

IN THE COURT OF APPEALS OF IOWA

No. 6-415 / 95-1846

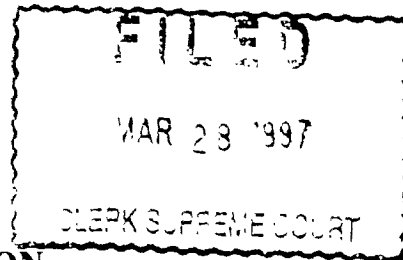
BRET ALAN PELLETT,

Appellee,

vs.

**IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,**

Appellant.



Appeal from the Iowa District Court for Cass County, James M. Richardson,
Judge.

The Iowa Department of Transportation appeals the district court's ruling on
judicial review rescinding its revocation of petitioner's driver's license for a chemical
test failure. **REVERSED.**

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

Carl J. Petersen and Terrance G. Rutherford of Rutherford, Trewet & Petersen,
Atlantic, for appellee.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

PER CURIAM.

The Iowa Department of Transportation, Motor Vehicle Division (D.O.T.), revoked the driver's license of Bret Pellett for chemical test failure. The district court reversed the agency's decision. The D.O.T. now appeals. We reverse the district court decision and reinstate the decision of the D.O.T..

On April 2, 1995, Officer Bobby Blake of the Atlantic Police Department stopped Pellett for speeding. Officer Blake noticed Pellett had an odor of alcohol. Pellett failed the horizontal gaze nystagmus test and the walk-and-turn test. He was able to stand on one leg. After a preliminary breath test, Pellett was arrested.

Officer Blake arrived with Pellett at the Atlantic jail at 12:12 a.m. Pellett requested to go to the bathroom. Officer Blake testified when he checked on Pellett, he observed him rinsing his mouth in the sink. Officer Blake stated Pellett pulled water into his mouth, swished it around, and spit it out. Pellett came out of the bathroom at 12:15 a.m. At 12:25 a.m. Officer Blake requested a breath sample and Pellett consented.

Officer Blake initially marked down that the breath test was given at 12:24 a.m. However, he later changed the time to 12:34 a.m. He testified he had inadvertently read the wrong time on his digital watch, but soon noticed his mistake. Also, he initially marked down that Pellett had a blood alcohol level of .145, but this was changed to .146. Officer Blake testified the number on the intoxilyzer had been flickering between .145 and .146, but was .146 when the machine locked out.

The D.O.T. revoked Pellett's driver's license pursuant to Iowa Code section 321J.12 (1993) for operating a motor vehicle with a blood alcohol concentration of more than .10. Pellett appealed the revocation, claiming Officer Blake failed to comply with D.O.T. regulations concerning intoxilyzer tests. He believed the results of the test were inaccurate because he drank water within fifteen minutes of taking the test.

An administrative hearing was held. The administrative law judge (ALJ) found Pellett had failed to meet his burden of proof to challenge the test results. The ALJ concluded Pellett had been observed for fifteen minutes before the breath test and he did not have anything to drink in that fifteen minute time span. The D.O.T. affirmed the decision of the ALJ.

Pellett filed a petition for judicial review. The district court reversed the revocation of Pellett's driver's license. The court found Pellett had met his burden of proof to demonstrate the test results were untrustworthy. The court found Pellett had consumed water within a questionable period of time prior to the breath test. The court noted Officer Blake had incorrectly recorded the time of taking the breath sample, had made an error in the calibration reading, and had admitted the entire procedure was completed in haste. The court determined all of these abnormalities and mistakes in the collection of Pellett's breath sample were concerns regarding the trustworthiness and credibility of the test result. The D.O.T. has appealed the district court decision.

The D.O.T.'s revocation decision will be upheld if supported by substantial evidence in the record made before the agency when that record is viewed as a whole. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). Evidence is substantial when a reasonable person would accept it as adequate to reach the same findings. *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence. *Gaskey*, 537 N.W.2d at 698. The question on judicial review is not whether the evidence might support a different finding, but whether the evidence supports the finding the agency actually made. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981). The fact that a reviewing court might justifiably have made a different choice had the matter been before it de novo does not mean the finding of the agency is not supported by substantial evidence. *Iowa Health Sys. Agency, Inc. v. Wade*, 327 N.W.2d 732, 733-34 (Iowa 1982).

The aforesaid standards impose a considerable limitation on the authority of the district court to overrule an agency on purely factual grounds. In *Ward*, our supreme court characterized as "generally powerless" a litigant seeking to overturn an adverse factual determination. *Ward*, 304 N.W.2d at 238. It is clear under existing law that a driver contesting a license revocation has the burden to prove why the license should not be revoked. *Gaskey*, 537 N.W.2d at 697. In this respect, the

credibility of witnesses is, of course, to be determined by the fact finder, not by the appellate court. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990).

The D.O.T. contends there is substantial evidence in the record to support its decision Pellett did not sustain his burden of proof to show that he drank water within fifteen minutes prior to taking the breath test. The only evidence on this issue is Officer Blake's testimony he saw Pellett rinsing his mouth with water. Officer Blake stated he did not see Pellett drinking any water. Pellett presented no evidence to show he had actually ingested water. To successfully challenge intoxilyzer test results, a driver must do more than merely speculate something might have occurred to invalidate those results. *Anson v. Iowa Dep't of Transp.*, 477 N.W.2d 695, 697 (Iowa App. 1991). We conclude there was substantial evidence to support the D.O.T.'s finding that Pellett had not drunk water within fifteen minutes of taking the test.

The D.O.T. also claims there is substantial evidence to support its decision Pellett did not sustain his burden of proof to show the breath test was invalid. The D.O.T. found the breath test had been given at 12:34 a.m. There is substantial evidence to support this finding. Thus, even if Pellett had drunk water at 12:15 a.m., the test was given more than fifteen minutes later and should be considered valid. Furthermore, whether the officer wrote down .145 when the test result was .146 would not invalidate the test results. As noted above, Pellett must do more than

merely speculate the test results were invalid. We conclude there was substantial evidence to show the test results were valid.

We reverse the decision of the district court. We reinstate the decision of the D.O.T. revoking Pellett's driver's license for operating a motor vehicle with a blood alcohol level in excess of .10. Costs of this appeal are assessed to Pellett.

REVERSED.