

IN THE COURT OF APPEALS OF IOWA

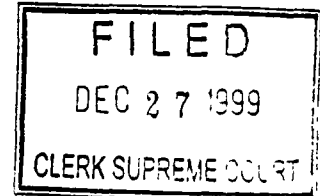
No. 1999-397 (9-650) / 99-0024

Filed December 27, 1999

DAVID N. McCLURE,
Petitioner-Appellant,

vs.

**IOWA DEPARTMENT OF
TRANSPORTATION,**
Respondent-Appellee.



Appeal from the Iowa District Court for Cerro Gordo County, Bryan H.
McKinley, Judge.

The petitioner appeals from the district court's ruling on judicial review
affirming the respondent's revocation of the petitioner's driver's license for a
chemical test refusal. **REVERSED.**

Michael G. Byrne of Winston & Byrne, P.C., Mason City, for appellant.

Thomas J. Miller, Attorney General, **David A. Ferree**, Special Assistant
Attorney General, and **Carolyn J. Olson**, Assistant Attorney General, for appellee.

Heard by **Huitink, P.J.**, and **Mahan and Hecht, JJ.**

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MAHAN, J.

David McClure appeals the district court's ruling on judicial review affirming the revocation of his driver's license pursuant to Iowa Code section 321J.9 (1997) for a chemical test refusal. McClure claims the trooper's initial invocation of implied consent refusal violated his right to counsel under the specific circumstances of this case. We reverse.

On March 4, 1998, Trooper Lee Okerlund arrested McClure for OWI at 11:51 p.m. after he had administered the horizontal gaze nystagmus test and McClure had refused to submit to a preliminary breath test. McClure asked to speak to attorney Michael Byrne. Okerlund made four telephone calls to the attorney's residence between 12:04 a.m. and 12:10 a.m. Each time the line was busy.

At 12:11 a.m., Okerlund made a written request for a breath specimen. McClure continued to request legal counsel. Beginning at 12:15 a.m., Okerlund made three more telephone calls to Byrne's residence, again each time the line was busy. The last call was placed at 12:25 a.m. Upon Okerlund's request, the operator cut into the line and determined Byrne's telephone was either off the hook or connected to a computer. After the seventh attempt to reach Byrne, McClure was offered the phone book so he could select another attorney. McClure insisted on speaking to Byrne.

Okerlund invoked implied consent at 12:28 a.m. McClure did not sign the implied consent form nor did he agree to submit to a breath test. At that time, McClure was deemed to have refused the test.

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~~At 12:48 a.m.~~¹ Okerlund made a "curiosity" call² and successfully reached Byrne on the telephone. McClure was permitted to speak with his attorney.³ At 1:03 a.m., after speaking with McClure, Byrne asked Okerlund to allow McClure to submit to a breath test. Okerlund refused to allow McClure to take a chemical test.

McClure's license was subsequently revoked. The revocation was affirmed by the administrative law judge and by IDOT on administrative appeal. On judicial review, the district court also affirmed the revocation.

McClure appeals.

I. Standard of Review. In reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. *Houlihan v. Employment Appeal Bd.*, 545 N.W.2d 863, 865 (Iowa 1996); *Henry v. Iowa Dep't of Transp.*, 426 N.W.2d 383, 385 (Iowa 1988). The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. *Id.* When we review such action by the district court, we merely apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. *Id.* If the conclusions are the same, we affirm; otherwise we reverse. *Downing v. Iowa Dep't of Transp.*, 415 N.W.2d 625, 627 (Iowa 1987).

¹ Between 12:28 a.m. and 12:48 a.m., McClure remained at the same location in the jail as he had been during all attempts to reach counsel and Okerlund's invoking of the implied consent.

² Okerlund testified his reason for making the 12:48 a.m. call was "I was just curious as to why that phone just wouldn't ring in."

³ This call was supervised and McClure was under observation during this time.

II. Reasonable Opportunity to Contact an Attorney. Under Iowa Code section 804.20, a person arrested for OWI has a limited right to contact an attorney, prior to deciding whether to consent or refuse chemical testing. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997) (citing *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)). The right is limited to circumstances which will not materially interfere with the administration of testing within the two-hour time limit imposed by Iowa Code section 321J.6(2). *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa App. 1991). However, the two-hour period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing. *Id.*

Generally this right to counsel is satisfied by allowing the arrestee to make a telephone call. *Bromeland*, 562 N.W.2d at 626 (citing *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988); *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576, 578 (Iowa App. 1989)). Section 804.20 has never been interpreted as providing an absolute right to talk to one particular attorney if that person is unavailable or unable to be reached. *Id.*

McClure asserts Okerlund's refusal to allow him to take the test after his first and only opportunity to consult with counsel is *per se* unreasonable and capricious. In the alternative, McClure argues the subsequent conduct of Okerlund after invoking implied consent affects his right to a reasonable opportunity to consult with counsel. Since this case will be resolved on the second issue, we will not address the first.

McClure concedes, and we agree, under the initial facts of this case he was allowed a reasonable opportunity to contact an attorney prior to making a decision about whether to submit to chemical testing. Okerlund made seven telephone calls to McClure's attorney of choice, spoke to the operator, and offered McClure the opportunity to select another attorney from the telephone book. McClure did not refuse to sign the form or refuse to call another attorney. Instead, he stated he preferred to continue attempts to contact attorney Bryne. Okerlund then invoked implied consent. This action was proper.

However, we agree with McClure the reasonableness determination is affected by the events which took place thereafter. Okerlund again attempted to reach attorney Bryne within twenty minutes of invoking implied consent and was successful. McClure was still present in the same area of the jail and was allowed to speak with Bryne. The phone consultation commenced at 12:48 a.m. This phone consultation was supervised and McClure was under observation. At 1:03 a.m., Bryne requested McClure be allowed to take the test. Okerlund denied said request.⁴

It is undisputed Okerlund initiated the successful call to Bryne and then allowed the attorney-client conversation to take place. The request to allow McClure to take the test was made with forty-eight minutes left in the two-hour time requirement. We conclude the peculiar and specific facts of this case affected McClure's reasonable opportunity to contact an attorney. *See e.g. Fuller v. Iowa Dep't*

⁴ The record does not disclose Okerlund was involved in any other specific duties at the time.

of Transp., 275 N.W.2d 410, 411 (Iowa 1979). We emphasize our decision does not affect the current state of the law concerning implied consent. This is a fact-specific case determination.

REVERSED.