IN THE COURT OF APPEALS OF IOWA

No. 0-210 / 98-1853
Filed August 16, 2000

FILED
AUG 1 3 2000
CLERK SUPREME

PAUL FRANCIS TROYNA,
Petitioner-Respondent,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,
Defendant-Appellee.

Appeal from the Iowa District Court for Chickasaw County, Jon Fister Judge.

Petitioner appeals the district court's ruling on judicial review affirming respondent's revocation of petitioner's driver's license pursuant to Iowa Code section 321J.12 (1997) for a chemical test failure. **AFFIRMED.**

Roger L. Sutton of Sutton Law Office, Charles City, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree and Noel C. Hindt, Assistant Attorneys General, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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VOGEL, P.J.

Paul Francis Troyna appeals the district court's ruling on judicial review affirming the Department of Transportation's (DOT) revocation of his driver's license, pursuant to Iowa Code section 321J.12 (1997) for a chemical test failure. We find section 321J.2(7), allowing an accused to rebut the presumption that the chemical test result accurately reflects the alcohol concentration at the time of driving, does not apply to the civil, administrative proceeding for revocation of a driver's license under section 321J.12. Affirmed.

Background facts. The administrative proceeding, which resulted in the revocation of Troyna's driver's license, arose from the events that occurred on the evening of December 20, 1997. After spending a few hours at a bar with a friend, Troyna left the establishment at closing time, and proceeded to drive his friend home. At 2:23 a.m., Deputy Martin Hemann stopped Troyna for an equipment violation due to an inoperable taillight. As Troyna got out of the truck to inspect the light, the deputy noticed the smell of alcohol on him. The deputy asked Troyna if he had been drinking and he admitted to consuming four beers during the course of the evening. Deputy Hemann administered two field sobriety tests, which Troyna failed, then requested that he take a preliminary breath test. Troyna, apparently feeling he was not intoxicated, refused to comply. The deputy then arrested Troyna for operating a vehicle while intoxicated. Troyna consented to provide a breath sample at the sheriff's office. He was administered an Intoxilyzer test at 3:21 a.m., the results showing an alcohol concentration of .109. Subsequently, a DOT hearing was held, resulting

in the revocation of Troyna's driver's license. The DOT decision was affirmed by the district court. Troyna appeals.

Scope of review. The district court, when exercising the power of judicial review conferred by section 17A.19, is itself functioning in an appellate capacity to correct errors of law, as specified in section 17A.19(8). *Jackson County Public Hospital v. Public Employment Relations Board,* 280 N.W.2d 426, 429 (Iowa 1979); *Iowa Public Service Co. v. Iowa State Commerce Commission,* 263 N.W.2d 766, 768 (Iowa 1978). Consequently, our task is to determine whether the district court's view as to the meaning of the statute accords with our own interpretation. *Davenport Bank & Trust Co. v. Iowa Dep't of Revenue,* 457 N.W.2d 610, 612 (Iowa 1990); *Iowa Auto Dealers Ass'n v. Iowa Dep't of Revenue,* 301 N.W.2d 760, 762 (Iowa 1981).

Presumption regarding actual alcohol concentration at time of operating a vehicle. Iowa code section 321J.2(7) (1997) reads as follows:

> In any *prosecution* under this section, evidence of the results of analysis of a specimen of the defendant's blood, breath, or urine is admissible upon proof of a proper foundation. The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine *withdrawn within two hours after the defendant was driving* or in physical control of a motor vehicle is *presumed to be the alcohol concentration at the time of driving* or being in physical control of the motor vehicle. (emphasis added)

Troyna asserts this is a rebuttable presumption and he presented evidence at the revocation hearing that effectively established his alcohol concentration at the time of *driving* the vehicle was below the statutory limit of .10. Troyna claimed he quickly drank his last beer just prior to leaving the bar. His theory, supported by

by his expert witness, Dr. Howard Lyon, was that the alcohol had not yet peaked in his blood system at the time he was driving the vehicle. However, by the time he reached the sheriff's office and submitted to the Intoxilizer test an hour after the initial stop, the alcohol concentration was actually higher than when he was driving the vehicle. The State, however, maintains the administrative proceeding of revoking a driver's license under Iowa Code section 321J.12 (1997) operates differently from the criminal prosecution of operating while intoxicated. The statute guiding the administrative revocation does not contain the same presumption allowing a defense of a lower alcohol concentration at the time of the actual operation of the vehicle.[1]

The primary goal in statutory construction is to determine and give effect to the legislature's intent. *State v. Johnson,* 528 N.W.2d 638, 640 (Iowa 1995). That intent is evidenced by the words used in the statute. *State v. Adams,* 554 N.W.2d 686, 689 (Iowa 1996). In the absence of a legislative definition of a term or a particular meaning in the law, we give words their ordinary meaning. *State v. White,* 545 N.W.2d 552, 555 (Iowa 1996). Only when a statute is ambiguous may we resort to rules of statutory construction. *Consolidated Freightways Corp. v. Nicholas,* 258 Iowa 115, 120, 137 N.W.2d 900, 904 (Iowa 1965).

Iowa Code section 321J.2(7) (1997) allows a rebuttable presumption in any prosecution, that the result of the test, if given within two hours, is the alcohol concentration at the time the defendant was driving. Therefore, a defendant

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[1] We note the language of Iowa Code section 321J.12 (1999) was revised to read as follows: "[a]nd the test results indicated . . . an alcohol concentration equal to or in excess of the level prohibited by section 321J.2 . . . ." Section 321J.2(8) contains the presumption language.

charged under Iowa Code section 321J.2 (1997) would have the opportunity to provide evidence to negate the presumption and show the alcohol concentration at the time of driving was different than the concentration at the time the test was administered. Although this assertion is true in reference to criminal prosecutions, it does not necessarily apply equally to administrative proceedings. The court has previously noted the existence of a separation between criminal proceedings for operating while intoxicated and administrative proceedings to revoke a motor vehicle license. *See Brownsberger v. Department of Transp., Motor Vehicle Div.*, 460 N.W.2d 449, 451 (Iowa 1990). However, "[t]his court in *Brownsberger* recognized a ruling in a criminal proceeding can affect a license revocation when *statutorily authorized*." *Iowa Dep't of Transp. v. Iowa Dist. Court for Buchanan County,* 504 N.W.2d 897, 898 (Iowa 1993) (emphasis added).

The relevant code sections allow for a license revocation, under certain circumstances, in addition to criminal prosecution. Iowa Code section 321J.12 (1997) states:

> 1. Upon certification . . . 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 . . .

Iowa Code section 321J.13(2)(b) (1997) limits the scope of the issues in a license revocation hearing to:

> b. Whether a test was administered and the test results indicated an alcohol concentration as defined in section 321J.1 of .10 or more . . .

Iowa Code section 321J.8 (1997) requires:

> A person who has been requested to submit to a chemical test shall be advised by a peace officer of the following:
>
> 2. If the person submits to the test and the results indicate an alcohol concentration as defined in section 321J.1 of .10 or more, . . . the person's motor vehicle license . . . will be revoked by the department as required by and for the applicable period specified under section 321J.12.

The foregoing code sections addressing license revocation, however, do not state the alcohol concentration of .10 must have been met or exceeded during the time of the vehicle operation.

Troyna supports his argument by using only the criminal prosecution portion of the Iowa Code under section 321J.2 (1997) as previously analyzed, making it illegal to drive while intoxicated. However, as the State points out, the legislature specifically included a separate section allowing the administrative remedy of license revocation under certain conditions. Therefore, we must look to the applicable code sections to determine whether the legislature intended to allow the agency procedure the same rebuttable presumption that applies to a prosecution for operating while intoxicated.

The legislature, having included the presumption language in the portion of the code section pertaining to prosecution (321J.2), clearly meant for it to be applied to criminal proceedings for operating while intoxicated. Conversely, from the absence of any similar language in the portions of the code addressing the administrative revocation of a driver's license (321J.12 and 321J.13), we can infer the intent of the legislature to make this presumption inapplicable to such administrative proceedings. "When interpreting statutes, we follow the rule that legislative intent is 'expressed by omission as well as by inclusion.'" *Wiebenga v.*

Iowa Dep't of Transp., Motor Vehicle Div., 530 N.W.2d 732, 735 (Iowa 1995) (quoting *Barnes v. Iowa Dep't of Transp., Motor Vehicle Div.*, 385 N.W.2d 260, 263 (Iowa 1986)).

We agree with the district court that the statute under section 321J.12 clearly states the test results establish whether a driver's license will be revoked without reference to what the alcohol concentration may have been at the time of driving. Accordingly, we affirm.

AFFIRMED.