IN THE COURT OF APPEALS OF IOWA

No. 0-205 / 98-1517
Filed June 28, 2000

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JUN 28 2000
CLERK SUPREME COURT

CARLA GAY SELLERS GRIFFIN,
Petitioner-Appellant,

vs.

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

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Griffin appeals from the district court's ruling on judicial review affirming the respondent's decision to revoke her driver's license. **AFFIRMED.**

James A. Sinclair and Jeffrey M. Weber of Sinclair & Assoc., P.C., West 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 Streit, P.J., and Zimmer and Hecht, JJ.

STREIT, P.J.

Carla Griffin alleges the Iowa Department of Transportation wrongly revoked her driver's license when she refused to submit to chemical testing after her arrest for operating a motor vehicle while intoxicated. She claims her refusal does not have any legal effect because she was denied her statutory right to counsel. Finding the arresting officer afforded her a reasonable opportunity to reach an attorney, we deny her claim and affirm the revocation.

I. Background Facts & Proceedings.

Carla Griffin was arrested at 2:33 a.m. in Marion County for operating a motor vehicle while intoxicated (OWI). At the county jail, Griffin asked to call an attorney before she gave a breath test. She called her husband who gave her a number of an attorney in Des Moines. The number was incorrect, so an officer looked up the office phone number of the attorney she wanted to contact. She left a message at the attorney's office and refused to take the test until the attorney called back. The arresting officer waited twenty minutes for the attorney to call back. When no one called back and Griffin remained adamant about waiting for the attorney's call, the officer marked down her refusal to submit to chemical testing. About ten minutes later, the attorney called.

Griffin's license was revoked for failing to submit to a chemical test under Iowa Code section 321J.9 (1997). She petitioned for administrative review of the revocation, alleging she was denied the reasonable opportunity to contact her attorney and seek his advice. An administrative law judge denied her claim, finding she had a reasonable opportunity to consult with an attorney. On

administrative appeal the Iowa Department of Transportation affirmed the ALJ's decision. Griffin then petitioned the district court for judicial review. The district court concurred with the prior administrative rulings.

Griffin now appeals, claiming the previous rulings were reached in error as she was denied her statutory right to counsel under Iowa Code section 804.20.

II. Standard of Review.

Judicial review of the actions of an administrative agency is governed by the standards of Iowa Code section 17A.19. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996). The agency's decision is final if it is supported by substantial evidence and is correct in its conclusions of law. *Id.* The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence. *Id.* Evidence is substantial when a reasonable person could accept it as adequate in reaching a similar finding. *Pointer v. Iowa Dep't of Transp*, 546 N.W.2d 623, 625 (Iowa 1996). It is the licensee's burden to show compliance with the implied consent law and the officer's failure to satisfy the procedural requirements. *See Ramsey v. Iowa Dep't of Transp.* 576 N.W.2d 103, 106 (Iowa 1998); *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 697 (Iowa 1995).

III. The Merits.

Under Iowa law, a person arrested for OWI must be given a reasonable opportunity to contact an attorney prior to deciding whether to consent or refuse

to chemical testing.[1] *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997) (citing *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)). If an arrestee is denied that right, she cannot be held to have refused testing. *See Fuller v. Iowa Dep't Transp.*, 275 N.W.2d 410, 411 (Iowa 1979). If there is no refusal, there are no grounds for license revocation. *Id.*

In the OWI context, the statutory right to counsel is juxtaposed against Iowa Code section 321J.6(2), which demands any chemical testing be conducted within two hours of the arrest. The mere existence of this two-hour time period, however, does not necessarily grant every arrestee two full hours to consult or acquire an attorney. *Moore v. Iowa Dep't of Transp*, 473 N.W.2d 230, 231 (Iowa App. 1991). Rather, the right to counsel is normally satisfied by allowing the arrestee to make a telephone call. *Bromeland*, 562 N.W.2d at 626 (citing *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988); *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576, 578 (Iowa App. 1989)). If an arrestee's attorney cannot be reached promptly, she may then "'be required to elect between taking the test and submitting to revocation of [her] license, without the

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[1] Section 804.20 provides:

> 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.

Iowa Code § 804.20 (1997).

aid of counsel.'" *State v. Vietor*, 261 N.W.2d at 831 (quoting *People v. Gursey*, 239 N.E.2d 351, 342 (N.Y. 1968)).

Griffin was presented with a reasonable opportunity to contact an attorney. She was permitted to call her husband who gave her an attorney's phone number. When the phone number her husband had given her proved to be incorrect, the officer found the correct number in the phone book and permitted her to call the attorney's office. No one was present at the attorney's office, but she did leave a message with an answering service. Griffin did not attempt to call another attorney and was adamant about waiting for this particular attorney to return her call. The officer waited twenty minutes for the return phone call and when none came, invoked implied consent. Substantial evidence supports the administrative agency's conclusion that the procedural requirements of Iowa Code section 804.20 were met. Based on the record, a reasonable person could readily conclude Griffin was granted a reasonable opportunity to contact an attorney prior to making a decision. In a situation where she could not reach her attorney of preference, received no return phone call for twenty minutes, and failed to seek legal advise elsewhere; an officer may demand an arrestee to make a decision. The license revocation is affirmed.

AFFIRMED.