

Charges filed in fatality

N. Liberty man faces
vehicular homicide
charge in crash

By **Zack Kucharski**

The Gazette

IOWA CITY — A North Liberty man was charged with vehicular homicide in connection with an August crash that killed a rural Oxford man and seriously injured his wife.

Dan L. Wilkerson, 49, made his initial appearance on vehicular homicide and serious injury by vehicle charges in Johnson County District Court on Friday in connection with the Aug. 25 crash at the intersection of County Road F46 and Cosgrove Road. The crash killed Donald E. Westcott, 61, and left his wife, Judith, now 63, seriously injured.

After his initial appearance on the charges, Wilkerson was released on his own recognizance by Associate Judge Stephen Gerard.

Investigators say Wilkerson was drunk when he was driving north on Cosgrove Road about 10 p.m. and failed to stop at a stop sign, according to a criminal complaint filed Friday. His vehicle entered the intersection at the same time as Donald Westcott's, which was going west on County Road F46, also known as IWV Road.

Wilkerson's blood-alcohol level was .091 percent after the crash, the complaint states. A person is considered legally drunk in Iowa with a level above .08 percent.

Wilkerson was driving a van registered to Fleck Sales, a Cedar Rapids-based beer distributor, at the time of the crash. He remains an employee there, general sales manager Mike Schulte said Friday. He declined further comment.

If convicted, Wilkerson faces a maximum of 30 years in prison and fines of \$7,500.

IN THE IOWA DISTRICT COURT, IN AND FOR JOHNSON COUNTY

STATE OF IOWA,)
)
 Plaintiff,) No. FECR 68296
)
 vs.) RULING
)
 DAN L. WILKERSON,)
)
 Defendant.)

CLERK OF DISTRICT COURT
JOHNSON COUNTY, IOWA

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This matter came before the Court on January 26, 2005, for hearing on the Defendant's Motion to Suppress. The State appeared by Johnson County Attorney J. Patrick White; the Defendant appeared in person with his attorney, Scott C. Peterson. Evidence was received and the matter was submitted. The Court now makes the following ruling.

The Defendant is charged in Count I of the Trial Information with Homicide by Vehicle and in Count II with Serious Injury by Vehicle. The State alleges that on or about August 23, 2003, the Defendant unintentionally caused the death of Don Westcott while operating a motor vehicle while intoxicated. The State further alleges in Count II that the Defendant on that date unintentionally caused serious injury to Judith Westcott by operating a motor vehicle while intoxicated.

The Defendant pled not guilty to the charges. Trial has been set for April 11, 2005. Defendant filed a Motion to Suppress on November 4, 2004, urging that the Court order suppression of the blood sample and test result as well as all evidence and presumptions derivative of the same on the grounds that the blood sample was drawn, stored, tested and destroyed in violation of Iowa Code Section 321J, related provisions of the Iowa Administrative Code as well as the United States Constitution and the Constitution of the State of Iowa.

On January 10, 2005, the Defendant filed an Amended Motion to Suppress clarifying the earlier motion requesting the Court suppress the blood test results because of procedural failures with regard to the requirements of Chapter 321J and because of the State's violation of the Defendant's rights to due process related to the failure of the State to preserve the blood sample.

Following the completion of the evidence, each party provided the Court with briefs in support of and in resistance to the motion.

On August 25, 2003 at about 10 p.m. a vehicle driven by the Defendant and a vehicle driven by Don Westcott collided at the intersection of the Cosgrove road and the IWV Road in Johnson County. When Iowa Highway Patrol Trooper Tracy Vander Weil arrived at the scene on that evening, he observed the Defendant lying facedown on the gravel road at the scene of the accident. The Defendant was transported by helicopter ambulance to the University of Iowa Hospitals and Clinics.

Trooper Vander Weil requested Iowa State Patrol Trooper Christopher Adkins to go to the University of Iowa Hospitals and Clinics to obtain a blood specimen from the Defendant for testing. Trooper Adkins went to the University Hospitals and Clinics and arrived there before the Defendant. Trooper Adkins testified that he waited for the arrival of the air ambulance. After the Defendant arrived, Trooper Adkins waited outside the examination room for about an hour while the Defendant's medical needs were being addressed.

Trooper Adkins testified that he told the nurse Cynthia Balmer that he wanted a legal blood draw. He testified that he was informed that if he wanted to speak with the Defendant, a good time to make the request for the blood would be during the trip from the emergency room to interventional radiology.

Trooper Adkins testified that he rode in the elevator with the Defendant, a doctor, and other hospital personnel. The Defendant, according to Trooper Adkins, was lying flat on a gurney. Trooper Adkins could not remember if the

Defendant was receiving fluids intravenously at that time.

Although Trooper Adkins testified that he did not have concerns about the Defendant's ability to understand, nurse Cynthia Balmer testified to her recollections of that evening. She recalled that the Defendant's vital signs were very unstable when he came in and that he was unresponsive. She testified that the trooper asked her to draw the blood. She testified that the trooper accompanied the patient, the doctor, and the nurses from the emergency room to the interventional radiology department and that it was at a point in the hallway near the interventional radiology department that she drew the blood from the Defendant.

Trooper Adkins testified that he read the implied consent advisory from a booklet that he had with him. He testified that the Defendant was looking at him when he read the advisory and that the Defendant did not ask any questions. Trooper Adkins testified that the Defendant said he understood and that the Defendant gave verbal consent for the blood test.

Nurse Balmer testified that she vaguely recalled the trooper reading "the rights" to the Defendant. She testified to her puzzlement in observing that the Defendant was unresponsive "and yet he [the trooper] was going through with the request" to this unresponsive patient. She had no recollection that the patient, the Defendant, responded to the request. Ms. Balmer recalled Defendant's condition at the time was critical.

Trooper Adkins testified that he filled out the implied consent form and then signed the document indicating that the Defendant had given verbal consent. That implied consent form, however, has disappeared. The State introduced Exhibit 2 as a replica of the form filled out the way that Trooper Adkins testified he had filled out the form at the time of the request.

Trooper Adkins testified that he provided two glass tubes to the nurse from a box and that he witnessed her draw the blood from the Defendant. Trooper Adkins testified that he provided a written request to the nurse and that it was

sent to the DCI laboratory packaged with the vials. Trooper Adkins testified that nurse Cynthia Balmer had signed or initialed the written request.

Trooper Adkins testified that he took the tubes containing the blood, from Nurse Balmer, put them back in the box, sealed the box, and filled out paperwork for the lab. He took the box to his patrol car and later left it on a desk of a secretary at the office of the Highway Patrol in Cedar Rapids. Trooper Adkins testified that he left a note for the secretary to mail the box to the laboratory in Des Moines. He testified that he did not follow up with the secretary at the Cedar Rapids Iowa Highway Patrol and does not know when the blood was sent to the DCI laboratory.

The blood samples arrived at the Department of Criminalistics Laboratory on August 28, 2003. Technician Orville Berbano tested the blood. However, Mr. Berbano did not find any documentation showing nurse Balmer's signature or initials accompanying the samples. That document, like the original implied consent form, is not available.

Mr. Berbano prepared a report of the results of his testing. The report, introduced into evidence as Exhibit C, was sent to the submitting agency. Pursuant to the policy of the DCI Criminalistics Laboratory, it was noted that the evidence would be destroyed after 90 days. Mr. Berbano explained that the laboratory cannot maintain all substances indefinitely, and the purpose of that notification was to let folks know that if samples needed to be saved, steps needed to be taken to inform the laboratory to preserve the evidence. Nothing was done to preserve the sample. It was sent for destruction on January 8, 2004. The charges in this case were filed April 1, 2004.

Destruction of blood sample.

The Defendant urges that the destruction of the blood sample violated the defendant's right to due process, presumably because he was not afforded an opportunity to conduct independent testing on the blood specimen.

Iowa Code Section 321J.11 provides, in relevant part,

The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. *The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer.* Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person. Iowa Code § 321J.11 (emphasis added).

It therefore appears from the plain language of this statute that the inability of the defendant to obtain an independent test does not bar the admission of the results of the blood sample test.

In State v. Steadman, 350 N.W.2d 172, 175 (Iowa 1984), the Iowa Supreme Court found that Iowa Code § 321J.11 does not impose a duty on the officer to preserve a blood sample where the defendant does not make such a request. The court accordingly held that "the due process clauses of the state and federal constitutions do not require suppression of blood alcohol test results obtained through chapter [321J] implied consent procedures for failure of a peace officer to preserve a sample of the specimen tested when the defendant did not notify the officer of a desire for an independent test." Id.

Likewise, in State v. Dulaney, 493 N.W.2d 787, 791 (Iowa 1992), the Iowa Supreme Court held that the destruction of the defendant's blood sample before the defendant was able to have the sample independently tested did not violate the defendant's due process rights under the State and Federal Constitution. The court found no evidence of bad faith on the part of the State where the blood sample was destroyed pursuant to routine lab procedure. Id. Similarly, the sample in this case was destroyed pursuant to the lab's routine procedure, and the defendant has presented no evidence of bad faith on the part of the State in allowing the sample to be destroyed by the lab. Bad faith might be found if the defendant had requested the sample

for independent testing while the sample was still in existence, the state refused the demand, and the sample was later destroyed. See, State v. Boner, 186 N.W.2d 161, 164 (Iowa 1971).

Based upon the above and foregoing and the facts in this case, the Court finds that the defendant's due process rights under the State and Federal Constitutions were not offended by destruction of the blood sample pursuant to the lab's normal course or procedure. Therefore, the Motion to Suppress the evidence based on the destruction of the blood specimen should be and is hereby overruled and denied.

Whether the blood test should be suppressed for failing to comply with the Implied Consent requirements?

Iowa Code Chapter 321J is known as Iowa's implied consent law. State v. Palmer, 554 N.W.2d 859, 861 (Iowa 1996). The general purpose of chapter 321J "is to reduce the holocaust on our highways, part of which is due to the driver who imbibes too freely of intoxicating liquor." Severson v. Sueppel, 152 N.W.2d 281, 284. (1967). "To achieve this goal, chapter 321J provides authority for chemical testing of bodily substances from persons suspected of driving while intoxicated." Palmer, 554 N.W.2d at 861 (Iowa 1996). "The premise underlying implied consent is that a driver impliedly agrees to submit to a test in return for the privilege of using the public highways." Id. (citations omitted). "In reality, however, the statute normally requires the express consent of the driver before a test is administered." Id.

Iowa Code § 321J.6 sets forth the implied consent procedure. As the Iowa Supreme Court has noted, "Although the laudable goal of reducing deaths caused by drunk drivers could be most easily accomplished by the State's unfettered ability to invoke the implied consent law, the legislature has, nevertheless, placed limitations on the circumstances under which section 321J.6 applies. Only when the requirements of § 321J.6 have been met may the State make a suspected drunk driver choose between chemical

testing for the presence of alcohol or the loss of his or her driver's license." Id. (citing State v. Hopkins, 465 N.W.2d 894, 895 (Iowa 1991)).

The statutory restrictions on the applicability of the implied consent law have been found to serve three purposes: "1) to protect the health of the person submitting to the test; 2) to guarantee the accuracy of the test; and 3) to protect citizens from indiscriminate testing or harassment." Id. (citations omitted). "These purposes are consistent with a sensitivity to the fact such tests invade the bodily integrity of citizens without the protection of a search warrant." Palmer, 554 N.W.2d at 861.

The United States Supreme Court upheld the validity of requiring a person to submit to a blood test in the absence of a warrant in Schmerber v. California, 384 U.S. 757, 770 (1966), reasoning; "any delay necessary to obtain a warrant would necessarily result in the destruction of evidence because the body naturally eliminates alcohol from the system." Palmer, 554 N.W.2d at 862. The Court "warned against ill-considered extensions of its decision," stating; "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." Id. (quoting, Schmerber, 384 U.S. at 772).

To rely on the implied consent authorized by § 321J.6, the State must show 1) the withdrawal of bodily substances and the chemical test were administered at the written request of a peace officer having reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A, and any one of seven specified conditions exists. See State v Palmer, 554 N.W. 2d 859, 862 (Iowa 1996); Iowa Code § 321J.6(1) (a)-(g). The relevant condition here is § 321J.6(1)(b); "The person has been involved in a motor vehicle accident or collision resulting in personal injury or death." Iowa Code § 321J.6(1)(b).

The purpose of the written request requirement is to "provide a contemporaneous record of the relevant communication," which "promotes accuracy and furnishes a record for subsequent review." State v. Green, 470 N.W.2d 15, 18 (1991). The written request mandated by § 321J.6(1) is not required where the person sought to be tested is "dead, unconscious or otherwise in a condition rendering the person incapable of consent or refusal." State v. Green, 470 N.W.2d 15, 18 (1991) ("No useful purpose is served by requiring literal compliance with the written request requirement when the person sought to be tested is incapable of consenting or refusing").

Here, the evidence does not establish that the defendant consented to the test. The evidence does not establish that the defendant understood questions or made appropriate responses. He did not ask any questions. He was unresponsive. His condition was unstable and he was undergoing medical procedures. His condition was critical. The Court is convinced that he, at that time, was not capable of consenting or refusing.

Section 321J.7 governs the procedure that should be followed where a person is incapable of consenting or refusing. This section provides:

A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given if a licensed physician certifies in advance of the test that the person is dead, unconscious, or otherwise in a condition rendering that person incapable of consent or refusal. If the certification is oral, a written certification shall be completed by the physician within a reasonable time of the test.

Iowa Code § 321J.7. A written request is not required in such a situation because the physician's certification in advance of the testing provides the necessary contemporaneous record of what happened and ensures the accuracy of that record. Green, 470 N.W.2d at 18-19. Furthermore, the written request procedure would have no relevance where the person is incapable of consenting or refusing because all the record would show "would be the officer's request.

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JAMES A. HARRIS
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and no meaningful response from the person to be tested.” Id. Therefore, test results are not rendered inadmissible if an officer fails to follow the procedure for a written request pursuant to Iowa Code § 321J.6(1) *but instead* follows the procedure detailed in Iowa Code § 321J.7 for situations where the person to be tested is dead, unconscious or otherwise incapable of consenting or refusing. (emphasis added) Id. at 19.

The evidence establishes that Trooper Adkins did not obtain a physician’s certification pursuant to Iowa Code §321J.7 prior to obtaining a blood sample from the defendant. In State v. Boner, 186 N.W.2d 161, 163 (Iowa 1971), the court held that test results were inadmissible where the officer did not obtain a physician’s certification that the person sought to be tested was incapable of consenting or refusing prior to the blood sample.

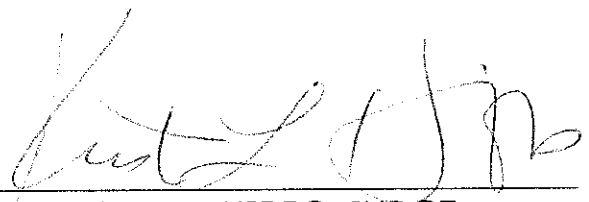
In addition, Trooper Adkins did not comply with the requirements of Iowa Code §321J.6(1). The evidence shows that the implied consent form in this case was lost, and the form presented at the hearing was recreated by Trooper Adkins over a year after the incident. The written request requirement is strictly interpreted by the Iowa Supreme Court; “[the] request itself must also be unequivocal and in proper form.” State v. Richards, 229 N.W.2d 229, 233 (Iowa 1975). Richards accordingly held that accession by defendant to an oral request to take blood test did not obviate officer’s statutory duty to make the request in writing before the blood sample is taken. Id. The court disapproves of efforts to reconstruct the written request after the fact because it impairs the aforementioned purpose of the requirement to provide a “record of the relevant communication,” which “promotes accuracy and furnishes a record for subsequent review.” State v. Meissner, 315 N.W.2d 738, 741 (Iowa 1982) (quoting Green, 470 N.W.2d at 18). Thus, even if the defendant had been capable of consenting or refusing at the time the blood was drawn, the test results are inadmissible because the procedural requirements of § 321J.6(1) were not complied with.

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IOWA SUPREME COURT

Based upon the above and foregoing, the Court finds that the officer failed to follow the implied consent procedures pursuant to Iowa Code § 321J.6(1) and failed to follow the procedure detailed in Iowa Code § 321J.7 for situations where the person to be tested is dead, unconscious or otherwise incapable of consenting or refusing. Therefore, the Motion to Suppress the evidence based on the State's failure to comply with implied consent requirements should be and is hereby sustained.

Clerk to notify.

DATED this 25th day of March 2005.



KRISTIN L. HIBBS, JUDGE
SIXTH JUDICIAL DISTRICT OF IOWA

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cc CA
S. Peterson
3/29/05
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IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

DEPT. OF CORRECTIONAL SERVICES
 JUDICIAL DISTRICT #6
 JAMES EARL RAY JR. COURT
 11/10/07 1:10:52
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STATE OF IOWA,)
)
 Plaintiff,)
)
 vs.)
)
 DAN LEE WILKERSON,)
)
 Defendant.)

No. FECR 068296

ORDER FOR DEFERRED JUDGMENT

The Defendant appears in open court with attorney Scott Peterson at the time scheduled for sentencing. The Defendant previously entered a Rule 2.10 plea of guilty to the offense of **Involuntary Manslaughter**, in violation of Iowa Criminal Code Section , a **707.5(2)**, an aggravated misdemeanor. The State of Iowa was represented by Johnson County Attorney J. Patrick White.

The Rule 2.10 plea agreement provides for a deferred judgment. The Defendant requests and consents to a deferral of judgment by the court and the placing of the Defendant on probation under such terms and conditions as the court may require.

THEREFORE, pursuant to Section 907.3(1) and 901.5 of the Iowa Corrections Code, pronouncement of judgment is hereby deferred for a period of two (2) years to July 6, 2007, and the Defendant is placed on supervised probation for a period of two (2) years to the Sixth Judicial District Department of Correctional Services during good behavior. The Defendant is also placed on the Intermediate Sanctions Continuum pursuant to Iowa Code 901B.1. The Department of Correctional Services shall evaluate the Defendant's risk to public safety and determine the appropriate level of supervision, or sanction, which may include correctional residential facility placement. Offenders shall follow the probation officer's directives, including all evaluations and treatment plans. DCS shall set the terms of probation, which shall include, but not be limited to the following:

1. There shall be no further violations of the law, simple misdemeanor traffic offenses excepted.
2. The Defendant shall undertake and successfully complete intensive outpatient substance abuse treatment, education and aftercare as directed by his probation officer.
3. The Defendant shall not possess or consume any alcoholic beverages.
4. The Defendant shall perform 100 hours of community service, educating the public on the dangers of drinking and driving by presenting programs to the public under the supervision of the Sixth Judicial District Department of Correctional Services

Enrollment Fee:

Defendant shall pay the enrollment fee required by Iowa Code Section 905.14 at the rate established by the Sixth Judicial District Department of Correctional Services.

Victim Restitution:

Defendant shall make victim restitution as set out in the Statement of Pecuniary Damages,

which is to be filed no later than 30 days after the date of this order. If Defendant objects to the amount set forth in the Statement of Pecuniary Damages, Defendant shall file any objections with the Clerk of this District Court within 20 days of the service of the Statement of Pecuniary Damages upon Defendant's attorney. Any objections will be set for hearing.

Defendant shall also make victim restitution to the estate of Don Westcott if he died testate, or to the heirs at law of Don Westcott if he died intestate in the sum of \$150,000.00 pursuant to the provisions of Iowa Code Section 910.3B and 633.210. The Defendant shall receive credit for this amount, since more than this amount was previously paid pursuant to the civil claim that was filed.

Defendant shall make victim restitution to Gerald Neuzil, 2747 IWV Road, SW, Iowa City, Iowa, in the sum of \$480.12.

Attorney Fees and Court Costs:

Defendant is further ordered to make restitution for court costs in the amount of \$_____. Defendant retained counsel, therefore, no attorney fee restitution is due.

Payment Plan:

Restitution for Defendant's financial obligations imposed by this order shall be included in the Plan of Payment to be prepared by the Department of Corrections or other supervising agency or institution and submitted to any judge of this court for approval.

The reasons for deferring the judgment in this case are:

1. The recommendation of the County Attorney;
2. The fact that the State does not believe that it has sufficient admissible evidence to obtain a conviction if the plea agreement is rejected by the court, which would result in a dismissal of this case by the County Attorney and reopening the investigation, with no reasonable likelihood of further charges;
3. To provide the Defendant with supervision and structure;
4. According to the presentence report, the Defendant has no prior alcohol related offenses, with the exception of a 1977 public intoxication;
5. To protect the community; and
6. The best means to provide this Defendant with the maximum opportunity for rehabilitation.

The Clerk of Court shall report this deferment of judgment as provided in the Code of Iowa.

Defendant's date of birth is 1/29/1955.

Defendant's appearance bond, if any, is exonerated.

Clerk to notify counsel and DCS.

Dated: July 6, 2005.

David M. Remley

DAVID M. REMLEY, JUDGE
SIXTH JUDICIAL DISTRICT OF IOWA

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Peterson
DCS w/ Muns
JCSO
DST w/ Comp
7/7/05d*

*\$480.12 - vict rest.
45.00 - court costs
\$537.00 - Amount Due*

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SIXTH JUDICIAL DISTRICT OF IOWA