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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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TIMOTHY ROBERT WALDNER,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Respondent-Appellant.

Filed March 31, 1987

7-42
86-914

Appeal from the Iowa District Court for Scott County (71277) - Edward B. deSilva, Judge.

Respondent Iowa Department of Transportation appeals from the district court's reversal of its decision revoking petitioner's license. **AFFIRMED IN PART AND REVERSED IN PART.**

Thomas J. Miller, Attorney General of Iowa, and Mark Hunacek, Assistant Attorney General, for respondent-appellant.

Dennis D. Jasper of Stafne, Lewis, Jasper & Payson, Bettendorf, Iowa, for petitioner-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J. 442

Respondent, Iowa Department of Transportation, appeals from the district court's reversal of its decision revoking petitioner's license under the provisions of section 321B.16, Iowa Code (1985). On the night of November 4, 1984, and early morning of November 5, 1984, petitioner, Timothy Robert Waldner, was taken into police custody and arrested for operation of a motor vehicle while intoxicated. On March 11, 1985, an administrative hearing was held and the hearing officer sustained revocation of petitioner's license in a decision dated June 7, 1985. This decision was affirmed by a reviewing officer on November 13, 1985. On December 13, 1985, the department denied the petitioner's request for rehearing. Petitioner then filed a petition for further review on December 26, 1985. On May 22, 1986, this matter was submitted to the district court and the court rescinded the agency's revocation of petitioner's license. From this ruling respondent has appealed.

The administrative agency and the district court considered two issues: (1) whether the blood-alcohol test was administered within the two-hour limitation provided in Iowa Code section 321B.4(2) (1985); and (2) whether petitioner could be charged with operating a motor vehicle under the influence because he was parked in a private driveway. Petitioner through his contentions, seeks to lead us into the areas of statutory construction and harmless error on this appeal. Considering our limited scope of review and our resolution of this appeal, we do not consider ourselves compelled to address these questions. However, we do consider respondent's contention that the district court erred in reversing factual determinations made by the hearing officer which are supported by substantial evidence in the record.

When a statute requires rights be determined by the agency after an evidentiary hearing has been provided, the proceedings are classified as a "contested

case." § 17A.2(2), Iowa Code (1985); Allegre v. Iowa State Board of Regents, 349 N.W.2d 112, 114 (Iowa 1984). Our review of a "contested case" is not de novo. Elliott v. Iowa Department of Transportation, 377 N.W.2d 250, 256 (Iowa Ct. App. 1985). On appellate review of a judgment of the district court, we review the agency action as the district court should have. Mary v. Iowa Department of Transportation, 382 N.W.2d 128, 131 (Iowa 1986).

In a contested case, the agency, rather than the district court, is required to hear evidence and make the findings of fact. § 17A.19(7), Iowa Code (1985); Kohorst v. Iowa State Commerce Commission, 348 N.W.2d 619, 621 (Iowa 1984). When the district court exercises the power of judicial review over agency action, it is functioning in an appellate capacity to only correct errors of law. § 17A.19(8), Iowa Code (1985); Hedges v. Iowa Department of Job Service, 368 N.W.2d 862, 865 (Iowa Ct. App. 1985).

Petitioner contends and the district court found there was not substantial evidence to support the agency's decision, pursuant to Iowa Code section 17A.19(B)(7) (1985). We must determine whether the agency's decision is supported by substantial evidence. "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." Mercy Health Center v. State Health Facilities, 360 N.W.2d 808, 811-12 (Iowa 1985). Substantial evidence need not be by a preponderance, but a mere scintilla will not suffice. Herring v. Iowa Law Enforcement Academy, 341 N.W.2d 65, 66-67 (Iowa Ct. App. 1983).

With these factors in mind we review the agency's findings of fact. Petitioner was found by Officer Paul Kelling of the Bettendorf Police Department, slumped over the steering wheel of the car, the vehicle was running, and parked in a private driveway. Petitioner was arrested by Officer Folkers of the Iowa State Patrol at the Bettendorf Police Department. Petitioner submitted to

a breath test which indicated an alcohol concentration of ten hundredths or more. In its finding of facts the agency did not specifically set forth the actual time table of occurrences. The hearing officer affirmed the revocation of petitioner's license. The reviewing officer found: the hearing officer concluded that the test was administered within two hours and no requirement existed that a person be on a public highway to be charged with operating a motor vehicle while under the influence.

On review the district court concluded the agency could not revoke petitioner's license because the test had not been given within two hours of his arrest. The court found petitioner was originally contacted at 11:35 p.m. on November 4, 1984, arrested at 12:55 a.m. on November 5, 1984, and administered the blood test at 2:10 a.m. The court found the following, regarding the time of the original contact: ". . . it does appear from other evidence in the transcript that 11:35 p.m. on November 4th was in fact, in all probability, the proper date and time." In the transcript of the administrative hearing, Officer Folker testified he had erred in writing on the criminal complaint and affidavit and the citation, that the time of initial contact was 11:35 p.m. on November 4. He testified he had meant to write 12:35 a.m. on November 5 and this was reflected on petitioner's implied consent form. The district court in concluding found:

> The question then is limited to whether or not at the time the Petitioner in this case was in fact detained or placed in custody by the officer making the initial contact will trigger the provisions of Section 321B.4(2) in regard to the commencing of the two-hour time limit.
>
> It is this Court's ruling that under Section 804.5 of the 1985 Code of Iowa as amended that in fact the taking into custody of the Defendant, or Petitioner in this cause of action, by the officer making the original contact at or about 11:35 a.m. on November 4, 1985 was in fact an arrest.

> 805.4, "Arrest is the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody."
>
> The record indicates that without question this occurred prior to 12:00 midnight on November 4, 1985 and that therefore the test was not administered to the Defendant or Petitioner or Plaintiff herein within two hours from the time of the original arrest, and there shall be no revocation under Section 321B.13 in this matter.

Pursuant to section 321B.4, Iowa Code (1985), the test shall be provided within two hours after the preliminary screening test is administered or refused or the arrest is made. The trial court found the arrest was made prior to midnight on November 4, 1984, and the test was therefore administered more than two hours after the arrest. We disagree with this conclusion and reverse.

As already mentioned, the agency is the finder of fact, the district court is to only correct errors of law. We consider only the evidence presented to the hearing officer: the testimony of Officer Folker, petitioner, and petitioner's mother; and the physical evidence of; the implied consent form and the criminal complaint and affidavit. From this evidence the hearing officer concluded petitioner's revocation was warranted. To supplement this conclusion we look to the actual record and conclude: the initial contact occurred at 12:35 a.m. on November 5; Officer Folkers arrested petitioner at 12:55 a.m.; and the test was administered at 2:10 a.m. The time of arrest is substantiated by the implied consent form and by Trooper Folkers sworn testimony at the hearing. The time of the initial occurrence was originally described on the trooper's citation at 11:35 p.m. on November 4, but at hearing he testified that was an error and the petitioner actually had initial contact with Officer Kelling at 12:35 a.m. on November 5, 1984. With 12:35 a.m. as the time of the initial contact and 2:10 a.m. as the time the test was administered the two-hour time period was complied with.

The district court erred when it made the factual determination that the blood test was not administered within the two-hour limitation period. "The agency's findings are conclusive when facts are in dispute or when reasonable minds may differ on the inferences to be drawn from the evidence." Elliott v. Iowa Department of Transportation, 377 N.W.2d at 256. We find there was substantial evidence to support the agency's findings.

Finally, petitioner on appeal contends that he was not operating a motor vehicle on a public highway and therefore, the sanctions of chapter 321B should not be applied to him. The agency and the district court rejected this argument. We note section 321.228, Iowa Code (1985), provides:

> The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:
>
> * * *
>
> 2. The provisions of sections 321.261 to 321.274, section 321.277 and sections 321.280 to 321.282 shall apply on highways and elsewhere throughout the state.

We note petitioner was arrested pursuant to 321.281 which is explicitly included under 321.228. We find no merit in petitioner's argument and therefore affirm the trial court on this issue.

AFFIRMED IN PART AND REVERSED IN PART.

Oxberger, C.J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

The district court, in a detailed and well-crafted opinion, concluded:

> It is apparent then that the officer's testimony at the time of the administrative hearing was that although it is shown in both the citation and on the complaint and affidavit that the operation of the vehicle for which Mr. Waldner was arrested occurred at 11:35 p.m. it in fact occurred at 12:35 a.m.
>
> It appears to the Court that in fact the officer was wrong in attempting to show a time different than that on the documents above-referred to as it does appear from other evidence in the transcript that 11:35 on November 4th was in fact, in all probability, the proper date and time.
>
> I note also that the Respondent in its brief does say on page 5, "The record when viewed as a whole indicates that Officer Kelling first observed the Petitioner at approximately 11:35 p.m. on November 4, 1985." Therefore, Officer Folkers was in fact mistaken when he indicated that he had not properly recorded the time of the operation of the vehicle or the original contact at 11:35 and it should have in fact been 12:35.

There is almost no evidence to support a conclusion that a time other than 11:35 p.m. was the time of the arrest. Apparently, the only evidence which supports a later time of arrest was hearsay testimony by a second officer attempting to remember what he had heard from the arresting officer.

Unless we are here going to abandon the substantial evidence test in reviewing administrative decisions and replace it with the "less-than-a-scintilla" test, I see no reason to disturb the district court's findings in this matter. Since the majority chooses not to address the issues of statutory interpretation and harmless error raised by the State, I believe we are required to affirm the district court's determination that there should be no revocation under section 321B.13 in this matter.