IN THE COURT OF APPEALS OF IOWA

No. 1-116 / 00-812
Filed July 18, 2001

GREGORY ALAN CLEVENGER,
Petitioner-Appellant,

vs.

IOWA DEPARATMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,
Respondent-Appellee.

FILED
JUL 18 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Warren County, Arthur E. Gamble, Judge.

The petitioner appeals from the district court's ruling affirming the revocation of petitioner's driver's license pursuant to Iowa Code chapter 321J for a breath test failure. **AFFIRMED.**

Mark F. Schlenker of Hall and Schlenker, Indianola, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and John W. Baty, Assistant Attorney General, for appellee.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

000071

PER CURIAM

The Iowa Department of Transportation revoked Gregory Clevenger's driver's license after he failed a chemical test. The district court affirmed the decision. On further judicial review, Clevenger claims the arresting officer did not have reasonable grounds to invoke our implied consent law because he was not operating a vehicle as required by Iowa Code section 321J.6(1) (1999). We affirm.

I. Background Facts and Proceedings

Indianola police officers fielded a complaint that certain people were refusing to leave a local grocery store. Officer Kness came to the store, saw Clevenger leaving, and suspected he was intoxicated. Clevenger initially sat in the driver's seat of his car, which was parked in two parking spaces. He then left his car and approached Kness, who was questioning others. Kness told him to return to his car. Clevenger did so. He placed his keys in the ignition but did not start the car.

Kness soon approached Clevenger's car and asked him to get out. Clevenger complied, leaving the keys in the ignition. In response to questions from Kness, Clevenger admitted he had been drinking alcohol before coming to the grocery store lot and further admitted he had driven the car to the lot. Clevenger stated he intended to drive his friends home from the grocery store.

Officer Kness concluded that Clevenger had driven to the grocery store while intoxicated. He administered field sobriety tests, which Clevenger failed. He then administered a preliminary breath screening test which revealed an

000072

alcohol concentration of .10 or more. Kness arrested Clevenger for operating while intoxicated, in violation of Iowa Code section 321J.2.

The department of transportation revoked Clevenger's license. An administrative law judge and reviewing officer upheld the revocation. Clevenger petitioned for judicial review of the department's final decision. The district court affirmed the revocation. This appeal followed.

II. Standard of Review

Our review of the department's decision is governed by Iowa Code section 17A.19, as recently amended.[1] Clevenger claims there is no evidentiary support for the agency's conclusion he was operating a motor vehicle when the officer invoked the implied consent law or that he was intoxicated when he previously operated the vehicle. Our legislature gave the department of transportation authority to consider and answer these questions in the first instance. Iowa Code § 321J.13(2). Clevenger's challenge, therefore, is to "a determination of fact clearly vested by a provision of law in the discretion of the agency," on the ground it "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code section 17A.19(10)(f). "Substantial evidence" is:

> the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code §17A.19(10)(f)(1). "When that record is viewed as a whole,"

[1] The amended provisions apply to proceedings commenced after July 1, 1999.

> means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Iowa Code §17A.19(10)(f)(3).

III. Discussion

Iowa Code section 321J.12 authorizes the department to revoke a person's driver's license if certain elements are present, including a peace officer's certification "that there existed reasonable grounds to believe that the person had been operating a motor vehicle in violation of Iowa Code section 321J.2" (operating while under the influence of alcohol or a drug or while having an alcohol concentration of .10 or more (OWI)).

The term "operates" means "the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." *State v. Munson*, 513 N.W.2d 722, 724 (Iowa 1994). Reasonable grounds are determined under the facts and circumstances known to the officers at the time the implied consent law is invoked. *State v. Boleyn*, 547 N.W.2d 202 (Iowa 1996). Direct and circumstantial evidence are equally probative. *Id.*

Our highest court has considered facts similar to ours on several occasions. *See Boleyn, 547 N.W.2d at 204; State v. Pointer*, 546 N.W.2d 623 (Iowa 1996); *Munson*, 513 N.W.2d at 725; *State v. Braun*, 495 N.W.2d 735 (Iowa 1993). In *Boleyn*, officers found Boleyn sleeping in the driver's seat of his car with an open bottle of beer between his thighs. *Boleyn*, 547 N.W.2d at 204. The

keys were in the ignition but the car was not running. *Id.* When he awoke, Boleyn admitted he drove to the site. *Id.* He failed field sobriety tests and was arrested and convicted of operating while intoxicated. *Id.* On appeal, Boleyn urged he was not operating a motor vehicle. *Id.* While the court agreed he was not operating the vehicle while intoxicated when officers found him, the court found substantial evidence that Boleyn had done so before the officers arrived. *Id.* at 205. Accordingly, the court affirmed Boleyn's conviction. *Id.* at 206; *accord Pointer*, 546 N.W.2d at 625; *Braun,* 495 N.W.2d at 739.

In *Munson*, an officer saw Munson asleep behind the wheel of a pickup with the keys in the ignition. *Munson*, 513 N.W.2d at 723. The officer arrested him, invoked the implied consent law, and administered a chemical test, which Munson failed. *Id.* at 724. The department of transportation revoked his license. *Id.* On appeal, the court found no evidence to establish Munson was operating the truck when the officer first saw him. *Id.* at 725. The court then considered whether there was evidence to show Munson had previously driven while intoxicated. *Id.* Although Munson admitted he had, the court found the admission came after the officer invoked implied consent. *Id.* Accordingly, the court reversed the revocation. *Id.*

With these cases in mind, we turn to the facts of our case. At the agency hearing, Clevenger stated he did not turn on the ignition of his car. He admitted he consumed alcoholic beverages on the evening in question. Officer Kness testified Clevenger told him he drove the car to the parking lot and drank alcohol before he arrived there. He further stated Clevenger had an odor of alcohol on

his person and had watery eyes and slurred and confused speech. After gleaning this information, Officer Kness obtained Clevenger's consent to administer the field sobriety and breath screening tests.

The only real dispute between the witnesses' testimony was on the question of whether Kness asked Clevenger if he consumed alcohol after he arrived at the parking lot, a fact which, if proved, would support a contention he became intoxicated after he drove to the lot. Clevenger said he was never asked. Kness did not dispute this testimony but stated Clevenger did not admit to drinking after he arrived in the lot. We believe this dispute, therefore, is really one of semantics. We find no evidence to suggest Clevenger consumed alcohol after he arrived at the parking lot.

On our whole review of the record before us, we find substantial evidence to support the agency determination that Officer Kness had reasonable grounds to believe Clevenger was operating a motor vehicle while intoxicated. Accordingly, we affirm the agency decision and the district court.

AFFIRMED.