IN THE COURT OF APPEALS OF IOWA

No. 6-731 / 96-0528

PHILIP BRUCE OTT,

Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Appellee.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Fayette County, Margaret L. Lingreen, Judge.

Philip Ott appeals from the district court's ruling on judicial review upholding the revocation of his driver's license for refusing to submit to chemical testing. **REVERSED.**

Michael E. Sheehy, Cedar Rapids, for appellant.

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

Considered by Sackett, P.J., Cady and Streit, JJ.

PER CURIAM

This is an appeal by Philip Ott claiming the district court erred in upholding the department of transportation's revocation of his driver's license for refusing to submit to chemical testing pursuant to Iowa Code section 321J.9 (1995). We reverse on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Philip Ott was arrested for operating while under the influence after submitting to a preliminary breath screening test that showed an alcohol concentration of .10 or more. The arresting officer determined the breath intoxilizer test could not be performed because the machine was broken. The officer prepared a written request that Ott submit to a blood specimen. Ott refused. Ott's license was revoked and he sought a license revocation hearing before the department of transportation.

At the hearing, when asked if there was a written request that Ott submit to a specimen of breath or urine, the officer testified, "No there isn't. It's just verbal." On the implied consent form, the officer indicated a request for a blood specimen was made, the date, and the time of the request. There is no indication the officer requested an alternate specimen. There is nothing in the record to show that a written request for urine was made.

The hearing officer rescinded the license revocation because chemical tests must be "at the written request of a peace officer" pursuant to section 321J.6(1) and a refusal to submit to a blood test is not deemed a refusal to submit to chemical

testing. *See* Iowa Code § 321J.6(2). Since the only written request was for a blood specimen, Ott's refusal of that testing was not grounds for revocation.

On appeal, the reviewing officer reinstated the license revocation. The reviewing officer's ruling provides in part:

> In the present case as in Meissner and Henry the peace officer read the implied consent advisory to the plaintiff and there was no suggestion the paper was misread, the paper was not visible to the licensee, or the form of the demand was defective.

The reviewing officer found the implied consent form "will meet the requirement of providing a record of the relevant communication for subsequent review" and that "it was an oversight on [the officer's] part to not check the box" that he requested Ott submit to a urine test. Ott filed a petition for judicial review. The district court affirmed the license revocation. Ott now appeals.

In reviewing a district court's ruling on the validity of agency action, we decide only whether the district court correctly applied the standards of Iowa Code section 17A.19(8). *Henry v. Iowa Dep't of Transp.*, 426 N.W.2d 383, 385 (Iowa 1988). We are mindful that the licensee bears the burden of proof in a license revocation proceeding to show compliance with the implied consent law and the peace officer's failure to satisfy the procedural requirements. *See Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695 (Iowa 1995). Here, we must reverse because the agency's findings are not supported by substantial evidence. *See* Iowa Code §

17A.19(8)(f). Ott met his burden of establishing the officer did not make a written request for chemical testing as required by section 321J.6.

It is true that our supreme court has allowed some leniency in the "written request" requirement. *See Henry*, 426 N.W.2d at 387 (aim of statute that there be a record of the relevant communication is satisfied where officer makes contemporaneous written record of oral request and refusal). But, the reviewing officer's finding that the peace officer read the implied consent form to Ott is not supported by the record. Had there been testimony presented at the hearing to that effect, we would affirm. *See State v. Meissner*, 315 N.W.2d 738, 740 (Iowa 1982) (court finds written request fulfilled where officer told licensee he was reading from a paper and there was no suggestion the paper was misread). However, no such record exists.

A driver's license revocation cannot be based on the refusal to submit to a blood test. There is nothing in the record made before the agency that establishes Ott was ever presented with a written request for a specimen other than blood. The arresting officer testified there was only a verbal request made. There is no contemporaneous written record of the officer's verbal request for a urine specimen. Consequently, the revocation of Ott's driver's license cannot stand.

The decisions of the district court and the department reviewing officer are reversed. The driver's license revocation is rescinded.

REVERSED.