

IN THE COURT OF APPEALS OF IOWA

No. 1999-219 (9-443) / 99-21

Filed December 27, 1999

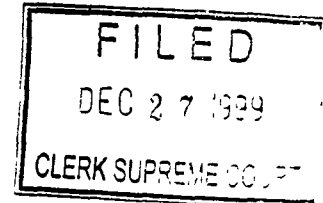
KAREN ELAINE BAUMUNK,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent-Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

The Iowa Department of Transportation appeals from the district court's ruling
on judicial review that rescinded the revocation of Karen Baumunk's driver's license.

REVERSED.

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

Ward A. Rouse, Des Moines, for appellee.

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

000048

ZIMMER, J.

The Iowa Department of Transportation appeals from the district court's ruling on judicial review that rescinded the revocation of Karen Baumunk's driver's license. We reverse and reinstate the revocation.

In the early morning hours of May 8, 1998, Iowa State Trooper Robert Hanson stopped a vehicle operated by the petitioner, Karen Baumunk, for a traffic violation. At approximately 12:33 a.m., Hanson arrested Baumunk for operating while intoxicated, in violation of Iowa Code section 321J.2 (1997). When Hanson mentioned he was going to ask for some tests at the jail, Baumunk informed him that she was taking the prescription painkiller, Vicoden. Hanson told Baumunk that if her breath test was not over the legal limit, he would also ask for a urine sample. He then permitted Baumunk to contact an attorney on his cellular phone. Baumunk spoke with the attorney for approximately seventeen minutes.

Hanson transported Baumunk to the West Des Moines police station and read her the implied consent advisory at approximately 1:24 a.m. Hanson requested a breath specimen from Baumunk. Her attorney arrived at the station at 1:42 a.m. and was permitted to speak with Baumunk in private. At 1:53, Hanson informed Baumunk and her attorney that he needed a response to his request for a breath specimen. The attorney requested more time to talk to Baumunk and Hanson consented to a few more minutes. At approximately 1:56, Hanson interrupted the consultation again and requested a specimen. The attorney objected but Hanson

refused to give them more time to consult. At 2:00 a.m., Baumunk indicated a refusal of chemical testing on the implied consent advisory.

Baumunk's license was revoked for the test refusal pursuant to Iowa Code section 321J.9. Baumunk commenced contested case proceedings before the Iowa Department of Transportation ("DOT"). An administrative law judge ("ALJ") rescinded the revocation based on the conclusion that Hanson's termination of the consultation constituted a violation of Baumunk's statutory right to counsel, contained in Iowa Code section 804.20. On review, the DOT reinstated the revocation. Baumunk petitioned for judicial review. On January 4, 1999, the district court agreed with the ALJ's conclusion and rescinded the revocation.

The DOT now appeals. The DOT argues the district court erred in determining there was a violation of section 804.20. The DOT asserts the statutory requirement was satisfied when Baumunk was allowed to talk to her attorney for approximately thirty minutes by telephone and in person.

I. Scope of Review. Our review of the DOT's decision is governed by Iowa Code chapter 17A and is confined to the correction of errors at law. See Iowa Code § 17A.19 (1997); *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996)(citation omitted). On appeal, we apply the standards of Iowa Code section 17A.19(8) to assess whether our conclusions coincide with those of the district court. *Wieslander v. Iowa Dep't of Transp.*, 596 N.W.2d 516, 520 (Iowa 1999) (citations omitted). If the district court correctly applied the law, we must affirm. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 625 (Iowa 1997). Questions of statutory

interpretation are also reviewed for errors of law. *Wieslander*, 596 N.W.2d at 520. We give limited deference to the agency's interpretation of a statute. *Craig Foster Ford, Inc. v. Iowa Dep't of Transp.*, 562 N.W.2d 618, 621 (Iowa 1997) (citations omitted).

II. Statutory Right to Counsel.* Under Iowa law, a person arrested for OWI has a right to contact an attorney prior to deciding whether to consent to or refuse chemical testing. See Iowa Code § 804.20¹; *Bromeland*, 562 N.W.2d at 626 (citations omitted). If an arrestee is denied the statutory right under section 804.20, he or she cannot be held to have refused a chemical test. *Fuller v. Iowa Dep't of Transp.*, 275 N.W.2d 410, 411 (Iowa 1979). If there is no refusal, the statutory premise for license revocation is absent. *Id.

In the OWI context, this right conflicts with and is limited by Iowa Code section 321J.6(2), requiring that a chemical test be offered within two hours of arrest

¹ Section 804.20 provides:

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.

~~or not at all.~~ See *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa App. 1991) (noting the right under section 804.20 is limited to circumstances that do not materially interfere with the two-hour time limit in section 321J.6(2)). An OWI arrestee is not permitted to use section 804.20 to sabotage the testing process; the right must be exercised within a period that still permits the test to be taken. *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978). In this case, we are again asked to balance the statutory right to counsel against the limitation of section 321J.6(2).

III. Reasonableness of Baumunk's Opportunity to Consult with Counsel.

The DOT defines the issue as whether Trooper Hanson allowed Baumunk a reasonable opportunity to talk to her attorney. The DOT argues the officer was not required to wait the full two hours before putting Baumunk to the choice of consenting to or refusing chemical testing. Petitioner contends further delay was objectively reasonable in this case since approximately thirty-three minutes remained on the two-hour time limit.

The district court framed the issue differently, addressing the circumstances under which an officer can terminate a statutory consult already in progress, not the issue of whether Baumunk had a reasonable opportunity to consult with counsel. The court concluded officers are only allowed to end the consultation when necessary to obtain and preserve evidence, taking into account the time remaining and the type of test to be conducted. Because the trooper did not state that the remaining thirty-three minutes were needed to complete testing, the district court concluded Baumunk was denied her statutory right to counsel. Contrary to the district court, we conclude an

arrestee's statutory right to consult with counsel is limited by more than the time needed to complete testing.

We agree with the DOT's framing of the issue. The proper focus is on whether the trooper gave Baumunk a reasonable opportunity to talk to an attorney, not on the circumstances in which an officer may terminate a consult in progress. We find the district court's analysis contrary to our case law, which has rejected a two-hour 'bright line' test for determining whether section 804.20 has been violated. *See Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa App. 1990) (Oxberger, C.J., dissenting) (pointing out the Iowa Supreme Court's rejection of a bright line rule granting an OWI arrestee a full two hours in which to consult with counsel). The reasonableness analysis is also in keeping with the purposes of both sections 804.20 and 321J.6(2). Such an analysis incorporates the DOT's and the district court's considerations of the time remaining, the time needed to conduct testing, and the type of test to be administered.

In addressing the reasonable opportunity issue, we objectively consider the statements and conduct of the arrestee and the officer and the surrounding circumstances to determine if a good faith request for counsel has been made by the arrestee and if the exercise of that right will materially interfere with the taking of the chemical test within the statutory time period. *Ferguson v. Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988). We conclude Baumunk was allowed a reasonable opportunity to confer with counsel before implied consent was invoked. She conferred for approximately thirty-three minutes with her attorney. Although she

claims not to have clearly understood her options, even after this lengthy consult, we do not think confusion is a legitimate reason for her to prevail. Approximately one-half hour remained on the two-hour clock. Both attorney and client knew the officer planned to seek a urine specimen if she failed the breath test because she had admitted use of a prescription drug. Taking the urine sample may have required more time than the relatively simple breath test. Considering the circumstances of this case, we find substantial evidence to support the agency conclusion that Baumunk was given a reasonable opportunity to consult with counsel.

Case law suggesting a different result is distinguishable. *See generally Moore*, 473 N.W.2d at 231-232. In *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576 (Iowa App. 1989), the arrestee's refusal of chemical testing was taken with forty-five minutes left and this court reversed the license revocation. However, the motorist was not permitted to speak to his attorney at all before he was deemed to have refused testing, quite unlike the situation at hand. In *Haun*, we held an OWI arrestee was denied a reasonable opportunity to consult with counsel when fifty minutes were left on the two-hour time limit. 462 N.W.2d 304. The arrestee had contacted his attorney briefly but was awaiting a return phone call when the officer invoked implied consent. However, *Haun* has been limited to its facts. *Moore*, 473 N.W.2d 230, 232 (Iowa App. 1991). This court also noted in *Haun* that the result was reached solely on the premise that nearly an hour remained in the two-hour period. *Haun*, 462 N.W.2d at 306.

Several other factors support reversal of the district court. First, our case law makes it clear that police are not required to wait the full two hours before requesting a specimen. *Moore*, 473 N.W.2d at 231 (refusing to give each arrestee two full hours before he or she must consent to testing). Second, significantly shorter consultations have been held sufficient to satisfy section 804.20 and its purpose. *See id.* (affirming reasonableness of twenty-minute consultation); *see Didonato v. Iowa Dep't of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990) (finding statutory purpose of section 804.20 served by providing actual opportunity to consult with counsel by telephone). In *Moore*, we concluded the motorist was not denied his statutory right to counsel:

Moore was allowed a substantial opportunity to confer with counsel and we will not hold that the right to counsel includes the absolute right to repeated conversations during the two-hour time period for chemical testing or requires officers to await the arrival of attorneys who are not within a short distance from the police station.

Moore, 473 N.W.2d at 232. We find Baumunk was given a reasonable opportunity to consult with counsel, given an objective consideration of all factors.

IV. Burden of Proof. Even if we agreed with the district court's framing of the issue and analysis, we would reverse because the district court erroneously placed the burden of proof on the DOT.

As mentioned, the district court framed the issue in terms of the propriety of terminating a consult that was already in progress. The district court based its reversal of the agency on the absence of evidence regarding the amount of time the officer would have required to complete testing, essentially placing the blame for the absence of evidence on the DOT. Since there were no facts to support a finding the

termination of the consult was necessary to complete testing, the district court found petitioner's right to counsel was unnecessarily interfered with.

However, the petitioner bore the burden to prove why her license should not be revoked. *See Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 697 (Iowa 1995) (citations omitted). The licensee bears the burden of proof in a license revocation proceeding to show his or her compliance with the implied consent law and the peace officer's failure to satisfy the procedural requirements. *Reed v. Iowa Dep't of Transp.*, 540 N.W.2d 50, 51 (Iowa 1995) (citing *Gaskey, supra*). We think this absence of evidence counts against petitioner, rather than the DOT. The effect of the district court decision was to place the burden of proof on the DOT to show there was a need to terminate the consult. This was error. *See Reed*, 540 N.W.2d at 51-52 (finding district court erroneously placed burden on DOT to prove officer had reasonable grounds to believe driver was operating motor vehicle while intoxicated). For these reasons, we reverse the district court and reinstate the revocation of the petitioner's driver's license.

REVERSED.

Miller, J., concurs; Sackett, C.J., concurs specially without opinion.