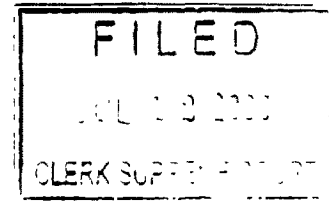


IN THE COURT OF APPEALS OF IOWA

No. 0-038 / 99-567
Filed July 12, 2000



JAMES PAUL OSBERG
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.

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

Richard A. Bartolomei of Bartolomei & Lange, P.C., Des Moines, 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 Mahan, P.J., Zimmer, J., and Hayden, S.J.*

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

HAYDEN, S.J.

James Paul Osberg appeals from the district court's ruling on judicial review affirming the respondent's revocation of petitioner's driver's license under Iowa Code chapter 321J for chemical test refusal. We affirm.

Officer Rodney J. Pavelka of the Stuart, Iowa police department was on call on May 23, 1998. He was in his second story apartment at approximately 2:14 a.m. and heard loud voices from the street. He stated that he saw two subjects enter a Mustang and start the car. The tires began to spin and left marks of nearly seventy feet. Officer Pavelka went to his patrol car and called deputy Lilly and requested the deputy provide him back up. He heard sounds coming from the same red Mustang and later observed black tire marks of one hundred ten feet were left in this incident. Officer Pavelka stopped this red Mustang.

The administrative law judge found officer Pavelka credibly testified the red Mustang was driven by the same person he had first seen from his apartment window. At the time Pavelka stopped Osberg he was not in uniform but was in a marked squad car and was wearing his badge. He spoke with Osberg who was behind the wheel of the Mustang. The keys were not in the ignition of the Mustang and it was not running at the time officer Pavelka approached that vehicle. Both officers Pavelka and Lilly spoke with the driver, Osberg. Lilly observed Osberg's eyes were watery and blood-shot. Osberg failed the horizontal gaze nystagmus test and other field sobriety tests. Osberg refused to take a preliminary breath test at approximately 2:25 a.m., May 23, 1998. He was arrested for OWI.

Osberg was taken to the Guthrie County jail, in Guthrie Center, Iowa. At the jail, Osberg was permitted to make three phone calls. First, he called his family and the two remaining calls were placed to his attorney Richard Bartolomei at approximately 3:20 a.m. and 3:25 a.m. Osberg stated he would not take the chemical test and would not do anything until his attorney arrived. Osberg's refusal to take the chemical test was recorded at 3:30 a.m. Osberg's attorney arrived with five minutes to spare on the two hour limit for implied consent testing. Before attorney Bartolomei arrived officer Pavelka invoked Osberg's refusal of implied consent.

Officer Pavelka served Osberg with notice his privilege to operate a motor vehicle was revoked for refusing to take a chemical test pursuant to Iowa Code section 321J.9 (1999). Osberg requested and received a contested case hearing to challenge the revocation. Osberg appealed this decision to the DOT reviewing officer. On October 2, 1998, the reviewing officer affirmed the administrative law judge's decision. Osberg's operators license was revoked by the DOT for 240 days. Osberg petitioned for judicial review in the district court for Polk County, Iowa. On March 1, 1999, the district court affirmed the DOT's revocation of Osberg's operators license.

Osberg appealed the district court's decision to the Iowa Supreme Court and it has been transferred to this court for appellate decision.

On judicial review of an agency action, the district court functions in an appellate capacity to apply the standards of the Iowa Code section 17A.19(8). *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). A district court acts in an appellate capacity to correct errors of law

on the part of the agency. *Swanson v. Employment Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa App. 1996). Nearly all disputes in the field of administrative law are won or lost at the agency level. *Iowa-Illinois Gas & Electric Co. v. Iowa State Commerce Comm'n*, 412 N.W. 2d 600, 604 (Iowa 1987).

Iowa Code section 17A.19(8)(f) (1999) provides that, in a contested case the court shall grant relief from an agency decision that is unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole. *Neil v. John Deere Component Works*, 490 N.W.2d 80, 82 (Iowa App. 1992). The question is not whether the evidence might support a different finding but whether the evidence supports the finding actually made. *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996). The mere possibility the record might support another conclusion does not permit the reviewing court to make a finding inconsistent with the agency's finding so long as there is substantial evidence to support the agency ruling. *City of Davenport v. Public Employment Relations Bd.*, 264 N.W.2d 307, 311-12 (Iowa 1978). The agency decision should be affirmed when there is not error of law and the decision is supported by substantial evidence. *Heatherly v. Iowa Dep't of Job Serv.*, 397 N.W.2d 670, 670 (Iowa 1986). Evidence is substantial if a reasonable mind would accept it as adequate to reach the same findings. *Swanson*, 554 N.W.2d at 296.

First, Osberg contends there were no reasonable grounds based on the facts available to officer Pavelka at the time he stopped Osberg to believe he was operating while intoxicated. Osberg indicates under Iowa Code section 321J.9, there are three elements that must be proven before a drivers license

can be revoked for a test refusal. First, that reasonable grounds exist to believe that person was operating while intoxicated. *Westendorf v. Iowa Dept. of Trans.*, 400 N.W.2d 553, 555 (Iowa 1987). Second there existed one or more of the necessary conditions for chemical testing. *Id.* Third, the person refused to submit to chemical testing. *Id.* He also indicates reasonable grounds must be present at the time the officer is required to act. *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682, 685 (Iowa 1976).

We have reviewed and considered the entire record and evidence and the applicable law. We hold there was substantial evidence to support the findings of the agency reasonable grounds existed at the time of Osberg's arrest for the officer's to believe he was operating while intoxicated.

Osberg next claims he was denied his statutory and constitutional right to private consultation with his attorney of choice before being required to submit to chemical testing. Osberg asserts he was never permitted to consult with his attorney privately and confidentially.

Iowa Code section 804.20 is set forth as follows:

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 *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978), the Iowa Supreme Court held that there is a limited statutory right to counsel before making the important decision to take or refuse a chemical test under implied consent procedures. We note the right to counsel is limited to those circumstances that do not materially interfere with the administration of the test within the two-hour time period specified in Iowa Code section 321J.6(2). See *Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa App. 1990). The two-hour time period commences after the preliminary screening test has been administered, refused, or the individual has been arrested. Iowa Code section 321J.6(2).

In the case of *Moore v. Iowa Dep't of Trans.*, 473 N.W.2d 230, 231 (Iowa App. 1991), the Iowa Court of Appeals held the two-hour time period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing. Also, that court determined a right to counsel is generally satisfied if the arrestee is allowed to make a phone call to his or her attorney. *Moore*, 473 N.W.2d at 231.

We find no requirement in Iowa Code section 804.20 the telephone calls Osberg made to attorney Bartolomei be confidential and private. Osberg made two phone calls to his attorney. The officer was not required to wait until attorney Bartolomei arrived at the jail for a personal consultation with Osberg. See *Id.* We note it is approximately sixty miles from Des Moines to Guthrie Center.

We hold Osberg was given a reasonable opportunity to consult with his attorney by telephone before officer Pavelka marked the implied consent form "REFUSED." There was no violation of the limited statutory right to counsel in

this case. There was substantial evidence to support the finding of the agency and the district court.

Osberg does not argue or cite any authority in support of his claim that he was denied a constitutional right to private consultation with his attorney. We deem the constitutional issue waived and do not consider it on this appeal. See Iowa R. App. P. 14(a)(3).

AFFIRMED.