IN THE COURT OF APPEALS OF IOWA

No. 0-509 / 99-1938
Filed September 13, 2000

BRIAN CHRISTOPHER OLIVER,
Petitioner-Appellant,

vs.

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

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

The petitioner appeals from the district court's ruling on judicial review affirming the revocation of petitioner's driver's license for a chemical test refusal.

AFFIRMED.

Christopher A. Kragnes, Sr., Des Moines, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Carolyn Olson, Assistant Attorney General, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

VAITHESWARAN, J.

The department of transportation revoked Brian Oliver's driver's license after he refused to submit to chemical testing. The district court affirmed the agency decision. On further review, Oliver contends the arresting peace officer violated his statutory right to consult with an attorney. We affirm.

I. Background Facts and Proceedings

On March 16, 1999, at 1:11 A.M. an officer arrested Oliver for operating a motor vehicle while intoxicated. The officer took him to the Urbandale Police Station, read him an implied consent advisory which explained the consequences of refusing a chemical test, then asked Oliver whether he wished to telephone anyone. Oliver said he did and, at 1:25 A.M., he called an attorney and left a message.

When Oliver did not receive a return call from the attorney in the ensuing ten minutes, the officer asked him if he wished to telephone anyone else. Oliver said no, but asked if he could wait longer for his attorney to call back. The officer responded that Oliver needed to immediately decide whether to take the chemical test. At 1:36 A.M. Oliver refused the test and signed an implied consent advisory.

Several minutes after he signed the form, the attorney returned Oliver's phone call and advised Oliver to take the chemical test. Oliver told the officer he had changed his mind but the officer declined to give him the test.

The department of transportation revoked Oliver's driver's license for refusal to submit to a chemical test. The administrative law judge and the

department's reviewing officer affirmed the revocation, as did the district court on judicial review. This appeal followed.

II. Standard of Review

On appeal from a judicial review ruling, we apply the standards of Iowa Code section 17A.19(8) to our review of agency action, to assess whether our conclusions coincide with those reached by the district court. *Wieslander v. Iowa Dep't of Transp.*, 596 N.W.2d 516, 520 (Iowa 1999). Here, we must decide whether the district court correctly applied the law. *Id.* We are bound by the agency's fact findings "unless a contrary result is demanded as a matter of law." *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 677 (Iowa 1995) (citation omitted).

III. Statutory Right to Attorney Consultation

Iowa Code section 804.20 (1997) grants detained persons a right to counsel.[1] This statutory right, however, is not absolute, affording the arrestee only a "reasonable opportunity to contact an attorney." *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). Oliver does not dispute he was given the opportunity to contact an attorney before refusing the test. Instead, he contends the opportunity was not reasonable because the officer: (1) did not wait long enough for the attorney to return Oliver's call and (2) did not allow him to

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[1] That provision states in pertinent part:

[a]ny 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." *See* Iowa Code § 804 20 (1997).

rescind his revocation after he spoke to the attorney. We will address each contention.

A. Obligation to Wait. Oliver's contention that the peace officer should have waited before invoking the implied consent provision is premised on Iowa Code section 321J.6(2). That section prohibits an officer from invoking the implied consent provision of the statute unless the officer offers the chemical test within two hours from the time a preliminary screening test is administered. Oliver maintains the officer could easily have waited for the attorney's phone call without running afoul of the two hour time limit. The district court rejected this argument, stating,

> Rather than requiring law enforcement officers to wait any particular length of time in these situations, the Iowa Supreme Court has simply stated that an arrestee must be given the opportunity to contact another attorney. Since Petitioner was given such an opportunity, this court finds that the Department of Transportation correctly denied Petitioner's appeal.

We agree with the district court.

This case is not unlike *Bromeland*, in which an officer placed a call to an attorney, let the phone ring fifteen to twenty times, then hung up and asked Bromeland if he wanted to call another attorney. Bromeland declined the offer and the officer invoked implied consent. The Iowa Supreme Court held Bromeland's statutory right to counsel was not violated. *Bromeland*, 562 N.W.2d at 626. The court reasoned Bromeland had no absolute right to talk to the attorney of his choice if that person could not be reached, but should instead have availed himself of the offer to select another attorney. *Id.*

Like Bromeland, Oliver was given the chance to contact someone else when he could not reach the attorney of his choice. Oliver declined the offer.

Under *Bromeland*, we conclude the officer's statutory obligation to make counsel available to Oliver ended at this juncture.

We find inapposite the authority cited by Oliver in support of a contrary result. *See Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa App. 1990); *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576 (Iowa App. 1989). In *Haun*, we held the arrestee was denied his statutory right to counsel where the arrestee informed the officer he had spoken to his attorney and the attorney would be calling again. We stated the officer "was effectively put on notice that appellee desired further communications with his attorney and was expecting another phone call from his attorney." *Haun*, 462 N.W.2d at 306. Here, in contrast, neither Oliver nor the officer knew whether or when the attorney would return Oliver's call. Therefore, the fact the attorney happened to call minutes after Oliver refused the test is immaterial for purposes of our analysis. Unlike the situation in *Haun*, the officer could not have been expected to wait for a call he did not know was coming.

Similarly, in *Short v. Iowa Department of Transportation*, 447 N.W.2d 576 (Iowa App. 1989), we held the licensee was denied a reasonable opportunity to consult with counsel where he notified the officer his attorney was coming to the jail but the officer nevertheless invoked implied consent. *Id.* at 577. It is true *Short* turned on the fact the officer had approximately forty-five minutes of the two-hour statutory window remaining when he invoked implied consent, as did the officer here. However, unlike Short, Oliver had exercised his right to counsel by the time the officer invoked implied consent. *Cf. Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa App. 1991) (noting, unlike Short, Moore was allowed a substantial right to confer with counsel). Additionally, Oliver did not

and indeed could not have told the officer that a phone call or attorney visit was imminent. Therefore, *Short* also is distinguishable. For these reasons, we conclude the officer did not violate Oliver's statutory right to counsel by failing to wait longer for a phone call from an attorney.

B. Obligation to Rescind Revocation. Citing *Fuller v. State*, 275 N.W.2d 410, 411 (Iowa 1979), Oliver next maintains the officer should have allowed him to rescind his revocation after he spoke to his attorney. The district court rejected this argument and so do we. In *Fuller*, the defendants initially refused to take a chemical test. Then, they changed their minds after speaking to attorneys. The officer nevertheless invoked implied consent based on the initial refusals. The Iowa Supreme Court held if a defendant is denied the statutory right to counsel he cannot be held to have refused a chemical test. *Fuller*, 275 N.W.2d at 411. Here, Oliver was not denied his right to counsel before refusing the chemical test. The officer let him call his attorney and also gave him the chance to call another attorney before refusing the chemical test. Therefore, *Fuller* is not controlling.

Oliver also cites *Didonato v. Iowa Department of Transportation*, 456 N.W.2d 367, 370 (Iowa 1990) for the proposition that a signature on an implied consent form does not necessarily constitute a final decision. However, as in *Fuller*, Didonato did not exercise his right to speak to counsel until after he signed the form. The court held "[w]hen the requested telephone call is permitted subsequent to signing the form, and the individual involved has an actual opportunity to consult with counsel or a family member before submitting to the chemical test, the purposes behind the statute are served." 456 N.W.2d at 371.

Because Oliver exercised his right to speak to counsel before refusing the chemical test, *Didonato* is inapplicable. As the Iowa Supreme Court stated more than two decades ago, "[t]o hold [the officer] was required to consider the refusal only conditional or subject to withdrawal during the two-hour period after arrest would require the patrolman to remain with or near the arrested person" for the entire two-hour period. *Kreuger v. Fulton*, 169 N.W.2d 875, 879 (Iowa 1969). The court concluded such a requirement would be unreasonable where the proper implied consent procedures were followed. Although decided before our highest court recognized a limited statutory right to counsel in *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978), we find the reasoning in *Fulton* persuasive. In sum, we conclude Oliver did not have a right to rescind his refusal to take the chemical test when he was afforded his statutory right to counsel before refusing the test.

We affirm the department's decision.

AFFIRMED.