

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DUANE DILLER HANSEN,)

Appellant,)

v.)

IOWA DEPARTMENT OF PUBLIC SAFETY,)

Appellee.)

Filed April 14, 1977

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2-58126

Appeal from Floyd District Court - J. W. Frye, Judge.

Plaintiff appeals from trial court adjudication sustaining administrative revocation of his driver's license for refusal to consent to a chemical test requested of him under the implied consent law. Affirmed.

Russell H. Schroeder, Jr., of Henke & Eggert, of Charles City, for appellant.

Richard C. Turner, Attorney General, John G. Mullen, Assistant Attorney General, and Marsha A. Szumczuk, Assistant Attorney General, for appellee.

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

ALLBEE, C.J.

This is an appeal from trial court adjudication sustaining the order of the Iowa Department of Public Safety revoking plaintiff's driver's license for 120 days because of his refusal to submit to a chemical test under the implied consent law, Chapter 321B, The Code. We affirm.

Our review of the facts as established during the administrative hearing and the district court evidentiary hearing is de novo. Carroll v. Iowa Department of Public Safety, 231 N.W.2d 19, 21 (Iowa 1975); section 321B.9, The Code.

On December 20, 1974, near Rudd, Iowa, plaintiff was arrested for OMVUI by highway patrolman, Roger Brown. After the arrest, Trooper Brown read Hansen his Miranda rights and transported him to the Charles City police station. At the station, Trooper Brown once again repeated the Miranda warning to plaintiff prior to commencement of the implied consent procedures. Brown testified that he read the entire implied consent form to Hansen, although this was denied by plaintiff. Hansen declined to say whether he consented or refused to take a chemical test, but instead maintained silence. Brown warned Hansen that his conduct was tantamount to a refusal to take a chemical test under Iowa law. Hansen testified that he requested several times to read the form and that Brown would not allow him to do so. Brown remembered only that Hansen asked to see the form in order to ensure that Brown did not forge Hansen's name on the signature line. Trooper Brown ultimately terminated the procedure and reported that plaintiff had refused to take a chemical test within the meaning of section 321B.5, The Code.

Plaintiff raises two errors: (1) does silence after a Miranda warning constitute a refusal if the motorist has not been told that his Miranda rights are not applicable to implied

consent procedures, and, (2) is a motorist entitled to read the implied consent form before indicating his consent or refusal.

I. Miranda warning.

Plaintiff has urged that his silence during Brown's request for a body specimen did not constitute a refusal because of his confusion over his right to remain silent. Plaintiff relies on language in *Swenumson v. Iowa Department of Public Safety*, 210 N.W.2d 660 (Iowa 1973).

However, it has been recognized the juxtaposition of the Miranda warning, the implied consent procedure, and the request for chemical test may raise a question of fact as to whether the arrested person was misled or confused by the Miranda warning to believe he had a right to the advice of counsel before responding to the request for chemical tests. *Swenumson* at 663.

At the outset, we have a serious question whether this error is preserved for appellate review since this claim was neither presented to the hearing officer nor the district court. See *Cole v. City of Osceola*, 179 N.W.2d 524, 527 (Iowa 1970). Even examining plaintiff's asserted error as a matter of grace, it still lacks substantial merit. At the district court evidentiary hearing, plaintiff in no manner even intimated that the Miranda warning misled or confused him as to implied consent procedures. Absent such a testimonial assertion, we could only speculate whether plaintiff was in fact confused by the Miranda warning. It is plaintiff's burden to establish his case by a preponderance of the evidence. *Carroll v. Iowa Department of Public Safety*, 231 N.W.2d 19, 21 (Iowa 1975). Plaintiff has failed to meet this burden. Absent evidence to the contrary, plaintiff's conduct constitutes a refusal to take the chemical test. See *Swenumson v. Iowa Department of Public Safety*, *supra* at 663.

II. *Reading implied consent form.*

Hansen challenges Trooper Brown's refusal to allow him to read the implied consent form. Plaintiff concedes chapter 321B contains no such requirement. In a similar situation as to whether a patrolman must give a copy of the form to a motorist, our Supreme Court said:

It is fair to assume the statute would have provided the written request be handed or given the motorist if the legislature intended such a requirement. It is not our province to write such a requirement into the statute. *Gottschalk v. Sueppel*, 258 Iowa 1173, 1183, 140 N.W.2d 866 (1966).

Although we see no harm in allowing a motorist to read the implied consent form, we find *Gottschalk* to be controlling.

Trial court's judgment hereby is affirmed.