IN THE COURT OF APPEALS OF IOWA

No. 1999-263 (9-493) / 98-1477
Filed November 10, 1999

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CLERK SUPREME COURT

NATHAN JOHN KOLBET,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent-Appellee.

Appeal from the Iowa District Court for Chickasaw County, James L. Beeghly, Judge.

The petitioner appeals from the district court's ruling on judicial review affirming the respondent's revocation of the petitioner's driver's license for a chemical test failure pursuant to Iowa Code section 321J.12 (1997). **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, Charles City, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, John W. Baty, and Kerry Anderson Assistant Attorney Generals, for appellee.

Heard by Streit, P.J., Vogel, and Vaitheswaran, JJ., decided by Huitink, P.J., and Streit, and Vaitheswaran, JJ.

VAITHESWARAN, J.

The Iowa Department of Transportation (DOT) revoked Nathan Kolbet's drivers license for operating a motor vehicle with a blood alcohol content of .10 or more. Kolbet appeals, contending he was not capable of consenting to withdrawal of a blood specimen. We affirm.

I. Background Facts and Proceedings

On the morning of October 5, 1997, Kolbet was driving in Chickasaw County when he collided with a Mennonite buggy, killing one person. At the accident scene, state patrolman David Zimer approached Kolbet and smelled a strong odor of alcohol coming from him. Zimer asked Kolbet if he was doing okay, to which Kolbet answered "yes." Zimer then asked Kolbet if he could administer a preliminary breath test. Kolbet agreed and the test was given, registering an alcohol concentration of .112. Kolbet was taken by ambulance to a hospital. At the hospital, Zimer confirmed Kolbet's name, then obtained the nurses' permission to advise Kolbet of the state's implied consent law. Zimer read the law and confirmed that Kolbet had listened and understood it. On Zimer's request, Kolbet agreed to give a blood sample. In response to further questioning by Zimer, Kolbet confirmed his birthdate, social security number, and location. Kolbet checked the consent box on the implied consent form and signed the document. Blood was taken and Zimer proceeded to interview Kolbet in greater depth. The blood test result showed an alcohol concentration of .110

On November 12, 1997, the DOT notified Kolbet that his driving privileges would be revoked for 180 days as a result of the test results. Kolbet's appeal was followed by an evidentiary hearing at which Kolbet questioned Zimer and also elicited testimony from his parents. An administrative law judge sustained the revocation. A DOT reviewing officer affirmed the decision.

Kolbet's judicial review petition raised issues not raised before the agency. The district court limited its review to those issues contained in Kolbet's first agency appeal letter. The court concluded Kolbet "failed to establish any grounds, for which error was preserved" which would warrant reversal of the DOT's decision.

II. Scope of Review

Like the district court, we review a DOT license revocation proceeding for correction of errors of law as to those issues considered at the administrative hearing. *Gaskey v. Iowa Dep't. of Transp.*, 537 N.W.2d 695, 697 (Iowa 1995).

III. Consent

Iowa Code section 321J.6 (1997) provides that a person who operates a motor vehicle under certain enumerated circumstances is deemed to have consented to withdrawal of blood, urine, or breath for testing to determine the alcohol or drug content. Iowa Code section 321J.7 states:

> A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given if a licensed physician certifies in advance of the test that the person is dead, unconscious, or otherwise in a condition rendering that person incapable of consent or refusal.

Kolbet contends his injuries and disorientation due to alcohol consumption prevented him from consenting to the blood test. As a result, Kolbet maintains the nurses could not withdraw a blood sample until a physician had certified he was incapable of consenting. Specifically, Kolbet points to evidence he: (1) denied he was a driver at the scene; (2) could not correctly answer certain questions including his direction of travel, where he came from, or the time of certain actions; (3) did not know he had hit a buggy; (4) did not know he was injured despite injuries to his face, elbow, and hand; and (5) was transported to another hospital for further treatment, a fact reflecting the seriousness of his injuries. Kolbet additionally cites his mother's testimony that she believed he was incapable of consenting to a blood test.

Like the agency and district court, we are not persuaded that this evidence establishes Kolbet's incapability to consent.[1] The burden of proof to show inadmissibility of a blood test is on the licensee. *Mary v. Iowa Dep't. of Transp.*, 382 N.W.2d 128, 132 (Iowa 1986). The evidence here reveals that the patrolman sought Kolbet's consent to withdrawal of a blood sample only after he (1) established Kolbet was sufficiently oriented to know who and where he was and (2) confirmed Kolbet understood the implied consent advisory. In *Mary*, which is on nearly all fours with this case, the Iowa Supreme Court affirmed a license revocation, noting:

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[1] Like the district court, we will not review issues which were not raised and considered by the agency. *See Kash v. Iowa Dep't. of Employment Servs.*, 476 N.W.2d 82, 83 (Iowa 1991).

> [N]o dispute exists that Mary manifested a capacity to exercise his statutory right to refuse the test. Although he was not fully coherent, the officers testified he asked them a couple of questions about the implied consent law and then commented 'damned if I do, damned if I don't.' In these communications the agency did not err in rejecting Mary's contention that a physician's certificate was required prior to the withdrawal of the specimen.

Id. at 132-33. Kolbet did not satisfy his burden of proving he was incapable of consenting to withdrawal of blood. The agency committed no legal error in reaching this conclusion and the district court correctly upheld the DOT's decision.

AFFIRMED.