IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0445

STATE OF IOWA,
Plaintiff- Appellee
vs.

MATTHEW ROBERT SEWELL
Defendant- Appellant

APPEAL FROM THE DISTRICT ASSOCIATE COURT
FOR DICKINSON COUNTY
THE HONORABLE DAVID LARSON

APPELLANT'S FINAL REPLY BRIEF

ROBERT G. REHKEMPER
GOURLEY, REHKEMPER, & LINDHOLM, P.L.C.
440 Fairway Dr., Suite 210
West Des Moines, IA 50266
Telephone: (515) 226-0500
Facsimile: (515) 244-2914
rgrehkemper@grllaw.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING

I, Robert G. Rehkemper, hereby certify that I filed the attached Brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on November 16, 2020, by filing it with the Court's electronic document management system.

Robert G. Rehkemper

November 16, 2020
Date

CERTIFICATE OF SERVICE

I, Robert G. Rehkemper, hereby certify that on November 16, 2020, I served a copy of the attached brief on all other parties to this appeal by filing it with the Court's electronic document management system.

Robert G. Rehkemper

November 16, 2020
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CERTIFICATE OF SERVICE UPON THE DEFENDANT

I, Robert G. Rehkemper, hereby certify that on November 16, 2020, I served a copy of Defendant's Proof Brief, upon the Defendant-Appellant via electronic mail pursuant to her previously provided written authorization to receive documents and/or court notifications via electronic mail.

Robert G. Rehkemper

November 16, 2020
Date

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I. IOWA CODE SECTION 804.20 GUARANTEES AN ARRESTEE CONFIDENTIAL TELEPHONIC CONSULTATION WITH COUNSEL.

An arrestee has a right to call an attorney, but that call may be monitored, recorded, and anything said on that call can and will be used against the accused - such goes the State's argument. Under the State's theory, law enforcement would be perfectly justified in baiting an arrestee into placing a phone call to their attorney, simply so law enforcement could monitor, record, and ultimately use what was said in that recording against the accused. To accept that argument would be to render the legislatively created right illusory and, worse, create a self-incriminating trap for the arrestee and an ethical conundrum for the attorney. "No rule of law should work as a trap for any person or the government." *State v. Hellstern*, 856 N.W.2d 355, 365 (Iowa 2014) (C.J. Cady, concurring specially).

The plain language of section 804.20 does not foreclose the right to a privileged telephone call with an attorney. If anything, it is supported. In his initial brief, Sewell has previously articulated how the word "made" in section 804.20 references the phone call's initial placement, not the corresponding consultation that takes place. "Made" as used in the statute, means "created" or "dialed." Contrary to the State's argument, this interpretation fits cleanly within the

language of the statute. Inserting "created/dialed" for "made," the statute would read as follows: "If a call is "created/dialed," it shall be "created/dialed" *in the presence* of the person having custody of the one arrested or restrained." (emphasis added). As it applies to an intoxicated individual or person under eighteen, the statute would provide: "If such person is intoxicated, or a person under eighteen years of age, the call may be "created/dialed" *by the* person having custody." The sober and/or individual over eighteen years of age is permitted to dial the phone number while law enforcement retains the right to dial the phone number for an intoxicated individual or person under eighteen.

Such an interpretation does not destroy the wording of the statute but rather coincides with the delicately balanced rights outlined in section 804.20 and the attorney-client privilege. This is true, especially considering that section 804.20 has been repeatedly applied to suspected intoxicated drivers since 1978. *State v. Vietor,* 261 N.W.2d 828 (Iowa 1978). Despite being allegedly in an intoxicated state, this Court has routinely concluded that the arrestee has the right to consult with an attorney or family member themselves. *Id.* If "made" did not merely apply to the initial placement of the call, a suspected drunk driver would arguably not have the right to a telephonic consultation with an attorney at all. Instead, law enforcement would somehow be entitled to be the one who makes that call and has

the consultation. The same would go for a person under eighteen years of age. Such a result flowing from the State's argument is nonsensical.

Iowa Code section 727.8 does not assist the State's argument either. It clearly articulates that the section prohibiting electronic and mechanical eavesdropping does not apply to "the recording by a sender or recipient of a message or one who is openly present and participating in or listening to a communication from recording such message or communication." Iowa Code § 727.8(3)(a). Deputy Grimmus was not the individual recording the communication, nor was he a participant in the conversation. Further and importantly, both Sewell and his attorney requested that the attorney-client privilege be respected and that no monitoring or recording occur. When this request was not honored, the conversation was terminated. Thus, this situation is markedly different from that which the legislature intended to authorize by section 727.8, or that which the court addressed in *State v. Craney*, 347 N.W.2d 668, 678-79 (Iowa 1984).

As it relates to Sewell's argument under *State v. Fox*, 493 N.W.2d 829, 831 (Iowa 1992), Iowa Code chapter 808B and 18 U.S.C. 2110, undersigned counsel must admittedly eat crow for not catching the fact that the statute was simply renumbered. The portion of counsel's argument attempting to distinguish *Fox* from the instant situation, claiming that the statutory provisions relied upon by the Court

in *Fox* were subsequently rescinded, is indeed as the State points out, "false.[1]" The sections were renumbered, and undersigned counsel failed to follow the elementary rule of statutory analysis of always reading the definitions section of a chapter before reducing the argument to writing.

The above being what it is, all good meals of crow are best enjoyed in other's company. A plate must also be fixed for the State. *Fox* did NOT involve the monitoring of attorney-client telephone calls by law enforcement. The monitoring and recording of attorney-client phone conversations have never been held to be "in the ordinary course" of law enforcement's duties. The precise opposite is true. "While the Court agrees that the ordinary course of a law enforcement officer's duties include, in the abstract, the monitoring of inmate communications, *the monitoring of an inmate's phone call with his attorney is not in the ordinary course of duties*. *Such communications are constitutionally protected*…" (emphasis added) *Anderson v. County of Becker*, 2009 WL 3164769, *15 (D.Minn. 2009) (unreported); see also *Crooker v. U.S. Dept. of Justice*, 497 F.Supp. 500, 504 (D. Conn. 1980) (Monitoring of inmate/attorney calls not within the "ordinary course" of duties exception of 18 U.S.C. 2520(b)(a)(ii)); and *Whitenight v. Elbel*, 2017 WL 8941221, 10 (W.D. Penn., 2017)

[1] Counsel would prefer to use the word "wrong" as "false" connotates an intent to deceive. Regardless, the word used by the State is indeed the word "false."

(unreported) (recognizing a difference between personal calls and inmate/attorney calls under 18 USC 2510(b)(a)(ii)).

Even individuals committed to the Federal Bureau of Prisons' custody, after being convicted of some of the most severe criminal offenses prosecuted in our nation, still retain the right to *unmonitored* calls with their attorneys. The Code of Federal Regulations makes this clear. "Staff may not monitor an inmate's properly placed call to an attorney." 28 C.F.R. § 540.102. While not reduced to an administrative regulation, the Iowa Department of Corrections has similar protections for convicted inmates' telephonic communications with counsel. According to the Department of Corrections website, "offenders can utilize the inmate telephones to place an outgoing call to their attorney. *Calls to attorney office telephone numbers* registered with the Iowa Supreme Court *are not monitored or recorded* in the offender telephone system." (emphasis added) https://doc.iowa.gov/administration/attorney-contact-incarcerated-clients.

Suppose protections exist for telephonic conversations between counsel and *convicted* inmates. In that case, they most certainly must apply to a citizen who has not been formally charged (paperwork not filed), is presumed innocent, and has not yet been processed or formally booked into a local law enforcement detention facility. To use the State's language, it is "false" for the State to claim that

individuals within the custody of law enforcement do not have a statutorily protected right to confidential telephonic consultations with an attorney.

The reason arrestees retain the right to confidential telephonic consultations with counsel is as explained in Sewell's initial brief; all communications with an attorney to seek advice are covered and protected by the attorney-client privilege. The State has failed to point the Court to a single authority that would authorize law enforcement to intercept and record a telephone conversation between an attorney and an arrestee. They have further failed to provide this Court with any authority to authorize a *de facto* denial of a statutory right to counsel by governmental interference with the attorney-client privilege.

Sewell did not speak freely and of his own accord in the presence of a third person. Instead, he astutely requested privacy and for the attorney-client privilege to be honored. He requested a reasonable accommodation that would ensure at least his attorney's advice would remain confidential. These specific and repeated requests were all denied, and consequently, Iowa Code section 804.20 was violated.

II. LAW ENFORCEMENT'S MONITORING AND RECORDING OF AN ARRESTEE'S CONSULTATION WITH COUNSEL, VIOLATES ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION.

The attorney-client privilege has never depended upon any constitutional "attachment" analysis. It applies where the constitutional right to counsel has

absolutely no application. What triggers the privilege is the existence of an attorney-client relationship and a desire to communicate within that relationship in confidence. *Keefe v. Bernard*, 774 N.W.2d 663, 669 (Iowa 2009). Given the deeply rooted history and tradition of the attorney-client privilege in our nation and state, the right to demand communications with counsel be protected by privilege is indeed a fundamental right. The State makes no argument to the contrary.

The fundamental nature of a citizen's right to attorney-client privilege prohibits governmental interference with that right unless the government's conduct is narrowly tailored to serve a compelling government interest. Noticeably absent from the State's brief is any claim that the conduct of monitoring and recording of an arrestee's phone call with his attorney was either narrowly tailored or in furtherance of a compelling government interest.

The State feebly attempts to assert that an officer's presence "prevents mischief and destruction of evidence" (Appellee's Brief, pp. 51-52). It should be noted on the instant record that a cooperative individual was attempting to communicate with a licensed attorney in good standing with the State of Iowa. There is no claim that the defendant was up to no good or that Lindholm was a rogue, Better Call Saul criminally complicit attorney out to exact a coverup on behalf of his "client." The State's suggestion that arrestees should not be trusted to have privileged communications with licensed attorneys because the attorney may

well become complicit in their client's criminal misdeeds is nothing short of unsupported fearmongering needlessly disparages all members of the Iowa Bar.

Finally, the Government's argument of no prejudice misses the point. The prejudice resulting from the government's conduct was the prevention of Sewell's privileged consultation with counsel. He could not speak freely or secure advice from his attorney before making one of the most critical decisions in an operating while intoxicated investigation. That is prejudice. That is the violation of Sewell's rights, which resulted from the government's improper and outrageous conduct.

III. LAW ENFORCEMENT'S MONITORING AND RECORDING OF AN ARRESTEE'S TELEPHONIC CONSULTATION WITH COUNSEL VIOLATES ARTICLE 1 SECTION 10 OF THE IOWA CONSTITUTION.

The issue regarding the attachment of the right to counsel under article I, section 10 of the Iowa Constitution at the center of *State v. Senn* is far from settled. If anything, *State v. Green* and *Ruiz v. State* confirm that this issue is ripe for resolution.

State v. Green, 896 N.W.2d 770 (Iowa 2017), involved a non-custodial questioning of a defendant who had yet to be arrested. It was not an operating while intoxicated case where the defendant was arrested and sought the assistance of counsel for a crucial decision that had an immediate and enduring impact on not just the criminal prosecution but on a protected liberty interest (his driving

privileges) as well. Not surprisingly, a unanimous court concluded that the right to counsel had not yet attached under article I, section 10 of the Iowa Constitution. However, Justices Appel, in his special concurrence, joined by Wiggins and Hecht, reiterated, "I do not agree with a bright-line rule that invariably requires that the state file a piece of paper in a court in order for the right to counsel to attach." *Id.* at 444 (Appel, J, specially concurring)

Ruiz v. State, 912 N.W.2d 435 (Iowa 2018) was similarly not an operating while intoxicated case, nor did it involve an individual who had been arrested and faced a compelled and crucial decision that directly and immediately impacted a protected liberty interest. *Ruiz* merely involved the non-custodial questioning of an individual long before he was arrested. While Ruiz had retained counsel, his attorney had not notified law enforcement of his representative capacity and did not attempt to participate in the non-custodial questioning. *Id.* at 438.

Notably, the Court in *Ruiz* distinguished the federal case of *United States v. Bowers*, 517 F.Supp. 666 (W.D. Pa. 1981), explaining that "in *Bowers* the government had already marshalled its forces and was ready and going to prosecute if the defendant did not accept its immunity offer, whereas here, the government had yet to begin any sort of criminal investigation when Hernandez Ruiz's counsel allegedly breached a duty." *Id.* at 440. As such, the Court's conclusion that the right to counsel under both the Sixth Amendment and Article I,

section 10 of the Iowa Constitution, had not yet attached makes sense. While all justices concurred in the result, the hotly debated issue left undecided in *Senn*, specifically applicable in Sewell's case, was again reiterated by both sides in special concurrences.

With the record requested by the late Chief Justice Cady in *Senn* now squarely before the court, the peculiarly critical stage of the proceeding facing Sewell at the time he invoked his right to counsel becomes unavoidable. The invocation of implied consent, where an arrested individual is forced to make a vital decision that immediately impacts a protected liberty interest as well as the production of crucial evidence in a criminal prosecution, is just the sort of pre-paperwork filing stage of a legal proceeding where article I, section 10 right to counsel must attach. The Iowa Constitution must be adaptable to changes in our civilization, statutes, and technology. To say that the "and in cases involving the life, or liberty of an individual" language only applies to the prosecution of fugitive slaves would be to relegate the Iowa Constitution cobwebbed shelves as a static and antiquated document that is unadaptable to our current world. That was never the intent nor design of our state constitution.

It bears repeating that Sewell does not suggest an unlimited right to counsel that would put a hold on the implied consent process. Rather a limited constitutional right to counsel consistent with the framework already set forth by

cases interpreting and applying the statutory rights under section 804.20 would adequately balance the practical, pragmatic concerns. To the extent this Court concludes that the statutory right to counsel outlined in section 804.20 does not provide for privileged consultation with counsel, the limited right to counsel under article I, section 10 of the Iowa Constitution would protect such communications.

Senn's plurality expressed concerns with deviating what they considered a "bright-line" rule related to the attachment of the right to counsel. The State echoes those concerns in its argument in this case. However, an easy to apply rule that adequately considers law enforcement's need for clarity and a citizen's ability to seek privileged communication with counsel is not beyond formulation. The rule could be as simple as the following: the right to counsel attaches under article 1, section 10 of the Iowa Constitution, when an individual is subjected to a custodial and compelled participation in the gathering of evidence in a criminal investigation, absent a court order or search warrant. Law enforcement knows when an individual is taken into custody. They also know when they are forcing an individual to provide evidence in a criminal investigation. These are intentional actions undertaken by the law enforcement officer that are not subject to confusion or even debate. This would be simply drawing a line that adequately protects the accused's constitutional rights while ensuring ease of application for law enforcement and the courts.

The sensible reason to not extend the application of the right to counsel under article I, section 10 to the other situations mentioned by the plurality in *Senn*, 882 N.W.2d at 26, (non-custodial questioning and consent searches) is simple. Those individuals are not in custody. Their freedom, liberty, unconstrained, and voluntary decision-making ability have not been intruded upon by the government. They are free to accept or reject the choices put to them *without consequence.* When a motorist is arrested and faces the invocation and attending implications associated with Implied Consent, the corresponding decisions have immediate and enduring results. That situation is transformed from a mere investigation to an in case "involving the life, or liberty of an individual."

As it relates to indigent arrestees, a couple of solutions exist. First, when time is considered in the Implied Consent process, the individual must simply be provided the reasonable opportunity to seek a consultation with counsel. Due to no fault of law enforcement, the availability or unavailability of counsel does not create a violation of the constitutional right so long as the individual is provided a reasonable opportunity. As occurs presently under section 804.20, the arrestee must simply be afforded the opportunity to seek counsel's advice and avail himself/herself to such a consultation if the appropriate arrangements can be made. Iowa Code section 804.20 has worked this way since its inception without disparate application claims based upon indigency. Alternatively, if the Court

concludes that counsel must be provided and made available, the State Public Defender's Office could easily assign public defenders to be on-call, the same way that members of the undersigned's law firm, county attorneys, and judges across this State are on-call every hour of every day of the year. When time constraints are not applicable, the process will work just the same as it currently does when law enforcement wishes to interrogate an indigent defendant.

Such a limited constitutional right to counsel would not result in the falling of the heavens. Other alternatives would also exist. For example, if law enforcement wished to work around the right to counsel, they could always avoid taking a defendant into custody the same way they do currently with non-custodial interrogations and consent searches. Solutions exist aplenty when solution-based problem solving is put into action. The applicability of a constitutional right should never hinge on theoretical inconveniences. When an individual is taken into custody and compelled to participate in the production of evidence in a criminal prosecution, the investigation transforms from a mere inquiry to a "case involving the life, or liberty of an individual" and the constitutional right to counsel under article I, section 10 of the Iowa Constitution should apply.

IV. DISMISSAL IS THE ONLY APPRORIATE REMEDY TO VINDICATE THE BLATANT VIOLATION OF SEWELL'S RIGHT TO PRIVILEGED CONSULTATION WITH COUNSEL.

Even if the court does not dismiss the charge to remedy the constitutional violation, the harmless error does not arise from the result's mere suppression. Sewell only waived his right to a jury trial and only stipulated to a trial on the minutes of testimony "with respect to the charge of Operating While Intoxicated while having an alcohol *concentration in excess of .08 in violation of Iowa Code Section 321J.2(1)(b)*." (emphasis added) Written Waiver of Jury Trial and Stipulation to Trial on the Minutes, ¶ 6; App.A005- A007. That being the case, even if the trial court could be said to have found Sewell guilty of operating while under the influence of alcohol, in violation of Iowa Code section 321J.2(1)(a), the court was without the authority to makes such a finding absent the defendant's specific consent and waiver of the right to a jury trial on that issue.

Furthermore, the district associate court found Sewell guilty of the general offense of operating while intoxicated, "in violation of section 321J.2." Verdict, p. 2; App. A061-A062. While the court made specific findings of fact, the ultimate verdict was a general one without specification as to 321J.2(1)(a) or (b). The court further specifically considered Sewell's breath test results in its verdict, and consequently, any error in refusing to suppress the breath test result was not harmless. See *State v. Moorehead*, 699 N.W.2d 667 (Iowa 2005).

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this court reverse the district associate court's decision denying his motion to suppress evidence and dismiss and remand the case for entry of a dismissal.

Respectfully Submitted,

GOURLEY, REHKEMPER &
LINDHOLM, P.L.C.

By: Robert G. Rehkemper, AT0006553
ATTORNEY FOR APPELLANT

Certificate of Compliance with Type-Volume Limitations, Typeface Requirements, and Type-Style Requirements.

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,132 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Robert G. Rehkemper — November 16, 2020 Date

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I, Robert G. Rehkemper, attorney for the Appellant, hereby certifies that the actual cost of reproducing the necessary copies of this Brief was $0.00, and that amount has been paid in full by me.

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