FILED
JUN 26 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-150 / 89-881

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ROBERT ARTHUR BUTLER,

Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Edwin L. Mitchell, Judge.

The DOT revoked Butler's driver's license under the provisions of the implied consent law. Upon judicial review the district court upheld the revocation, and Butler has appealed. **AFFIRMED.**

Ronald E. Runge, Sioux City, for appellant.

Thomas J. Miller, Attorney General; Charles J. Krogmeier, Deputy Attorney General; and Ted Metier and Carolyn Olson, Assistant Attorneys General; for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

In administrative proceedings, the Iowa Department of Transportation upheld the revocation of Butler's license. Upon judicial review, the district court once again upheld the revocation. Butler has now appealed the district court's order. We affirm.

Robert Butler was arrested for OWI, and was taken to the police station. There, the implied consent advisory was read to him and a breath test was requested. Butler first said he would submit to the breath test, but then said he would not give a breath test until he talked to a lawyer. The police dialed the number of his lawyer, but there was no answer. At Butler's request, the police called Butler's brother. In the conversation that resulted between Butler and his brother, Butler asked his brother for the name of a lawyer to call. After declining to call the lawyer the brother suggested, no further lawyer was suggested. The police gave Butler the yellow pages and suggested that he select a lawyer from the list appearing there. After looking at it briefly, Butler pushed the book away without selecting anyone.

Upon the completion of this process, Butler was asked again to submit to a breath test. At first he consented, but then changed his mind and refused to take the test at that time.

Butler claims that he only refused until he could talk to counsel and claims that he was denied his limited right

to counsel before deciding whether or not to submit to a chemical test.

He also claims he was denied due process during the judicial review hearing because the district court did not allow him to present additional evidence pursuant to Iowa Code section 17A.19(7).

On appeal, we are bound by the agency's findings of fact if there is substantial evidence in the record to support the ruling when the record is considered as a whole. McConnell v. Iowa Dep't of Job Service, 327 N.W.2d 234, 236 (Iowa 1982).

When a person who has been arrested for operating while under the influence asks to speak to an attorney, he shall be afforded one. State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978). The right to counsel under those circumstances is not a absolute one, and there is no absolute right to refuse the test until a lawyer arrives. Id. at 831.

In this case, there is substantial evidence to support the finding of the hearing officer that Butler refused the breath test. In accord with the decision of Ferguson v. State of Iowa Dept. of Transportation, 424 N.W.2d 464 (Iowa 1988), the statements and conduct of the arrestee and peace officer, as well as the surrounding circumstances, were considered in determining if Butler refused to submit to chemical testing.

Butler contends that the case must be reversed because it is conclusively shown that he called his lawyer first, and then called his brother for assistance in selecting a lawyer, rather than the other way round. The order of those calls is irrelevant. When offered the opportunity to select an attorney from the yellow pages, or to call his brother's lawyer, he declined, and in effect refused to act further.

An examination of the totality of the circumstances leads us to the conclusion that Butler was not deprived of due process of law in the court's refusal to allow the introduction of further evidence. Butler fails to show that the evidence sought would have been material. There was no violation of due process in the court's refusal to authorize additional evidence.

On the whole record, Butler's appeal is without merit.

AFFIRMED.