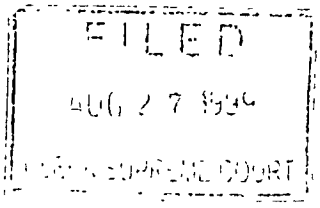
IN THE COURT OF APPEALS OF IOWA

No. 1999-107 (9-294) / 98-2173
Filed August 27, 1999

ERNEST BRUCE HARPER, II,

Petitioner-Appellee,

vs.



IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Respondent-Appellant.

Appeal from the Iowa District Court for Page County, Keith E. Burgett, Judge.

The Iowa Department of Transportation appeals from the district court order rescinding the revocation of petitioner's driving privileges. **AFFIRMED.**

Thomas J. Miller, Attorney General, and David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

G. Rawson Stevens, Shenandoah, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Respondent-appellant Iowa Department of Transportation, Motor Vehicle Division, appeals from the district court order rescinding a revocation of petitioner-appellee Ernest Bruce Harper, II's driving privileges. The department contends the district court erred in determining (1) Harper's right to counsel was violated, and (2) a notice of appeal from an administrative ruling confers jurisdiction if filed by a legal assistant. We affirm.

We review applying the standards of Iowa Code section 17A.19(8) to the agency action. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 625 (Iowa 1997). If after reviewing the agency action our conclusions are different than those of the district court, then reversal may be required. *Id.*

Harper was stopped at 1:38 a.m. on January 26, 1998. He took a preliminary breath test at 1:58 a.m. that showed a level above .10. Harper was arrested at 2:02 a.m.[1] and taken to the police station. At 2:07 a.m., he was advised of his right under *Miranda*. Harper asked for an attorney. Harper was asked to submit to chemical testing at 2:15 a.m. Harper requested he talk to an attorney about the implied consent advisory. After several calls, Harper reached an attorney at 2:24 a.m. and talked to him until 2:37 a.m. During that time, Harper was explaining the implied consent form to the attorney when the officer took the form away from him. The attorney told

[1] At the February 24, 1998 telephone hearing, Officer Thomas testified the arrest report indicated Harper was arrested at 2:02 a.m., and the Department of Transportation implied consent form indicates he was arrested at 1:59 a.m.

Harper he would come to the station. Harper told the officer he would not take the test until his attorney arrived. Harper did not tell the officer how long it would be before the attorney would arrive. The attorney lived five to ten minutes from the police station. The officer told Harper he would not wait and treated Harper's response as a refusal to submit to chemical testing. Harper's attorney arrived about 2:45 a.m., less than ten minutes after Harper told the officer his attorney was coming and less than one hour after Harper's arrest. The attorney asked that Harper be allowed to take the breath test at that time. The officer refused to allow Harper to take the test.

Harper challenged the department's revocation of his driving privilege based on his refusal to take the test. After a contested case hearing, an administrative law judge issued a proposed decision rescinding the revocation finding Harper's right to counsel under Iowa Code section 804.20 (1997) [2] was violated.

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[2] **Communications by arrested persons**

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.

Iowa Code § 804.20 (1997).

The department filed a notice of appeal. The signature line of the notice of appeal had typed names of an assistant attorney general and a legal assistant. The only signature on the notice was that of a legal assistant.

The reviewing officer reversed the administrative law judge. Harper filed a petition with the district court seeking judicial review. On judicial review, Harper advanced the reviewing officer did not have jurisdiction to hear the appeal because the notice of appeal filed by the department was defective in that it was signed by a legal assistant who was not an attorney. The district court reversed the hearing officer concluding the administrative law judge had correctly interpreted the law. The district court did not find it necessary to reach the issue of the reviewing officer's jurisdiction to hear the appeal, but in its ruling did say:

> Suffice it to say that if a paralegal is allowed to file an appeal without a duly licensed practicing [a]ttorney's signature thereon contained this is an overly broad interpretation of the rule and flies in the face of [the rules] requiring [l]awyers to make [c]ourt [a]ppearances.

The department on appeal contends the district court was not correct and the limited right to counsel in an implied consent proceeding was not violated. The department contends Harper's right under Iowa Code section 804.20 simply insures a person arrested for operating a motor vehicle while intoxicated be allowed to telephone an attorney. The department advances this right was satisfied because Harper was allowed to make a telephone call and spoke to an attorney.

The department contends *Haun v. Crystal*, 462 N.W.2d 304 (Iowa App. 1990) and *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576 (Iowa App. 1989), which have

under limited circumstances recognized an arrestee's statutory right to counsel during the statutory period may include more than a single telephone call, should be overruled. The cases follow the statutory scheme of Iowa Code section 804.20. We decline the department's invitation to overrule them and continue to recognize, under limited circumstances, the requirements of section 804.20 are not necessarily met by a single telephone call.

The department argues the officer was not obligated to wait because he did not know when or if Harper's attorney would arrive. The right to counsel in a civil proceeding to revoke a driver's license under Iowa's implied consent law is statutory. *Fuller v. Iowa Dep't of Transp.*, 275 N.W.2d 410, 411 (Iowa 1979). The right is limited so as not to interfere with the time specified for taking the test under Iowa Code section 321.J6(2). *See Haun*, 462 N.W.2d at 306.

Generally, the statutory requirement is satisfied by a telephone call to an attorney, though an arrestee's right is not necessarily limited to a single telephone conference with an attorney. *See id.* However, an arrested person is not permitted to sabotage the purpose of chapter 321J by delay, *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978), and the right to consult with a lawyer must be exercised within a period that allows the test to be taken. *Id.* We disagree that the fact Harper did not specifically inform the officer of the exact time of his attorney's projected arrival is dispositive. The officer interfered with Harper's telephone conference with his

attorney who arrived within eight minutes after Harper announced he would come and within one hour of the arrest.

In a strikingly similar factual situation in *Haun*, we found there was not substantial evidence supporting the agency finding the arrestee was afforded his statutory right to counsel. There the arrestee called his attorney one hour before the termination of the two-hour period and immediately after the call said the attorney would be calling back. The officer had invoked the implied consent proceedings despite the fact the attorney called back in ten minutes. *See Haun*, 462 N.W.2d at 306. We affirm the district court on this issue.

The department requests we address Harper's challenge to the hearing officer's jurisdiction to hear the appeal and find it is not necessary an attorney sign a notice of appeal. The department advances the legal assistant's notice of appeal was done at the request of and under the supervision of an attorney and the signature of the legal assistant was all that was necessary. We find it unnecessary to address this issue and do not do so.

AFFIRMED.