

IN THE COURT OF APPEALS OF IOWA

No. 4-524 / 94-174

FILED

JAN 23 1995

CLERK SUPREME COURT

NORMAN LEE MARCOV, JR.,

Appellant,

vs.

**IOWA DEPARTMENT OF
TRANSPORTATION, MOTOR
VEHICLE DIVISION,**

Appellee.

Appeal from the Iowa District Court for Dubuque County,
James L. Beeghly, Judge.

The plaintiff appeals the district court's ruling on judicial review affirming the Iowa Department of Transportation's revocation of plaintiff's driving privileges for failing a breath test for alcohol concentration. **AFFIRMED.**

Joseph J. Bitter, Dubuque, for appellant.

Bonnie J. Campbell, Attorney General, and Kerry Anderson, Assistant Attorney General, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

On July 4, 1992, at approximately 2 a.m., a Dyersville police officer stopped plaintiff Norman Marcov's pickup truck after the officer saw the truck pull away from a stop sign at a high rate of speed. Marcov claimed he had only three glasses of beer that evening. The officer observed Marcov's eyes were bloodshot and his breath had an alcoholic odor. Marcov failed field sobriety tests the officer requested Marcov to perform. The officer then performed a preliminary breath test which indicated Marcov had an alcohol concentration of .10. The officer arrested Marcov for operating while intoxicated and took Marcov to the Dyersville police department. At the Dyersville police department, the officer read Marcov the implied consent form, and Marcov consented to the taking of a breath specimen which was tested by Intoxilyzer 4011A. The breath sample was given at 2:46 a.m. The intoxilyzer gave a visual readout of .109 and a printout of .10. Marcov was given notice his driver's license would be revoked under Iowa Code chapter 321J for a period of one year.

Marcov contested the revocation through administrative proceedings before the Iowa Department of Transportation. At a hearing before an administrative law judge, Dr. Walter Frajola testified as an expert witness on alcohol breath testing. Frajola testified the manufacturer of the intoxilyzer used to test Marcov's breath indicated the device had an accuracy of better than plus or minus .01.

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Frajola claimed the Intoxilyzer used would be accurate to within plus or minus .01 or ten percent. The expert also testified the third decimal of the test shown on the visual readout should not be used because it went beyond the limits of accuracy on the device. Frajola also testified Marcov's breath alcohol concentration at the time he was stopped would have been less than .05.

On October 6, 1992, the administrative law judge sustained the revocation. The administrative law judge stated:

The concerns of Dr. Frajola can be addressed only by the certified agency and/or the legislature. In this proceeding, a test is presumed valid if the Officer follows the administrative requirements in providing the test. There was no direct evidence to indicate that the Officer failed to follow any of the required steps. Dr. Frajola testified that the manufacturer believes the margin of repeatability, variance, or error is better than .01 percent He failed to establish by credible evidence that margin should be attributed to this machine at the time the test was administered.

Marcov appealed the administrative law judge's decision with the agency. On November 4, 1992, the department's reviewing officer affirmed the decision.

On November 25, 1992, Marcov filed a petition for judicial review challenging the revocation. Marcov claimed the test results minus the margin of error for such results could not be used as a basis for the revocation of his license. Marcov believed his alcohol concentration was less than .10.

On December 28, 1993, after a telephonic hearing, the district court entered a decision affirming the

department's revocation of Marcov's license. The district court determined there was substantial evidence supporting the department's conclusion the plaintiff's breath test results exceeded the statutory limit under the implied consent law.

On January 6, 1994, Marcov filed a motion to enlarge pursuant to Iowa Rule of Civil Procedure 179(b). The motion raised Marcov's margin of error issue and his claim at the time he was operating the motor vehicle he was under the legal limit.

On January 21, 1994, the district court entered a decision denying plaintiff's posttrial motion.

On February 1, 1994, the plaintiff filed a notice of appeal. Marcov raises two issues on appeal. First, Marcov argues substantial evidence does not exist to support the department's decision his test results exceeded the statutory limit. Second, Marcov argues substantial evidence does not exist to support the department's determination his license should be terminated.

I. Scope of Review.

The scope of review in cases arising out of the Iowa Administrative Procedure Act is limited to the corrections of errors at law. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id. To make that determination this court applies the standards

of Iowa Code section 17A.19(8) (1991) to the agency action to determine whether our conclusions are the same as the district court's. Jackson County Pub. Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when that record is viewed as a whole. Eaton v. Iowa Dep't of Job Serv., 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Id. at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Henry v. Iowa Dep't of Job Serv., 391 N.W.2d 731, 734 (Iowa App. 1986). The fact two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

II. Test Results.

Iowa Code section 321J.12 states in pertinent part:

The results of a chemical test may not be used as the basis for a revocation of a person's motor vehicle license or nonresident operating privilege if the alcohol concentration indicated by the chemical test minus the established margin of error inherent in the device or method used to conduct the chemical test does not equal an alcohol concentration of .10 or more.

With respect to Frajola's testimony, we agree with the department's reviewing officer in this case. The reviewing officer stated:

In the present case while . . . Dr. Frajola's testimony was uncontradicted it did not rise above mere speculation. There was no showing that the Intoxilyzer used the night of the Plaintiff's test was not operating correctly, that the margin of error was in fact .10 or greater, or that the third number on the test result had no meaning.

Furthermore, the Iowa Supreme Court has used the visual readout of the Intoxilyzer machine. In one case, our supreme court specifically looked to "the numerals appearing on the digital display" when the printed card produced by the machine had a row of zeros superimposed over the test results. Gordon v. Iowa Dep't of Iowa Transp., 389 N.W.2d 390, 391 (Iowa 1986). The same conclusion is at least implicit in other decisions, which refer to three-digit alcohol concentrations. See Barker v. Iowa Dep't of Transp., 431 N.W.2d 348, 348 (Iowa 1988) (noting the breath test "indicated a blood alcohol content of .108%").

A reasonable mind could certainly believe Marcov's test results indicated an alcohol content above the legal limit. The district court is affirmed on this issue.

III. Revocation of License.

Iowa Code section 321J.12 (1991) provides:

Upon certification, subject to penalty for perjury, by the peace officer that there existed reasonable grounds to believe that the person had been operating a motor vehicle in violation of section 321J.2 [operating while under the influence of alcohol or a drug or while having an

alcohol concentration of .10 or more (OWI)], that there existed one or more of the necessary conditions for chemical testing described in section 321J.6, subsection 1 [implied consent to test], and that the person submitted to chemical testing and the test results indicated an alcohol concentration as defined in section 321J.1 of .10 or more, the department shall revoke the person's motor vehicle license

All elements of section 321J.12 must exist before the department is warranted in revoking a license. Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 555 (Iowa 1987). All elements are met here.

Marcov argues the fact finder should have based his decision on evidence presented as to his possible alcohol concentration while he was driving, not at the time of the test. This is simply not the law. Iowa Code section 321J.12 requires only a certification the peace officer had reasonable grounds to believe the licensee was operating while intoxicated. At no place in the implied consent law is the licensee granted the opportunity to argue "relation back" to the time of operation.

In the case at bar, the record is replete with evidence supporting the agency's decision. The officer had reasonable grounds to believe Marcov was operating a vehicle while intoxicated. Marcov left a stop sign at a high rate of speed and squealed his tires. His eyes were red and watery. His speech was slurred. Marcov smelled of alcohol. He failed each field test administered to him.

The officer had reasonable grounds. Further, Marcov submitted to the test, and the test results indicated an alcohol concentration of .10 or more. All elements of Iowa Code section 321J.12 were met. Thus, the department acted properly in revoking his driver's license.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Judgment of the district court affirmed. Costs of appeal are to be taxed to Marcov.

AFFIRMED.