No. 19-121896-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

vs.

KYLE L. HEINEKEN
Defendant-Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Clay County, Kansas
The Honorable William M. Malcolm, District Magistrate Judge
District Court Case No. 18 TR 191

Richard E. James, #20962
Clay County Attorney
712 5th Street, Suite 202
Clay Center, KS 67432
(785) 632-3226
(785) 632-3819 Facsimile
claycoatty@yahoo.com
Attorney for Appellant
Oral Argument: 15 Min.

TABLE OF CONTENTS

No. 19-121896-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

vs.

KYLE L. HEINEKEN
Defendant-Appellee

BRIEF OF APPELLANT

NATURE OF CASE

The Defendant, Kyle Heineken, was charged in Clay County District Court with one count of driving under the influence of alcohol, second offense, and one count of speeding. The Defendant filed, and the district court magistrate heard, a motion to suppress alleging the arresting officer improperly denied the Defendant a right to an additional blood alcohol test at his own expense. That motion was denied, and the Defendant subsequently filed a request for a jury trial. The case was then transferred to a district judge for a jury trial. The Defendant then filed a motion to reconsider to be heard before the district judge. After hearing argument at a status hearing, the district judge remanded the case back to the magistrate judge to hear the motion to reconsider and, if necessary, conduct a misdemeanor

jury trial. The magistrate judge then heard the motion to reconsider and granted the motion. The State then filed the instant interlocutory appeal, arguing the district court magistrate erred in granting the motion to suppress.

STATEMENT OF THE ISSUE

ISSUE: The district court erred in holding the arresting officer improperly denied the Defendant the opportunity to obtain his own test after testing on the Intoxilizer 9000.

STATEMENT OF THE FACTS

On September 29, 2018, Deputy Keith Myers of the Clay County Sheriff's Department stopped a vehicle for speeding. (Vol. II, p. 4) He approached and identified the driver as the Defendant, Kyle L. Heineken. (Vol. II, p. 4) After a series of field sobriety tests, he arrested the Defendant for driving under the influence of alcohol. (Vol. II, p. 4) The deputy transported the Defendant to the Clay County Law Enforcement Center where the Defendant consented to a breath test on the Intoxilizer 9000. (Vol. II, p. 5) The Intoxilizer provided a printout that indicated a valid test and that the Defendant was in excess of the legal limit for driving. (Vol. II, p. 5)

However, as the officer was removing the mouthpiece from the machine after the test, he noticed flakes of what appeared to be chewing tobacco on the mouthpiece. (Vol. II, p. 5) After the test, the Defendant asked about contacting his attorney, and was told he could. (Vol. II, p. 5) (Video 215829-220311 22:01) Then, about eight minutes later, the Defendant asked about an independent test; the conversation, as recorded on booking room camera, was:

Myers: (referring to consulting an attorney about additional testing) ". . . but if at this point he says yeah, go ahead, you're going to have to secure testing on your own. That means you'll have to go somewhere and take the test.

Heineken: That'll be fine.

Myers: There's nowhere around here that you can take an actual breath test. The only option . . .

Heineken: What about blood ?

Myers: . . would be to go to the hospital and have blood drawn. That's something you would have to do on your own.

Heineken: Under your surveillance?

Myers: No, at this point any additional testing that you do is on you, pretty much. So if you want to go have blood drawn and use that as your defense later down the road, that's totally up to you because my basis for the arrest tonight was based on what I observed out in the field. Okay. (Video 220903-221039 22:09)

The deputy explained to the Defendant that he wanted to be fair to him and he was worried the tobacco particles on the mouthpiece would not give him an accurate breath test. (Vol. II, p. 6) He did not deny the Defendant an opportunity to get another test, but simply gave him the option of taking a second breath test after rinsing his mouth and waiting another 20 minutes. (Vol. II, p. 6-7) The Defendant eventually agreed to a second breath test, and at the conclusion of the second breath test, the Defendant was turned over the jailer for booking. (Vol. II, p. 7) After the second test was complete, the Defendant did not ask to do additional testing; the deputy asked him if he had any questions, and when the Defendant replied "no," the deputy left. (Vol. II, p. 7)

After the Defendant was charged and arraigned, the Defendant filed, and

the district court magistrate heard, a motion to suppress alleging the arresting officer improperly denied the Defendant a right to a second blood alcohol test at his own expense. (Vol. I, p. 44-45) That motion was denied, and the Defendant subsequently filed a request for a jury trial. (Vol. I, p. 44-46) The case was then transferred to a district judge for a jury trial. The Defendant then filed a motion to reconsider to be heard before the district judge. (Vol. I, p. 73) After hearing argument at a status hearing, the district judge remanded the case back to the magistrate judge to hear the motion to reconsider and, if necessary, conduct a misdemeanor jury trial. (Vol. I, p. 93) The magistrate judge then heard the motion to reconsider and granted the motion. (Vol. I, p. 99) The State then filed the instant interlocutory appeal, arguing the district court magistrate erred in granting the motion to suppress.

ARGUMENTS AND AUTHORITIES

ISSUE: The district court magistrate erred in holding the arresting officer improperly denied the Defendant the opportunity to obtain his own test after testing on the Intoxilizer 9000.

Standard of Review

The State alleges the district court erred when it granted the Defendant's motion to suppress. The State is authorized to take this interlocutory appeal pursuant to K.S.A. 22-3603. The standard of review for an appellate court reviewing a motion to suppress is as follows:

> Our review of an evidence suppression issue is bifurcated. Without reweighing the evidence, the appellate court first examines the district court's findings to determine whether they are supported by

> substantial competent evidence. The district court's legal conclusions are then reviewed *de novo*. If there are no disputed material facts, the issue [of whether to suppress evidence] is a question of law over which the appellate court has unlimited review. *State v. Karson*, 297 Kan. 634, 639, 304 P.3d 317 (2013).

Argument and Authorities

The issue is, as noted above, whether the Defendant was given a timely opportunity to obtain an independent blood alcohol test the night of his arrest. The parties seem to agree that the baseline case on this issue is *State v. George*, 12 Kan.App.2d 649, 754 P.2d 460 (1998). In *George*, the defendant asked for an additional test approximately an hour after testing was complete, but the officer refused to take him for a blood test. 12 Kan.App.2d at 651-52. The officer's stated reasons for the refusal to take George to get the test were that he would have to transport George, the hospital would have to call off duty personnel in, and that it would take too long to get George ready and transport him to the hospital. *Id.* The *George* panel held:

> We hold that there is coupled with a DUI suspect's statutory right to additional testing a corresponding duty on the part of law enforcement officers not to deny the suspect that right. Law enforcement officers may not nullify a right granted to a citizen by the legislature. George did not have a reasonable opportunity to obtain additional testing. Under the facts of this case, the denial of George's request for additional testing violated K.S.A. 1987 Supp. 8–1004 and the State's breath test should have been excluded. What is a "reasonable opportunity" will depend on the circumstances in each case. When a DUI suspect is detained under arrest the opportunity afforded him must be consistent with safe custody. What may be a reasonable opportunity in one locality may not necessarily be reasonable in another. *Id.* at 653-54.

As noted by the *George* panel, what is a "reasonable opportunity" will depend on the circumstances in each case.

The opposite result was reached in *Mitchell v. Kansas Dept. of Revenue*, 32 Kan.App.2d 298, 81 P.3d 1258 (2004), a case decided six years after *George*. Mitchell was immediately driven to a hospital by the police after requesting an independent test after his breath test was complete, but the hospital refused to draw his blood. 32 Kan.App.2d at 299-300. The officer argued with the hospital staff and even offered to take the cuffs off Mitchell, then allow Mitchell to walk in on his own and request the test. *Id.* The hospital still refused and would only do the test if the Kansas Highway Patrol could be billed. Id.

The officer took Mitchell back to jail, and Mitchell argued on appeal that the officer had a responsibility to take him to a different facility that would draw his blood. *Id.* at 300-01. However, Mitchell did not renew his request for a blood test after he was turned down at the hospital. *Id.* The *Mitchell* Panel noted that the test was whether Mitchell had a reasonable opportunity to obtain an independent test, and whether that opportunity was reasonable was driven by the circumstances of the case, rather than a bright line rule. *Id.* at 301.

The *Mitchell* Panel then searched for similar precedent in Kansas case law as well as other jurisdictions. The Panel noted that in *State v. Chastain*, 265 Kan. 16, 22, 960 P.2d 756 (1998), our Supreme Court held it was not unreasonable interference with the right to an independent test when the police officer told Chastain that an additional test would resulted in a higher reading than the breath

test had provided. In two cases in Georgia, *Grizzle v. State,* 153 Ga. App. 364, 265 S.E.2d 324 (1980) and *Jenkins v. State,* 198 Ga. App. 843, 403 S.E.2d 859, 861 (1991), Georgia appellate courts held that when the defendants were turned away from hospitals the officers were not required to "insure the performance of the test." 265 Kan. at 302-303. Likewise, the *Mitchell* Panel found both South Carolina and Maine followed the same principle. See *City of Columbia v. Ervin,* 330 S.C. 516, 500 S.E.2d 483 (1998); *State v. Copeland,* 391 A.2d 836 (Me.1978). 265 Kan. at 303.

After this review of caselaw in Kansas and other jurisdictions, the Panel noted that Mitchell had argued it was the officer's responsibility to transport him to another facility to get the independent test and that by not doing so, the officer violated his rights. 265 Kan. at 304. The Panel in response held:

> The problem with this argument is that we find no evidence in the record that suggests that Winner ever refused to take Mitchell to a second hospital. We find no evidence that Mitchell requested to be taken to a second hospital. The evidence supports the conclusion reached by the trial court that Mitchell had a reasonable opportunity to obtain an independent BAC test but failed to do so. *Id.*

Likewise, our Supreme Court in *Chastain,* as noted above, has ruled that it was not unreasonable interference with the suspect's attempts to secure an additional test when a police officer informed the suspect that the additional test would register higher than the breath test the officer had just given him.

A similar conclusion was reached in *State v. Brown*, 196 P.3d 1232 (Table),

2008 WL 5234533 (attached), decided ten years after *George*. In *Brown*, the defendant was transported to the hospital by ambulance after a single vehicle accident, and the police followed the ambulance to the hospital. 2008 WL 5234533 at *1. While there, the defendant told the officer he wanted both a blood test and a breath test, but when the technician attempted to draw his blood, he refused and asked to go to the bathroom instead. *Id.* He was told that would count as a refusal. *Id.*

No blood was taken, and about an hour later, Brown was released from the hospital and immediately arrested by the officer. *Id.* On the way to the police station, he told the officer he would like a breath test and successfully completed one at the station; the test showed his BAC to be .159. *Id.* He made no further requests and was booked into jail. *Id.* The district court denied his motion to suppress the breath test. *Id.* at *2.

After being convicted of felony DUI, he filed an appeal, alleging the police should have allowed him to get a blood test after completing the breath test at the station and cited to *State v. George* for support. *Id.* The *Brown* Panel noted that *George* held ". . . a suspect is not afforded a reasonable opportunity to obtain additional testing when the facts demonstrate that an officer has unreasonably interfered with the suspect's reasonable attempts to secure additional testing." *Id.* at *3 quoting *George*, 12 Kan.App.2d at 655. Then, the Panel found:

> Here, Brown's request for a blood test was not met with a flat refusal from Tatro; Tatro provided Brown an opportunity for the blood test at the hospital, but Brown refused to allow his blood to be drawn.

> Brown never made any further request for a blood test, even after submitting to the breath test at the jail. Thus, *George* is distinguishable. *Id.* at *3.

In *State v. Chastain,* 265 Kan. 16, 18, 960 P.2d 756 (1998), the defendant blew into the Intoxilizer but provided a deficient sample that nonetheless showed a reading of .210 BAC. Chastain then asked for a blood test, but the officer told him that the result of a blood test would be higher; the defendant then told the officer to "forget it." 265 Kan. at 18. On appeal, the defendant argued that the test should be suppressed because the officer's comments "wrongfully persuaded him from taking the blood test and resulted in an unreasonable interference by the State with his rights under the provisions of K.S.A. 8-1004." *Id.* at 20.

As noted above, our Supreme Court disagreed, holding:

> . . . [I]n certain circumstances, comments by officers which persuade an accused not to take an additional test will constitute an unreasonable interference with that right. Whether such comments constitute coercion and rise to the level of unreasonable interference depends upon the facts and circumstances of each particular case. *Id.* at 21.

The *Chastain* Court went on to find that the officer did not deny Chastain the subsequent test, and that the officer had told Chastain he could have an independent test. *Id.* at 21. The Court further found that there was no evidence in the record that the officer's comments were coercive or designed to prevent Chastain from seeking the test. *Id.* at 21-22.

What is common to *Brown*, *Mitchell,* and *Chastain* is there was an intervening event between the request for an independent blood test and the

opportunity for a blood test and none of the three defendants in those cases renewed their request after the intervening event. Also, in each case, the officer did not deny them the right to an independent test. In *Brown*, the intervening event was his subsequent arrest, transport, and test on the Intoxilizer. In *Mitchell*, the intervening event was the refusal of the hospital to perform a blood test, and finally, in *Chastain*, the intervening event was the officer's remarks about a blood test giving a higher result.

When comparing the case law to the instant case, after the Defendant submitted to the Intoxilizer 9000, he asked about an independent test some minutes after the officer discovered the tobacco flakes on the mouthpiece. The video camera recorded the entire encounter and recorded the following conversation between the officer and the Defendant:

Myers: (referring to consulting an attorney about additional testing) ". . . but if at this point he says yeah, go ahead, you're going to have to secure testing on your own. That means you'll have to go somewhere and take the test.

Heineken: That'll be fine.

Myers: There's nowhere around here that you can take an actual breath test. The only option . . .

Heineken: What about blood ?

Myers: . , would be to go to the hospital and have blood drawn. That's something you would have to do on your own.

Heineken: Under your surveillance?

Myers: No, at this point any additional testing that you do is on you, pretty much. So if you want to go have blood drawn and use that as your defense later down the

road, that's totally up to you because my basis for the arrest tonight was based on what I observed out in the field. Okay. (Video 220903-221039 22:09)

After this exchange, the two officers (Myers had been joined by another officer at the station) and the Defendant discussed the officer's offer of a second blood test after expressing his concern about the tobacco. The officer had explained the presence of tobacco and offered the second test about eight minutes before the exchange about an independent test. (Video 215829-220311 22:01) During the second twenty minute observation period, the Defendant did not renew his request for an independent test, although he spoke freely with both officers. At one point, he asked Officer Fischer if the officer thought he should take the second Intoxilizer test; the officer told him he could not give legal advice. (Video 221443-221701 22:14) When he blew into the intoxilizer the second time, the deputy read the Defendant the reading; it was in excess of the legal limit again, and only slightly less than the original reading from the first test. (Video 222339-223440 22:23)

At the conclusion of the second test, Myers asked the Defendant "Do you have any questions for me at this point;" the Defendant replied "No." (Video 222849-223048 22:29) At that point, Myers turned him over to the jailer for processing, a few minutes later, Myers reentered the room. Myers told him his bond amount and said, "Any other questions for me?" and the Defendant shook his head no. (Video 223650-224055 22:38) Then Myers said "OK, well, if you have any questions before you leave have them reach out to me and get ahold of me and

I'll see if I can answer them for ya, all right? Thanks, Kyle." (Video 223650-224055 22:38) At that point, the deputy left, had no further contact with the Defendant, who continued to process with the jailer and then immediately bonded out when the processing was complete. In spite of Myers' repeated questioning, the Defendant never asked again about an independent test.

Comparing these facts to the caselaw, it is the State's position that this case is on point with the three cases cited above, *Brown*, *Mitchell,* and *Chastain.* In each of those cases, the defendant requested an independent test, and then there was an intervening event. Here, the intervening event was the tobacco noted on the mouthpiece after the first test. Unlike the defendant in *George*, the Defendant was not told he could not or would not be allowed to get an independent test. The officer explained to him that was up to him "to do on his own." The officer testified he was referring to the fact that it was at the Defendant's own expense, and that he was not required to observe the test. (Vol. II, p. 6) The officer further testified that had the Defendant not consented to the second breath test, he would have taken him to get a blood test. (Vol. II, p. 25)

In *Brown*, *Mitchell,* and *Chastain*, each of the defendants failed to renew their request for a blood test after the intervening event. Here, the officer asked the Defendant to redo the breath test because of the tobacco. The Defendant cites *Dunler v. Kansas Dep't of Revenue*, 302 Kan. 420, 354 P.3d 519 (2015), for the proposition that a defendant may invoke his right to an attorney at any time, although he cannot exercise that right until after testing is complete. (Vol. I, p. 76)

He then argues that the same applies to a defendant's right to an independent test. That concept must be balanced against the purpose of a defendant's right to an independent test. The purpose of the right to an independent test was outlined by the Supreme Court in *Chastain*, cited above. The *Chastain* Court held that the purpose of this right is as expressed in K.S.A. 8-1004 and that is "to allow an accused an opportunity to secure independent testing in order to rebut the results of police testing, which may be used by the State upon trial." 265 Kan. at 20.

The measure, as repeatedly outlined by Kansas appellate courts, is did law enforcement unreasonably interfere with the defendant's right to independent testing? In *Chastain*, the Supreme Court quoted the *George* Court for the standard that law enforcement must unreasonably interfere with the suspect's reasonable attempts to obtain additional testing. *Id.* at 20, quoting *George*, 12 Kan.App.2d 649 at Syl. ¶ 4. See also *Mitchell*, 32 Kan.App.2d at 302; *Brown*, 2008 WL 5234533 at *2.

If the standard was as the Defendant argues, each of these previously cited cases, except *George* and *Chastain*, should be overturned. In *Mitchell*, as noted above, the officer took the defendant to a hospital that would not draw blood but did not take him to another area hospital. The defendant did not renew his request for a blood test, and the *Mitchell* Panel held the officer was not required to do more. Likewise, in *Brown*, the defendant requested a blood test before he was in custody and before he had taken a breath test, then refused to let the hospital draw blood. If the Defendant today is correct and the Defendant needs ask only once, at

any time for additional testing, and the purpose of additional testing is to provide evidence for a defendant to counter the State's test in court, should not have Brown been taken back to the hospital after his breath test? In neither *Mitchell* or *Brown* did the defendant renew their request for additional testing, and in both cases, panels of this Court held the officers did not err.

In yet another case, not previously discussed in this Brief, *State v. Nodgaard*, 149 P.3d 547 (Table), 2007 WL 92683 (attached), the defendant was arrested for DUI, and during the reading of the implied consent advisory, interrupted the officer and asked for a blood test. 2007 WL 92683 at *1. He was told he was being offered a breath test, to which he eventually submitted. *Id.* He did not renew his request for a blood test after his breath test and was convicted of DUI. On appeal, he argued that his breath test be suppressed because the officer did not honor his request for a blood test after the breath test was complete. The *Nodgaard* Panel summed up his request this way:

> What Nodgaard asks on appeal is for us to find that the mention of an attorney and a blood test during the reading of the implied consent advisories triggers an affirmative requirement on the part of law enforcement officers to see that such rights are exercised after testing is completed, despite the fact that Nodgaard made no request for either an attorney or a further test after he learned of the .17 results of the breath test. *Id.* at *3.

Then, citing the "reasonable opportunity" language in *George*, the Panel upheld the trial court's denial of Nodgaard's motion to suppress.

In each of these cases cited, the appellate courts did not establish a requirement for the officer to ensure an additional test is provided no matter

when a defendant invokes the right to additional testing. Indeed, in each of these cases, the appellate courts cited the standard that an officer cannot unreasonably interfere with a defendant's reasonable efforts to obtain testing. In the instant case, the Defendant's attorney argued in the suppression hearing that he did not restate his desire for an additional test because he assumed when the officer told him he would have to do it on his own, he would not be taken to get one. There is absolutely no evidence of this in the video; in fact, the officer twice asks him after the second test if he has any questions, and then before leaving the station, he told the Defendant to have the staff call him back if he needed anything. It is just as reasonable to think that the Defendant, after taking two breath tests and being told twice he was over the legal limit, assumed an additional test would yield the same results and therefore changed his mind about additional testing.

CONCLUSION

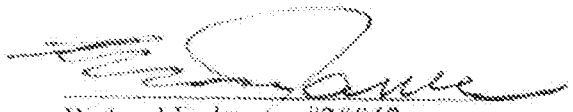
Here, the Defendant asks this Court to establish a new, bright line rule: that if a defendant in a DUI case asks, at any point in the process, to be allowed to have an additional test, law enforcement must then ensure he gets that opportunity, no matter what obstacles an officer must overcome. That has never been the standard in this case. The question is did the officer unreasonably interfere with this Defendant's right to additional testing? The record and the recording show that the officer did not interfere with the Defendant's right for additional testing.

After the Intoxilizer test was administered and flakes of tobacco were discovered on the mouthpiece, the officer followed his training and requested he Defendant take a second breath test on the Intoxilizer. The Defendant was free to decline that test, and openly considered whether to do it; at one point even asking another officer if he should take it. Deputy Myers testified that if the Defendant had refused the second test, he would have taken him to get a blood test. The Defendant elected to take the second test, and after being told the reading was almost identical to the first reading, did not request further testing.

The deputy did not foresee the tobacco on the mouthpiece, and as noted earlier, followed his training at that point. At some point along the way, the Defendant changed his mind, for whatever reason, about additional testing. Although given every opportunity to request an additional test, he did not do so. Myers did not unreasonably interfere with the Defendant's right to additional testing in the instant case under the circumstances noted above.

For all of these reasons, the State prays this Court reverse the district court's suppression of the evidence and remand the matter back to the district court for trial.

Respectfully submitted,

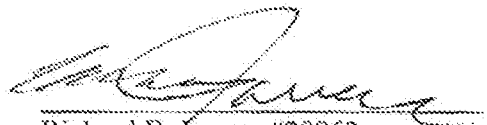


Richard E. James, #20962
Clay County Attorney
2nd Floor Courthouse
712 5th St., Suite 202
Clay Center, KS 67432
(785) 632-3226 Fax: (785) 632-3819
claycoatty@yahoo.com

Derek Schmidt
Kansas Attorney General

Certificate of Service

The undersigned hereby certifies that service of the above and forgoing brief was made by electronic service, to Jeremy Platt, Attorney for Appellant, at jeremy@m\clarkplatt.com and one copy to Derek Schmidt, Attorney General, Kansas Judicial Center, Topeka, Kansas, 66612, on the 31st day of October, 2019.



Richard E. James, #20962
Clay County Attorney

ATTACHMENT I

State v. Brown, 196 P.3d 1232 (Table), 2008 WL 523453

196 P.3d 1232 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Kevin Lee BROWN, Appellant.

No. 98,591.
Dec. 12, 2008.

West KeySummary

1 **Criminal Law**
Necessity in general
Criminal Law
Acts, admissions, declarations, and confessions of accused

Trial court's error of failing to suppress statements that were made by defendant before *Miranda* warnings were given was harmless in prosecution for driving a vehicle under the influence of alcohol (DUI). Excluding the incriminating statements that should have been suppressed, the remaining lawful evidence would have been sufficient to convict. A police officer observed the defendant slumped over in the driver's seat of his truck. Also, a breath test taken over two hours after the defendant's accident registered .159 grams of alcohol per 210 liters of breath. K.S.A.2005 Supp. 8–1567(a)(1).

Appeal from Reno District Court; Timothy J. Chambers, Judge.

Attorneys and Law Firms

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

Gregory T. Benefiel, assistant district attorney, Keith E. Schroeder, district attorney, and Paul J. Morrison, attorney general, for appellee.

Before CAPLINGER, P.J., MARQUARDT and STANDRIDGE, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Kevin Lee Brown appeals the decision of the district court to deny his motion to suppress. We affirm.

Facts

After the **State** charged him with felony driving under the influence (DUI), Brown filed a motion to suppress certain incriminating statements and evidence of a breath test. The district court conducted an evidentiary hearing on the motion.

At the hearing, Officer Matt Tatro of the Reno County Sheriff's Department testified that on or around 3:23 a.m. on August 20, 2005, he was dispatched to a single-vehicle accident involving a pickup truck. Tatro arrived at the scene and made contact with Brown, who was slumped over in the driver's seat and wearing a Bud Light wristband on his left wrist. Tatro smelled an extremely strong odor of alcohol emanating from the vehicle. Tatro asked Brown about the odor, and Brown responded that he probably drank " 'way too much' " that evening.

Medical personnel secured Brown on a spine board, protected his neck against movement with a cervical collar (C-collar), and transported him to the hospital. Tatro followed Brown, arriving at the hospital at 4:06 a.m.

Tatro testified he followed Brown into the emergency room, after which he began asking Brown about the accident. Tatro admitted he did not advise Brown of his *Miranda* rights prior to asking these questions. In response to Tatro's questions, Brown told Tatro he had been at a local bar in Hutchinson and had been attempting to drive home. Tatro observed that

Brown's speech was very slurred, his eyes were extremely bloodshot, and the odor of alcohol was very apparent.

Tatro testified that Brown got more and more belligerent as Brown was waiting for x-ray results. More specifically, Brown began to repeatedly insist that his neck brace be removed. Both Tatro and medical personnel advised Brown that the neck brace should not be removed until doctors had examined his x-rays for injuries. Eventually, Tatro decided to handcuff Brown to the hospital bed because Brown was ignoring the emergency room doctor's orders to not undo the C-collar and tape stabilizing Brown's neck.

With Brown handcuffed to the bed, Tatro talked to Brown about taking a blood test. To that end, Tatro provided Brown an implied consent form, read the form to him, and then asked whether Brown would be willing to submit to the blood test. Brown **stated** he wanted to submit to a blood test and a breath test. When the laboratory technician arrived to draw his blood, however, Brown demanded that he be allowed to use the restroom first. Since the doctor had ordered Brown to remain immobilized, Brown was not allowed to use the restroom, and no blood was taken. Tatro advised Brown that his actions would constitute a test refusal.

Approximately 1 hour after the laboratory technician left, Brown was released from the hospital. Upon release, Tatro immediately arrested Brown and transported him to jail. During the ride, Brown requested a breath test be administered. Once they arrived at the Law Enforcement Center, Brown again requested a breath test be administered. At that point, Tatro again read the implied consent form to Brown and conducted a breath test, which registered an alcohol concentration of .159 grams of alcohol per 210 liters of breath. Brown made no further requests and was booked into jail.

***2** Upon consideration of the evidence presented, the district court denied Brown's motion to suppress. Based on stipulated facts submitted after this decision, the district court convicted and sentenced Brown for felony DUI. Brown filed this appeal with respect to the district court's decision to deny his motion to suppress.

Analysis

As his first point of error, Brown contends that Tatro's failure to administer a blood test after Brown submitted to the breath test at the jail requires the court to suppress the breath test results. As his second point of error, Brown maintains his statements to Tatro at the hospital should have been suppressed because they were made before Tatro advised him of his *Miranda* rights.

> "When considering a district court's decision regarding the suppression of evidence, an appellate court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. Appellate courts do not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence." ***State*** *v. Greever,* 286 Kan. 124, Syl. ¶ 2, 183 P.3d 788 (2008).

When the material facts to a trial court's decision on a motion to suppress evidence are not in dispute, the question of whether to suppress is a question of law over which an appellate court has unlimited review. ***State*** *v. Porting,* 281 Kan. 320, 324, 130 P.3d 1173 (2006). The **State** bears the burden of proof to demonstrate that a search or seizure that led to the discovery of the evidence in question was lawful. ***State*** *v. Ibarra,* 282 Kan. 530, 533, 147 P.3d 842 (2006).

7. Suppression of the Breath Test Results

Brown contends the results of his breath test should have been suppressed because he was denied a reasonable opportunity to have additional testing completed after submitting to the breath test, as required by Kansas statute. To support his argument, Brown recites verbatim nearly five pages of transcript to show that Tatro was aware Brown had agreed to submit to a blood test at the hospital and that Tatro failed to take Brown back to the hospital after Brown submitted to a breath test at the jail.

Testing a driver who may be impaired for alcohol or other drugs generally is governed by K.S.A.2007 Supp. 8–1001. Once an officer completes an alcohol or drug test, "the person [tested] has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians." K.S.A.2007 Supp. 8–1001(f)(10). The right to this additional testing is further discussed in K.S.A. 8–1004, which **states**:

> "Without limiting or affecting the provisions of K.S.A. 8–1001 and

> amendments thereto, the person tested shall have a reasonable opportunity to have an additional test by a physician of the person's own choosing. In case the officer refuses to permit such additional testing, the testing administered pursuant to K.S.A. 8–1001 and amendments thereto shall not be competent in evidence."

*3 Generally, what constitutes a "reasonable opportunity" to undergo an additional test pursuant to K.S.A. 8–1004 must be determined according to the facts of each case. ***State*** v. *George*, 12 Kan.App.2d 649, Syl. ¶ 2, 754 P.2d 460 (1988). To that end, a panel of this court has held that a suspect is not afforded a reasonable opportunity to obtain additional testing when the facts demonstrate that an officer has unreasonably interfered with the suspect's reasonable attempts to secure additional testing. *See George*, 12 Kan.App.2d at 655, 754 P.2d 460.

In *George*, the defendant requested additional testing about 1 hour after submitting to a breath test, but the officer flatly refused to honor the defendant's request. 12 Kan.App.2d at 651–52, 754 P.2d 460. The court held the officer's refusal constituted an unreasonable interference with the defendant's reasonable attempt to obtain additional testing, in violation of K.S.A.1987 Supp. 8–1004. 12 Kan.App.2d at 655, 754 P.2d 460.

Here, Brown's request for a blood test was not met with a flat refusal from Tatro; Tatro provided Brown an opportunity for the blood test at the hospital, but Brown refused to allow his blood to be drawn. Brown never made any further request for a blood test, even after submitting to the breath test at the jail. Thus, *George* is distinguishable.

The opposite result to *George* was reached in *Mitchell* v. *Kansas Dept. of Revenue*, 32 Kan.App.2d 298, 81 P.3d 1258 (2004). In *Mitchell*, the defendant requested additional testing after submitting to preliminary testing, and the officer drove the defendant to the hospital so the test could be performed. The hospital, however, refused to perform the test, so the officer returned the defendant to jail. 32 Kan.App.2d at 299–300, 81 P.3d 1258. The defendant failed to renew his request and did not make any other attempt to secure additional testing. 32 Kan.App.2d at 301, 81 P.3d 1258. Based on the results of the breath test, the **State** suspended the defendant's driver's license. 32 Kan.App.2d at 300, 81 P.3d 1258.

On appeal, the defendant claimed he was not provided a reasonable opportunity to obtain additional testing because the officer failed to take the defendant to a site where the request for a test would be honored. *Mitchell*, 32 Kan. App.2d at 301. The court cited several cases from other jurisdictions, some of which held an officer had no duty to make a second attempt to locate additional testing, while others implied an officer would be required to drive to a second location, but only if the defendant renewed his request after the first attempt failed. In light of these decisions, the court upheld the suspension of the defendant's license. 32 Kan.App.2d at 302–03, 81 P.3d 1258.

Another panel of this court reached a result similar to the one reached in *Mitchell*. In ***State*** v. ***Nodgaard***, No. **95,747**, unpublished opinion filed January 12, 2007, *rev. denied* 284 Kan. 949 (2007), the officer read to the defendant the implied consent form, part of which **stated** the person shall be " 'hereafter requested to take a blood, breath or urine' " test. Slip op. at 2. While reading this quoted language, the defendant interrupted the officer, **stating** that he wanted a blood test. The officer informed the defendant that he was being offered a breath test. After the breath test was completed, the defendant did not ask about a blood test. The court held the defendant's rights under K.S.A. 8–1004 were not violated because the defendant failed to request an additional test after the breath test was completed. Slip op. at 8.

*4 Like *Mitchell*, Brown failed to renew his request for a blood test after the first attempt to obtain a blood test failed. As in ***Nodgaard***, Brown failed to request an additional test after the completion of the breath test. Relying on these cases, we find Brown's rights under K.S.A. 8–1004 were not violated; thus, the district court did not err in denying Brown's motion to suppress results of his breath test.

2. Suppression of Statements Made by Brown at the Hospital

The district court denied Brown's motion to suppress statements made at the hospital. More specifically, the district court concluded the circumstances failed to establish that the Brown's statements were made as the result of a custodial interrogation; thus, no *Miranda* warning was required before questioning Brown. With regard to this conclusion, the district court found that although Brown was restrained by handcuffs, a reasonable person would have felt they were being protected

from harming themselves, rather than being placed in a custodial law enforcement situation. In addition, the court found that Tatro was still conducting an investigation at the time the questioning occurred.

At the hospital, Tatro asked Brown (1) what caused the accident; (2) where Brown had been; (3) whether Brown had been drinking; and (4) whether Brown would submit to a blood test. Since an officer is not required to advise a defendant of his or her *Miranda* rights prior to requesting the defendant to submit to an alcohol test, *see* ***State*** *v. Bishop*, 264 Kan. 717, 724, 957 P.2d 369 (1998), only Brown's responses to the first three questions will be evaluated for compliance with *Miranda*.

Miranda warnings are required when an accused is subjected to a custodial interrogation. See *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Custodial interrogation has been described as the questioning (or its functional equivalent) of persons by law enforcement officers, initiated and conducted while such persons are held in legal custody or are otherwise deprived of their freedom of action in any significant way." ***State*** *v. Jones*, 283 Kan. 186, 194, 151 P.3d 22 (2007).

Custodial interrogations are distinguished from investigatory interrogations. "An investigatory interrogation is the questioning of a person by a law enforcement officer in a routine manner before the investigation has reached the accusatory stage and where the person is not in legal custody or deprived of his or her freedom in any significant way." ***State*** *v. Vanek*, 39 Kan.App.2d 529, Syl. ¶ 4, 180 P.3d 1087 (2008), *rev. denied* ——— Kan. ——— (July 3, 2008).

Whether a person is in custody for purposes *of Miranda* " 'depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.' " *Jones*, 283 Kan. at 193, 151 P.3d 22. The test is whether a reasonable person would have felt at liberty to terminate the encounter with the officer under the totality of the circumstances. *See* 283 Kan., at 195, 151 P.3d 22. The determination of the circumstances surrounding the interrogation is a question of fact. Whether a reasonable person would have felt at liberty to terminate the encounter is a question of law. *See Thompson v. Keohane*, 516 U.S. 99, 112–16, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (clearly defining the two-step inquiry to be applied in evaluating whether an interrogation was custodial).

*5 In ***State*** *v. Deal*, 271 Kan. 483, 495, 23 P.3d 840 (2001), abrogated on other grounds by ***State*** *v. Anthony*, 282 Kan. 201, 214, 145 P.3d 1 (2006), the Kansas Supreme Court set out the following factors to be considered in analyzing the circumstances of the interrogation:

> "(1) when and where the interrogation occurred; (2) how long it lasted; (3) how many police officers were present; (4) what the officers and the defendant said and did; (5) the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door; (6) whether the defendant is being questioned as a suspect or a witness; (7) how the defendant got to the place of questioning, that is, whether he came completely on his own in response to a police request or was escorted by police officers; and (8) what happened after the interrogation-whether the defendant left freely, was detained, or was arrested. The importance of each factor varies from case to case. [Citation omitted.]" 271 Kan. at 497–98, 23 P.3d 840.

In *Jones*, 283 Kan. at 195, 151 P.3d 22, the Kansas Supreme Court emphasized that it "has never slavishly adhered" to these eight factors. Instead, the court indicated that two discrete inquiries are essential to the determination of whether an interrogation is custodial. First, what were the circumstances surrounding the interrogation? Second, under the totality of the circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave? 283 Kan. at 193–94, 151 P.3d 22; see *Thompson*, 516 U.S. at 112. These more general inquiries are especially relevant when, as here, the facts involve on-the-scene questioning by law enforcement instead of the controlled interview of a suspect at a police station or some other location away from the crime scene. See *Vanek*, 39 Kan.App.2d at 536–37, 180 P.3d 1087.

Here, the evidence establishes the following facts, which are relevant to our inquiry:

Place and Time: The interview occurred at the emergency room of the hospital. Tatro followed the ambulance to the hospital and arrived at 4:06 a.m.

Duration: Tatro testified he was with Brown at the hospital for over 1 hour.

Number of Police Officers Present: Tatro and another officer were in the emergency room with Brown. Nothing indicates Tatro or the other officer ever left the emergency room.

Conduct of the Officers and Brown: When Brown refused to comply with the doctor's order to refrain from removing the C-collar and tape stabilizing Brown's neck, Tatro handcuffed both Brown's arms to the hospital bed.

Presence of Actual Physical Restraint: There is no question that Brown "was restrained."

Being Questioned as a Suspect or a Witness: The **State** admits Tatro questioned Brown as a suspect.

Whether Brown was Escorted by the Police to the Interrogation Location or Arrived Under His Own Power: Tatro followed Brown's ambulance to the hospital; thus, Tatro did not escort Brown to the interrogation location, but Brown did not subject himself purposely to the interview with Tatro.

6 *Result of the Interrogation:* Tatro immediately arrested Brown upon Brown's release from the hospital.

The circumstances of this case strongly suggest that the interview with Brown had reached the accusatory stage. As noted above, Brown did not purposely subject himself to the interview with Tatro, and Brown was being questioned as a suspect. Although the interrogation itself may have been of short duration, Tatro remained at the hospital with Brown for Brown's entire hospital visit, which lasted at least 1 hour, and nothing suggests Tatro or the other officer ever exited Brown's room. In addition, there is no question that the officer's use of handcuffs physically restrained Brown to the extent that he was no longer free to make his own decisions, especially when the officer used the handcuffs to curtail his efforts to refuse medical care. Finally, as soon as Brown was released from the hospital's care, Tatro immediately arrested him.

Under the totality of the circumstances presented, we find no reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. Compare ***State*** *v. Louis*, 240 Kan. 175, 183–84, 727 P.2d 483 (1986) (hospitalized defendant was in custody where defendant was notified that his blood was being drawn for police purposes while three officers were present, and defendant was arrested immediately upon release from hospital) with *United* ***States*** *v. Robertson*, 19 F.3d 1318, 1320–21 (10th Cir.1994) (defendant was not in custody where FBI agent testified the FBI did not intend to take defendant into custody at time of interview, and defendant was free to check himself out of hospital); ***State*** *v. Canaan*, 265 Kan. 835, 847, 964 P.2d 681 (1998) (defendant was not in custody where defendant was alone for significant periods of time and was not arrested at hospital, and purpose of officers' presence at hospital was to determine when defendant would be released so they could later question him); ***State*** *v. Brunner*, 211 Kan. 596, 601, 507 P.2d 233 (1973), *disapproved in part on other grounds by* ***State*** *v. Murry*, 271 Kan. 223, 21 P.3d 528 (2001) (although hospitalized defendant was a suspect, defendant was not in custody because there was "nothing to indicate that so far as the police were concerned he was not a free agent" and defendant's detention "resulted purely from medical advice").

In light of our determination that the interview was conducted in the context of a custodial interrogation, we conclude that Tatro's questions to Brown concerning the accident should have been preceded by *Miranda* warnings and that, as a result, the district court should have suppressed the statements. *See Miranda*, 384 U.S. at 479. With that said, we find reversal of Brown's conviction for this reason is not warranted, because any error on the part of the district court in denying Brown's motion to suppress was harmless. Where a district court's failure to suppress statements is harmless, reversal is not required. *See* K.S.A. 60–261 (erroneous admission of evidence does not require reversal of conviction unless refusal to take such action is inconsistent with substantial justice). This is true even if, as here, the error is of constitutional magnitude. If this court possesses a firm belief beyond a reasonable doubt that the constitutional error had little, if any, likelihood of having changed the result of the trial, it may be declared harmless. ***State*** *v. Ewing*, 258 Kan. 398, 403, 904 P.2d 962 (1995).

7 Here, the **State** charged Brown with driving a vehicle under the influence of alcohol in violation of K.S.A.2005 Supp. 8–1567(a)(1).[1] To convict Brown of violating K.S.A.2005 Supp. 8–1567(a)(1), the **State** must have established Brown operated his vehicle when the alcohol concentration in his blood or breath was .08 or more. To that end, and excluding the incriminating statements the district court should have suppressed, we find the remaining lawful evidence would have been sufficient to convict Brown of violating K.S.A.2005 Supp. 8–1567(a)(1).

First, the evidence demonstrates that when Tatro arrived at the scene of Brown's accident, Tatro observed Brown slumped over in the driver's seat of the truck. This circumstantial

evidence is sufficient to find that Brown had been driving the vehicle. See *State* v. *Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980) (proof maybe established by circumstantial evidence); *see also State v. Stevens*, 285 Kan. 307, 319, 172 P.3d 570 (2007) (defendant was sitting in the driver's side of the vehicle); *State v. Dill*, 182 Kan. 174, 176, 319 P.2d 172 (1957) (defendant was found intoxicated and slumped over steering wheel). Moreover, a breath test taken over 2 hours after the accident registered .159 grams of alcohol per 210 liters of breath. We believe, beyond a reasonable doubt, that the district court's error in denying Brown's motion to suppress had little, if any, likelihood of having changed the result of the trial.

Affirmed.

All Citations

196 P.3d 1232 (Table), 2008 WL 5234533

Footnotes

1 The **State's** statutory citation to K.S.A. 8–1597 appears to be a typographical error-the applicable statute defining DUI offenses is found under K.S.A.2005 Supp. 8–1567.

End of Document

ATTACHMENT II

State v. Nodgaard, 149 P.3d 547 (Table), 2007 WL 92683

149 P.3d 547 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Christian J. **NODGAARD**, Appellant.

No.
95,747
|
Jan. 12, 2007.
|
Review Denied May 8, 2007.

Appeal from Douglas District Court; Jack A. Murphy, judge. Opinion filed January 12, 2007. Affirmed.

Attorneys and Law Firms

Philip R. White, of Ariagno, Kerns, Mank & White, L.L.C., of Wichita, for appellant.

Brenda J. Clary, assistant district attorney, Charles E. Branson, district attorney, and Phill Kline, attorney general, for appellee.

Before GREENE, P.J., CAPLINGER, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Christian J. **Nodgaard** appeals the district court's denial of his motion to suppress his breath test results and his subsequent conviction of driving under the influence (DUI), K.S.A.2005 Supp. 8-1567.

The case was tried on stipulated facts after the hearing on the motion to suppress, which was denied and reserved for appeal.

Testimony at the suppression hearing showed Douglas County Sheriff's Officer Clark Rials stopped **Nodgaard** for unsafe starting of a parked vehicle and speeding. After a conversation with **Nodgaard**, field sobriety testing, and a preliminary breath test, he was arrested for DUI.

Nodgaard was transported to the Douglas County jail where he was given a copy of the implied consent advisories which Rials also read to him. During the reading of that portion of the implied consent that says there is no constitutional right to a lawyer regarding whether to submit to testing, **Nodgaard** "mentioned a lawyer," and Rials testified he told **Nodgaard**, "[N]o, [you] cannot have a lawyer" and continued to read the implied consent.

Rials further testified that while he was reading the part of the implied consent where it says the person shall be "hereafter requested to take a blood, breath or urine" test, **Nodgaard** interrupted the reading and asked about taking a blood test. Rials testified he told **Nodgaard** that he was offering **Nodgaard** the breath test.

Rials concluded reading the implied consent advisories and a breath test was taken yielding a result of .17. Rials testified that **Nodgaard** did not ask about a blood test after the breath test had been taken, and he did not take **Nodgaard** to get a blood test. Rials further testified that after he finished his processing and the jail officers finished theirs, **Nodgaard** had the opportunity to call anybody he wished. Rials admitted he did not allow **Nodgaard** to contact an attorney while he was in his custody and did not advise any jail detention officer that **Nodgaard** wanted to talk with an attorney.

Nodgaard filed a motion to suppress the breath test results, arguing Rials violated his rights to consult an attorney and obtain additional testing under K.S.A. 8-1001(f)(1) and K.S.A. 8-1004. Following an evidentiary hearing, the district court issued a comprehensive 8-page memorandum decision denying the motion.

As we previously said, **Nodgaard** was convicted of DUI and speeding based on the stipulated facts. The unsafe starting of a parked vehicle charge was dismissed by the **State**. **Nodgaard** appeals, contending the district court erred in denying his motion to suppress his breath test results.

> "In reviewing a district court's decision regarding suppression, [an appellate] court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de

novo standard with independent judgment. [An appellate] court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. [Citation omitted.]" *State v. Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006).

*2 Resolution of **Nodgaard's** arguments requires interpretation of K.S .A. 8-1001 *et seq.* Interpretation of statutes raises issues of law subject to de novo review on appeal. *State v. Schroeder*, 279 Kan. 104, 108, 105 P.3d 1237 (2005).

"The fundamental rule of statutory construction is to ascertain the legislature's intent. The legislature is presumed to have expressed its intent through the language of the statutory scheme. Ordinary words are to be given their ordinary meanings. A statute should not be read to add language that is not found in it or to exclude language that is found in it. When a statute is plain and unambiguous, the court must give effect to the legislature's intent as expressed rather than determining what the law should or should not be. [Citation omitted.]" *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006).

The wording of the implied consent advisories which the record shows were read to **Nodgaard** includes the provisions of K.S.A. 8-1001(f)(C) and (f)(I), which **state**: "There is no constitutional right to consult with an attorney regarding whether to submit to testing," and "after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians ."

Suppression of alcohol test results is the remedy where an officer denies a defendant the right to consult counsel after completion of the required testing. *City of Dodge City v. Wipf*, 33 Kan.App.2d 51, 57, 99 P.3d 635, *rev. denied* 278 Kan. 843 (2004); *State v. Kelly*, 14 Kan.App.2d 182, 191-92, 786 P.2d 623 (1990). Additionally, "the person tested shall have a reasonable opportunity to have an additional test by a physician of the person's own choosing," and the officer's refusal to permit the additional testing renders the testing administered not competent in evidence. K.S.A. 8-1004; see *State v. Gray*, 270 Kan. 793, Syl. ¶ 2, 18 P.3d 962 (2001) (noting that if a person consents to requested testing, but additional testing is not allowed by police, suppression of any reference to testing is the proper remedy).

The statutory language of K.S.A. 8-1001(f)(I) and K.S.A. 8-1004 shows a person does not have the right to consult with an attorney before submitting to testing or to secure additional testing until after completion of the requested testing by the law enforcement officer. See *State v. Bristor*, 236 Kan. 313, Syl. ¶ 5, 691 P.2d 1 (1984); *Schulz v. Kansas Dept. of Revenue*, 19 Kan.App.2d 665, 670, 877 P.2d 1 (1993).

The record in this appeal is clear that Rials did not prevent **Nodgaard** from attempting to contact an attorney or obtain an additional test after the completion of the requested testing. Thus, the language of K.S.A. 8-1004 and the rulings of *Wipf*, *Gray*, and *Kelly* previously cited do not apply in this case.

*3 What **Nodgaard** asks on appeal is for us to find that the mention of an attorney and a blood test during the reading of the implied consent advisories triggers an affirmative requirement on the part of law enforcement officers to see that such rights are exercised after testing is completed, despite the fact that **Nodgaard** made no request for either an attorney or a further test after he learned of the .17 results of the breath test.

Nodgaard's assertion that this right should be recognized much like a premature appeal is recognized has no statutory or case law support. Our appellate decisions have been reluctant and, in most instances, have refused to add requirements that are not contained in K.S.A. 8-1001. See *State v. Kristek*, 14 Kan.App.2d 77, 79, 781 P.2d 1113 (1989), and the *Young*, *Hazlett*, and *Gruss* cases cited therein. Although different from our case factually in that a request was made for an independent test and the officer unsuccessfully attempted to assist the individual to obtain one, *Mitchell v. Kansas Dept. of Revenue*, 32 Kan.App.2d 298, Syl. ¶ 2, 81 P.3d 1258 (2004), held: "An officer does not violate K.S.A. 8-1004 when a hospital staff refuses to administer an additional [blood or breath alcohol concentration] test to an individual at his or her own expense and *the individual fails to request that he or she be taken to a different testing site.*" (Emphasis added.) In our case, there was no request for either an attorney or an additional test after the testing procedure of the **State** was completed.

However, we do not agree with the **State's** argument that Rials correctly answered **Nodgaard's** comment about an attorney when Rials said something to the effect that "no, you cannot have one." That is an incomplete and potentially misleading answer when, in fact, the correct statement by a law enforcement officer should have mirrored the language of K.S.A. 8-1001(f)(C) that there is no constitutional right to

consult an attorney regarding whether to submit to testing or simply have said, "No, you do not have the right to an attorney at this time."

Rials' answer to **Nodgaard's** comment about a lawyer must be viewed in light of the following implied consent statement, based on K.S.A. 8-1001(f)(1), that was later read to **Nodgaard**: "After the completion of testing you have the right to consult an attorney and may secure additional testing which, if desired, should be done as soon as possible and is customarily available for medical care facilities and physicians." The reading of this statement to **Nodgaard** clearly advised him of both the right to then consult counsel and the right to obtain additional testing.

In *State* v. *George*, 12 Kan.App.2d 649, Syl. ¶ 2, 754 P.2d 460 (1988), it was held that what is a "reasonable opportunity" to have an additional alcohol concentration test performed depends on the circumstances of each case. In *George*, our court held the officers did not take any affirmative action to see that a test was obtained after George had specifically asked for one. See 12 Kan.App.2d at 652-55. While **Nodgaard** had asked about a blood test and was informed that he was being offered a breath test, the record is clear that after the **State's** testing was complete, there was no request by Norgaard for additional testing.

*4 We will not repeat and rehash the trial court's memorandum decision which correctly denied **Nodgaard's** motion to suppress. The trial court's decision finding **Nodgaard** guilty of DUI and speeding was clearly justified by the stipulated facts and the admissible results of the breath test.

Affirmed.

All Citations

149 P.3d 547 (Table), 2007 WL 92683

End of Document