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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-391 / 00-1964
Filed November 16, 2001

ETHAN WENDALL BOYER,
Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,
Respondent-Appellant.

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

Agency appeals from the district court order overturning its decision revoking the petitioner's license for 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.

Terrance G. Rutherford and John M. Trewet of Rutherford, Trewet & Knuth, Atlantic, for appellee.

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

SACKETT, C.J.

Petitioner appellee Ethan Wendall Boyer was arrested for OWI in violation of Iowa Code section 321J.2. Respondent appellant the Iowa Department of Transportation motor vehicle division revoked his license. The district court reversed the department's revocation of petitioner's license and this appeal follows. We reverse.

On March 17, 2000 petitioner was stopped by a trooper who claimed petitioner was driving sixty-eight miles per hour in a fifty-five mile-per-hour zone. The trooper testified he smelled beer on petitioner after the stop and that petitioner admitted he drank a couple of beers. According to the trooper petitioner failed three field sobriety tests. Petitioner was given a preliminary breath test which indicated he had an alcohol concentration of .10 or more. Defendant was arrested for violation of Iowa Code section 321J.2.

The implied consent advisory was read to petitioner, and he consented to a breath test on the Intoxilyzer 4011A. In administering this test the trooper turned on the intoxilyzer and ran it through its pre-operational procedure. He let it warm up and give the ready light, a green light, and ran it through its checklist. He then asked petitioner to give a breath sample. The trooper testified he had switched the testing device from "air blank" to "breath" just as petitioner started blowing in the tube. The trooper said his switching the device would not have affected the results. He stated the result was a reading of .144.

Petitioner was notified his driver's license was revoked and petitioner requested an administrative hearing contesting the revocation. The administrative law judge issued a proposed decision sustaining the revocation.

The proposed decision was affirmed on administrative appeal. The matter was appealed to the district court. In reversing the agency action the district court judge said:

> Here . . . we deal with two instruments of modern electronic wizardry used to calculate the biology of breath, to wit: the preliminary breath testing device, Alco Sensor II; and the venerable Intoxilyzer 4011A.
>
> Despite Respondent's protest, the issue of validity of testing, because that requires application of fact to law, is not a factual finding of the administrative court but is a legal conclusion after consideration of the facts. The facts as found are that the subject law enforcement officer relied upon the results of preliminary testing to both satisfy the requirements of Iowa Code Section 321J.6 and to pursue what he believed to be a lawful arrest, also in satisfaction of 321J.6. Inherent in theses findings are the fact that the trooper did not follow operation guidelines of the device [transcript p. 34] and that the device was not in compliance with Iowa law as regards calibration record, i.e.: calibration record did not identify the device or the methods of calibration as required by Iowa Administrative Code Section 7.5(2), and the device had not been calibrated for over one month prior to its use in violation of Iowa Administrative Code Section 7.5(2). Respondent's advancing of arithmetical gymnastics to support a conclusion of compliance with administrative requirements are not well taken and were erroneously relied upon by the administrative court in forming a conclusion of compliance. In order to rely on the findings of devices like that used herein by law enforcement, at least some semblance must be made of adherence to the rules. This trooper makes no pretense of compliance but cavalierly espouses that he is doing it the way he was taught despite the fact that he does it wrong.
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> The trooper is possessed of no known electronic or biologic genius so as to permit deviance from procedure. This is exactly the reason that established procedure must be followed. The experts who developed the procedure and requirements must have done so so that peculiar expertise was not required to validate the results of the device. Failure to follow the procedure without such expertise compromises the test and result. This is especially important and, in fact, crucial, when it concerns implied consent procedure which, by its very nature, operates on the thin edges of acceptable due process standards.
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> This Court can find no reason to place any reliance upon results of the preliminary breath test and none to support administrative conclusion to the contrary. The preliminary breath test cannot be considered.

> The law enforcement officer here testified he arrested [petitioner] based upon both his reasonable grounds to believe a violation of Iowa Code Section 321J.2 had occurred and upon [petitioner's] failure of preliminary breath testing. In that the test is not valid and the administrative court makes no findings to support lawfulness of arrest as is required by Iowa Code Section 321J.6, and this Court can find nothing in the record to support a conclusion of lawful arrest, this Court cannot conclude that Iowa Code Section 321J.6 is satisfied so as to validate further analysis of specimen and subsequent revocation.
>
> Although not necessary to decision, the court must also conclude the law enforcement's Intoxilyzer test is fatally flawed for failure to follow established procedure. The trooper's spontaneous exclamation in the record that his botched procedure did not affect the result of the Intoxilyzer test is not supported by foundation of the trooper's expert qualification and cannot be reliably considered without demonstration of the trooper's qualification to have any knowledge of how the machine works. His deviation into the realm of expertise was not solicited by Plaintiff and does not affect his burden of proof. If the trooper's opinion is to be relied upon by Respondent, it is Respondent's obligation to show basis of the opinion. Respondent did not do this and the opinion thereby becomes, essentially, useless.
>
> Because [petitioner] amply demonstrated the trooper's ignorance of procedure, or unwillingness to follow procedure, and the Trooper's actual non-compliance, no lawful basis for revocation can be found.

Our review of a DOT revocation decision is governed by chapter 17A, Iowa's Administrative Procedure Act. *See Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 625 (Iowa 1997). *See generally* Iowa Code ch. 17A. We review only whether the district court correctly applied the law. *See Bromeland*, 562 N.W.2d at 625. Applying the standards for review of agency action found in section 17A.19(10), we determine whether our conclusions are the same as those made by the district court. *See id.* If they are, we affirm. *See id.* If our conclusions are not the same, and we decide the district court has incorrectly applied the law, we must reverse. *See id.*

A licensee's challenge to the revocation of his or her driver's license is governed by chapter 17A, which provides in part:

> No revocation, suspension, annulment or withdrawal . . . of any license is lawful unless . . . the licensee was given an opportunity to show, in an evidentiary hearing . . ., compliance with all lawful requirements for the retention of the license.

Iowa Code § 17A.18(3).

The respondent first contends that the district court erred in holding that because the officer based the arrest in part on an invalid preliminary breath test the arrest was also invalid. Respondent contends that the arresting officer testified he based the arrest on petitioner's driving sixty-eight miles per hour in a fifty-five mile-per-hour zone; the strong smell of alcohol coming from petitioner and his vehicle; the fact petitioner admitted he had been drinking beer; the fact petitioner failed three field sobriety tests; and the fact the preliminary breath test indicated an alcohol concentration of .10 or more.

Petitioner contends the district court correctly found the preliminary breath test was not valid because the test device was more than a month past the required calibration and thus was not calibrated as required by Iowa Administrative Code section 661-7.5(2). The device was used on March 17, 2000. It was last calibrated on February 3, 2000. The machine was calibrated in March, but after the date it was used to test petitioner. The respondent contends that because it was calibrated in February and again in March, though not within a thirty-day period, it meets the requirements of this section of the Iowa Administrative Code.

Respondent contends that even in the absence of a valid preliminary breath test the evidence shows the officer relied on other factors in arresting

petitioner. Petitioner contends if the breath test was not valid, the arrest was not valid either.

A preliminary breath-screening test cannot serve as a basis for finding reasonable grounds to believe petitioner was operating his vehicle while intoxicated. *State v. Braun*, 495 N.W.2d 735, 738 (Iowa 1993). The results of a preliminary breath-screening test may be included in the determination of whether the reasonable grounds requirement under section 321J.12 (1999) is met to allow the department of transportation to revoke a person's motor vehicle license. *See Westendorf v. Iowa Dep't of Transp.*, 400 N.W.2d 553, 555 (Iowa 1987). Yet the reasonable grounds test is met when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief that an offense has been committed. *State v. Owens*, 418 N.W.2d 340, 342 (Iowa 1988). While we are not persuaded by the respondent's argument that Iowa Administrative Code section 661-7.5(2) only requires calibration in every given month rather than every thirty days, we find that aside from the preliminary breath-screening test, ample evidence that petitioner was driving while intoxicated was introduced. *See Braun*, 495 N.W.2d at 739. We reverse the district court's holding to the contrary.

The next question is whether the district court was correct in finding the manner in which the officer operated the Intoxilyzer 4011A invalidated the result. The respondent contends petitioner bears the burden of proof on this issue.

In *McCrea v. Iowa Dep't of Transp.*, 336 N.W.2d 427 (Iowa 1983) the licensee McCrea challenged a revocation for failure to submit to chemical testing. The agency ruled that the licensee had failed to sustain his burden to prove he

had complied with the implied consent law, specifically that he had submitted to chemical testing. *Id.* After the district court reversed the agency's decision, the DOT appealed. *Id.* The court held that section 17A.18(3) placed the burden of proof on the licensee at the administrative hearing "to show his compliance with the implied consent law." *Id. at 429.* The court continued to apply this holding in later cases under varying factual scenarios. *See Reed v. Iowa Dep't of Transp.*, 540 N.W.2d 50, 51 (Iowa 1995) (affirming revocation on the basis that licensee failed to meet his burden of proof "to show compliance with the implied consent law and the peace officer's failure to satisfy the procedural requirements" when licensee argued arresting officer did not have reasonable grounds to believe licensee was operating while intoxicated). *See also Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 697-98 (Iowa 1995); *Peterson v. Iowa Dep't of Transp.*, 508 N.W.2d 689, 691-92 (Iowa 1993). In *Mary v. Iowa Dep't of Transp.*, 382 N.W.2d 128, 132 (Iowa 1986), where licensee claimed his consent to blood test was invalid and that he was incapable of consenting, the court held the driver had the burden to prove by a preponderance of the evidence that he had complied with the implied consent law and that the peace officers had not satisfied the procedural requirements of that law. In *Gaskey* the court stated that "a driver contesting a license revocation has the burden to prove why the license should not be revoked," and that "[w]hen a party challenging an administrative agency action fails to produce supporting evidence to satisfy the party's burden of proof, the agency's decision should be affirmed." *Gaskey*, 537 N.W.2d at 697. *See also Scott v. Iowa Dept. of Transp., Motor Vehicle Div.*, 604 N.W.2d 617, 620 (Iowa 2000).

The burden of proof on an issue is ordinarily upon the party who would suffer loss if the issue were not established. Iowa R. App. P. 14(f)(5); *McCrea,* 336 N.W. 2d at 429; *cited in Gaskey,* 537 N.W. 2d at 697. In order for petitioner to prevent the loss of his license, he has the burden of proof to show that the error in following the correct Intoxilyzer machine procedure detrimentally affected the results of the test. *See Anson v. Iowa Dep't of Transp.,* 477 N.W. 2d 695, 697 (Iowa 1991). Although the respondent must provide certified Intoxilyzers and the officer administering the test must do it properly, the record in front of the district court was insufficient to satisfy petitioner's burden of proof that the Intoxilyzer 4011A was not properly operated. Furthermore, petitioner had the burden of proof to demonstrate not only that the Intoxilyzer procedure was not followed adequately, but also that the results were demonstrably flawed. Beyond claiming the procedure had not been followed with precision, petitioner introduced no evidence at the hearing to show that switching the setting from "air blank" to "breath" mode immediately after defendant was told to breathe into the tube would have affected the results of the test.

Because the implied consent in this case did not rely on the results of the PBT, whether it was operational or not, and because the petitioner made insufficient showing that Intoxilyzer procedure was not followed, and no showing as to how the results of the Intoxilyzer were flawed, we reverse the district court's decision reversing petitioner's license revocation.

REVERSED.