FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KEVIN BLAINE FAGAN,

Plaintiff-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Defendant-Appellant.

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9-39
88-1181

Appeal from the Iowa District Court for Dubuque County (46595), Thomas H. Nelson, Senior Judge.

Iowa Department of Transportation appeals from the district court overruling the agency's order revoking plaintiff's motor vehicle operator's license. **REVERSED.**

Thomas J. Miller, Attorney General of Iowa, and Daniel W. Perkins, Assistant Attorney General, for defendant-appellant.

Joseph J. Bitter, Dubuque, for plaintiff-appellee.

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

HAYDEN, J.

The Iowa Department of Transportation (DOT) appeals from a district court's order on judicial review.

Kevin Fagan was involved in an accident with his motorcycle. He was injured and taken to a hospital in Dubuque, Iowa. While he was in the emergency room at the hospital, an investigating officer, Deputy Uskovitch, observed Fagan. The officer observed Fagan's speech was slurred, he had watery and bloodshot eyes, and he smelled an odor of alcohol on his breath. Also, Fagan's preliminary breath test registered an alcohol concentration of .09. The officer suspected Fagan may have been intoxicated at the time of the accident and requested Fagan to submit to chemical testing. Uskovitch asked Fagan three times to take a chemical test. Each time Fagan asked why he had to do it and each time the officer explained to him the reason. Fagan did not answer yes or no to any of the requests. Before the requests were made to Fagan, the officer read the implied consent advisory form to him. When Uskovitch requested Fagan to submit to chemical testing, he asked him if he would submit to a blood or urine test. The evidence is disputed whether the officer offered the blood test first and then later the urine test or if they were both offered simultaneously.

The officer interpreted Fagan's failure to decide as a refusal to submit to chemical testing. He triggered the

provisions of the implied consent law. The DOT revoked Fagan's driver's license for failure to submit to chemical testing.

The revocation was upheld in the administrative proceedings. Upon judicial review, the trial court overturned the revocation.

The trial court held the officer did not have reasonable grounds to believe Fagan had been operating while intoxicated and did not have reasonable grounds to request chemical testing. The trial court also held the officer had used improper procedures by making his requests for blood or urine tests simultaneously. The court held the officer should have requested a blood test first and then, if faced with doubt or refusal, should have offered a urine test as an alternative to a blood test. The court stated sequential rather than simultaneous requests were contemplated by Iowa Code section 321J.6(2), which provides that a person who objects to a blood test should be offered the opportunity of a different chemical test.

The DOT claims the district court erred in considering these issues because Fagan failed to raise them during the administrative procedures.

DOT also claims there is substantial evidence to support the agency finding there were reasonable grounds for a peace officer to believe Fagan was operating a motor vehicle in violation of Iowa Code section 321J.2, and to

support the agency finding the officer first requested a blood test which was refused and then a urine test which was refused.

DOT also contends even if the officer made simultaneous rather than sequential requests for blood and urine testing, such simultaneous requests are not statutory violations of section 321J.6(2). We reverse.

This appeal results from a contested case state agency proceeding. See Iowa Code § 17A.2(2) (1987). In "contested case" proceedings, the agency, rather than the district court, is empowered to hear evidence and make findings of fact. Iowa Code § 17A.19(7) (1987). The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. Iowa Code § 17A.19(8) (1987). Kohorst v. Iowa State Commerce Commission, 384 N.W.2d 619, 6211 (Iowa 1984). Our review of the district court's decision is limited to correction of errors law. Roberts v. Iowa Dep't of Job Service, 356 N.W.2d 218, 221 (Iowa 1984). We, like the district court, are bound by the agency's fact findings if those findings are supported by substantial evidence. Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Peoples Memorial Hospital v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982).

I.

The trial court overturned the agency decision in this case for two reasons. The trial court first found the officer requesting a chemical test did not have reasonable grounds to believe Fagan was operating a motor vehicle while under the influence of alcohol. The trial court also decided Iowa Code section 321J.6(2) is not complied with by offering the alternative of a blood test or urine test, but requires the refusal of a blood test to be followed by a subsequent offer of a breath or urine test.

The first ground for the district court's opinion was not raised as an issue in either the administrative or district court proceedings. The second ground was not raised as an issue until the plaintiff filed a brief in the judicial review proceeding.

We reverse the trial court on both of these issues. A party cannot raise for the first time on appeal issues of fact or law which have not been raised below. This principle of law extends to judicial review of administrative decisions where issues have not been raised during the contested case proceeding. Welch v. Dep't of Employment Services, 421 N.W.2d 150, 152 (Iowa App. 1988) (citations omitted). Thus, the trial court exceeded its jurisdiction and authority in ruling on these matters that were never brought before the agency.

II.

Because these issues may one day properly confront the trial judge, we choose to address them.

A. Iowa Code section 321J.2 (1987) reads as follows:

> **Operating while under the influence of alcohol or a drug or while having an alcohol concentration of .10 or more. (OWI)**
> 1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:
> a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
> b. While having an alcohol concentration as defined in section 321J.1 or .10 or more.

We also set out Iowa Code section 321J.6 (1987) as follows:

> **Implied consent to test.**
> 1. A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration or presence of drugs, subject to this section. The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer having reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2, and if any of the following conditions exist:
> a. A peace officer has lawfully placed the person under arrest for violation of section 321J.2.
> b. The person has been involved in a motor vehicle accident or collision resulting in personal injury or death.
> c. The person has refused to take a preliminary breath screening test provided by this chapter.
> d. The preliminary breath screening test was administered and it indicated an alcohol

> concentration of less than .10 and the peace officer has reasonable grounds to believe that the person was under the influence of a drug other than alcohol or a combination of alcohol and another drug.
>
> 2. The peace officer shall determine which of the three substances, breath, blood, or urine, shall be tested. Refusal to submit to a chemical test or urine or breath is deemed a refusal to submit, and section 321J.9 applies. A refusal to submit to a chemical test of blood is not deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other two substances shall be tested and shall offer the test. If the peace officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.
>
> 3. Notwithstanding subsection 2, if the peace officer has reasonable grounds to believe that the person was under the influence of a drug other than alcohol or a combination of alcohol and another drug,a urine test may be required even after a blood or breath test has been administered. Section 321J.9 applies to a refusal to submit to a chemical test of urine requested under this subsection.

Here the peace officer who invoked the "implied consent" procedure on Fagan knew Fagan had been operating the motorcycle involved in a personal injury accident. The officer also detected an odor of alcohol on Fagan's breath and observed his speech was slurred and his eyes were watery and blood shot. The officer was also aware Fagan had tested .09 from a preliminary breath screening test.

We determine Deputy Uskovitch's function in invoking the "implied consent procedure" is likened to the performance of making an arrest. The determination to make an arrest should be made objectively and not subjectively.

Crosser v. Iowa Dep't of Public Safety, 240 N.W.2d 682, 685 (Iowa 1976). "The 'reasonable grounds' test is met where the facts and circumstances known to the officer at the time he was required to act warrant a prudent man in believing the offense has been or is being committed." Id.

We hold the information Deputy Uskovitch had, together with his observations of Fagan in the hospital's emergency room, provided him reasonable grounds to invoke Iowa Code section 321J.6.

B. In the agency proceedings, the hearing officer found Officer Uskovitch requested Fagan to submit to a blood test, then a urine test, a minimum of three times. Our review of Uskovitch's testimony before the hearing officer reveals he "asked Fagan for a blood or urine test." Both the blood test and urine test were offered at the same time in this manner. For purposes of this appeal, we interpret the officer's testimony in this manner rather than accepting the hearing officer's finding an offer of a blood test was first made and refused and then an offer of a urine test which was refused.

Clearly, Iowa Code section 321J.6(2) gives the peace officer a choice of which three substances, breath, blood or urine, shall be tested. This section also provides "[r]efusal to submit to a chemical test or urine or breath is deemed a refusal to submit, and section 321J.9 applies." It is also clear, in the record, a urine test

was offered to Fagan, even though at the same time of a blood test. Fagan did not consent to the urine test. He did not expressly refuse either test. Fagan did not say "yes" and he did not say "no" to either test. This scenario was repeated three times. Under these circumstances, we determine it was reasonable for the peace officer to consider Fagan's failure or refusal to reply or answer the questions as a refusal to take the urine test. Fagan definitely did not agree or consent to take the urine test. We hold here, Fagan refused to submit to a urine test and this is deemed a refusal to submit per section 321J.6(2).

Iowa Code section 321J.6 is silent on whether a blood test must be offered before a urine test is refused. It merely provides "[a] refusal to submit to a chemical test of blood is not deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other two substances shall be tested and shall offer the test." (Emphasis added.)

We acknowledge if a blood test alone had been offered and refused by Fagan, then one of the other two substances, urine or breath, must then be offered for testing and refused before section 321J.9 applies. That is not the case here. Section 321J.6(2) does not prohibit a peace officer from requesting a person take one of two chemical substance tests. It does not require one substance must be

offered and refused before another substance is offered, unless only blood is offered first, to constitute a refusal. We believe Uskovitch's offer of the two chemical substances test is not deficient. If it was deficient, we determine it was not of such magnitude as to defeat the import of section 321J.6(2). See State v. Janssen, 247 N.W.2d 260, 262 (Iowa 1976). Fagan had been offered a urine test and he refused to take it.

We reverse the trial court and reinstate the agency's final ruling and decision. We decline Fagan's request to remand this case back to the agency to reopen the proceedings for additional evidence.

REVERSED.