IN THE COURT OF APPEALS OF IOWA

No. 0-495 / 99-1682
Filed September 27, 2000

DWAYNE LEROY JENSEN,
Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,
Appellee.

FILED
SEP 27 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cass County, Timothy O'Grady, Judge.

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

Terrance G. Rutherford and Carl J. Petersen of Rutherford, Trewet & Petersen, Atlantic, for appellant.

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

Considered by Vogel, P.J., and Miller and Hecht, JJ.

VOGEL, P.J.

Dwayne Jensen appeals the district court's ruling on judicial review affirming the revocation of his driver's license for a chemical test failure pursuant to Iowa Code section 321J.12 (1997). Because we find the officer had both reasonable grounds to believe Jensen was operating the vehicle while intoxicated and probable cause to arrest, we affirm the driver's license revocation.

Background facts. Jensen was stopped in November 1998 by State Trooper Martin McCreedy for swerving onto the right fog line, then into the oncoming traffic's turning lane. Upon approaching the vehicle, Trooper McCreedy noticed a strong odor of alcohol and Jensen's slurred speech. When questioned, Jensen admitted that he had been drinking that evening. Trooper McCreedy administered two field sobriety tests, including the horizontal gaze nystagmus and the walk and turn tests. After Jensen failed both of these, the trooper administered a preliminary breath test (PBT), which showed a result over the Iowa Code section 321J.2 limit of .10. Jensen was then arrested. Implied consent was invoked and Jensen submitted a breath sample for an Intoxilyzer analysis, which registered an alcohol level of .118. Jensen's license was revoked pursuant to Iowa Code section 321J.12.

Jensen requested a hearing regarding his driver's license revocation. Administrative Law Judge Mark Wampler affirmed the revocation as did the Iowa Department of Transportation. The revocation was affirmed by the district court and Jensen now appeals that decision.

Scope of review. Our review of a DOT revocation decision is governed by Iowa Code section 17A, Iowa's Administrative Procedure Act. *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.*

Requirements to invoke implied consent. Jensen argues the requirements to invoke implied consent for chemical testing were not met because the trooper did not have reasonable grounds to believe he was operating while intoxicated, the results of the PBT were suppressed, and there was no probable cause for an arrest.

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, including the defendant's lawful arrest for operating while intoxicated or a preliminary breath result of .10 or more. *Id.*

Jensen claims Trooper McCreedy told him prior to administering the PBT that if he tested under .10, he would not be arrested. Although he tested over

.10, the results were suppressed and therefore, Jensen argues, there was no basis for invoking implied consent. On our review of the transcript of the revocation hearing and the videotape of the stop, we disagree with Jensen's position. Trooper McCreedy testified regarding his general procedure for using the preliminary breath test in OWI stops.

> Q. All right. Now, tell me what the procedure is - - if you're using it either for evidentiary or a screening device - - the PBT? A. Okay. I offered the test for screening purposes to make sure it's safe for me to release him if he scores under a .1 - - if it's all right to let him go down the road for public safety reasons.
>
> Q. All right. A. If he's close to a .1 but under I probably would have had him give me a - - a phone number and had someone come out and drive him home. If he's over .1 then I'm using him for evidentiary reasons.

The videotape contained a statement by Trooper McCreedy that if Jensen had only consumed two alcoholic beverages, as he had indicated, he would not test over the .10 limit. That statement did not, however, insure that Jensen would be free to go with such a result. Therefore, we cannot conclude the PBT was the sole reason for invoking implied consent.

However, even without the preliminary breath test results, Trooper McCreedy had reasonable grounds to believe Jensen was operating his vehicle while intoxicated. Trooper McCreedy knew these facts before the arrest: Jensen swerved back and forth across the road; he had a strong smell of alcohol on his breath; he admitted to drinking alcohol that evening; his speech was slurred; and he failed the walk and turn field sobriety test as well as the horizontal gaze nystagmus test. The videotape of the stop confirms the department's rendition of these facts. These facts not only supported reasonable grounds to believe

Jensen was operating while intoxicated but also provided probable cause to arrest Jensen, notwithstanding the suppressed preliminary breath test result. *See Ramsey v. Iowa Dep't of Transp.*, 576 N.W.2d 103, 107 (Iowa 1998) (defining the reasonable grounds test as whether the facts and circumstances known to the officer at the time the action was required would have warranted a prudent person's belief that an offense has been committed).

We find substantial evidence supports the department's findings that Trooper McCreedy had both reasonable grounds to believe Jensen was operating the vehicle while intoxicated and probable cause to arrest. Therefore, the requirements to invoke implied consent were properly met and the Intoxilyzer result validly offered into evidence. Accordingly, we affirm the revocation.

AFFIRMED.