

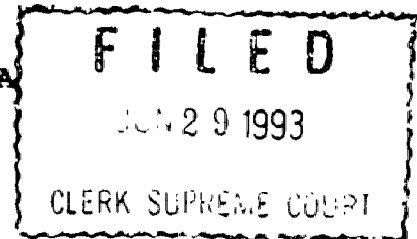
IN THE COURT OF APPEALS OF IOWA

No. 3-282 / 92-1852

DAVIE YOUNG and DOUG CROUSE
d/b/a CHILLS AND THRILLS,
Petitioners-Appellees,

vs.

ALCOHOLIC BEVERAGES DIVISION,
DEPARTMENT OF COMMERCE,
Respondent-Appellant.



000323

Appeal from the Iowa District Court for Wapello County,
Phillip R. Collett, Judge.

The Alcoholic Beverages Division of the Department of Commerce appeals from the district's court reversal of the agency's decision that the petitioners had violated Iowa Code section 123.49 (1991) by serving alcoholic beverages to an intoxicated person. **AFFIRMED.**

Bonnie J. Campbell, Attorney General, and Jeffrey D. Farrell, Assistant Attorney General, for appellant.

Patrick F. Curran of Vinyard & Curran, Ottumwa, for appellees.

Heard by Sackett, P.J., and Habhab, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, J.

000325

The sole issue in this appeal is whether the district court correctly determined there was not substantial evidence to support the finding of respondent-appellant Alcoholic Beverages Division, Department of Commerce, that an employee of petitioners-appellees Davie Young and Doug Crouse served an alcoholic beverage to an intoxicated person in violation of Iowa Code section 123.49 (1991). We agree with the trial court there was not and affirm.

The appellant, Department of Commerce, Alcoholic Beverages Division, sought to revoke the liquor license of Chills and Thrills Bar in Ottumwa on the charge that a bartender working in the establishment had sold an intoxicating beverage to Kenneth Carnes when Carnes was intoxicated. The matter was tried to an administrative law judge who found the bartender had sold a beer to Carnes when Carnes was intoxicated. The administrative law judge ordered the license of Chills and Thrills suspended for ten days. Richard L. Morrell, the Administrator of The Alcoholic Beverages Division, Department of Commerce, on his own motion filed an order to review the administrative law judge's decision. The Administrator adopted the findings and conclusions of the administrative law judge but increased the suspension period to twenty-one days. Young and Crouse appealed the decision and the vice chairperson of the Hearing Board of the Iowa Department of

Public Safety found no reason to overturn the decision of the Administrator and ordered a twenty-one day suspension.

Young and Crouse filed a petition for judicial review before the district court. The district court concluded the decision that the bartender at Chills and Thrills violated Iowa Code section 123.49(1) was not supported by substantial evidence and the district court ordered that the decision to suspend their license be reversed. The Department has appealed challenging this decision. We affirm.

The facts as found by the administrative law judge are that Carnes went to Chills and Thrills between 11:55 p.m. on October 10, 1990, and 12:10 a.m. on October 11, 1990. Carnes ordered a beer and a glass of ice. They were served to him and he paid for them. He did not drink the beer but went to the telephone and made a call. After making the call, Carnes told the bartender he had been assaulted and had called the Ottumwa Police Department. Telling the bartender at Chills and Thrills he would be back, he went across the street to a second liquor establishment, The Lucky Diamond.

Thirty to forty-five minutes later, two officers came into The Lucky Diamond in response to Carnes' complaint. The officers testified Carnes had a strong odor of alcohol and had difficulty standing. They discussed the assault with Carnes and Carnes decided not to press charges. While giving the opinion Carnes was intoxicated, the officers did

not arrest Carnes for public intoxication, apparently because he claimed to be a victim of an assault. The officers watched Carnes cross the street and go to the Chills and Thrills where they found him drinking a beer. The beer he was drinking was determined to be the beer he had been served about midnight. At 12:40 a.m., Carnes was arrested for public intoxication.

The issue is whether there is substantial evidence to support the agency's finding that the bartender at Chills and Thrills violated section 123.49¹ when he served Carnes a beer about midnight. The bartender, who was acquitted of a criminal charge filed against him for violating section 123.49, testified Carnes was not intoxicated when the beer was served. The evidence Carnes was intoxicated came from the police officers who found Carnes in another bar at least thirty-minutes later. And while testifying Carnes was then intoxicated, they did not arrest him for public intoxication until he had returned to Chills and Thrills.

The trial court in reaching its decision said:

The agency's decision that the patron was intoxicated at the time he was served relies on the assumption that the patron was in the same condition at the time he was served as he was when the officers observed him and arrested him for public intoxication. This assumption might be warranted if the evidence established a high degree of intoxication. If that had been shown,

1. Iowa Code section 123.49 provides (in relevant part):

1. A person shall not sell, dispense, or give to an intoxicated person, or one simulating intoxication, any alcoholic liquor, wine, or beer.

a reasonable person could, with some assurance, conclude the person was so intoxicated at the time of the observation that he must have been intoxicated 45 minutes earlier. The description of the patron by the officers, their reluctance to press public intoxication charges, and their statement that the result of the PBT test (questionable evidentiary value) was "over .10" does not suggest a high degree of intoxication. Combine these factors with the testimony of the bartender and the common knowledge of a reasonable person that sobriety and intoxication can change dramatically in the span of 45 minutes, it is difficult to see how a reasonable person could conclude that the patron was intoxicated at the time the bartender sold him the beer.

In reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. When we review such action by the district court, we merely apply the standard of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse. Henry v. Iowa Dep't of Transp., Motor Vehicle Dep't, 426 N.W.2d 383, 385 (Iowa 1988). The agency, rather than the district court, is empowered to hear evidence and make findings of fact. Iowa Code § 17A.19(7) (1991). The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. Iowa Code § 17A.19(8) (1991); Kohorst v. Iowa State Commerce Comm'n, 348 N.W.2d 619, 621 (Iowa 1984). Our review of the district court's

decision is limited to correction of errors at law. See Roberts v. Iowa Dep't of Job Serv., 356 N.W.2d 218, 221 (Iowa 1984). We, like the district court, are bound by the agency's fact findings if those findings are supported by substantial evidence. Iowa Code § 17A.19(8)(f) (1991). Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Peoples Memorial Hosp. v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982).

The focal question is whether the officers' testimony as to the intoxication of Carnes, in another liquor establishment some thirty minutes after the drink was sold in the Chills and Thrills, proved by a preponderance of the evidence Carnes was intoxicated when he was served. We agree with the district court that it did not. We note, as did the district court, the officers did not determine Carnes' condition was such that he should be arrested for public intoxication at the time of their initial observation. Affirmed.

AFFIRMED.