrect. In light of the stipulation, however, he did not address it. State v. Richards, 229 N.W.2d 229, 233 (Iowa 1975); Allied Mutual Casualty Co. v. Long, 252 Iowa 829, 832, 107 N.W.2d 682, 683 (1961) ("A court may always correct error to which it has fallen, before the final judgment.").

I would affirm the trial court.