

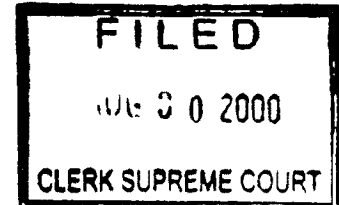
IN THE COURT OF APPEALS OF IOWA

No. 0-237 / 99-898
Filed August 30, 2000

GLENN HAROLD IVERS,
Petitioner-Appellant,

vs.

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



Appeal from the Iowa District Court for Polk County, Linda R. Reade,
Judge.

The petitioner appeals from the district court's ruling on judicial review
which affirmed the revocation of the petitioner's driver's license for a chemical
test refusal under Iowa Code chapter 321J. **AFFIRMED.**

James A. Sinclair and Jeffrey M. Weber of Sinclair & Associates, P.C.,
West Des Moines, for appellant.

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

Considered by Zimmer, P.J., Vaitheswaran, J., and Hayden, S.J.*

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

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HAYDEN, S.J.

There is one issue in this case. That is whether Glenn H. Ivers' (Ivers) right to counsel as provided by Iowa Code section 804.20 (1997) was violated

On July 2, 1998, Ivers was arrested for operating while intoxicated (OWI). Ivers' time of arrest was 10:42 p.m. He was transported to the Urbandale police department where the arresting officer read the implied consent advisory to him. The officer requested Ivers submit to a specimen of breath for testing of alcohol concentration at 10:54 p.m.

Ivers requested to call his wife, Nancy. He and his wife spoke for twenty minutes. Ivers' attorney then called and he and his attorney spoke for eleven minutes. His attorney informed the arresting officer he wanted to speak with Ivers in person. The officer refused to allow him to do that. The officer offered to permit Ivers and his attorney a private phone line to talk but the attorney could not come to the police station to talk in person.

The officer then requested a breath sample of Ivers. Ivers stated he wished to speak in person with his attorney. The officer told Ivers he would mark that as a refusal. Ivers told the officer "I am not refusing, but I want my attorney present before I decide." When Ivers was advised that he would not be able to speak with his attorney in person he asked to call his attorney again. The officer allowed him to make another call to his attorney and they spoke for a minute or two.

After talking with his attorney the second time, the officer again asked for a breath test from Ivers. Ivers responded he didn't want to make a decision until after he spoke to his attorney privately in person. The officer told Ivers "that

wasn't going to happen." At 11:31 p.m., the officer marked the "refused" box. The attorney's phone number was 279-8891. This was a local phone number.

The Iowa Department of Transportation, Motor Vehicle Division (DOT) revoked Ivers' drivers' license pursuant to Iowa Code section 321J.9 (1997). Ivers commenced contested case proceedings. A presiding administrative law judge determined the officer's actions violated the appellant's right to consult with an attorney under Iowa Code section 804.20. The administrative law judge determined this case is distinguishable from *Moore v. Iowa Dept. of Transp.*, 473 N.W.2d 230, 232 (Iowa App. 1991). The administrative law judge further determined there was no evidence presented the attorney was a great distance away and could not have reached Ivers quickly. Another factor, well over an hour remained in the two-hour window to obtain the test. The administrative law judge held appellant's statutory right to counsel was violated and his actions did not amount to a refusal. The judge further held the revocation inappropriate. The two year revocation of Ivers' drivers' license was rescinded.

The DOT appealed to a DOT reviewing officer. The reviewing officer determined the administrative law judge shifted the burden of proof when he found there was no evidence the attorney was a great distance away and could not have reached the appellant quickly. The record is absent of any evidence the attorney was within a short distance and could reach the law enforcement center quickly. The reviewing officer ruled the administrative law judge's decision was not supported in the record and was reversed. The revocation of Ivers' drivers' license was supported in the record and was reinstated.

Ivers appealed the reviewing officer's decision to the Polk County district court. On March 17, 1999, the district court conducted a telephonic hearing on appeal from the reviewing officer's decision. On May 10, 1999, the district court sustained the reviewing officer and permitted DOT to proceed with revocation of Ivers' drivers' license.

Ivers timely appealed the district court's decision to the Iowa Supreme Court. It has been transferred to the Iowa Court of Appeals for decision. We affirm..

The parties are not in dispute about the underlying facts of this appeal.

**ISSUE: WAS IVERS' RIGHT TO COUNSEL PURSUANT TO IOWA CODE
SECTION 804.20 VIOLATED?**

Ivers claims he was entitled to an in-person consultation with his attorney prior to submission or refusal of chemical testing during the implied consent proceedings.

SCOPE OF REVIEW

On judicial review of an agency action the district court functions in an appellate capacity to apply the standards of Iowa Code section 17A.19(8) (1997). *Jackson County Public Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429-30 (Iowa 1979). When this court reviews a decision of a district court rendered pursuant to section 17A.19, the sole question is whether the district court correctly applied the law. *Id.* In order to make that determination, this court applies the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. *Id.*

The Iowa Administrative Procedure Act, Iowa Code section 17A.19 governs our review of agency action. Our review is for corrections of errors at law, not *de novo*. *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991).

Iowa Code section 804.20 (1997) entitled Communications By Arrested Persons provides:

Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

In the case of *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, 616 (Iowa 1997), the Iowa Supreme Court held 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.

Moore v. Iowa Dept. of Transp., 473 N.W.2d 230, 231 (Iowa App. 1991), held a person arrested for OWI has a limited statutory right to counsel prior to being required to submit or refuse to chemical testing. This statutory right also applies to civil revocation proceedings under Iowa's implied consent law. *Moore*, 473 N.W.2d at 232.

Moore, arrested for OWI, was permitted to make a phone call from the Newton police station to his attorney in Ankeny. They talked for twenty minutes. The attorney was coming to the Newton police station to discuss the testing with Moore in person. The officer responded he would not wait for the attorney to make the forty-mile trip to Newton.

Following the telephone call, the officer again requested a breath test. Moore responded he wanted to talk in person with his attorney, who was then en route to Newton, before agreeing or refusing to give a breath test sample. The officer treated this response as a refusal to consent to testing and invoked the implied consent law. The attorney arrived in Newton about thirty-seven minutes before the expiration of the statutory two-hour period for chemical testing. The

Moore court held Moore was not denied his opportunity to consult with counsel.
Id.

In *Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa App. 1990), the Iowa Court of Appeals held the right is limited to circumstances which will not materially interfere with the administration with testing within the two-hour time limit imposed by Iowa Code section 321J.6 (2) (1989). Generally the limited right is satisfied if the arrestee is permitted to make a phone call to his or her attorney. *Haun*, 462 N.W.2d at 306. Haun spoke with his attorney by telephone and when he hung up he said the attorney wanted to check into the situation and would call him back. The police requested Haun submit to testing immediately after he spoke with his attorney the first time and with over an hour of the two-hour period remaining. Haun's statement, he wanted to wait until his attorney called back before deciding whether to submit to testing, was taken as a refusal and his license was subsequently revoked. In *Haun*, we found in order for an arrestee's right to counsel to be meaningful, law enforcement personnel must allow the arrestee further communication as long as such extension does not place in jeopardy the termination of the two hour period specified in section 321J.(6)(2).
Id.

In *Short v. Iowa Dept. of Transp.*, 447 N.W.2d 576, 579 (Iowa App. 1989), the arrestee (Short), contacted a friend who in turn contacted Short's attorney. The attorney in question lived within five minutes from the police station. Approximately forty-five minutes before the two-hour time limit ran, Short wanted to wait until he spoke with his attorney before he submitted to testing. The police officer treated Short's response as a refusal and revoked his license. Short did

not speak with his attorney at all before he was deemed to have refused to consent to chemical testing. In *Short* we found the arrestee was not afforded a reasonable opportunity to consult with his attorney. *Short*, 447 N.W.2d at 579.

Ferguson v. Iowa Dept. of Transp., 424 N.W.2d 464, 466 (Iowa 1988), stated we have held anything less than an unqualified unequivocal consent is a refusal.

We recognize Ivers' attorney was reached at a local phone number. However, there is no showing in the record the length of time it would take him to arrive in the police station at the time the officer invoked the implied consent procedure to Ivers. There is no evidence his attorney arrived at the police station.

Ivers made three phone calls—one to his wife and two to his attorney. He refused a private line to consult with his attorney privately on the phone.

Under the facts of this case, Ivers was afforded opportunities, and, in fact, had two meaningful phone consultations with his attorney. Iowa Code section 804.20 was not violated. We affirm the district court.

AFFIRMED.