FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

28

IN THE MATTER OF
DALE DENNIS BONE,

Plaintiff-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION
MOTOR VEHICLE DIVISION,

Defendant-Appellee.

Filed November 20, 1984

4-360
83-1356

Appeal from the Iowa District Court for Linn County - Ansel J. Chapman, Judge.

Plaintiff appeals from the district court decision on judicial review affirming defendant agency's revocation of his driver's license. AFFIRMED.

Mary E. Robinson, Cedar Rapids, for plaintiff-appellant.

Thomas J. Miller, Attorney General and David A. Ferree, Assistant Attorney General, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

I. Nature Of The Case

This is an appeal from a judgment of Linn County District Court sustaining the revocation of plaintiff, Dale Dennis Bone's, drivers license and driver's privileges. The Iowa Department of Transportation (hereinafter D.O.T. or defendant) revoked plaintiff's license and privileges for operating a motor vehicle while intoxicated and refusing to submit to chemical testing pursuant to the "implied consent" provision of Iowa Code §321B.4 (1983). The plaintiff exhausted the administrative remedies which were available to him. He applied for and submitted a written brief in support of judicial review of the D.O.T.'s decision to revoke his driving privileges. A district court judge sustained the revocation and dismissed Mr. Bone's petition for judicial review. The plaintiff then filed this timely appeal.

II. Statement Of Facts

During the evening hours of January 20, 1982, plaintiff was driving an automobile without the aid of its headlights. Plaintiff was observed by a state trooper, stopped and subsequently placed under arrest for operating a moving vehicle while he was intoxicated. The arrest occurred at or about 11:55 p.m. According to the testimony of the trooper, the plaintiff was taken to a detention center where plaintiff was read the implied consent form and told the ramifications it could have concerning his driving privileges. At or about 12:17 a.m., on January 21, 1982, that Mr. Bone had consented to take a breath test, filled out the necessary forms and signed them. When the chemical test was about to be administered, plaintiff told the law enforcement officials that he wished to consult with his attorney before proceeding with the test.

Plaintiff asked officials to contact a Cedar Rapids attorney by the name of Alan Rush. There was no listing for an attorney by that name in the information directory. With the aid of the Cedar Rapids police department, plaintiff and law

enforcement personnel located the telephone number of an attorney by the name of Robert Rush. Phone calls to Mr. Rush were made at 1:30 a.m., and 1:50 a.m., but there was no answer. Another attorney, from Mt. Pleasant, was contacted solely through the efforts of the state trooper, but he refused to speak with the plaintiff. At approximately 2:00 a.m., the defendant's agent invoked the implied consent law.

We have been called on to decide three (3) issues stemming from the revocation of plaintiff's driving privileges. First, whether a ten (10) month lapse of time between plaintiff's request for an agency hearing and the date of the actual hearing is a prejudicial delay. Second, whether the action of law enforcement officials on the day of plaintiff's arrest resulted in a denial of plaintiff's right to counsel. And finally, whether there was a timely refusal by plaintiff to the offer of the breath test.

III. Applicable Law

A. Scope of Review

Code of Iowa section 321B.27 provides: "Judicial review of an action of the department may be sought in accordance with the terms of the Iowa administrative procedure Act.***."

In reviewing the administrative procedure act, we note that Code of Iowa section 17A.19 provides in pertinent part:

> "Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action.
> * * *.
>
> "* * *
>
> "7. In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding.***."

Code of Iowa §17A.19(7)(1983).

Our review is limited to a determination of whether the district court made errors of law when it exercised its power of review of agency decision under Iowa Code section 17A.19. Woods v. Iowa Dept. of Job Service, 315 N.W.2d 838, 840 (Iowa Ct. App. 1981). Iowa Code section 17A.19 limits the district court's review to a determination of whether the agency committed any of the errors of law set out in section 17A.19(8). There is a finite list which provides that relief be offered a petitioner who has had substantial rights prejudiced because the agency action was:

> a. In violation of constitutional or statutory provisions;
> b. In excess of the statutory authority of the agency;
> c. In violation of an agency rule;
> d. Made upon unlawful procedure;
> e. Affected by other error of law;
> f. In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; or
> g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

Code of Iowa §17A.19(8)(a)-(g)(1983).

This is a "contested case" as defined by section 17A.2(2). An appeal from a determination by the district court is allowed under section 17A.20. Our review in a contested case under 17A.20 is not de novo Hoffman v. Iowa Dept. of Transportation, 257 N.W.2d 22, 25 (Iowa 1977). Our task is to review the record in the manner specified in §17A.19(7) and make anew the judicial determinations specified in §17A.19(8). Our review is limited, as the district court's review should be, to the record made before the hearing officer. Id.

B. Whether plaintiff was prejudiced by the delay between his request for a hearing and the actual hearing.

Iowa Code section 321B.26 provides that:

> 321B.26 Hearing. Upon the written request of a person whose privilege to drive has been revoked or denied. . .the department shall grant the person an opportunity to be heard within twenty days after the receipt of the request. . .

Code of Iowa §321B.26(1983). However, the twenty-day period which is discussed in the statute is not a mandatory duty. In the case of Taylor v. Department of Transportation, 260 N.W.2d 521 (Iowa 1977) the supreme court held that this was discretionary language. Id. at 523. The court has recognized that the objective of Chapter 321B [Intoxicated Drivers] is to promote public safety by removing dangerous drivers from the highways. Krueger v. Fulton, 169 N.W.2d 875, 878 (Iowa 1969); Janson v. Fulton, 162 N.W.2d 438, 441 (Iowa 1968); Severson v. Sueppel, 260 Iowa 1169, 1174, 152 N.W.2d 281, 284 (1967); also see Code of Iowa §321B.1(1983). The following language from Taylor is instructive for us in making a decision as this issue:

> "Delay beyond the statutory period is unfortunate and is not to be condoned. Nevertheless, the time provision in [§321B.26] is clearly designed to provide order and promptness in the administrative process, the characteristic purpose of a directory statute. The main legislative goal of removing dangerous drivers from the highways can still be attained when hearings are late. In the absence of a showing of prejudice by the licensee, a failure to hold the revocation hearing within 20 days of receipt should not preclude a later hearing."

260 N.W.2d at 523.

We have found no cases, nor have any been cited for us by the parties, which hold that a delay of ten (10) months between the time a hearing is requested and the actual hearing date is prejudicial to the one whose license has been revoked. The defendant, D.O.T., does, however, refer us to the New York case of Ceary v. Commissioner of Motor Vehicles, 459 N.Y.S.2d 494 (N.Y. Sup.Ct., App. Div. 1983). In that case a delay of some seven and one-half months was not prejudicial.

In the case before us, the plaintiff has the burden of proof to show by a preponderance of the evidence that he was prejudiced by the delay in setting this matter for actual hearing. See Taylor, 260 N.W.2d at 524. He has not met his burden and therefore we find that the district court did not err in upholding the D.O.T.'s decision to revoke the license and driving privilege of Mr. Bone. The revocation is upheld as to the basis of appellant's appeal.

C. Whether appellant was denied his right to counsel prior to the invocation of the implied consent statute.

We make it clear, from the start of our discussion of this issue, that the appellant does not have a fifth or sixth amendment right to counsel in a situation, as here, where the implied consent law is involved. Swenumson v. Iowa Department of Public Safety, 210 N.W.2d 660, 662 (Iowa 1973). We would direct interested persons to footnote one (1) on page 755 of State v. Epperson, 264 N.W.2d 753 (Iowa 1978) for case citations from other jurisdictions which have held likewise on the issue of right to counsel.

Hence, there is no fundamental right to have an attorney present before a person charged with OWI will be required to submit to or refuse to take a chemical test to determine blood alcohol content. However, this does not mean that a person so charged does not have the right to speak to an attorney before a response is obtained to law enforcement personnel's request for submission. State v. Vietor, 261 N.W.2d 828 (Iowa 1978) makes it clear that a person arrested for operating a motor vehicle while under the influence of alcohol shall have the right to call his attorney if he so requests to do so. Id. at 832. The opinion goes on in further summarizing its holding by stating that such person's "right to prior consultation with an attorney is limited to circumstances when that course will not materially interfere with the taking of a test within the time specified in [§321B.4]." Id. A review of Code of Iowa section 321B.4(1983) reveals that there is a two-hour time limit for the providing of a chemical test. The limitation period begins to run from the earliest of three (3) operative time frames. First, the time when the preliminary screening test is conducted; second, when the preliminary screening breath test is refused; and finally, when an arrest is made. A person arrested for OWI must exercise his or her right to consult with an attorney within a period of time which will still allow the test to be taken effectively. Vietor, 261

N.W.2d at 831. If counsel is not obtained within the limitation period, the right to have the advice in formulating a response to a request to submit to chemical testing is lost. Id. As it sheds some light on the situation at bar, where attempts were made by law enforcement officials to make counsel available to Mr. Bone, the following language from Vietor is relevant:

> "If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel."

Id. (quoting from People v. Gursey, 22 N.Y.2d 224, ___, 292 N.Y.S.2d 416, 417, 239 NE2d 351, 352 (1968)).

The appellant was given the opportunity to attempt to obtain the advice of an attorney. He gave the arresting officer the name of an attorney who did not appear in the Cedar Rapids information directory. Officers made two attempts to secure the aid of counsel for the appellant before he made a decision pursuant to the implied consent proceedings. We are appreciative of the supreme court's holding in the case of State v. Heisdorffer, 164 N.W.2d 173 (Iowa 1969). Here the court did not set firm guidelines on how far the state needs to go in attempting to secure the advice of legal counsel for a person arrested under the statute. However, the court did hold that two (2) phone calls to the same unresponsive attorney was not sufficient. Id. at 177. Such is not the facts before us. The provisions of chapter 321B were invoked as the two-hour time limitation was winding to an end. The appellant has not had his right to advice from counsel before submitting or refusing a chemical test violated under the terms of the statute. The right to counsel is not absolute in this situation.

D. Whether appellant responded to a request to submit to a chemical test within the time limitation of Chapter 321B.

As was reiterated earlier, section 321B.4 of the Code contains a two-hour time limitation for the providing of a test pursuant to this chapter. Code of Iowa

§321B 4(1983) The time of arrest stipulated in this case was 11:55 p.m., on January 20, 1982. At approximately 2.00 a.m , on January 21, 1982 arresting officer invoked the provisions of the implied consent statute under the assumption that appellant had refused to take the requested chemical test The supreme court has found that where either an affirmative or negative response follows a request to submit to a chemical test, and such response is contingent on obtaining advice from counsel, then for purposes of this statute a refusal has been given. Swenumson v. Iowa Dept of Public Safety, 210 N.W 2d 660, 662 (Iowa 1973). The two-hour limitation was not violated where the statute is given a sensible, practical, workable and logical construction. See Krueger v. Fulton, 169 N.W.2d 815, 877 (Iowa 1969) The statutory provisions have been complied with.

AFFIRMED