IN THE COURT OF APPEALS OF IOWA

No. 8-320 / 07-0956
Filed June 11, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD JOSEPH WASKO,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily, District Associate Judge.

Ronald Wasko appeals his conviction for operating while intoxicated, second offense, and driving while suspended. **AFFIRMED.**

Steven Gardner, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Mark Tremmel, County Attorney, and Richard Scott, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Donald Wasko appeals following conviction and sentence for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2(2)(b) (2005), and driving while suspended in violation of section 321J.21. Wasko asserts the following on appeal: (1) the district court erred in admitting testimonial evidence in violation of his constitutional right to confrontation; (2) there was insufficient evidence to support the finding that he was operating a motor vehicle; (3) there was insufficient evidence to support the finding that the blood test was withdrawn within two hours; and (4) the district court erred in admitting his driving record and notice of suspension. We affirm.

I. Background Facts and Proceedings.

On December 17, 2005, Robert Ludwig was traveling east on River Road from Ottumwa and noticed dust rising from the gravel road. Seeing no other traffic, Ludwig pulled over, scanned the ditch, spotted a car upside down, and called 911. He tried speaking to the person in the car, later identified as Wasko, but received no response. Deputy Jeff Layton of the Wapello County Sheriff's Department was the first officer to arrive on the scene. Deputy Layton noticed Wasko had a strong odor of alcohol and appeared to be unconscious. An ambulance crew arrived and removed Wasko from the vehicle. Iowa State Trooper Jason Neely joined the scene as medics loaded Wasko into the ambulance. He also smelled the odor of alcohol on Wasko. Trooper Neely gave Deputy Layton a blood sample kit and the necessary forms to obtain a sample of Wasko's blood from his medical providers. The ambulance transported Wasko to the hospital and Deputy Layton followed to continue his investigation.

At the hospital, Dr. Thomas Leavenworth signed an affidavit certifying that Wasko was unconscious and incapable of consenting or refusing to submit his blood. Laboratory technician Gregory Durrell took a sample of Wasko's blood, signed the request form Deputy Layton provided, labeled the sample, and turned it over to Deputy Layton. Deputy Layton then turned the sample over to Trooper Neely who mailed it to the Iowa Division of Criminal Investigation laboratory (DCI). The DCI analysis found a blood alcohol content of .172.

Wasko waived his right to a jury trial, and the case was tried to the court on the minutes of evidence. The court concluded Wasko was guilty of operating while intoxicated, second offense, and driving while suspended.[1] Wasko was sentenced to a term of imprisonment not to exceed two years, with all but seven days suspended. Wasko now appeals.

II. Scope and Standard of Review.

We conduct a de novo review of alleged constitutional violations. *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007), *cert. denied*, ___ U.S. ___,128 S. Ct. 1655, ___ L.Ed.2d ___ (2008). In all other matters, we review the court's actions for the correction of errors of law. Iowa R. App. P. 6.4; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532.

[1] The court admitted a certified copy of Wasko's December 2005 driving record establishing that his license was suspended due to a prior operating while intoxicated test refusal. The court also admitted a certification establishing that notice was mailed to Wasko of his license revocation.

III. Issues on Appeal.

A. Confrontation Clause.

Wasko argues the district court erred in admitting the blood alcohol test as testimonial evidence in violation of his constitutional right to confrontation. In its minutes of testimony, the State's witness list included two criminalists or a designee and indicated the witnesses' written analysis and results of the blood alcohol testing would be admitted pursuant to Iowa Code section 691.2.[2] Under that section, Wasko could have requested the criminalists or designee testify in person at trial by notifying the county attorney at least ten days before the date of trial. Iowa Code § 691.2 (2007). Wasko failed to notify the county attorney to request the witnesses to testify in person.

The primary purpose of the confrontation clause is to secure for the opponent the opportunity of cross-examination. *State v. Holland*, 389 N.W.2d 365 (Iowa 1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974)). The Iowa Supreme Court has rejected confrontation clause challenges to Iowa Code section 691.2. *State v. Davison*, 245 N.W.2d 321, 323 (Iowa 1976); *State v. Kramer*, 231 N.W.2d 874, 880 (Iowa 1975).

We find Wasko was given the opportunity to request the testimony in person pursuant to the statute. We find no violation of Wasko's Sixth Amendment right to confront the witnesses against him. We conclude the district court did not err in admitting the blood alcohol test and affirm on this issue.

[2] Section 691.2 is Iowa's "Notice and Demand Statute" that authorizes admission of certification reports without having the analyst present.

Wasko also argues the laboratory report is testimonial evidence and cannot be admitted into evidence without testimony of the person who prepared the report. Because we find Wasko waived his right to request the testimony pursuant to section 691.2, we decline to discuss whether the laboratory report is testimonial or non-testimonial evidence.

B. Sufficiency of Evidence: Operation of the Motor Vehicle.

Wasko also claims there was insufficient evidence to show he operated the motor vehicle. To convict a defendant charged with operating while intoxicated, the State must establish beyond a reasonable doubt the defendant operated the vehicle and did so while intoxicated. Iowa Code § 321J.2(1) (2005); *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Operation of a motor vehicle may be established by direct or circumstantial evidence. *Hopkins*, 576 N.W.2d at 377-78; *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). Therefore, even if direct evidence fails to prove that a defendant was in the process of operating a motor vehicle when authorities found him, circumstantial evidence may prove the defendant *had* operated when driving to the location where the vehicle was located. *See Hopkins*, 576 N.W.2d at 377-78.

Contrary to Wasko's contention, we find substantial circumstantial evidence that he had driven to the location where he was found. A witness traveling east on River Road from Ottumwa noticed dust rising from the gravel road. There were no other cars or people on the road. The witness pulled over and scanned the ditch, where he spotted Wasko's car upside down with a flashing light. The witness noticed Wasko was in the car and unconscious. When police arrived, several officers noticed Wasko had a strong odor of alcohol,

he was trapped inside the vehicle, he appeared to be unconscious, and the vehicle's lights were on.

We find this evidence substantially supports the district court's finding that Wasko operated the motor vehicle when driving to the location where the vehicle was discovered by the witness and law enforcement. We affirm on this issue.

C. Sufficiency of the Evidence: Blood Test.

Wasko next claims there was insufficient evidence to show the blood alcohol test was taken within two hours of operation of the motor vehicle pursuant to Iowa Code section 321J.2(8)(a).[3] Because Wasko contends there is insufficient evidence to show he operated the motor vehicle, he argues the two-hour window cannot be established. We have already found substantial evidence that Wasko operated the motor vehicle when driving to the location where the vehicle was discovered. The question now before us, therefore, is whether the blood alcohol test was administered within two hours of Wasko's operation or physical control of the motor vehicle.

At around 4 p.m., just before sunset, on December 17, 2005, a witness noticed dust rising from the gravel road when there were no other cars or people on the road. The witness then spotted Wasko's car upside down in the ditch and immediately called 911. Wasko was transported to the hospital. At around 5 p.m., an emergency room doctor observed Wasko, determined he was

[3] Under section 321J.2(8)(a), the alcohol concentration of a

> Defendant's blood, breath or urine withdrawn within two hours after the Defendant was driving or in physical control of a motor vehicle is presumed to be the alcohol concentration at the time of driving or being in physical control of the motor vehicle.

Iowa Code § 321J.2(8)(a).

unconscious, and determined Wasko was unable to consent or refuse to give a blood sample. A laboratory technician was summoned to draw a blood sample from Wasko. The technician's report indicated he received the request to withdraw the sample at "17:13."

We find this evidence substantially supports the district court's finding that the blood alcohol test was administered within two hours of Wasko's operation or physical control of the motor vehicle. We affirm on this issue.

D. Admissibility of Driving Record and Notice of Suspension.

Wasko last argues the district court erred in admitting his driving record and notice of suspension because the State failed to establish mailing of notice. The Iowa Supreme Court has determined that the State is required to show the Iowa Department of Transportation (DOT) mailed notice of suspension to a defendant in order to support a conviction for driving under suspension. *State v. Green*, 722 N.W.2d 650, 651-52 (Iowa 2006). Proof that the DOT mailed a notice of suspension to the defendant may be established by testimony to support its claim of mailing or an affidavit of mailing. *Id*. at 652. The DOT may use its records in conjunction with U.S. Postal Service records available to the DOT to prepare an affidavit of mailing verifying the mailing of a notice. *Id*.

In this case, the State submitted a copy of an official notice of suspension dated February 25, 2004. The notice was addressed to Wasko at his last known address. The State also submitted a certificate of bulk mailing showing the Department mailed an official notice of suspension to Wasko at his last known address on February 27, 2004.

We find this evidence substantially supports the district court's finding that notice of suspension had been mailed to Wasko. We conclude the district court did not err in admitting the driving record and notice of suspension as evidence and we affirm on this issue.

AFFIRMED.