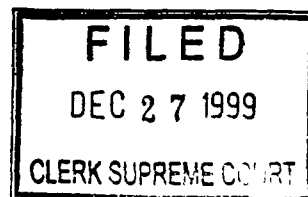


IN THE COURT OF APPEALS OF IOWA

No. 1999-290 (9-520) / 98-2254

Filed December 27, 1999



DAVID MICHAEL PIEPER,
Petitioner-Appellant,

vs.

**IOWA DEPARTMENT OF
TRANSPORTATION, MOTOR
VEHICLE DIVISION,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

David Pieper appeals a district court ruling on judicial review which affirmed the revocation of his driver's license. **AFFIRMED.**

James A. Sinclair and Jeffrey M. Weber of Sinclair & Associates, West Des Moines, for appellant.

~~Thomas~~ J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellee.

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

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VOGEL, J.

David Pieper appeals a district court ruling on judicial review which affirmed the revocation of his driver's license. We affirm.

Background facts. On February 5, 1998, Pieper was stopped by Trooper Patrick Casey for speeding. Pieper was arrested for OWI at approximately 9:00 p.m. after failing field sobriety tests and a preliminary breath test. Casey then transported Pieper to the Webster City police department and read him the implied consent advisory. At 9:30 p.m. Pieper requested and was allowed to telephone attorney James Sinclair. Sinclair told Pieper and Casey that he would have an attorney from Clarion meet them at the station. At approximately 9:55 p.m. Casey asked Pieper to submit a breath test. Pieper again asked and was allowed to call attorney Sinclair. Sinclair then advised Pieper and Casey that an attorney from Fort Dodge would be arriving at the station in approximately ten minutes.¹ At 10:20 p.m., Casey read the implied consent advisory to Pieper again and asked him to submit to the test. Pieper was allowed to speak to Sinclair yet again and then refused to submit to the test. At 10:24 p.m., Casey marked the test refusal on the consent form. Attorney Jim McGlynn arrived at 10:30 p.m.

Pieper's subsequent license revocation was upheld by an administrative law judge and by the district court on judicial review. He now appeals.

¹ Officer Casey testified that he had asked Sinclair for the Fort Dodge attorney's phone number, but that Sinclair stated he did not have the number with him.

Scope of review. Our review of a DOT's revocation decision is governed by Iowa Code chapter 17A and is confined to the correction of errors of law. *See* Iowa Code § 17A.19(8) (1997); *Ramsey v. Iowa Dep't of Transp.*, 576 N.W.2d 103, 106 (Iowa 1998). We will uphold the revocation decision if it is supported by substantial evidence in the record when viewed as a whole. *See* Iowa Code § 17A.19(8)(f) (1997); *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). It is the licensee's burden to show compliance with the implied consent law and the officer's failure to satisfy the procedural requirements. *See Ramsey*, 576 N.W.2d at 106; *Gaskey*, 537 N.W.2d at 697.

I. Right to counsel. Pieper contends the agency and district court erred in concluding that his right to counsel was not violated.

A person arrested for OWI has a limited statutory right to counsel prior to being required to submit or refuse to chemical testing. *See Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997); *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). The right to counsel is not absolute, but a peace officer is required to provide the arrestee with a reasonable opportunity to contact an attorney. *Bromeland*, 562 N.W.2d at 626. Iowa Code § 804.20 (1997) specifically provides:

Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney or the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney.

~~This right to counsel~~ is limited to circumstances which will not materially interfere with the administration of testing within the two-hour time limit imposed by Iowa Code section 321J.6(2). *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa App. 1991).

Pieper essentially argues that the officer should have given him the remaining thirty-six minutes within the two-hour time limit to locate and speak with counsel. However, this argument ignores previous case law which has held that the right to counsel can generally be satisfied by allowing the arrestee to make a telephone call. *See Bromeland*, 562 N.W.2d at 626 (citations omitted). Furthermore, the mere existence of the two-hour time period does not mean every arrestee is granted two full hours before he or she must consent to testing. *See Moore*, 473 N.W.2d at 231. Pieper was allowed to call and speak to an attorney *four* times before the refusal was marked. Officer Casey waited beyond the anticipated arrival time for attorney McGlynn and allowed Pieper to call Sinclair one last time before asking for an answer. Finally, Casey testified he heard Sinclair advise Pieper not to submit to the test during the final call. After examining the record, we conclude there is substantial evidence to support that Pieper was not denied his right to counsel.

Having considered all issues properly before us on appeal, we hereby affirm the district court order upholding the revocation of Pieper's license.

AFFIRMED.