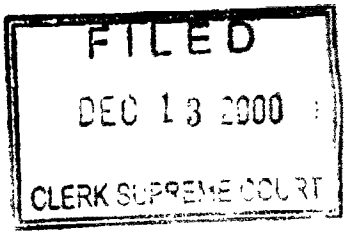
IN THE COURT OF APPEALS OF IOWA

No. 0-669 / 00-0454
Filed December 13, 2000



JEFFREY JAMES STEVENS,
Petitioner - Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,
Respondent - Appellees.

Appeal from the Iowa District for Cass County, James M. Richardson, Judge.

Petitioner-Appellant appeals the trial court's decision on judicial review affirming the revocation of his driver's license pursuant to Iowa Code chapter 321J. **AFFIRMED.**

John M. Trewet, Rutherford, Trewet & Knuth, Atlantic, for appellant.

Thomas J. Miller, Attorney General, and Mark Hunacek, Assistant Attorney General, for appellee.

Considered by Sackett, C.J. and Vogel, J.J. and Honsell, S.J.*

Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

Petitioner-appellant appeals from the district court's decision on judicial review affirming the revocation of his driver's license for refusing to take a chemical test. He asserts that reasonable grounds to believe he was operating a motor vehicle while intoxicated did not exist. Therefore, there was no basis for invoking the implied consent procedure. He also maintains that he was not provided a reasonable opportunity to contact his attorney.

Mr. Stevens is disabled. Both of his legs have been amputated. One is severed at the hip and the other just above the knee.

On May 3, 1999, he lost control of the vehicle he was driving and went into a ditch northeast of Atlantic, Iowa, during the evening hours. He did not have a wheelchair with him. He propelled himself by using his hands and buttocks to a farmhouse a quarter of a mile distant and waited for the occupants to return home. Two of the residents, Charles Rudy and Roger Rudy, drove Mr. Stevens back to the accident scene upon returning home.

Cass County deputy sheriff Don Lappe was dispatched to the scene and arrived there about 11:45 p.m. Mr. Stevens, the Rudys and two city of Atlantic police officers were present when he arrived. One of the police officers was Steven Green. Deputy Lappe had been contacted by Officer Green by radio prior to arrival at the scene. Officer Green informed Lappe that Mr. Stevens smelled of alcohol and his speech was slurred.

Upon arrival at the scene, Deputy Lappe spoke with Mr. Stevens, who told him that he had lost control of his vehicle after turning a corner and "somewhat steered" it into the ditch so that it wouldn't roll over. Deputy Lappe made the

same observations as Officer Green, and also noted that Mr. Stevens' eyes were dilated. When Deputy Lappe checked the status of Mr. Stevens' driver's license, he found out that Mr. Stevens' driving privilege was barred at that time. He then informed Mr. Stevens that he was under arrest for driving while his license was barred. Mr. Stevens indicated that in fact he had not been driving and that the vehicle had come loose from being towed and the towing vehicle belonged to and was being driven by Jeff Anderson. When contacted by telephone from the scene, Mr. Anderson said that was not the case. Mr. Stevens also told Deputy Lappe that he had drank a can of beer when he returned to the scene with the Rudys. Deputy Lappe inquired of Charles Rudy whether Mr. Stevens had drunk a beer after the Rudys brought him back to the scene and Mr. Rudy indicated that Mr. Stevens had not drunk a beer at the scene.

Mr. Stevens was taken to the Cass County correctional facility. There Deputy Lappe informed Mr. Stevens that he suspected that Mr. Stevens was under the influence of alcohol and that field sobriety tests were going to be administered. Mr. Stevens was then asked by Deputy Lappe to take a preliminary breath test and a nystagmus test. He refused saying that he would not do anything until he spoke with an attorney. He was offered the opportunity to contact a lawyer by making collect telephone calls, however, he was unable to contact a lawyer despite making more than one attempt to do so. Mr. Stevens was successful in contacting his mother by telephone. Deputy Lappe commenced the implied consent advisories shortly after 12:30 a.m. The request for the tests was made and refused by 12:55 a.m. on May 4, 1999.

When asked during the hearing before the administrative law judge whether he had reason to not believe Mr. Stevens, Deputy Lappe responded that about one-half of what Mr. Stevens had told him was not true.

I. Scope of review. Our review of a DOT revocation decision is governed by Iowa Code section 17A. *See Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 625 (Iowa 1997); *see generally* Iowa Code § 17A. "[W]e ask only whether the district court has correctly applied the law." *Bromeland*, 562 N.W.2d at 625. Applying the standards for review of agency action found in Iowa Code section 17A.19(8), we determine whether our conclusions are the same as those made by the district court. *See Scott v. Iowa Dep't of Transp.*, 604 N.W.2d 617, 619 (Iowa 2000). If they are, we affirm. *Id.* If our conclusions are not the same and we decide the district court has incorrectly applied the law, we must reverse. *Id.*

II. Implied consent. Iowa Code section 321J.6 outlines the requirements prior to invoking implied consent and submitting to a chemical test. First, the officer must have reasonable grounds to believe the person has been operating the vehicle while intoxicated. Iowa Code § 321J.6(1). Second, there must exist one of seven conditions which include that the person has refused to take a preliminary breath screening test provided by this chapter. *Id.*

III. Consultation with an attorney. In *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978), the Iowa Supreme Court held:

> The privilege of consulting with counsel concerning exercise of legal rights should not, however, extend so far as to palpably impair and nullify the statutory procedure requiring drivers to choose between taking the test or losing their license. It is common knowledge that the human body dissipates alcohol rapidly and,

> indeed, . . . test results are admissible in evidence only if the test had been taken within two hours of the time of arrest. Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the stationhouse or immediately available there, no danger of delay is posed. But, to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene . . . . If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel.

In *Bromeland v. Iowa Dept. of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997), the Iowa Supreme Court held Iowa Code section 804.20 does not provide an absolute right to counsel, but requires a peace officer to provide the arrestee with a reasonable opportunity to contact an attorney. In that case the arrestee was unable to contact the attorney he first requested, but declined an opportunity to contact another attorney. The court held because he was afforded the opportunity to contact an attorney but declined, the officer reasonably invoked implied consent. *Bromeland*, 562 N.W.2d at 626.

Premised on his interaction with Mr. Stevens and the investigation made by him as set forth above, Deputy Lappe had reasonable grounds to believe that Mr. Stevens had been operating the vehicle observed at the scene of the single vehicle accident while under the influence of an intoxicating beverage. Mr. Stevens was accorded the opportunity to contact counsel and more than one attempt to do so was made. Mr. Steven's rights were not violated. We affirm the district court.

AFFIRMED.