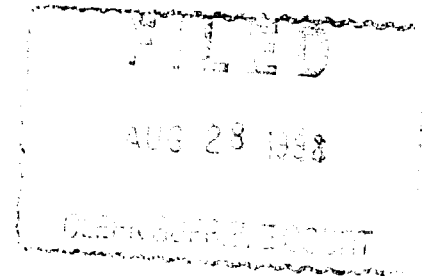


IN THE COURT OF APPEALS OF IOWA

No. 8-195 / 97-0541
Filed August 28, 1998



JOEL CHRISTOPHER JOHNSON,
Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION
MOTOR VEHICLE DIVISION,
Appellant.

Appeal from the Iowa District Court for Bremer County, John S. Mackey,
Judge.

The Department of Transportation appeals from the district court's ruling on judicial review reversing the department's revocation of Joel Johnson's driver's license for a chemical test failure pursuant to Iowa Code section 321J.12(6) (1995).

REVERSED AND REMANDED.

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

Dale E. Goeke of Hagemann, Goeke, Egli & Thacker, Waverly, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

The Department of Transportation (department) appeals from an adverse judgment on judicial review of its decision revoking Joel Johnson's motor vehicle license. We reverse and remand.

I. Background Facts and Proceedings.

Johnson was arrested for operating a motor vehicle while intoxicated on August 16, 1996. He agreed to provide a breath specimen to measure his alcohol content. The results of the test by an Intoxilyzer Model 4011A indicated Johnson's alcohol concentration as .109. Because Johnson's alcohol concentration exceeded .10, the Department revoked his motor vehicle license. Iowa Code § 321J.12 (test results of .10 or greater require the department to revoke a driver's motor vehicle license).

Johnson challenged the department's revocation of his motor vehicle license. At an administrative hearing, Johnson offered expert testimony and other evidence indicating the margin of error inherent in 4011A test results was at least .01 (10%). The department offered expert testimony indicating the margin of error was no more than .005 (5%). An administrative law judge (ALJ), based on Johnson's evidence, found the margin error was at least ten percent. Upon subtraction of that amount from

the test result, the ALJ determined Johnson's alcohol level was less than .10 and rescinded Johnson's license revocation.¹

On administrative appeal, a reviewing officer rejected the ALJ's finding that the 4011A's inherent margin of error was at least ten percent. The reviewing officer's decision provides:

While the testimony of the plaintiff's [Johnson's] witness was that he believed the 4011A was unreliable and he believed the inherent margin of error for the Intoxilyzer 4011A was 10% or more, he failed to show that the margin of error of the Intoxilyzer used to test the plaintiff's [Johnson's] breath was in fact 10%. He further testified he had never examined the Intoxilyzer used to test the plaintiff's [Johnson's] breath and he was not present when the breath test was administered. The testimony of the plaintiff's [Johnson's] witness did not rise above mere speculation.

The reviewing officer, citing the Department of Public Safety's certification of the 4011A used in Johnson's test, also found its margin of error "to be +0.004 or + 5% or better, whichever is greater."

On judicial review, the district court reversed and reinstated Johnson's license.

The court stated:

. . . Mr. Johnson did not fail his burden of proof by not performing tests on the actual 4011A used to measure his B.A.C.

Further, the 4011A used to test Mr. Johnson had not been checked for accuracy or recalibrated in nearly a year at the time of his test. That being the case, the court does not believe that Robert Monserrate's [the department's expert witness] testimony that all

¹ Iowa Code section 321J.12(6) provides a person's license may not be revoked on the basis of the results of a chemical test if those results "minus the established margin of error inherent in the device or method used to conduct the chemical test does not equal an alcohol concentration of .10 or more"

4011A's were certified with a margin of error of .004 can be substantial evidence to support the DOT's final action where the 4011A has a manufacturer's specified error of .10."

In this appeal the department contends the reviewing officer's decision is supported by substantial evidence and the district court erred in concluding otherwise. Johnson cross-appeals challenging the constitutionality of the statutes and procedures resulting in the administrative revocation of his motor vehicle license.

II. Scope of Review.

In reviewing the district court's decision on the validity of an agency action, we only determine whether the district court correctly applied the law. *Cobb v. Employment Appeal Bd.*, 506 N.W.2d 445, 447 (Iowa 1993). An agency's fact findings are binding on this court if supported by substantial evidence in the record. *Id.* Evidence is substantial if a reasonable mind would accept it as adequate to reach the same findings. *Id.* Evidence is not insubstantial merely because it supports a contrary inference. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 598 (Iowa 1995) (quoting *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991)). To the extent Johnson asserts constitutional claims, we review de novo. *Consumer Advocate v. Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991).

III. Substantial Evidence.

The theory advanced by Johnson throughout these proceedings is the Intoxilyzer 4011A is unreliable and outdated technology. He offered a formidable array of scientific evidence and expert testimony supporting his contention. The

record nevertheless contains conflicting evidence supporting the reviewing officer's findings made on administrative appeal. These findings expressly reject Johnson's evidence and accept the testimony of the department's expert and the content of the Department of Public Safety's certification of the relevant Intoxilyzer's margin of error. While we do not hold Johnson's burden of proof required testing of the Intoxilyzer used in his case, the reviewing officer, as the fact finder, was entitled to give this fact the weight she deemed appropriate. The district court, in reaching a contrary result, failed to defer to the reviewing officer's findings of fact. We are accordingly compelled to reverse on this issue.

IV. Johnson's Cross-Appeal.

Johnson raises a sweeping due process challenge to those provisions of Iowa's implied consent statute authorizing the withdrawal and testing of body specimens to determine alcohol concentration. He argues the provisions of Iowa Code section 321J.11² and 321J.12(6) are so "general and vague that no minimal guidelines are provided to prevent the arbitrary and capricious application of breath testing procedures." He also argues:

Due process is denied when an antiquated device is still used to falsely accuse citizens. Due process is denied when a device used to

² Section 321J.11 provides in pertinent part:

However, any peace officer, using devices and methods approved by the commissioner of public safety, may take a specimen of a person's breath or urine for the purpose of determining the alcohol concentration or presence of drugs.

accuse individual is only examined once per year. Due process is denied when a device accuses individuals but yet can't differentiate between the deep lung air it is supposed to measure and mouth alcohol or other interferants. Due process is denied when statistically and scientifically insignificant third place decimals are used to falsely charge citizens. Due process is denied by methods and procedures which failed to provide even minimal protection and guidelines against arbitrary and capricious government action."

We disagree.

We assume without deciding that Johnson has the right to cross-appeal on this issue. *See Wausson v. Sac County Fair Assoc.*, 313 N.W.2d 548, 550 (Iowa 1981)(a party may not appeal from a finding or conclusion of law not prejudicial no matter how erroneous, unless the judgment itself is adverse).

Every Iowa statute is supported by a strong presumption of constitutionality. *Larsson v. Iowa Bd. of Parole*, 465 N.W.2d 272, 273 (Iowa 1991)(citations omitted). Johnson "must negate every reasonable basis upon which the statute could be upheld as constitutional." *Schroeder Oil Co. v. Iowa State v. Dep't of Revenue and Finance*, 458 N.W.2d 602, 603 (Iowa 1990).

Johnson's due process challenge is analyzed under a "rational basis test unless the statutes challenged employ a suspect classification or burden a fundamental right." *Ruden v. Parker*, 462 N.W.2d 674, 676 (Iowa 1990). Because Johnson's claims implicate neither, we apply a rational basis test in this instance.

Under the rational basis test, a statute is constitutional unless it "bears no rational relationship to a legitimate government interest; or the means employed by

the statute bear no reasonable relationship to a legitimate government interest.”
Bennit v. City of Redfield, 446 N.W.2d 467, 474 (Iowa 1989).

The legitimate government interest implicated by Iowa’s implied consent law is the public’s protection from the dangers posed by intoxicated drivers. *State v. Weaver*, 405 N.W.2d 852, 854 (Iowa 1987) (citing *State v. Webb*, 202 Iowa 633, 637, 210 N.W. 751, 752 (1926)). The purpose of implied consent statute’s procedural requirements are: (1) to protect the health of persons tested; (2) to guarantee the accuracy of test results for use in judicial proceedings, and (3) to prevent citizens from indiscriminate testing and harassment. *Zenor v. Iowa Dep’t of Transp., Motor Vehicle Div.*, 558 N.W.2d 427, 430-431 (Iowa 1996).

We hold upon application of the rational basis test that the provisions of Iowa Code sections 321J.11 and 321J.12(6) are constitutional. Both bear a rational relationship to a legitimate governmental interest. Additionally, the purposes underlying the implied consent testing procedures bear a rational relationship to the legitimate government interest implicated.

We also note that comparable due process challenges have been rejected in other jurisdictions. *See People v. Ireland*, 33 Cal. App. 4th 680, 693, 39 Cal. Rptr. 2d 870, 877 (1995); *State v. Downie*, 117 N.J. 450, 569 569 A.2d 242 (1990).

The judgment of the district court is reversed and this case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.