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## LEGAL UPDATE

Legal Services Division



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### IOWA SUPREME COURT DECISION — CONFIDENTIAL TELEPHONE CALL WITH ATTORNEY BEFORE FILING OF CRIMINAL CHARGES

**Purpose.** *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

**State v. Sewell**  
**Filed June 4, 2021**  
**No. 20-0445**

[www.iowacourts.gov/courtcases/12094/embed/SupremeCourtOpinion](http://www.iowacourts.gov/courtcases/12094/embed/SupremeCourtOpinion)

**Factual and Procedural Background.** On January 15, 2019, at 2:49 a.m., Dickinson County dispatch received a call from a resident reporting that a person was passed out in a truck in their driveway. A Dickinson County sheriff's deputy arrived at the residence at about 3:00 a.m. and discovered a Ford F-150 truck in the driveway running, with its lights on, with a male sleeping in the driver's seat. The driver eventually produced a driver's license identifying him as Matthew Sewell. Sewell admitted he had been drinking and stated he did not know what street he was on. The deputy noticed a strong odor of alcohol and that Sewell's eyes were watery and bloodshot and his speech was slurred. Sewell performed poorly on field sobriety tests and refused a preliminary breath test.

The deputy arrested Sewell and transported him to the Dickinson County Jail where Sewell was read the implied-consent advisory and was requested to provide a chemical breath test sample. Sewell was provided the opportunity to contact an attorney or family member using the jail telephone. Sewell did so and left a message with a criminal defense attorney who later returned his call. Sewell informed the attorney they were speaking on the jail's telephone. The deputy denied Sewell's request and the attorney's request for a confidential conversation on Sewell's cell phone, but informed them they could have a confidential meeting at the jail. When the attorney learned that he could not have a private phone conversation, he declined to further advise Sewell. Sewell decided to take the breath test which showed a blood alcohol content of .206. Sewell was booked into jail.

Sewell was subsequently charged by trial information with operating while intoxicated (OWI), first offense. Sewell filed a motion to suppress evidence, stating that his rights had been violated under Iowa Code section 804.20, the Fourth and Sixth Amendments to the United States Constitution, and Article I, Sections 8 and 10 of the Iowa Constitution, as well as a motion to dismiss for due process violations. Both motions were based on the jail's refusal to allow Sewell a private, unrecorded conversation with the attorney.

The district court held a hearing and denied both motions. Sewell waived his right to a jury trial and the trial court found him guilty of OWI on two alternate theories: being under the influence of alcohol and having a blood alcohol concentration of .08 or more. Sewell appealed to the Iowa Supreme Court (Court).

**Issue.** Whether an arrested person has the right to a confidential telephone consultation with an attorney before criminal charges are filed under either Iowa law or the Iowa Constitution.

**Holding.** Iowa law does not provide a right to a confidential telephone consultation with an attorney before criminal charges are filed because Iowa Code section 804.20 provides that if a call to an attorney is made “it shall be made in the presence of the person having custody of the one arrested or restrained.” The Iowa Constitution does not provide such a right because the right to counsel under Article I, Section 10 arises in “criminal prosecutions” and “cases involving the life, or liberty of an individual,” not in procedures that occur before a prosecution or case is commenced.

**Ruling.** The defendant was not entitled to a private phone consultation and his motions to suppress and dismiss were properly denied. The Court affirmed the defendant’s conviction and sentence.

**Majority Analysis.** Justice Mansfield delivered the opinion of the Court. Iowa Code section 804.20 (communications by arrested person), provides that:

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. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

In analyzing the statute, the Court reasoned that “the notion appears to be that the phone calls are brief and for the purpose of obtaining counsel, not for the purpose of obtaining *advice* from counsel.” The Court noted that the words “make” and “made” are used three times in Iowa Code section 804.20, and if the words are to be read consistently in each instance, then “make” must mean something more than merely dialing the telephone in the presence of the person having custody of the person arrested or restrained and something less than having a substantive discussion to obtain legal advice. The Court stated that the statute specifically provides that an attorney shall be permitted to see and consult confidentially with an arrested person alone and in private at the jail or other place of custody and that if the same guarantee of confidentiality was intended for phone calls, the statute would have included such language. The Court also discussed three prior decisions rejecting the defendant’s argument.

The Court then discussed whether Article I, Section 10 of the Iowa Constitution provides a right to consult privately with counsel before deciding whether to consent to or refuse blood alcohol testing. Article I, Section 10 provides:

In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel.

The Court had previously considered the issue in *State v. Senn*, 882 N.W. 2d 1 (2016) involving similar facts, which was decided by a plurality of the Court. The issue in *Senn* was whether the right to counsel attached before the state filed criminal charges and the arrested person faced the decision whether to submit to a chemical breath test which measures blood alcohol level. The Court reasoned the enumerated rights only come into play in actual court proceedings, and that when the accused asked for a confidential conversation with counsel prior to a blood alcohol test there was not yet a prosecution or case against the accused. In discussing precedents from other states, the *Senn* plurality noted the vast majority of states have concluded there is no state constitutional right to counsel at the time a motorist must decide whether to submit to chemical testing.

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The Court finally considered the claim that denying Sewell a confidential telephone call with an attorney violated Sewell's right to due process by interfering with the attorney-client relationship under Article I, Section 9 of the Iowa Constitution. The Court stated that the only "interference" was in refusing something that Sewell had no right to at the time of the chemical test.

**Justice Appel, concurring in part and dissenting in part.** Justice Appel recognized a large body of case law suggesting that a statutory right to counsel in the context of informed consent necessarily means a private consultation with an attorney, but concurred with the majority's interpretation of the statute. Justice Appel's opinion discussed case law regarding whether the right to counsel attaches after a custodial arrest and the arrested person is faced with making an informed consent decision noting substantial authority from a number of jurisdictions that hold that when a person is placed under arrest and is confronted with the choice of providing a breath test or losing one's driver's license, "the power of the state has been sufficiently focused upon the individual to give rise to a right to counsel designed to protect individuals in criminal prosecutions." Five states have found a constitutional right to counsel in the context of implied consent, and at least six states have provided for confidential consultation with counsel in the informed consent setting by statute or rule.

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