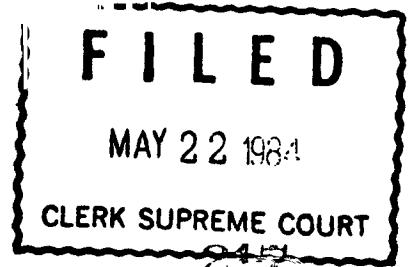


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed May 22, 1984

vs.

)

DALE ARLO YOCOM,

)

4-147
83-888

Defendant-Appellant.

)

Appeal from the Iowa District Court for Johnson County - Larry J. Conmey,
Judge.

Defendant appeals his conviction of operating a motor vehicle while
intoxicated in violation of Iowa Code section 321.281 (1983). **AFFIRMED.**

Phillip Mears of Mears, Zimmerman & Mears, Solon, Iowa, for defendant-
appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney
General, for plaintiff-appellee.

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

Defendant appeals his conviction of operating a motor vehicle while intoxicated in violation of Iowa Code section 231.281 (1983).

Defendant was arrested on the charge on January 22, 1983, after an Iowa City police officer observed defendant's vehicle being driven in an erratic manner. After the stop, the officer observed the defendant exhibiting symptoms of intoxication. After the arrest, the officer invoked the implied consent law. The defendant refused to sign the implied consent form and to provide a breath sample under Iowa Code section 321B. At the trial the State introduced evidence that the defendant refused to provide the breath sample. The defendant objected on the grounds that the State had failed to provide a proper foundation for such evidence because the State failed to show that the officer was a certified intoxilyzer operator or that the intoxilyzer was certified. The trial court overruled the objection. We affirm.

Defendant claims that evidence of his refusal to provide a breath sample was inadmissible because the State failed to lay a proper foundation for its admission. He alleges that it was necessary for the State to show that the officer invoking implied consent was a certified intoxilyzer operator and to show that the intoxilyzer itself was certified.

Iowa Code section 321B.4 (1983) sets out the procedure to be followed in invoking implied consent. The following conditions are precedent to invoking implied consent:

1. The peace officer has reasonable grounds to believe defendant was operating a motor vehicle while intoxicated;
2. The peace officer has arrested defendant for OWI;
3. The peace officer has made a written request for the administration of the breath test.

Iowa Code sections 321B.4(1), (1)(a) and (2). Section 321B.4 does not contain any requirements that the officer requesting administration of a breath test be a

certified intoxilyzer operator or that the intoxilyzer with which the test is administered be certified. Iowa Code section 321B.13 (1983) provides that if the defendant refuses to provide the requested sample, no test shall be given. Defendant refused to provide the requested breath sample, so no breath test was administered.

Because no breath test was administered, it is irrelevant and immaterial whether Officer Kibbee was a certified intoxilyzer operator or whether the Johnson County intoxilyzer was certified. The certification of the operator and breath testing instruments are only precedent to the admission of the results of an actual breath test. Iowa Code section 321B.15 (1983) (taking sample for test); see State v. Proulx, 252 N.W.2d 426, 430 (Iowa 1977) (results of blood test admissible when compliance with precedent requirements shown); cf. State v. Hall, 203 N.W.2d 375, 376 (Iowa 1973) (evidence of refusal to take breath test not admissible where implied consent request procedures were not complied with).

In this case, the requirements of section 321B.4 (1983) were met so that evidence of defendant's refusal was admissible. Officer Kibbee was a "peace officer" as defined by Iowa Code section 321B.2 (1983), was an Iowa City police officer, trained at the state law enforcement academy, and had training at the law enforcement academy in dealing with intoxicated individuals. Kibbee was a "peace officer" under chapter 321B by virtue of his training and his position as an Iowa City police officer. Iowa Code sections 321B.2(2) and (5); State v. Proulx, 252 N.W.2d at 430-31.

Kibbee had reasonable grounds to believe that defendant was operating a motor vehicle while intoxicated. An officer has "reasonable grounds" under chapter 321B when "the facts and circumstances known to the officer at the time he was required to act warrant a prudent man in believing the offense has been or is being committed." Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682, 685 (Iowa 1976). The testimony reveals the facts and circumstances known to Officer

Kibbee were sufficient to give him reasonable grounds to believe defendant was operating a motor vehicle while intoxicated. Defendant's car was observed proceeding erratically by a citizen who reported his observations to the Iowa City police. It was seen running over a traffic sign. Officer Kibbee observed defendant driving slowly, strike the curb, and veer out into traffic. He observed defendant's car cross the center of the street and then veer back sharply into the proper lane.

Officer Kibbee testified he observed defendant as well as defendant's driving. There was a strong odor of alcoholic beverage around defendant. Defendant's balance was unsteady, and he almost fell as he got out of his car. Defendant appeared confused as to the location of his driver's license and about using his car keys to open the car door. Defendant was argumentative. Defendant was unable to perform the field sobriety tests requested and demonstrated by Officer Kibbee. Defendant's eyes were watery and bloodshot and reacted poorly to light.

The facts and circumstances were sufficient to give the arresting officer reasonable grounds to believe defendant had been operating a motor vehicle while intoxicated. Crosser, 240 N.W.2d at 685. We hold the reasonable grounds precedent condition of section 321B.4 was met in the instant case.

The arrest and written request precedent conditions of section 321B.4 were also met. Officer Kibbee placed defendant under arrest for OWI. He made a written request to defendant that defendant take the implied consent breath test. Evidence of defendant's refusal to provide a breath sample was properly admitted because these conditions were met. See State v. Young, 232 N.W.2d 535, 538 (Iowa 1975) (evidence of refusal admissible when statutory conditions met); cf. State v. Hall, 203 N.W.2d 375, 376 (Iowa 1973) (evidence of refusal not admissible where statutory conditions not met).

Defendant relies upon Young and Hall in arguing that it is necessary to show that the intoxilyzer and operator were certified before evidence of his refusal was admissible. These cases do not support his contention because of changes in the implied consent law since these cases were decided. At the time Young and Hall were decided, it was necessary to first offer the OMVUI suspect a blood test. Young, 232 N.W.2d at 536; Hall, 203 N.W.2d at 375. Only when the suspect refused the blood test, could an alternative test be offered. Id. The results of the second test and evidence of refusal to take the blood test were not admissible unless compliance with this condition was shown by the State. Id.

Because the State sought to admit the results of the test which had been performed, it was necessary to show that that test was given by use of devices and methods approved by the commissioner of public safety. Id. Here, because no breath test was performed, it was not necessary to show that the intoxilyzer and operator were certified. We hold the trial court did not abuse its discretion in admitting evidence of defendant's refusal to take the breath test.

AFFIRMED.