

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 46702-2019
 Plaintiff-Respondent,)
) Kootenai County Case No.
 v.) CR-2017-17638
)
 KYLE JOSEPH EVENSON,)
)
 Defendant-Appellant.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

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District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE	3
ARGUMENT	4
Evenson Failed To Show That Law Enforcement Interfered With Or Affirmatively Denied Him The Opportunity To Acquire BAC Testing At His Own Expense.....	4
A. Introduction.....	4
B. Standard Of Review	4
C. The Record Shows No Due Process Violation	5
CONCLUSION.....	7
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Decker</u> , 152 Idaho 142, 267 P.3d 729 (Ct. App. 2011)	4, 5
<u>State v. Hedges</u> , 143 Idaho 884, 154 P.3d 1074 (Ct. App. 2007).....	5
<u>State v. Jacobson</u> , 150 Idaho 131, 244 P.3d 630 (Ct. App. 2010)	5

STATEMENT OF THE CASE

Nature Of The Case

Kyle Joseph Evenson appeals from his conviction for felony DUI. On appeal he challenges the denial of his motion to suppress evidence.

Statement Of The Facts And Course Of The Proceedings

The state charged Evenson with felony DUI with a persistent violator enhancement and misdemeanors for concealment of evidence, possession of a controlled substance, and possession of paraphernalia. (R., pp. 57-59.) He moved to suppress evidence. (R., pp. 61-63.) Evenson argued that his due process rights were violated because he was denied the opportunity to arrange additional breath or blood alcohol concentration (“BAC”) testing. (R., pp. 81-89.)

The parties stipulated that Evenson was arrested for felony DUI; that probable cause supported his arrest, the traffic stop, and the administration of field sobriety tests; that Evenson failed the field sobriety tests; that the officer read Evenson the statutory rights form; and that Evenson took a breath test with a result of .166/.163. (R., pp. 127-28.) The parties further stipulated that Evenson stated that he wanted additional breath testing. (R., p. 128.) Evenson was provided access to the jail’s phones, and the parties further stipulated to the conditions by which inmates may make phone calls. (R., p. 128.) Evenson attempted four times to make a phone call to his grandmother, but, because his grandmother did not properly enter the three-digit verification code on her credit card, the calls were not connected. (R., pp. 128-30.)

The district court denied the motion (R., pp. 132-38), finding that “the factual record fails to show that law enforcement interfered with or affirmatively denied Defendant

access to a telephone once he requested to make telephonic arrangements for an independent BAC test” (R., p. 137).

Pursuant to a plea agreement Evenson pled guilty to felony DUI and possession of marijuana and the state dismissed the remaining misdemeanors and the enhancement. (R., pp. 139-151.) Evenson preserved his right to appeal from the denial of his motion to suppress evidence. (R., p. 147.) The district court imposed a sentence of six years with three years determinate on the felony DUI, suspended execution of the sentence, and ordered probation. (R., pp. 169-72.) Evenson filed a timely notice of appeal. (Supp. R., pp. 20-23.)

ISSUE

Evenson states the issue on appeal as:

Did the district court err when it denied Mr. Evenson's motion to suppress?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has Evenson failed to show that law enforcement interfered with or affirmatively denied him the opportunity to acquire BAC testing at his own expense?

ARGUMENT

Evenson Failed To Show That Law Enforcement Interfered With Or Affirmatively Denied Him The Opportunity To Acquire BAC Testing At His Own Expense

A. Introduction

The facts show that Evenson was provided access to phones by which he could make collect calls, that he made four calls, but that all four calls were terminated because the intended recipient, his grandmother, failed to properly enter the security code from her credit card. (R., pp. 127-30.) The district court found that Evenson failed to prove that a government actor denied or materially interfered with his due process right to arrange additional BAC testing at his own expense. (R., pp. 132-38.) On appeal Evenson argues that providing access to a phone system that required Evenson's grandmother to enter the security code from her credit card was a material interference with his right to arrange BAC testing at his own expense. (Appellant's brief, pp. 6-17.) Evenson's argument fails because the record supports the district court's conclusion there was no due process violation.

B. Standard Of Review

“Where a defendant claims his or her right to due process was violated, we defer to the trial court's findings of fact, if supported by substantial evidence” but “freely review the application of constitutional principles to those facts found.” State v. Decker, 152 Idaho 142, 147, 267 P.3d 729, 734 (Ct. App. 2011). “It is the defendant's burden to demonstrate facts that constitute a due process violation.” Id.

C. The Record Shows No Due Process Violation

A due process claim is analyzed in two steps: first, whether the Defendant has “a liberty or property interest within the meaning of the Fourteenth Amendment’s Due Process Clause”; and second, if so, the court must apply a balancing test “to determine what process is due.” Decker, 152 Idaho at 147, 267 P.3d at 734. “DUI arrestees have a liberty interest in timely securing evidence central to their defense, satisfying the first due process step.” State v. Jacobson, 150 Idaho 131, 135, 244 P.3d 630, 634 (Ct. App. 2010). “In the context of a DUI arrest, due process requires that police give a person accused of DUI a reasonable opportunity to procure a timely BAC sample through the accused’s own efforts and expense.” State v. Hedges, 143 Idaho 884, 887, 154 P.3d 1074, 1077 (Ct. App. 2007). “A detainee’s inability to obtain additional BAC testing will not result in suppression of the test completed by the state unless this right was affirmatively denied or materially interfered with by the state.” Id.

The stipulated facts include that, after Evenson expressed a desire for his own BAC testing, he was allowed access to the phones at the jail. (R., p. 128.) Evenson attempted to call his grandmother four times.¹ (R., p. 129.) The jail phone system allows persons to accept collect calls from inmates by providing a credit card, something that the grandmother had done before and therefore was in the system. (R., pp. 128-29.) Because the grandmother had previously accepted jail phone calls on her credit card she could not accept a free 60 second call, but the only necessary condition for completing the calls was

¹ There is no evidence Evenson called his grandmother for the purpose of securing BAC testing at his own expense. In his briefing to the district court Evenson stated he “attempted to contact an immediate family member to *potentially* make arrangements for independent testing.” (R., p. 82 (emphasis added).)

the grandmother entering the three-digit verification number from her credit card. (R., p. 129.) Evenson's calls to his grandmother were not completed because she had some unspecified "difficulty" entering her credit card's three-digit verification code. (R., p. 129.) Nothing in the stipulated facts indicates a government actor "affirmatively denied or materially interfered with" Evenson's efforts to secure independent BAC testing at his own expense. The record supports the district court's conclusion there was no due process violation. (R., pp. 132-38.)

On appeal Evenson argues that the government did affirmatively deny or materially interfere with his efforts to secure BAC testing "because the telephone it provided was dysfunctional in a way that prevented Mr. Evenson from making his phone call." (Appellant's brief, p. 10.) Specifically, by making available a phone system that required his grandmother to successfully enter a three-digit verification number from the back of her credit card, the state "prevented Mr. Evenson from making the call he had requested." (Appellant's brief, pp. 10-16.) This argument lacks merit because the record establishes that the only reason the call failed was because Evenson's grandmother failed to properly enter the verification number from her credit card. The government did not deny or materially interfere with his right to BAC testing at his own expense.

In this record there is no evidence that the jail set up or maintained a phone system with the goal or with the effect of preventing inmates, and particularly inmates seeking to arrange BAC testing at their own expense, from completing phone calls. Nor is there evidence that inmates generally had difficulty making phone calls. Indeed, as far as we know, Evenson's attempts to call his grandmother were the only uncompleted phone calls in the history of the system. Finally, Evenson did not bring the problem to the attention of

jail personnel or attempt to call anyone else. The only reason Evenson's calls were not completed was because his grandmother failed to enter the three-digit verification code from her credit card. Evenson's attempt to lay that failure at the feet of the state is without merit.

The record supports the district court's determination that Evenson failed to prove that a government actor denied or materially interfered with his right to BAC testing at his own expense.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 29th day of July, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of July, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KKJ/dd