IN THE COURT OF APPEALS OF IOWA

No. 8-078 / 07-0924
Filed April 9, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REGIS MURPHY,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Nancy Baumgartner, Judge.

Following the granting of discretionary review, the State seeks reversal of the district court's ruling which suppressed evidence of the defendant's refusal to comply with the implied consent procedures in an operating while intoxicated case. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Janet Lyness, County Attorney, and Iris Frost, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Regis Murphy was pulled over after driving erratically and arrested for operating while intoxicated as a third offender. Following the granting of discretionary review, the State seeks reversal of the district court's ruling granting the defendant's motion to suppress evidence of his refusal to comply with implied consent procedures. Upon our review, we reverse and remand.

I. Background Facts and Proceedings.

At approximately 7:50 p.m. on October 21, 2006, a citizen traveling on Interstate 380 called police to report a possible intoxicated driver. The caller reported that a vehicle was traveling all over the road, and its front headlight was dangling from the vehicle. North Liberty police officer Tyson Landsgard caught up to the vehicle and observed it weaving, crossing lanes, and crossing the fog line. Officer Landsgard pulled the vehicle over and identified the driver of the vehicle as Regis Murphy.

Murphy refused to perform any standardized field sobriety tests, and he declined to provide a preliminary breath test. Officer Landsgard informed Murphy that he was being arrested for driving under revocation and operating while intoxicated. Officer Landsgard repeatedly asked Murphy if he would like to make any phone calls, either to a lawyer or family or friends. Murphy stated that he did not want to make any phone calls. Officer Landsgard then transported Murphy to the Coralville police station.

At the station, Murphy refused to perform any sobriety tests. Officer Landsgard again asked Murphy if there was anyone whom he would like to call, and Murphy said “no.” Murphy stated that he would not read or sign anything

without a lawyer. At that point, Officer Landsgard asked if Murphy wanted to call a lawyer and Murphy said "no." The officer then offered to provide Murphy with a phone book and asked if he would like to call a family member or friend. Once again, Murphy declined the invitation to contact anyone.

After Murphy declined to call an attorney, Officer Landsgard read Murphy the "implied consent advisory" and again asked Murphy if he would submit a breath test. Murphy refused to sign the consent and to take the test. Officer Landsgard recorded Murphy's response to the implied consent advisory as a test refusal. Officer Landsgard asked Murphy if he wanted to answer any questions. Murphy responded that he did not, and the discussion ended. Murphy was never subjected to an interrogation.

The State filed a trial information charging Murphy with third-offense operating while intoxicated and driving under revocation in violation of Iowa Code sections 321J.2 and 321A.32(1) (2005). The minutes of testimony which accompanied the charge indicated the State intended to introduce evidence captured on videotape during the stop of Murphy's vehicle and at the police station following his arrest. Murphy filed a motion to suppress any evidence derived from the stop of his vehicle and any statements made by him prior to receiving *Miranda* warnings in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and Article I sections 6, 8, 9, and 10 of the Iowa Constitution. The State filed a resistance to the motion.

The district court held a hearing on Murphy's motion and viewed the videotape of the traffic stop as well as the videotape of Murphy's interaction with Officer Landsgard at the police station. Following the hearing, the court issued

an order denying in part and granting in part Murphy's motion to suppress. The court concluded the vehicle stop was lawful because Officer Landsgard had reasonable and articulable suspicion to stop Murphy's vehicle. The court also declined to suppress evidence that Murphy refused to perform field sobriety tests after he was pulled over. However, the court's order suppressed anything said by Murphy at the police station after Murphy requested an attorney, including his refusal to submit to chemical testing.

The State filed an application for discretionary review of the district court's ruling. Our supreme court granted the State's application, stayed the district court proceedings, and transferred the case to this court for review.

II. Scope and Standards of Review.

Where a constitutional right is involved, our scope of review is de novo. *State v. Washburne*, 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa Ct. App. 1999).

III. Discussion.

The State contends Murphy's request for counsel, but subsequent refusal to contact an attorney, did not preclude Officer Landsgard from recording Murphy's refusal to comply with implied consent procedures as a test refusal. The State also argues the test refusal is admissible against Murphy at his criminal trial, because no constitutional grounds exist for suppression of this evidence.

In its ruling denying in part Murphy's motion to suppress, the district court stated:

> From the videotape, it is clear that Murphy was not in custody at the time he was asked to perform field sobriety tests, thus his refusal to perform any tests need not be suppressed. Additionally, field sobriety tests and the implied consent procedure do not amount to an interrogation. *State v. Stroud*, 314 N.W.2d 437, 438 (Iowa 1982); *State v. Schultz*, 690 N.W.2d 696 (Iowa Ct. App. 2004). As such, when Murphy was stopped and asked to take a field sobriety test, he was neither in custody nor was there an interrogation.

We agree with this portion of the district court's ruling. However, the court, in granting in part Murphy's motion to suppress, then went on to state:

> Once at the station, after a few preliminary questions, Murphy stated that he would not answer any questions without a lawyer, even though he did not want to call one at the time because it was too late at night. At this point in the process, regardless of any Miranda issues, questioning should have ceased as Murphy had exercised his 5th and 6th Amendment rights to counsel. *See State v. Kyseth*, 240 N.W.2d 671, 674 (Iowa 1976) (court should have suppressed defendant's refusal to answer questions after he asked for attorney). Thus anything said by Murphy after this request for an attorney, including his refusal to sign any implied consent documents or submit to chemical testing, should be suppressed.

Murphy contends the district court's motion to suppress should be affirmed because his Fifth and Sixth Amendment right to counsel were violated. For the reasons which follow, we disagree.

We begin our discussion by briefly noting that this is not a case which involves a breach of Murphy's statutory right to counsel under Iowa Code section 804.20. That section provides:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney.

As the district court noted, the record reveals that Murphy was repeatedly offered the opportunity to call a friend, a member of his family, or a lawyer of his choice. Despite numerous opportunities, Murphy made no attempt to contact a lawyer or anyone else.[1] After Officer Landsgard told Murphy that a lawyer was not going to "magically appear," Murphy responded, "I know that." Nothing in the record suggests Murphy's statutory right to communicate with counsel or a family member was violated. We now turn to the merits of the defendant's constitutional claims.

The district court relied on the *Kyseth* case in concluding Murphy's constitutional rights had been violated. *State v. Kyseth*, 240 N.W.2d 671 (Iowa 1976). We believe the district court's reliance on *Kyseth* was misplaced. In *Kyseth*, a peace officer, who was investigating a motor vehicle accident, went to a hospital where he found the defendant in the emergency room with an attending physician. 240 N.W.2d at 672. The peace officer gave the defendant the *Miranda* warnings and then began questioning him. *Id.* After answering at least one question, the defendant stated that he wanted to talk to his attorney and refused to answer several of the subsequent questions. *Id.* at 672-73. Our supreme court concluded that the district court should have suppressed the defendant's refusal to answer questions after he asked for an attorney because the defendant had exercised his Fifth and Sixth Amendment rights. *Id.* at 674.

[1] As the district court noted, Murphy claimed he did not want to call an attorney because it was too late at night. The video in the police car ends at 8:12 p.m. when Murphy and Officer Landsgard were on their way to the station. The record does not reveal when the video started within the police station; however, the entire conversation between Murphy and Officer Landsgard inside the station takes place in approximately seventeen minutes.

The factual circumstances in *Kyseth* are different from the circumstances in the present case because *Kyseth* does not involve the implied consent procedures set forth in Iowa Code chapter 321J or the protections struck in the statute to balance constitutional rights against the driving privilege. Iowa's implied consent statute "establishes the basic principle that a driver impliedly agrees to submit to a test [to determine alcohol concentration or presence of a controlled substance] in return for the privilege of using the public highways." *State v. Hitchens*, 294 N.W.2d 686, 687 (Iowa 1980). Iowa Code section 321J.6(1) provides:

> A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 or 321J.2A is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration or presence of a controlled substance or other drugs, subject to this section . . . .

However, a person retains the right to withdraw his implied consent and refuse the test. Iowa Code § 321J.9 ("If a person refuses to submit to the chemical testing, a test shall not be given . . . ."). Our supreme court has held the right to refuse the test is a statutory right and not mandated by the provisions of the United States Constitution. *State v. Massengale*, 745 N.W.2d 499, 501 (Iowa 2008); *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981); *see Schmerber v. California*, 384 U.S. 757, 761, 772, 86 S. Ct. 1826, 1831-32, 1836, 16 L. Ed. 2d 908, 914, 920 (1966) (holding taking a blood sample against the OWI defendant's objection did not violate the Fourth or Fifth Amendments of the United States Constitution).

Under Iowa Code section 321J.8, when a peace officer requests a person to submit to chemical testing, the peace officer must advise the person of the consequences of refusing the test in addition to the consequences of failing the test. Section 321J.9 states that "[i]f a person refuses to submit to the chemical testing . . . the department . . . shall revoke the person's driver's license . . . ." Section 321J.16 further provides:

> If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle [under the influence of alcohol.]

None of the cases relied on by Murphy on appeal involve the implied consent procedures or the refusal to submit a breath test.[2]

Murphy suggests *Kyseth* should control the outcome of his case because *Kyseth* involved the exercise of a defendant's Sixth Amendment right to counsel.[3] However, the United States Supreme Court has made clear that the Sixth Amendment right to counsel for criminal defense applies only to the "critical stages" of the criminal proceedings. *See, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 189, 104 S. Ct. 2292, 2298, 81 L. Ed. 2d 146, 155 (1984) (holding that the Sixth Amendment right to counsel attaches only at or after the initiation of judicial proceedings against the defendant). At the time of the invocation of implied consent, Murphy had not been formally charged, he had not appeared

[2] Murphy does not contend the implied consent advisory given to him before he refused to take a breath test was inadequate in any way.

[3] On appeal, Murphy also argues that Article I, section 10 of the Iowa Constitution reflects Sixth Amendment protections and suggests that the Iowa Constitutional provision would somehow preclude admission of a test refusal in this case. However, Murphy makes no argument that the right to counsel analysis under the Iowa Constitution should differ in any way from the analysis under the Federal Constitution. Therefore, we will not apply divergent analyses in this case. *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005).

before the court, and the county attorney had not been involved. Accordingly, at that point in time he had no Sixth Amendment right to exercise. The request for a breath specimen itself is not significant for Sixth Amendment purposes. *See* William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 31:6 (2008) ("Attachment of right to counsel—Police investigations—Sobriety testing") (listing cases finding no Sixth Amendment right to counsel prior to sobriety testing).

Other cases decided since *Kyseth* support the conclusion that Murphy's constitutional rights were not violated. Our supreme court addressed implied consent procedures in *State v. Vietor*, 261 N.W.2d 828 (Iowa 1978), a case decided two years after *Kyseth*. Without mentioning *Kyseth*, the *Vietor* court concluded the refusal to submit to chemical testing was not inadmissible under Sixth Amendment grounds.[4] The court found that a defendant, who refused to submit a chemical test after being read the *Miranda* warnings and informed of the implied consent procedures, was not entitled to relief on any constitutional grounds. The court noted that "[t]he legislature has made a refusal to submit to chemical tests admissible in both civil and criminal cases." *Id*. at 830; *see* Iowa Code § 321J.16 (formerly section 321B.11). The court stated, "We have upheld the constitutionality of this statute and have approved the admissibility of such refusal in criminal trials." *Id*. (citations omitted).

On appeal, Murphy acknowledges that his refusal to take a breath test triggered Iowa Code section 321J.16, in addition to the loss of driving privileges.

[4] In *Vietor,* the court found the test was inadmissible on state statutory grounds; however, in this case, Murphy does not assert that he was denied his right to counsel in accordance with any statute.

However, he argues that evidence of his refusal to submit to the breath test "could be implicitly testimonial," and therefore violates the Fifth Amendment. Again, we disagree. Our supreme court has previously held that the implied consent procedure under Iowa Code chapter 321J does not constitute interrogation. *State v. Stroud*, 314 N.W.2d 437, 438 (Iowa 1982); *State v. Epperson*, 264 N.W.2d 753, 755-56 (Iowa 1978). In *Stroud* and *Epperson*, the court concluded that the implied consent procedures did not need to be preceded by *Miranda* warnings. *Id*. Moreover, in *South Dakota v. Neville*, 459 U.S. 553, 563-64, 103 S. Ct. 916, 922, 74 L. Ed. 2d 748, 758-59 (1983), the United States Supreme Court held the admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend his Fifth Amendment right against self-incrimination. The court found a refusal to take such a test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination. *Neville*, 459 U.S. at 564, 103 S. Ct. at 923, 74 L. Ed. 2d at 759. The court further held it would not be fundamentally unfair in violation of due process to use a defendant's refusal to take the blood-alcohol test as evidence of guilt, even though the police failed to warn him that the refusal could be used against him at trial. *Id.* at 565, 103 S. Ct. at 923, 74 L. Ed. 2d at 759.

Once Murphy was at the police station and had requested counsel, we agree that any interrogation had to cease in accordance with *Miranda* because Murphy had been arrested and was in custody. However, the implied consent procedure is not interrogation. Therefore, Murphy's refusal to comply with implied consent procedure is not the fruit of any interrogation. And we conclude

that evidence of Murphy's test refusal should not have been suppressed. Accordingly, we reverse the district court's order suppressing Murphy's refusal to comply with the implied consent procedures of Iowa Code section 321J.6, and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.