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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM FRANCIS LENNON, Appellee,	)	Filed April 14, 1977
v.	)	
IOWA DEPARTMENT OF PUBLIC SAFETY, Appellant.	)	81 2-58160

Appeal from Webster District Court - Newt Draheim, Judge.

Appeal from trial court's order and judgment setting aside commissioner's revocation of appellee's driving privileges under the implied consent law, chapter 321B, The Code. Reversed and remanded.

Richard C. Turner, Attorney General, David E. Linquist and Marsha A. Szymczuk, Assistants Attorney General, for appellant.

William Enke of Mitchell, Murray and Blackburn, of Fort Dodge, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

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CARTER, J.

This is an appeal from an order and judgment of the trial court vacating and setting aside the revocation of plaintiff's privileges to operate a motor vehicle, which had previously been ordered by the commissioner of public safety. The commissioner's order of revocation was based upon the implied consent law and a finding that plaintiff, after being placed under arrest for operating a motor vehicle while under the influence of an intoxicating beverage, refused to submit to a chemical test as required by section 321B.7, The Code. The commissioner's initial revocation order was upheld following an administrative hearing but vacated following a subsequent de novo hearing in the district court. We reverse the trial court and direct reinstatement of the order revoking plaintiff's operator's privileges.

There are three issues raised on this appeal. These are (1) whether the law enforcement officers administering the implied consent law were required to advise the person arrested that a licensed physician, medical technologist or registered nurse would withdraw the blood specimen under strict, sanitary and sterile conditions; (2) whether section 321B.5, The Code, requires that a licensed physician must certify that the person arrested is not in a condition rendering him incapable of consenting to a chemical test before a refusal to consent can be the basis for a revocation of his operator's privileges; and (3) whether the revocation of plaintiff's operator's privileges was properly vacated because plaintiff was not permitted to change his mind and consent to a chemical test following his initial refusal. We treat these issues in the order in which we have listed them.

I. In considering the first issue we note that there is no provision made in the implied consent law, chapter 321B, The Code, that law enforcement officers administering these statutes

must advise the person arrested with respect to (a) who will administer the chemical test provided for in this legislation; or (b) the manner and circumstances under which the tests will be administered. Nor has our attention been directed to any applicable administrative rules or regulations which contain such a requirement. Absent an expression of legislative intent to impose such requirements we are not inclined to impose them by judicial decision. Plaintiff seeks to buttress his contention that such requirement should be imposed by reference to evidence in the record that plaintiff was apprehensive about having a blood specimen withdrawn because his wife had once contracted an illness from a serum injection made under unsanitary conditions. The commissioner, in response to this contention, points out that plaintiff not only declined the blood test but also refused the alternative request to submit a sample of his breath. We conclude that it was not necessary to advise plaintiff as to the mode and manner in which any of the requested chemical tests would be administered prior to requiring him to elect whether he would submit to such tests. Conditional refusals are deemed refusals under the implied consent law. Swenumson v. Iowa Department of Public Safety, 210 N.W.2d 660 (Iowa 1973). The vacation of the revocation order therefore cannot be upheld on this ground.

II. As to the second issue we conclude that there is no requirement in section 321B.5, The Code, that a licensed physician must certify that the condition of the person arrested is such that he is capable of consenting in order to base a revocation on his refusal to consent. This statute is concerned with the limited situation where effort is made to secure a blood sample from one who has not consented and is incapable of giving

consent. As such it has no application to the situtation involved in the present case and provides no basis for vacating the commissioner's revocation order.

III. Lastly, we consider whether the trial court erred in its determination that the revocation order was improper because the officers administering the implied consent law failed to subsequently permit the plaintiff to consent to a chemical test after his initial refusal to do so. In reviewing the facts relating to this issue we begin with the proposition that it is undisputed in the record that plaintiff refused to submit to a blood test or alternative breath test at 7:55 p.m. on the evening he was arrested. This refusal was 45 minutes after plaintiff had been placed under arrest. The request for a chemical sample and resulting refusal took place at the district highway patrol office at Fort Dodge. Following the completion of the applicable administrative forms at this location, plaintiff was taken by the two state troopers who had administered the implied consent procedure to the Fort Dodge police department for booking. At the police station they were met by plaintiff's wife who posted bail for plaintiff's release.

Other evidence offered at the hearing before the trial court included testimony of plaintiff's wife that while at the police station she was informed of the effect of the implied consent proceeding on her husband's operator's privileges and offered to take him to a hospital for a blood test. According to her testimony this was approximately 8:20 p.m. -- one hour and 20 minutes after the time of the plaintiff's arrest. She stated that the officers responded by telling her to take her husband home. One of the troopers testified in the trial court that at or about this time plaintiff was still persisting in his refusal to take the test.

The commissioner seeks reversal of the trial court's order on the basis that Krueger v. Fulton, 169 N.W.2d 875 (Iowa 1969); Swenumson v. Iowa Department of Public Safety, supra; and Morgan v. Iowa Department of Public Safety, 227 N.W.2d 155 (Iowa 1975) have held that one refusal to submit to chemical testing is determinative for purposes of the implied consent law. Plaintiff on the other hand seeks to distinguish these cases on the basis that the lapse of time involved was greater than is the case in the present controversy. Plaintiff urges us to apply the more flexible rule adopted by the North Dakota court in Lund v. Hjelle 224 N.W.2d 553 (N.D. 1974). There it was held that subsequent consent by an individual to take a chemical test cures his prior refusal to do so when the subsequent request is made within a reasonable time after the prior refusal, the testing equipment or facilities are still readily available, honoring the subsequent test will result in no substantial inconvenience to the police, and the individual requesting the test has been under observation for the entire time since his arrest.

In resolving the issue presented we note that the language of Swenumson v. Iowa Department of Public Safety, supra, and Morgan v. Iowa Department of Public Safety, supra, seems to support the commissioner's reliance on a one refusal rule. But we need not decide in the present case whether or not there may ever be situations under the implied consent law where subsequent consent may be allowed to cure a prior refusal. Plaintiff's case does not appear to fit the rule he propounds. We have searched the record and find no indication that plaintiff ever communicated at any time to any of the officers his willingness to take the test.

The trial court found that negotiations for the blood test had been resumed at the insistence of plaintiff's wife. Perhaps

the record supports this finding but we do not believe mere resumption of negotiations can be characterized as the unconditional consent required under the implied consent law. Absent a showing of such consent there is no factual foundation for the legal argument which plaintiff now advances.

For the reasons stated we hold the trial court erred in vacating the commissioner's revocation order. The case is reversed and remanded for a decree upholding the commissioner's finding.