

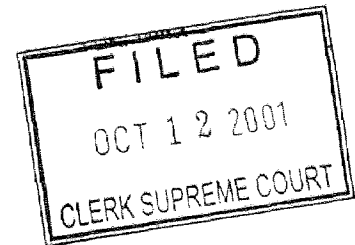
IN THE COURT OF APPEALS OF IOWA

No. 1-553 / 00-1718
Filed October 12, 2001

RYAN NICHOLAS LUDWIG,
Petitioner-Appellee,

vs.

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



Appeal from the Iowa District Court for Crawford County, John C.
Ackerman, Judge.

The respondent appeals from the district court's ruling on judicial review
reversing the revocation of petitioner's driver's license for a chemical test failure
under Iowa Code section 321J.12 (1999). **AFFIRMED.**

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

Thomas R. Eller of Eller, Brink & Sextro, Denison, for appellee.

Considered by Sackett, C.J., and Mahan and Zimmer, JJ.

MAHAN, J.

The Iowa Department of Transportation (DOT) appeals the decision of the district court which reversed the revocation of petitioner's driver's license for a chemical test failure under Iowa Code section 321J.12 (1999). The DOT claims the district court erred in finding the DOT's decision to revoke petitioner's license was not supported by substantial evidence. We affirm the district court.

At about 6:30 p.m. on November 15, 1999, police officer Ken Myers noticed a car parked in an area of new construction in Denison, Iowa. There were two people in the car, the car was not running and the lights were off. A dome light in the car was on and officer Myers saw the people making furtive movements, as if they were trying to put something underneath the dashboard.

Officer Myers approached the vehicle and asked the person in the driver's seat, Ryan Ludwig, to roll down the window. At that time, the key was in the ignition. An odor of burnt marijuana came from the car. Officer Myers saw a small marijuana pipe in the car. He administered the horizontal gaze nystagmus test, but Ludwig was unable to keep his head still enough to complete the test. Ludwig successfully completed the walk-and-turn test and the one-leg stand, although his raised foot trembled during this test.

Officer Myers took Ludwig to the Denison Police Department. Ludwig had an intoxilyzer test which showed a blood alcohol level of .000. Officer Myers then requested a urine test. Later analysis showed more than 100 nanograms per milliliter of THC, which is over the legal limit in Iowa for operation of a motor vehicle. See Iowa Admin. Code r. 661-7.9(1). Ludwig was arrested for operating

while under the influence. See Iowa Code § 321J.2(1)(c) (person operates a motor vehicle "while any amount of a controlled substance is present in the person, as measured in the person's blood or urine.").

I. Administrative Decisions

Pursuant to section 321J.12, Ludwig's driver's license was revoked. Ludwig requested a hearing, claiming he had not used marijuana on the day in question. He admitted he had used marijuana four or five days earlier. Ludwig testified when officer Myers approached, he took the key from the console between the two front seats, and put it in the ignition so he would be able to lower the power window. He presented the testimony of Dr. Rodney Ludwig, a physician, who testified a urine test will show marijuana use within the last thirty days, but cannot show when, within that time period, the marijuana was used. Dr. Ludwig testified a blood test would be more accurate to show recent marijuana use.

The administrative law judge (ALJ) upheld the revocation, finding there were reasonable grounds to establish Ludwig had been operating a motor vehicle while under the influence of a controlled substance. Ludwig appealed. The DOT upheld the ALJ's decision.

II. Decision in District Court

Ludwig filed a petition for further review. The district court reversed the decision of the DOT. The court found there was not substantial evidence from which a reasonable police officer could have concluded petitioner had been operating a motor vehicle in violation of section 321J.2. The court determined

while there was sufficient evidence to show Ludwig was under the influence of a controlled substance, there was insufficient evidence to show he had been operating a motor vehicle. The court stated:

The record supports the agency's finding that the engine was not running or in motion at the time the officer approached the stopped vehicle. Therefore, there was no reasonable grounds to believe that the petitioner was operating the vehicle at the time of the encounter. However, there was nothing in the record indicating that the petitioner had driven to the location where the officer found the car. Therefore, there was no reasonable grounds to believe that the petitioner had operated the vehicle prior to the officer's arrival that evening.

The DOT appeals the district court decision.

III. Scope of Review

On appeal of judicial review of agency action, we are "limited to determining whether the district court correctly applied the law in exercising its section 17A.19(8) judicial review function." *Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 676 (Iowa 2000). We are bound by the agency's factual findings if they are supported by substantial evidence in the record. Iowa Code § 17A.19(10)(f); *IPB, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). A petitioner has the burden to prove why his license should not be revoked. *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d 722, 723 (Iowa 1994).

IV. Substantial Evidence

The DOT contends there was substantial evidence in the record to uphold the agency's findings, and the district court erred in finding otherwise. The DOT points out Ludwig was sitting in the driver's seat when officer Myers approached the vehicle. Officer Myers saw the key in the ignition. Ludwig turned the key so

he was able to activate the power window. The DOT asserts all of these facts show Ludwig had been operating the motor vehicle.

Under section 321J.6, the "implied consent statute cannot be invoked unless the officer first has reasonable grounds to believe the driver has been operating a motor vehicle while intoxicated." The reasonable grounds test is met when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person believe an offense had been committed. *State v. Braun*, 495 N.W.2d 735, 739-40 (Iowa 1993). Thus, the reasonable grounds test is determined under the facts known to the officer at the time the implied consent law is invoked. *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). Later-acquired evidence is not considered on the issue of whether implied consent should be invoked. *State v. Christianson*, 627 N.W.2d 910, 913 (Iowa 2001).

The district court relied upon *Munson*, where a police officer found Munson asleep behind the wheel in a vehicle in a parking lot. *Munson*, 513 N.W.2d at 723. The key was in the ignition, but the car was not running. *Id.* The supreme court concluded at the time implied consent was invoked, the police officer did not have reasonable grounds to believe Munson had been operating his vehicle while intoxicated before he was observed in the parking lot. *Id.* at 725. In particular, there was no evidence to show whether Munson had driven himself to the parking lot, or whether he had been intoxicated before he got to the parking lot. *Id.* The court determined Munson's license should not have been revoked.

Munson was distinguished in *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625-26 (Iowa 1996), which involved the following facts: Pointer was found sitting in the driver's seat in a car in the ditch; the keys were not in the ignition, but were in the car; no one else was in the car or nearby; and Pointer admitted to the officer he had "really screwed up." The court stated that looking at both direct and circumstantial evidence, a police officer would have reasonable grounds to believe Pointer had been operating a motor vehicle while intoxicated. *Id.* at 626.

In a more recent criminal case, *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998), a defendant was found unconscious, sitting behind the wheel of her car with the engine off, and the key in the ignition. There was also evidence, however, a witness had seen Hopkins' car traveling very slowly before it came to a stop along the road. *Id.* at 378. No one else was seen near the car. Hopkins admitted she had been drinking earlier in the day. *Id.* Under these facts the supreme court determined there was sufficient evidence to permit the jury to reasonably infer Hopkins had been operating while intoxicated. *Id.*

We find the facts in the present case are more like *Munson* than *Pointer* or *Hopkins*. In *Pointer* and *Hopkins* there was evidence, in addition to the fact the person was sitting in the driver's seat, to show the person had been driving the vehicle. In *Pointer*, Pointer admitted he had "screwed up," and there was no evidence anyone else had been involved. *Pointer*, 546 N.W.2d at 626. In *Hopkins*, a witness had seen Hopkins driving very slowly before the car came to a stop. *Hopkins*, 576 N.W.2d at 378. Hopkins was also alone in the car. *Id.*

In the present case, Ludwig was not alone when a police officer arrived, he was in the car with a friend. Prior to the officer's application of implied consent procedures, Ludwig made no admission he had been driving the car. Here, the only evidence to show Ludwig had been driving the car was the fact he was sitting in the driver's seat, and under *Munson* we conclude this is not sufficient to create reasonable grounds for a police officer to believe he had been operating a motor vehicle while intoxicated.

We affirm the decision of the district court. Because we have affirmed, we do not need to address Ludwig's argument the urine test was incompetent to determine whether he was operating a motor vehicle while intoxicated.

AFFIRMED.