IN THE SUPREME COURT OF IOWA

No. 17-0637

STATE OF IOWA

Plaintiff-Appellee,

vs.

ROBERT A. DAVIS

Defendant-Appellant.

APPEAL FROM THE MUSCATINE COUNTY DISTRICT COURT

THE HONORABLE GARY P. STRAUSSER

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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/s/ Kent A. Simmons

KENT A. SIMMONS

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ROUTING STATEMENT

The issue presented can be adjudicated upon the firmly established law of this Court, and transfer to the Court of Appeals would be appropriate.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a direct appeal that Robert A. Davis takes from his conviction after a bench trial.

PROCEEDINGS: The County Attorney filed a Trial Information on March 30, 2015, charging Mr. Davis with the sole count of Operating While Intoxicated (OWI), Second Offense in violation of Sections 321J.2(1)(a) and (b), the Code. (App. 3) The offense is an aggravated misdemeanor. In details set out below, Mr. Davis litigated an Amended and Substituted Motion to Suppress, challenging evidence on the basis of a violation of his statutory right to consult with counsel upon being taken into custody. The

right is set out in Section 804.20, the Code. The motion proceeded to hearing, and the Honorable Gary P. Strausser issued a ruling granting the motion in part, and denying it in part. (Ruling on Motion to Suppress, 8/1/16; App. 13-20).

The case was submitted for trial on the basis of the suppression hearing transcript and several exhibits. One of the exhibits was the entire transcript of the hearing in the Department of Transportation (DOT) proceedings regarding the revocation of the privilege to drive. Upon the record made, Judge Strausser issued a verdict of guilt based upon the breath test result of .128 blood alcohol content from the DataMaster analysis. (Order on Verdict, 3/1/17; App. 28-31) Sentencing proceeded March 23, 2017, and a timely Notice of Appeal was filed April 14, 2017. (App. 36)

Statement of the Facts

Robert Davis and his wife, Barbara, were at the Geneva Country Club in Muscatine one evening for drinks and dinner. It was February 25, 2015.

When they started the drive home, it was snowing. Deputy Sheriff Edward Cardenas of the Muscatine Police Department described the conditions as "actively snowing", with two or three inches of snow on the ground at the time in question, about 10:30 p.m. The officer said the roads were slippery. It was "very hard to see", and it was cold. As Barb and Bob Davis were heading home, an oncoming vehicle slid into the Davis vehicle's path. Bob's evasion limited the collision to contact on the front corner of his driver's side, but his Toyota Tundra ended up in the ditch. The officer conceded in the suppression hearing that the other driver caused the accident, not Mr Davis. (Suppression Hearing Transcript, 4/1/16 [hereafter "Supp. Tr."] pp. 4-6, L. 15-24 , p. 34, L. 5-17) (Suppression Ruling, 8/1/16, pp. 1-2; App. 13-14)

Deputy Cardenas found that Bob and Barb were sitting in the back of their vehicle by the time he arrived on the scene. Cardenas said he could smell a "slight odor of alcohol," as he spoke to the couple from outside their truck. They moved into an ambulance for a cursory medical exam. Cardenas said that he could also smell alcohol when he talked to Mr. Davis outside the vehicles and in the ambulance. Bob agreed to participate in the

officer's observations for Horizontal Gaze Nystagmus (HGN). Barb Davis told the officer they had been out for dinner and drinks. Cardenas testified Bob admitted to drinking three rum and cokes. Bob and Barb both told the officer that Bob was the driver when the accident occurred. The deputy claimed he detected six out of six signs of intoxication from the HGN exam, and then he told Bob to get in the back of his squad car. Cardenas said he "ordered" Barb to stay near the ambulance as he placed Bob in the back of the squad. He did not use handcuffs. (Supp. Tr. pp. 7-12, L. 2-9, p. 15, L. 10-23) (Supp. Ruling, pp. 1-2; App. 13-14)

Due to the weather conditions, the deputy told Bob he was going to transport him to the jail for additional testing. Bob and Barb were still sitting in the ambulance at that time after completion of the HGN test. Bob told Cardenas he wanted to talk to his attorney before deciding whether to go to the jail. He had his cell phone in his hand and had already dialed his attorney's number. The officer took the phone out of Bob's hand and handed it to Barb. He then took Bob to the squad. Cardenas testified in the DOT hearing that he knew Bob's wife was talking to Bob's attorney on the phone, and Barb said Bob needed to talk to his attorney before doing

any further testing. In the suppression hearing, Cardenas testified Barb did not say anything to him. The officer took the phone from Barb and left with Bob for the jail. Barb had told her husband's attorney what had happened and that the deputy was taking Bob to the jail. (Defense Ex. "B", DOT Transcript, 7/1/15, [hereafter "DOT Tr." pp. 18-19, L. 9-19; App 22-23) (Supp. Tr. 15-17, L. 10-5; pp. 70-71, L. 14-19, p. 73, L. 4-24) (Supp. Ruling, p. 2; App. 14)

Deputy Cardenas was untruthful in his suppression hearing testimony about what he did with Mr. Davis's phone once he took it from Barb. In that hearing, Cardenas testified he gave the phone to Bob as he sat in the back of the squad car, and then he started the transport to the jail. The transcript of the squad audio recording shows the deputy did not give Mr. Davis his phone back until sometime after he had gotten him into the jail. (Trial Ex. "C"; App. 25-26) The squad audio/video was put into evidence and Judge Strausser was directed to the portions showing the Cardenas testimony was false. (Supp. Tr. 16-18, L. 8-25) The conversation recorded shortly after the officer placed Mr. Davis in the squad car shows the phone

was not returned until after field tests were completed at the jail. In his ruling, the judge concluded:

> The evidence establishes that Deputy Cardenas retrieved the defendant's phone. It is unclear at which point the defendant was provided with his phone during transport to the jail. Deputy Cardenas can be heard on the recordings stating I have your phone and will give it to you **at the jail.**
>
> At 22:57:14, shortly after the defendant was placed in the back of the squad car, the defendant states as follows: "Can I talk to my wife before we leave?" Deputy Cardenas' response is **once we are all done we can**. (Supp. Ruling, p. 2; App. 14) (emphasis added)

The attorney Barb talked to on the phone that night was Greg Johnston. He testified at the suppression hearing. Attorney Johnston told the Court that he got the call as he was leaving Iowa City after a Hawkeye basketball game. After Barb filled him in on the details, Johnston called the jail to say he would be arriving there to speak with Bob. Cardenas had not yet arrived at the jail at that point. When Johnston got to the jail, he told the

staff it was important that he be able to speak with Mr. Davis. Cardenas had arrived at that point. The staff told Attorney Johnston that Cardenas would not talk to him and would not allow Johnston to talk to his client before completion of the field tests. It was after Bob had performed the one-leg stand and walk-and-turn field tests in the jail's sally port, that Mr. Johnston finally got to talk to his client. (Supp. Tr. 18-19, L. 3-24, pp. 47-55, L. 16-10, pp. 61-64, L. 14-24) (Supp Ruling, pp. 2-3; App. 14-15) As explained in detail, below, the fact that Bob had performed the balance field tests at the jail directly affected and completely changed the legal advice. Rather than follow his standard procedure of recommending against the breath test, Attorney Johnston advised Mr. Davis to submit a breath sample that could be admissible as evidence at trial. He advised Bob to submit a breath sample to the DataMaster analysis for the deputy. "The result was a .128 blood alcohol content." (Order on Verdict, p.2; App. 29)

Attorney Johnston testified as to how he had to adjust his legal advice because he was not allowed to consult with Mr. Davis before he took the balance tests at the jail:

Q. Greg, is it your understanding by the time you were allowed to talk to Mr. Davis he had already submitted to and purportedly failed a series of field sobriety tests?

A. That's exactly the reason why I was so insistent to talk to the deputy and to talk to the jailer, to tell them that I was going to be assisting Mr. Davis. And I didn't want anybody to talk with him or him to do anything until -- until I had a chance to talk with him.

Q. Hypothetically, if you were allowed to talk to Mr. Davis -- let's say if he was in the back of a squad car on the way to the jail -- by phone, what would your advice have been and why?

A. I represented Mr. Davis about 13 years ago on an OWI charge, and I was well aware that in that case he was convicted. And I was aware from what his wife told me that they had been struck by another vehicle who spun out in front of them and drove them into the ditch. So with that in mind, I know he has at least the potential that this would be a second offense drunk driver case and that he was not at fault driving. It would have been my advice to not participate or do anything. I would not have

> authorized him to do horizontal gaze nystagmus. I would have directed him not to do any field sobriety tests. (Supp. Hrg. pp. 58-59, L. 8-5)

Attorney Johnston went on to explain that due to experience with reports and testimony of field tests, he was predicating his advice on the assumption Mr. Davis had failed the balance tests in the jail. It is an extremely rare occurrence where the officer reports favorably on the performance of those tests. Assuming those two tests resulted in failure for Mr. Davis, the attorney opined that the "die was cast." The client virtually had nothing left to lose at that point. If Mr. Davis had not taken the field tests, Attorney Johnston would have advised against submitting a breath specimen on the DataMaster analyzer. (Supp. Tr. 59-60, L. 1-24)

> Q. So by the time you arrived, Mr. Davis had failed a series of field sobriety tests, or purportedly so. What were you left with as far as advice?
>
> A. When I was admitted to the DataMaster room, it was clear Mr. Davis had complied with or performed the field sobriety tests. I had -- would have to tell you that my experiences are that in all of my cases, I can't imagine

> that I've only had but one or two times where an officer wrote any favorable outcome of field sobriety tests, so I didn't ask whether he had failed the tests, didn't matter. He had to make a decision concerning whether or not he would take a -- provide a bodily specimen. And at that point in time, the die was cast. I mean, I would recommend he take the test for the sole reason that he might be under the legal limit. If he refused, he would -- potentially the jury could hear that he refused the test or the jury could hear -- or the driver's license sanctions, if he refused, could be enhanced. But I would have recommended -- but for the field sobriety tests, I would have recommended to decline to provide a bodily specimen. There's kind of a general rule on the Data-Master. First offense, take the test; second offense, probably not; third, no. It's not a rule, it's a policy. (Supp. Tr. 60-61, L 5-2)

In his ruling on the suppression motion, Judge Strausser seemed to conclude that Attorney Johnston should have determined before he talked to Mr. Davis at the jail that all the evidence of field testing was inadmissible because he was denied his right to consult with his attorney beforehand.

The judge concluded the field tests were conducted in violation of Mr. Davis's statutory rights. Additionally, the judge determined the meeting he had with his attorney before deciding to submit to the DataMaster satisfied the right Mr. Davis had under the Code. "From that point forward, there was no violation of Iowa Code Section 804.20 and evidence collected after that point is admissible." The judge suppressed all evidence of field tests but allowed the DataMaster result. (Supp. Ruling, pp. 6-7; App. 18-19)

ARGUMENT

THE JUDGE ERRED IN DENYING SUPPRESSION OF THE BREATH TEST RESULT BECAUSE UNDISPUTED EVIDENCE PROVED MR. DAVIS MADE THE DECISION TO SUBMIT TO THE BREATH TEST AS A DIRECT RESULT OF THE VIOLATION OF HIS STATUTORY RIGHT TO CONSULT WITH HIS ATTORNEY BEFORE THE FIELD TESTS

STANDARD OF REVIEW: The judge's interpretation of the statute is reviewed for error of law. The Court will affirm the suppression ruling where

the trial court "correctly applied the law and substantial evidence supports the court's fact-finding." "Prejudice is presumed upon a violation of section 804.20." *State v. Walker,* 804 NW 2d 284, 289, 296 (Iowa 2011) A fact-finding is supported by substantial evidence if the finding it can be reasonably inferred from the evidence presented. *Hubby v. State,* 313 NW 2d 690, 694 (Iowa 1983)

The statute in question reads *in toto*:

> 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. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by

> the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

PRESERVATION OF ERROR: In his Amended and Substituted Motion to Suppress filed March 15, 2016, Mr. Davis averred the application of Section 804.20 at length. In the prayer of the motion, he requested:

> WHEREFORE, Defendant prays for a ruling finding the arresting officer violated Defendant's right to consult with an attorney before consenting to additional field tests; that those tests and the subsequent breath test be suppressed as "fruit of the poisonous tree" at time of trial; and for such other relief as the Court may deem appropriate. (Amend. Mot. 3-5; App. 10-12)

In his ruling, Judge Strausser concluded Deputy Cardenas violated 804.20 when he refused to allow Mr. Davis to speak with his wife after he was detained, and he refused to allow him to speak to his attorney before deciding whether to complete the field tests at the jail. The judge concluded the Code was violated in that respect, and ruled the State would

be “precluded from using as evidence the field sobriety tests performed in the sally port / garage at the Muscatine County Jail.” (Supp. Ruling, p. 4; App. 16).

Judge Strausser’s ruling on the DataMaster result is much less clear. The vague rationale for the ruling is discussed upon the merits, below. Nonetheless, the result was clear in ruling that the evidence of the alcohol content in the breath specimen submitted to the DataMaster would be admissible at trial. (Ruling, pp. 6-7; App. 18-19)

The Merits

Judge Strausser did correctly set out the defense argument, but he reached the wrong conclusion:

> The defendant’s position that his attorney’s advice would have been different if the attorney had been allowed to meet with his client before field sobriety tests were performed is without merit as it relates to the Implied Consent procedure. The defendant’s position is that

> one of the factors that weighed into the advice the defendant received was the fact that he had already completed field sobriety tests. Attorney Johnston testified that but for field sobriety tests he would have recommended the defendant decline the Data-Master. The Court recognizes it has now suppressed the results of the field sobriety tests performed at the Muscatine County Jail. The fact that Attorney Johnston's advice may have been different had the defendant's rights not been violated by performance of the field sobriety does not require suppression of the Implied Consent procedure and the results of the breath test. (Supp. Ruling, p. 6; App. 18)

The judge seems to conclude that because Attorney Johnston had a chance to meet with Mr. Davis before he submitted a breath sample, the attorney had all the information he needed to confidently determine the field tests would be suppressed. Judge Strausser wrote:

> Attorney Johnston was not asked during the Motion to Suppress hearing, nor did he state, whether he had already concluded the field sobriety tests likely would not be admissible when he met with his client. Given Attorney Johnston's experience, it is reasonable to believe that he

> had a full and complete opportunity to consult with his client and had an opportunity to determine whether any purported evidence collected by the State would be admissible at trial and weigh this in his advice to the defendant. (Supp. Ruling, p.7; App. 19)

The judge's thought that Mr. Johnston could have decided the field tests would be suppressed defies logic, the record and the law. Mr. Johnston's conclusion as to the admissibility of the field test performance was quite clearly to the contrary. First, the record very plainly shows that Johnston logically and correctly assumed his client failed the field tests at the jail. This was based on his "experience" with police procedures, and Judge Strausser found Johnston's experience was important to the analysis. The record also clearly shows Johnston was proceeding on the prudent presumption that the field tests would not be suppressed and the officer's observations would be used as evidence against Mr. Davis. The attorney specifically testified that evidence of the field tests against his client was the deciding factor in his decision to advise his client to submit the breath sample. Considering the evidence of the field tests would be used against Mr. Davis, the attorney then concluded "the die was cast."

The legal advice was based on Mr. Johnston's reasoned judgment that Bob had nothing left to lose. He might as well take the breath test on the chance he would pass it, and thereby turn the tables on the evidence. (Supp. Tr. 60-61, L. 5-2)

Where is the logic in the judge's speculation that the attorney concluded the field tests would be suppressed? If Mr. Johnston determined the field tests would be suppressed, why would he advise his client to then turn around and give the State evidence in a breath specimen? Attorney Johnston's testimony could not be more clear. The judge's reasoning could not be more unclear.

Another interpretation of the judge's language is that the simple opportunity for the attorney to consider suppression issues in his advice on the breath test is *all* that the statute requires. The decision suggests Johnston should have concluded the field tests were inadmissible, but does not say that specifically. The ruling twice emphasizes attorney and client had "a full and complete opportunity" to discuss the situation and determine whether any evidence gathered before the breath test would be admissible at trial. (Supp. Ruling, p.7; App. 19)

The implication of the judge's order seems to be that Attorney Johnston should have determined the field tests would be suppressed, and he should have therefore advised Mr. Davis to refuse the breath test. That would defy reason and logic. An attorney has to give advice based on the evidence as he knows it. He would not know from the client consultation in question whether recordings would be available from Bob's conversations with Deputy Cardenas. The attorney would not know what explanations the deputy would give for his actions or inaction. There would be a possibility an explanation could arise that would make the delay in consultation reasonable. The attorney would do well to anticipate that the deputy would not tell the truth about everything. If Judge Strausser would have believed the deputy's testimony that he gave Bob his phone before transport to the jail, the field tests would have been admissible. Mr. Johnston would not have known the squad recording would show the falsity of the officer's testimony that he gave Bob his phone back while still at the scene. See: *State v. Simmer,* 2003 WL 21230199 (No. 02-1125) (Ia. App. 2003) (Trial Ex. "C"; Squad Recording Trans. (App. 24-27)

There are countless things an attorney cannot know after an initial meeting with a client within an hour after events in question. The attorney cannot be held to a crystal-ball standard to make a determination as to the outcome of a motion to suppress that would be litigated after all the evidence is gathered. Attorney Johnston reasonably made his recommendation on the premise that his client had failed field tests and those failures would be admissible at trial. The judge failed to apply the proper legal standard. The evidence that must be suppressed is the evidence that was obtained directly or indirectly as a result of the illegal police conduct. The focus is not in speculation on what Attorney Johnston should or could have done. The focus is on what Cardenas gained as a result of denying Mr. Davis his rights. Prejudice is presumed when the officer violates the statute. *State v. Walker,* 804 NW2d 284, 296 (Iowa 2011) The extreme irony in the judge's speculation as to whether Mr. Johnston opined on the admissibility of the field tests is that the attorney would never have been placed in that position if Cardenas had not violated the statute. If Mr. Davis had been allowed to talk to his attorney before

making the decision on the field tests, he would have gotten the very simple directive to refuse any type testing.

The straightforward approach to the issue is that the breath test result is always suppressed after a violation of the statute. "The exclusionary rule extends to the exclusion of breath tests, breath test refusals, and non-spontaneous statements obtained after unnecessary delay in allowing the person the statutory right to consult with an attorney or family member." *State v. Garrity,* 765 N.W. 2d 592, 597 (Iowa 2009). In *State v. Walker,* 804 N.W. 2d 284, 296 (Iowa 2011), the Court said, "The district court applied the remedy mandated by more than a generation of our precedent -- suppression of the breath test results." There is no reason the exclusionary rule would be applied differently in enforcing the statutory right, as compared to constitutional rights. The mechanics and rationale of the exclusionary rule were set out in detail in *State v. Seager,* 571 N.W. 2d 204 (Iowa 1997).

> The exclusionary rule is
> designed to deter illegal
> police misconduct. (cite)
> It applies to evidence gained
> indirectly as well as directly
> through unconstitutional

> conduct to ensure the prosecution is not "put in a better position than it would have been if no illegality had transpired. 571 N.W. 2d at 210

Judge Strausser correctly ruled Cardenas had violated Section 804.20 by not allowing Mr. Davis to talk to his wife and not allowing him to talk to his attorney before the field tests. Without citing any authority, the judge went on to reach this legal conclusion:

> The State's misconduct by violating Iowa Code Section 804.20 ended when the defendant was allowed to consult with his wife by phone and his attorney in person. From that point forward there was no violation of Iowa Code Section 804.20 and evidence collected after that point is admissible.

The judge laid down an artificial line of demarcation, rather than applying the law of the exclusionary rule. The question is whether the violation of the statute indirectly or directly led to the result obtained from the breath test. On that score, there can only be one fact-finding drawn from the evidence. As the judge stated it in his ruling: "Attorney Johnston

testified that but for the field sobriety tests, he would have recommended the defendant decline the DataMaster." (Ruling Supp. 6; App. 18) That testimony certainly does not rebut the presumption of prejudice, and it clearly shows the DataMaster breath result was obtained as a direct result of the violation of the statutory right. Attorney Johnston also testified that if he could have spoken to Mr. Davis before he performed the field sobriety tests at the jail, he would have recommended those tests be declined, as well. (Supp. Tr. 58-59, L. 8-12)

CONCLUSION

Because the deputy sheriff violated Mr. Davis's statutory right to confer with his attorney, the State was able to obtain a breath sample from him. The evidence was gained as a direct result of the violation. The judge erred in refusing to suppress the DataMaster result. The action must be reversed for a new trial with direction to suppress the evidence.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.908(1), Appellant requests to be heard in oral argument.

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