FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NORMAN DAVID DUNNING,

Petitioner-Appellant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent-Appellee.

Filed April 29, 1980

0-44
2-63187

Appeal from Benton District Court - August F. Honsell, Judge.

Petitioner appeals district court affirmance of revocation of his driver's license by Iowa Department of Transportation. - Reversed.

Morris L. Eckhart, of Milroy & Eckhart, Vinton, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, Craig Gregerson, Assistant Attorney General, and Robert W. Goodwin, Special Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner, Norman David Dunning, appeals district court affirmance of revocation of his driver's license by respondent, Iowa Department of Transportation. We reverse.

Dunning was arrested and charged with operating a motor vehicle while intoxicated. When arrested, he was presented with an implied consent form of the type condemned in State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978). The agency then brought an administrative action to revoke Dunning's driver's license and Dunning sought to have evidence of his purported refusal of consent suppressed from the administrative hearing. His request was denied by the hearing officer and after a hearing on the record, the officer found Dunning had refused to give consent and revoked his license on that ground. The agency action was affirmed on judicial review in the trial court and Dunning appeals.

Review of agency action is governed by section 17A.19(8), the Code 1979, and under section 17A.19(8)(f), agency action may be striken if unsupported by substantial evidence in the record as a whole. Dunning's challenge is like that before the court in Fuller v. Iowa Department of Transportation, 275 N.W.2d 410, 411 (Iowa 1979). There, the court said the rationale of Vietor, 261 N.W.2d at 832, applied in the administrative law context and, therefore, a defendant denied the statutory right to counsel could not be held to have refused a chemical test. The revocation action here was predicated on section 321B.7, The Code, and Dunning's purported refusal to consent to a chemical test to determine if he was driving while under the influence of an intoxicant. Dunning claims under Vietor he cannot be deemed to have refused consent because he was denied his section 755.17 right to counsel. Without the refusal, he argues, the agency action is not supported by substantial evidence.

Initially the parties debate the issue whether Dunning read the consent form and whether determination of the issue is precluded by a prior ruling on it in Dunning's criminal trial. Unlike Vietor, the arresting officers did not orally read the prohibited language to Dunning. Nevertheless, he was given the form to read and sign and officer Zimmerman testified Dunning appeared to have read the form. While we think the record supports a finding Dunning read the consent form, our resolution of the issue is

unnecessary. The fact the form was presented permits the inference Dunning relied on it. That inference was not rebutted by the agency.

Vietor and Fuller held evidence on a refusal to consent was inadmissible if a defendant asks to call a lawyer and is denied that statutory right. Vietor, 261 N.W.2d at 832; Fuller, 275 N.W.2d at 411. Although Dunning did not request to consult counsel, that failure is not fatal to his claim. Dunning was given a form that in prominent red ink stated he did not have the right to counsel. Like Vietor, we cannot ascertain from the record if the incorrect statement on his right to counsel persuaded him not to try to request an attorney. As in Vietor, we think the circumstances compel a holding his right to counsel was denied. The form represented a de facto denial of counsel; Dunning could not be expected to make a futile request.

Since Dunning was denied his right to assistance of counsel to determine whether to consent to a chemical test, he cannot be held to have refused consent. Fuller, 275 N.W.2d at 410. Thus, the agency finding he refused consent is not supported by substantial evidence and its conclusion his driver's license should be revoked on that basis was erroneous. Accordingly, the revocation order is reversed.

REVERSED.

Carter, J., dissents.

CARTER, J. (dissenting)

I dissent. I agree that petitioner is entitled to some relief. But, I do not deem it necessary or proper on the record in this case to determine that the finding of the agency that petitioner failed to consent to a chemical test is not supported by substantial evidence.

The record is clear that both the agency decision and the decision of the district court were induced by the belief that the exclusionary rule announced in State v. Vietor, 261 N.W.2d 828 (Iowa 1978) does not apply to administrative hearings under chapter 321B, The Code. As a result of Fuller v. State Department of Transportation, 275 N.W.2d 410 (Iowa 1979) (decided after the district court's decision), such conclusion was erroneous. This constitutes a ground for upsetting the agency decision under section 17A.19(8)(e), The Code. But I submit that the appropriate relief is to remand the matter to the agency to reconsider the issue without resort to the erroneous legal standard previously alluded to. As I read the record, it does not compel a result different from that reached at the initial administrative hearing.

The record does not require a finding, as a matter of law, that petitioner's rights under section 755.17, The Code, have been violated in this case. In Fuller, the court only held "if a defendant is denied this statutory right on request, he cannot be held to have refused a chemical test (emphasis added)." Both of the drivers involved in the consolidated cases presented in the Fuller appeal had requested to talk to an attorney prior to electing whether to submit to chemical testing. There is no indication that petitioner in the present case made such request. Indeed, the record indicates that he stated he did not wish to consult with an attorney approximately 11 minutes prior to the time a request was made for a chemical test.

To the extent that the court, in State v. Vietor, resolved the issue of a potential violation of section 755.17 adversely to the State on an incomplete record, I submit that the policy reasons for so doing in a criminal case are entirely different than in an administrative proceeding. In the latter type of proceeding, I would require the driver to establish by evidence that he was in fact denied the right to consult an attorney which section 755.17 might have afforded him.