798 N.W.2d 736 (Table)
(The Court's decision is referenced in a "Decisions Without Published Opinions" table in the North Western Reporter.)
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff–Appellee,
v.
Alexander William BARRANS,
Defendant–Appellant.

No. 09–1705. | March 7, 2011.

West KeySummary

1 **Automobiles**
Advice or warnings; presence of counsel

A defendant was given the opportunity to call, consult, and see a member of the defendant's family or an attorney, as required under Iowa law. After the defendant was arrested for operating while intoxicated and brought to a state trooper's patrol station, the defendant was allowed to make four phone calls, two to friends, and two to attorneys. Although the defendant was unable to reach any of the four people he contacted, the defendant indicated that he did not know anyone else he wanted to contact. It was only after the defendant said he no longer wanted to contact anyone that the trooper asked the defendant whether he wanted to consent to chemical testing. Further, the trooper had advised the defendant that the purpose of the calls was that they related to the test. I.C.A. § 804.20.

Cases that cite this headnote

Appeal from the Iowa District Court for Polk County, Odell McGhee, District Associate Judge.
A defendant appeals his judgment and sentence for operating while intoxicated, contending that the district court erred (1) in denying his motion to suppress evidence of his refusal to submit to chemical testing and (2) in concluding that his right to consultation under Iowa Code section 804.20 (2009) was not violated. AFFIRMED.

Attorneys and Law Firms

R.A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by SACKETT, C.J., and VOGEL and VAITHESWARAN, JJ.

Opinion

VAITHESWARAN, J.

***1** Alexander Barrans appeals his judgment and sentence for operating while intoxicated, first offense. He contends the district court should have suppressed evidence of his refusal to consent to chemical testing. He also contends his statutory right to contact an attorney or family member under Iowa Code section 804.20 (2009) was violated.

I. Background Facts and Proceedings

A State trooper stopped a vehicle driven by Barrans and smelled alcohol on his breath. Barrans was driving a noncommercial vehicle, but also had a commercial driver's license. He inquired about the effect on his licenses. The trooper responded as follows:

> I told him that if he submitted to the—to the certified test and failed it that his license would be revoked for one year, and if he refused it would be revoked for two years and that his CDL would be disqualified for one year and two years if he refused it.

This response was inaccurate. *See* Iowa Code § 321.208(2)(a), (b) (setting forth one-year disqualification period for operating a commercial motor vehicle while under the influence of alcohol, other drug, or controlled substance and for refusal to submit to chemical testing). [1]

After administering a preliminary breath test and field sobriety tests, the trooper arrested Barrans and transported him to a patrol post. There, the trooper read him an implied

consent advisory that mentioned the effect of a test failure on a person's commercial driver's license.

The trooper next helped Barrans make several phone calls, none of which were answered. At that point, the trooper asked Barrans whether he would like to consent to chemical testing. Barrans refused the test.

The State charged Barrans with operating a motor vehicle while intoxicated. *See* Iowa Code § 321 J.2(1). Barrans moved to suppress his test refusal on the ground that the implied consent advisory was misleading. He also asserted that he was not adequately informed of his consultation rights under Iowa Code section 804.20. The district court denied the motion.

Following a trial to the court, Barrans was found guilty. This appeal followed.

II. Analysis

A. Implied Consent Advisory

Barrans contends the implied consent advisory given to him was inaccurate and misleading concerning the consequences of a breath test failure on his commercial driving privileges. *See* Iowa Code § 321J.8. At the time of Barrans's arrest, section 321J.8 stated in pertinent part:

> A person who has been requested to submit to a chemical test shall be advised by a peace officer of the following:
>
> ....
>
> ... If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and *either refuses to submit to the test or operates a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances,* the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

***2** *Id.* § 321J.8(1)(c)(2) (emphasis added). The applicable period of disqualification from operating a commercial motor vehicle was one year. *Id.* § 321.208(2)(a), (b).

Barrans notes that this provision referred to the consequences of a test refusal and of driving while under the influence but did not explicitly mention the consequences of a test *failure.* In his view, therefore, the trooper's rendition of the implied consent advisory concerning the consequences of a test failure was not authorized by statute.

Our highest court has not read the cited statutory provisions so narrowly. As Barrans concedes, the court made specific reference to these provisions in *State v. Massengale,* 745 N.W.2d 499 (Iowa 2008), and stated that the disqualification period applied to a test failure as well as a test refusal. In particular, the court noted that section 321.208 provides for "a one year CDL revocation for an individual who refused or *failed chemical testing* regardless of whether the individual was operating a commercial or noncommercial motor vehicle." *Massengale,* 745 N.W.2d at 503 (emphasis added). And, the court stated that under section 321.208(2), "an individual, such as Massengale, holding a CDL and driving a noncommercial vehicle will lose his commercial driving privileges for one year if he refuses or *fails chemical testing.*" *Id.* (emphasis added). Based on this language, we conclude the trooper's rendition of the implied consent advisory concerning test failure was not misleading and the district court did not err in denying Barrans's motion to suppress on this ground.

B. Challenge to Use of the TraCS system

Barrans next contends the district court erred in concluding that an electronic system known as TraCS satisfied the statutory requirement that a peace officer make a written request for a specimen. While this appeal was pending, the Iowa Supreme Court decided *State v. Fischer,* 785 N.W.2d 697 (Iowa 2010), which resolved this issue in the State's favor. *Fischer,* 785 N.W.2d at 706. Accordingly, Barrans has moved to withdraw the issue. We grant the motion.

C. Trooper's failure to follow approved methods in obtaining a test refusal

Barrans contends the trooper "did not prepare an operational checklist and attach a Datamaster printout showing the purported [test] refusal." Barrans concedes the district court did not rule on this issue. He did not file a post-ruling motion for the court to consider this issue. Accordingly, we conclude error was not preserved. *See Meier v. Senecaut,* 641 N.W.2d 532, 540 (Iowa 2002) ("The rule requires a party seeking to appeal an issue presented to, but not considered by, the district

court to call to the attention of the district court its failure to decide the issue.").

D. Section 804.20

Barrans finally asserts a violation of Iowa Code section 804.20, which affords an arrestee a right "to call, consult, and see a member of the person's family or an attorney of the person's choice, or both." *Accord State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009). He contends: (1) he was denied an opportunity to reach counsel and (2) he was not properly informed of the purposes of section 804.20. Our review of this issue is for correction of errors at law.

***3** Following Barrans's arrest and arrival at the station, the trooper advised Barrans that "he had the right to contact a friend and/or family member and/or attorney to seek counsel regarding the test." When Barrans indicated he was having trouble with his cell phone, the trooper offered him the battery from his own phone. While the trooper's battery was not compatible with Barrans's phone, the defendant was still provided a phone with which to make calls. The trooper also helped Barrans locate phone numbers, using his own computer as well as Yellow Pages.

Barrans was allowed to make four phone calls, two to friends, and two to attorneys. He was unable to reach any of the four people he contacted. After these calls, the trooper asked Barrans "if he had anyone else that he would like to contact." According to the trooper, Barrans "stated that he didn't know anyone else who he would like to contact." Only then did the trooper ask Barrans whether he would like to consent to chemical testing.

On these facts, we conclude the district court did not err in declining to find a violation of section 804.20. The trooper advised Barrans of the purpose of the calls by telling him they related to the test.[2] He also gave him several opportunities to contact someone for assistance. Although the trooper had fifty minutes left in the statutory period for administering the test, *see* Iowa Code § 321J.6(2), there was no reason for him to delay testing where Barrans himself did not find it necessary to contact anyone else. *See State v. Shaffer*, 774 N.W.2d 854, 856 (Iowa Ct.App.2009) (concluding that although officer was not close to abutting the two-hour deadline for administering chemical testing, section 804.20 was still satisfied when the defendant was given various opportunities to reach counsel).

III. Disposition

We affirm Barrans's judgment and sentence for operating while intoxicated, first offense.

AFFIRMED.

TABOR, J., takes no part.

Parallel Citations

2011 WL 768820 (Iowa App.)

Footnotes

1 There is no question the trooper verbally misinformed Barrans about the applicable period of disqualification. However, at trial, Barrans appeared to concede that the written advisory the trooper read to him made reference to the correct disqualification period. On appeal, he also concedes that the district court did not rule on the effect of the verbal misinformation. Accordingly, any challenge to this aspect of the verbal advisory is not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) ("The rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue."). We only address the trooper's rendition of the implied consent advisory as it related to the consequences of a test failure.

2 We are not persuaded by his argument that *State v. Garrity*, 765 N.W.2d 592 (Iowa 2009) requires a detailed explanation of all the purposes for the phone calls.