

IN THE SUPREME COURT OF IOWA

No. 23-0964

Des Moines County No. OWIN 028293

STATE OF IOWA

Plaintiff-Appellee,

vs.

HOPE JENNIFER CLARK

Defendant-Appellant

APPEAL FROM THE DES MOINES COUNTY DISTRICT COURT

THE HONORABLE EMILY DEAN

**APPELLANT'S APPLICATION
FOR FURTHER REVIEW**

Court of Appeals Opinion filed September 18, 2024

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ISSUE PRESENTED FOR REVIEW

Whether police officers have an affirmative duty to take all reasonable steps to fully accommodate an arrestee in promptly making a phone call to an attorney upon arrival at a jail when the arrestee has made the request for counsel upon arrest and before arrival at the jail

CERTIFICATE OF COMPLIANCE

1. This application and brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains **3,946 words**, excluding the parts of the Application exempted by Iowa R. App. P.

2. This Application and brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface based on Word in Times New Roman 14 font.

/s/ Kent A. Simmons

Kent A. Simmons

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STATEMENT SUPPORTING FURTHER REVIEW

This Application addresses an issue of critical importance to the proper administration of justice in the district courts and in police station houses and jails. The constitutional and statutory rights of an arrestee to request and talk to an attorney upon arrest is sacrosanct and must remain inviolate. This Court has engaged a long line of cases to explain that an arrestee's request to exercise the right to counsel must be honored without unreasonable delay upon arrival at a place of detention. And still, police officers continue to search for ways to circumvent those rights. The instant case demonstrates a procedure where police did nothing to assist a profoundly hard of hearing arrestee by obtaining an interpreter to assist her understanding as to what police were telling her and to assist in making a phone call to an attorney. That obligation is required by law. The police had the defendant's cell phone in custody. They proceeded through Implied Consent procedures without handing the defendant her cell phone or otherwise indicating she was free to use the phone, or any other phone. No call to an attorney was attempted. As a result, the defendant's refusal to submit to chemical testing was used against her in the jury trial. This Court must make it absolutely clear that an arrestee's request to speak with counsel creates a solemn duty for the officers to affirmatively take all reasonable steps to provide access to a phone call.

Statement of the Facts

The Des Moines County Sheriff's Office investigation of the charge on the night of June 9, 2022, was highly defective for two reasons. First, the police officers chose to conduct the questioning and field tests literally in the middle of a very busy four-lane street, and it became clear almost immediately that Ms. Clark has a severe hearing deficit. The conversation and field testing were conducted in a turning lane with two lanes of two-way traffic in motion on each side of the turn lane. Hope was stopped in the center lane of five lanes of traffic. Secondly, the officers made no effort to obtain the services of an interpreter to aid in questioning and answers and testing procedures, and they considered no alternative location for conducting the investigation. (D0072, Suppression Hearing Transcript, 6/23/23, [hereafter "Supp. Tr."] pp. 26-31, L.23-24) (D0073, Trial Transcript, 7/19/23, [hereafter "Tr."] p. 101, L. 3-8)

Video evidence was submitted from before the time of the traffic stop up until the deputies concluded their Implied Consent procedures at the county jail, after Ms. Clark was arrested and booked. Video exhibits were submitted at the suppression hearing and in the jury trial by stipulation. In order to avoid confusion, Appellant will refer to portions of the videos in the real time that is stamped in the upper left corner in military time. (D0072, Supp.Hrg. Tr., 6/23/23, pp. 56-57, L. 7-16) (D0073, Tr., 7/19/23, pp. 38-39, L. 10-7, pp.

87-88, L. 9-2, pp. 120-121, L. 20-6) (D0046 Order for Maintenance - Trial Video Exhibits, 4/13/23)

For the submission of evidence on the suppression motion, the parties agreed that the defense could submit Suppression Motion Exhibit “A” by stipulation. The exhibit is a letter authored by Doctor of Audiology Jason Aird. Dr. Aird opened the letter by saying Hope Clark had been a patient at the Iowa Audiology Clinic in Coralville for many years. The doctor emphasized that Hope’s “hearing loss is unique”, and he composed the letter to “give a better understanding of the degree of loss and expectations when communicating with someone with the limitations of this degree of hearing loss”. (D0029, Suppression Motion Exhibit A, 2/2/23, p. 1, par. 1)

Dr. Aird reported that Hope last had a hearing test in 2017. She suffers from severe to profound hearing loss, and there are some areas in her hearing that cannot be tested for audition because “there is no remaining hearing in those areas”. Hope is a candidate for cochlear implants. “Cochlear implants are reserved for severe hearing losses and when standard amplification is known to still limit the patient’s ability to communicate effectively in daily situations.” (D0029, Hrg. Ex. A, 2/2/23, p. 1, par. 2)

Dr. Aird also emphasized that environmental interference can add to Hope’s inability to effectively communicate. “[I]t is always recommended that ambient noise be reduced or controlled. It is also recommended that there is adequate lighting and the person speaking uses clear, well articulated speech while looking at the individual with

hearing loss at a distance from no more than approximately seven feet.” The speaker must slow down the speech and use different words for the same meaning when the person with hearing loss does not seem to understand what is being said. The doctor further explained that even with amplification Hope will not hear all the sounds that make up the language. She will only hear parts of words. She will hear part of a sentence, but not other parts. “This leads to miscommunication, misunderstanding, and a lack of cohesiveness with a conversation.” Hope will try to find other ways to fully comprehend sentences. (D0029, Hrg. Ex A, 2/2/23, p.1. par. 3; App.)

In the instant case, one of Dr. Aird’s conclusions is especially material:

The individual with a hearing loss like Hope’s will typically communicate better with people they are familiar with, and have a history with and have had a conversation with as to how best to communicate with them. When you add poor lighting, traffic noise, a new person talking to them for the first time and a potentially stressful situation, these factors will greatly decrease the already poor communication process. (D0029, Hrg. Ex A, 2/2/23, pp. 1-2)

Shortly before 11:00 p.m. on the night of June 9, 2022, county deputies were dispatched to locate a dark-colored vehicle entering the city of Burlington. There was no license plate number provided. The factual basis for the dispatch is discussed in detail in Argument III, below, the assignment of error for the admission of double-hearsay testimony. Deputy Phillips was training a new officer at that time, Deputy Cheesman. The

two were in the same squad car. Phillips was driving the squad. He began following a dark-colored convertible on Roosevelt Avenue. After seeing the vehicle “bump” a curb and an improper lane usage, Phillips activated his emergency lights and siren to make a traffic stop in a turning lane in the middle of Roosevelt Avenue. The turning lane is surrounded by four lanes of traffic, two-way traffic with two lanes heading in each direction. Phillips got out of the squad car. At first, the driver did not realize the squad car lights and siren were activated. The driver began making the left turn when Phillips “slapped” the car and shouted, “Hey !” The vehicle then immediately stopped. (D0073, Tr., 7/19/23, Tr. p. 35, L. 2-25) (Videos, 22:58:51 - 22:59:35)

Deputy Cheesman then initiated the questioning of the driver who immediately provided documentation identifying her car and her identity as Hope Jennifer Clark. Both officers would later testify that they smelled the odor of an alcoholic beverage emanating from her breath. Initially, Hope answered the question from Phillips as to whether she “had anything to drink” in the affirmative. When Cheesman asked if she “had been drinking tonight, Hope answered “No”. (D0059-60, Videos, 22:59:35 - 23:01:23) The questions were similar, but they were asked by two different people.

As Cheesman started describing field sobriety tests that he wanted her to complete, Ms. Clark informed him that she was hearing impaired, and she showed him that she had hearing aids in both ears. Cheesman and Phillips testified that they both then began to “try” to look Hope directly in the face to allow her to read lips and also to “try” to speak

loudly and to clearly enunciate their words. The attempts at field testing were fraught with Hope not being able to hear, or to understand, what the officers were saying in their directions. The officers repeated themselves numerous times. They admitted in their testimony that the traffic on Roosevelt Avenue at that time and location was very busy and noisy. The Court can see and hear that for itself. The officers never considered moving to a quieter, less hectic location for questioning and field tests or obtaining the services of an interpreter. (D0072, Supp. Hrg. Tr., 6/23/23, pp. 26-31, L. 23-24) (D0073, Tr., 7/19/23, p. 41, L. 6-18, pp. 78-79, L. 2-21) (Videos, 23:01:23 - 23:13:25)

After administering the Horizontal Gaze Nystagmus examination (HGN), and then deciding to abandon the other two field balance tests that are routinely used, Cheesman asked Hope if she would submit to a Preliminary Breath Test (PBT). At that point, Hope informed Cheesman she wanted to talk to her attorney. Cheesman considered that request as a refusal to submit to the PBT and immediately placed Hope in handcuffs, telling her she was under arrest. (D0059-60, Videos, 23:11:00 - 23:13:25)

At the jail, the deputies immediately escorted Hope through the sallyport and into the booking desk. They then began to prepare the “Intox Room” to read Hope’s rights to her, and then to read the Implied Consent advisory statement to her. After Hope was seated in the Intox Room, Deputy Phillips then brought Hope’s cell phone into the room and placed it on the desk where Cheesman and Hope were sitting. Cheesman then covered up the phone with a copy of the Implied Consent Advisory shortly after the phone’s

placement on the desk. After he read her the lengthy Implied Consent advisory, Cheesman asked Hope if she would submit to a breath test using the Datamaster Intoxilyzer. She hesitated. Both Cheesman and Phillips testified they told Hope she could call anybody she wanted to call before answering the question. Again, Hope stated that she wanted her attorney, four times. Again, Cheesman and Phillips considered that answer to be a test refusal. They both testified to the jury that she had refused both tests. (D0059-60, Videos 23:30:17 - 23:37:12)

Argument

Police officers have an affirmative duty to take all reasonable steps to fully accommodate an arrestee in promptly making a phone call to an attorney upon arrival at a jail when the arrestee has made the request for counsel upon arrest and before arrival at the jail.

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) On an assignment for violation of constitutional rights, the Court engages a *de novo*

review. *Ledezma v. State*, 626 N.W. 2d 134, 141 (Iowa 2000) When police continue solicitation of responses from a defendant in custody who has requested the assistance of counsel, they violate the Fifth and Fourteenth Amendments to the federal constitution. In reviewing the ruling on a Motion to Suppress, the Court will consider evidence presented at trial in addition to evidence presented with the submission of the motion. *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001)

“The Fifth Amendment to the federal constitution provides that no person ‘shall be compelled in any criminal case to be a witness against himself’. The Due Process Clause of the Fourteenth Amendment to the federal constitution makes this right against self-incrimination binding on the states.” Once a defendant in police custody has requested the assistance of an attorney, the defendant “is not subject to further interrogation by the authorities until counsel has been made available”. “Statements obtained in contravention of this bright-line rule violate the accused's Fifth and Fourteenth Amendment rights to have counsel present during custodial interrogation and for that reason are inadmissible.” *State v. Peterson*, 663 N.W.2d 417, 423-425 (Iowa 2003), quoting *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 1885 (1981)

“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)

The Panel's Error

The police officers failed in their affirmative duty to provide access to counsel without unnecessary delay after Ms. Clark made it perfectly clear she wanted to consult with counsel before answering any further questions. To fully understand this error, the Court must review critical points in the video recordings of the arrest and subsequent procedures at the jail, as discussed in detail, below.

The officers failed in two ways. First, they did not address Hope's request to speak with counsel immediately after she was booked into the jail. Instead, the officers chose to plow forward into a verbatim reading of her *Miranda* rights, then the Implied Consent statute, and then Section 804.20, the Code, as Hope sat in the corner in the interview room. The administrative booking process had already been efficiently and promptly completed by jail staff when the officers took Hope into the interview room. There was no reason for officers to delay performing their affirmative duty to put Hope in touch with an attorney at that point. (D0059-60, Videos 23:30:17 - 23:37:12) (D0033, Ruling on Motion to Suppress, 2/22/23, pp. 3-4)

Secondly, after the readings of all the legalese to this woman who is severely hard of hearing, the officers did nothing to accommodate Hope in making a phone call. When she was arrested, her cell phone was taken away from her. After Hope was placed in the jail's interview room, Officer Cheesman's body cam shows that he placed her cell phone on the desk in front of him. She was not "handed her phone", as the panel stated. She was not

told she could use *her cell phone* to make a call at that time or at any time. In fact, the officer almost immediately and fully covered up her phone with his paperwork as it sat on the desk in front of him and before he started the Implied Consent and Section 804.20 readings. After the readings, the officers told her she could call anybody she wanted, but they did not tell her how she could do that, and the cell phone remained under the paperwork. The deputy was very clearly keeping custody of her phone. The panel plainly erred in concluding the police had properly accommodated Ms. Clark's request for counsel. The case law discussed below will demonstrate the panel's error. (D0059-60, Videos 23:30:17 - 23:37:12) (Slip Opinion. Pp. 7-8)

The Merits

Hope Clark's request for counsel and the initiation of the custody arrest were simultaneous. In fact, her request for her attorney was the reason she was taken into custody. The deputies had completed the HGN and walk-and-turn portions of the field tests. Deputy Cheesman was then attempting to talk Hope into submitting a PBT sample, when she requested counsel. With that, the deputy hand-cuffed her, placed her under arrest, and put her in the back of the squad car. (D0059-60, Videos, 23:10:54 - 23:12:25)

The district court ruling and the appellate panel's opinion wrongly impose an affirmative duty upon Ms. Clark to repeat her initial request to talk to her attorney. It was the deputies' duty to assist Hope in making the call by making a phone available and

telling her that she could use it. The obligation of safeguarding the arrestee's rights is always a duty imposed on the arresting officers. In fact, the officers found out, even before conducting the field testing out on the street, that Hope was profoundly hard of hearing. She showed them that she was wearing hearing aids in both ears. They had the duty under Section 804.31 to obtain an interpreter for Hope before asking her to make any decision on the Implied Consent. They failed on that duty, also. Section 804.20, provides a statutory right for arrested persons to speak with a family member or an attorney when taken into custody:

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.

In *State v. Moorehead*, 699 N.W.2d 667 (Iowa 2005), the defendant requested to speak with his mother when he was placed in custody in the back of a squad car out at the scene of his OWI arrest. This Court concluded the breath test result and procedures the defendant complied with at the station had to be suppressed:

Moorehead's request was sufficient to invoke the statute. As a consequence, the police were obligated to honor Moorehead's

request “*without unnecessary delay* after arrival at the place of detention,” in this case the police station. Iowa Code Section 804.20. Because the police did not do so, they violated Moorehead's statutory right to contact a family member.”

Moorehead, 699 N.W.2d at 672 (emphasis added)

In the instant case, Officer Cheesman confirmed Ms. Clark’s request to speak with her attorney *after* he completed all of the field testing that he cared to attempt. Upon arrival at the jail, he took her straight to booking. Ms. Clark has not raised any complaint as to the brief delay and necessity to go through the booking procedure before she was securely placed in custody in the interview room. After she was formally booked, Deputy Cheesman immediately interviewed her and directed her through the Implied Consent procedure. She was not told she could call someone until the Implied Consent procedures were fully completed, and she was not told how she could go about making a call. In fact, Officer Cheesman believed the officer working in booking would have told Hope that she would not be allowed to use her cell phone to make a call. The officers placed the cart before the horse. Assisting Ms. Clark in making phone calls was required to be the deputies’ first order of business at the jail, not their last. And, when they finally told her she could make a call, they explained absolutely nothing as to how she could go about placing the call. They did not provide a phone. (D0072, Supp. Hrg. Tr., 6/23/23, pp.

19-22, L. 13 -16, pp. 31-36, L. 25-2, pp. 51-55, 20–2) (D0059-60, Videos, 23:30:17 - 23:36:47)

As in *Moorehead*, the police did not accommodate Ms. Clark’s request to call her attorney “without unnecessary delay”. As in *Moorehead*, the deputies proceeded through the *Miranda* warnings, reading the 804.20 rights, and invoking the Implied Consent before telling Hope she could call anyone she wanted. The deputies violated her Section 804.20 rights.

The panel erred by creating an affirmative duty on Hope’s part for grabbing her phone and making a call. The panel concluded:

Once Clark was processed into the jail and brought back to the officers, she was handed her phone within ten seconds and the officer confirmed at that time that she could call an attorney. Clark gave no indication she wanted to call at that time. The officer then read Clark her *Miranda* rights, the implied consent advisory, and the text of section 804.20 verbatim. Less than five minutes passed to complete those readings, at which point Clark referenced wanting to talk to an attorney and the officer again told Clark she could call an attorney. (Slip Op. p. 8)

As mentioned above, the video indisputably shows that Ms. Clark was not “handed her phone”. The deputy clearly kept the phone in his custody and did not hand it to her. Ms. Clark had no obligation at that point to *again* tell the officer she wanted to call her attorney. She had already asserted that right. In fact, when the deputy first told Hope he

was going to read her rights, Hope immediately asked, “Do I have a right to an attorney?” The deputy said “yep” and “that’s what this all is”, as he launched into the readings. Hope’s question at that point must be considered a second request for an attorney. The panel is incorrect in saying that when the phone was placed on the desk that “the officer confirmed at that time that she could call an attorney”. He did *not* say that at that time. He breezed right through the *Miranda* rights and then asked if she would talk to the officers at this time. It is not clear Hope knew exactly what the officer was saying at that point, but she nodded her head in the affirmative. At that point, the deputy clearly violated Ms. Clark’s bright line constitutional and statutory rights by asking her to talk to them without providing her requested opportunity to talk with an attorney. He then went through the Implied Consent and Section 804.20 readings. There was no explanation as to why Hope was not given her *Miranda* rights when she was arrested out on the street. (D0059-60, Videos, 23:11:30 - 23:30:20)

The panel made no reference to *State v. Hicks*, 791 N.W.2d 89 (Iowa 2010), even though Ms. Clark had explained the case at length in her opening brief at pages 41-43. That case is on all fours with the instant situation where Cheesman put Hope’s cell phone on the desk in front of him, but said nothing about her being allowed to use it. In *Hicks*, this Court described the fully analogous facts in this way:

The district court concluded “that the record indicates Hicks was permitted numerous opportunities to exercise his rights under section 804.20.” We disagree. The district court noted

that a telephone was located within reach of Hicks on the table where [the police officer] and Hicks were sitting, and that [the police officer] did nothing to deny Hicks the right to call his mother. First, from reviewing the tape of the processing room, no telephone is *visible* in the room. A small portion of the four-person table where [the police officer] and Hicks sat, the corner farthest diagonally from where Hicks was seated, was not shown on camera. If a telephone was located in that corner, it clearly was not within the reach *or control* of Hicks. Second, *even if a phone was in reach*, we do not think that alone suffices to provide a detainee a “reasonable opportunity” to contact family. (emphasis added) *Hicks*, 791 N.W.2d at 96

The panel fully disregarded *Hicks*, and that decision makes it perfectly clear it is the control of the cell phone that dictates whether the officer is providing a reasonable opportunity to provide a call. Deputy Cheesman did not hand Hope’s cell phone to her, and he did not tell her she was free to pick it up and place a call. Instead, he covered it up, and it remained covered up throughout the time that Hope refused the breath test. This case must be reversed and remanded with instruction that the Motion to Suppress shall be granted, and the action shall be set for a new trial.

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