IN THE COURT OF APPEALS OF IOWA

No. 1999-576 (9-857) / 99-0776
Filed May 31, 2000

FILED
MAY 3 1 2000
CLERK SUPREME COURT

BRET ALAN PELLETT,
Petitioner-Appellant,

vs.

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

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

Bret Alan Pellett appeals the district court's ruling affirming the administrative revocation of his driver's license for chemical test refusal pursuant to Iowa Code Section 321J.9 (1997). **AFFIRMED.**

Terrance 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 Mahan and Miller, JJ.

VOGEL, P.J.

Plaintiff-appellant, Bret Alan Pellett, appeals the district court's affirmance of the administrative revocation of his driver's license for chemical test refusal. He claims the court erred in (1) finding substantial evidence supports the finding the officer had reasonable grounds to believe he was operating while intoxicated; (2) ruling even though the preliminary breath test was improper, implied consent was invoked properly upon him; and (3) ruling he had waived his constitutional claim concerning the implied consent statute by not raising it before the agency.

About 2:00 o'clock one morning an officer stopped Pellett after he drove out of an alley with his headlights off. The officer noticed an odor of alcohol and an open beer container in the vehicle. When asked, Pellett admitted he had been drinking. The officer testified Pellett's speech was slurred, but did not note this observation in his initial report. The officer had Pellett perform three sobriety tests and determined Pellett failed them all. He did a preliminary breath test (PBT) which Pellett also failed. The officer arrested Pellett for operating while intoxicated. At the police station, Pellett refused to submit to further chemical testing. The Department of Transportation revoked his driver's license for test refusal under the implied consent statute. Iowa Code §§ 321J.6, 321J.9. Pellet pursued administrative appeals and the revocation was affirmed. Pellett sought judicial review, and the district court affirmed the agency's revocation of Pellett's license. Pellett appeals.

Section 321J.14 provides for judicial review of a Department of Transportation action in accordance with Iowa Code chapter 17A. *Tripp v. Iowa*

Dep't of Transp., Motor Vehicle Div., 474 N.W.2d 812, 814 (Iowa App.1991). Our scope of review is limited to correction of errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982). We review a district court decision rendered in an appellate capacity to determine whether the district court correctly applied the law. *Id.* To make that determination, we apply the standards of Iowa Code section 17A.19(8) (1995) to the agency's action to determine if our conclusions are the same as the district court's. *Zenor v. Iowa Dept. of Transp., Motor Vehicle Div.*, 558 N.W.2d 427, 430 (Iowa App. 1996). The burden is on the licensee to prove compliance with the implied consent law and that the officer did not satisfy the procedural requirements of the law. *Ramsey v. Iowa Dept. of Transp., Motor Vehicle Div.*, 576 N.W.2d 103, 106 (Iowa 1998).

Pellett first claims the district court erred in finding substantial evidence to determine the officer had reasonable grounds to believe Pellett was operating while intoxicated, thus permitting invocation of implied consent procedures. Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 917 (Iowa App.1985). The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App.1986). The fact that two inconsistent conclusions can be drawn from the evidence does not mean one of those conclusions is unsupported by substantial evidence. *Id.* Pellett asserts the field sobriety tests were not

administered in a reasonable manner and the district court found the PBT was administered too soon, so could not be used. Therefore, he reasons, the officer did not have reasonable grounds to believe he had operated his vehicle while intoxicated. Without reasonable grounds, Pellett claims, invoking implied consent procedures was improper.

The reasonable grounds test is passed when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief the offense has been committed. *State v. Braun*, 495 N.W.2d 735, 738-39 (Iowa 1993). The record reveals the officer observed Pellett driving at about 2:00 a.m. without headlights. He noticed an odor of alcohol. Pellett admitted he had been drinking. The officer administered several field sobriety tests and determined, according to his training and experience, that Pellett did not pass the tests. We agree with the district court that substantial evidence in the record, apart from the PBT, supports a finding the officer had reasonable grounds to believe Pellett had committed the offense as set forth in Iowa Code section 321J.2.

Pellett next claims the court erred in ruling that even though the PBT was administered too soon, the implied consent request was proper. He claims none of the grounds for invoking implied consent existed. *See* Iowa Code § 321J.6(1)(a)-(g); *State v. Braun*, 495 N.W.2d 735, 738 (Iowa 1993) (noting PBT results and the finding of reasonable grounds are two separate criteria). Because the officer had lawfully placed Pellett under arrest for violation of section 321J.2, we conclude the officer properly invoked implied consent procedures and

Pellet's refusal to submit to testing resulted in the administrative revocation of his license.

Finally, Pellett claims the district court erred in ruling that he waived his constitutional claim by not presenting it to the agency. He argues agencies do not have jurisdiction over constitutional issues and the district court was his first opportunity to raise this claim. The Department of Transportation asserts, and the district court determined, that Pellett's constitutional arguments were waived because he did not raise them before the agency. In contested cases such as this, our review is limited to those questions considered by the agency. *Chicago & N.W. Transp. Co. v. Iowa Transp. Regulation Bd.*, 322 N.W.2d 273, 276 (Iowa 1982). Constitutional issues must be raised before the agency to be preserved for judicial review. *Fisher v. Board of Optometry Examiners*, 478 N.W.2d 609, 612 (Iowa 1991); *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 283 (Iowa 1991). This is true even though the agency lacks authority to decide constitutional questions. *Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994); *Office of Consumer Advocate*, 465 N.W.2d at 283; *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 430 (Iowa 1987). Pellett did not raise his claim before the agency, so it is not preserved for our review.

AFFIRMED.