FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MERYLE LEE GORDON,

Plaintiff-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Defendant-Appellant.

Filed January 29, 1986

108

5-570
85-713

Appeal from the Iowa District Court for Clarke County - M. J. Streit, Judge.

Defendant appeals the district court's ruling reversing its revocation of plaintiff's license under Iowa Code section 321B.16 (1985). **AFFIRMED.**

Thomas J. Miller, Attorney General of Iowa, and Mark Hunacek, Assistant Attorney General, for defendant-appellant.

Richard J. Murphy and Richard O. McConville of Scalise, Scism, Sandre, and Uhl, Des Moines, Iowa, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Sackett, JJ.

Defendant appeals the district court's ruling reversing its revocation of plaintiff's license under Iowa Code section 321B.16 (1985). We affirm the district court.

Plaintiff was arrested by Osceola police officer Michael Petricca for allegedly driving while intoxicated. Officer Petricca transported plaintiff to the police station where plaintiff consented to take a breath test. Officer Petricca then watched as Officer Britt administered the intoxilyzer test to plaintiff. Both officers testified that they observed the intoxilyzer machine 4011A display a digital figure of .177 when plaintiff performed the test. However, the printed test record from the machine showed superimposed numbers in the column where blood-alcohol and calibration percentages are recorded. Despite the malfunctioning of the machine's printed test record, defendant revoked plaintiff's driving privileges according to Iowa Code section 321B.16.

At the hearing plaintiff agreed to stipulate that the police officer had probable cause to arrest and that the arrest itself was procedurally correct. Therefore, the single issue contested at the hearing was whether there was such a defect in the intoxilyzer machine so as to substantially affect the resulting measurement of breath alcohol content. Both police officers were unable to explain why two sets of numbers appeared on the printed result. Officer Britt, who administered the test, testified that he had no knowledge of the internal functions of the machine and could not say for sure whether or not the instrument had a defect in the calibration of the filter. Both Officer Britt and Officer Petricca stated that they saw .177 displayed on the LED readout of the machine when plaintiff performed the test, and that no "error" signal flashed on the machine. But neither officer could explain why the printed result had the extra

numbers According to Officer Britt, this specific problem had never occurred before

The printed result was closely scrutinized during the hearing. While both officers testified that they interpreted the result to be .177, upon cross-examination they each admitted that, because of the extra numbers, the breath result could be interpreted as .00, .17, .07 or .10. Officer Britt also admitted that, according to the instrument's manual, the additional numbers could indicate more than a ten percent error in the calibration reading of the intoxilyzer's filter

At the end of his cross-examination of Officer Britt, plaintiff's attorney [RM], asked the following questions:

> RM I understand there are zeroes, but you indicated from the very beginning of your testimony what you felt was the two possibilities of what happened here was that there was numbers and there were zeroes printed over them.
>
> OB There could've been, sir.
>
> RM: Well, I think that's what you testified, and that was your second assumption.
>
> OB: That may be, sir.
>
> RM: All right.
>
> OB: I'm not a lab expert, sir.
>
> RM: If that's the case, then, using your second assumption, then .19 is your calibration reading, isn't that correct?
>
> OB: That, I don't know, sir.
>
> RM: All right. And if that is correct, if your assumption is correct, isn't that error in regard to your statement here as far as whatever exhibit this is, the operational checklist?
>
> OB: I could not be positive, sir.

RM: All right. And you can't be positive, then, whether the machine was printing wrong, or whether the LED was wrong?

OB: No, sir. I do not know the functions of the machine internally.

RM: Okay. So something was wrong, but you don't know what it was?

OB: Apparently, sir, there may have been something wrong.

The hearing officer in this case found as a fact that, notwithstanding the malfunctioning in the printing mechanism, plaintiff's breath alcohol content was 177. This finding of fact was affirmed on administrative appeal.

On plaintiff's application for judicial review, however, the district court held that the agency's finding of fact was not supported by substantial evidence and therefore reversed defendant's ruling. The only issue raised on appeal is whether the district court was correct in reversing the agency's decision on the basis that it was unsupported by substantial evidence.

An agency action may be reversed if the action is "unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code § 17A.19(8)(f) (1985). Evidence is considered substantial when a "reasonable mind would accept it as adequate to reach a conclusion." City of Davenport v. P.E.R.B., 264 N.W.2d 307, 311 (Iowa 1975).

Where facts are disputed in an agency action, the Iowa courts have adopted the factual determinations made by the agency as long as they are supported by substantial evidence in the whole record. Newman v. Iowa Dept. of Job Service, 351 N.W.2d 806, 807 (Iowa App. 1984).

Defendant argues that the district court erred twice in its ruling. First it argues that the evidence card printed by the intoxilyzer machine was not the "sole basis" for the DOT action. Defendant states in its brief that in addition

to the evidence on the printed card, the ruling also relied upon the officers' sworn statements that they saw .177 displayed on the digital readout.

We note, however, that Officer Britt, during his cross-examination, not only admitted possible malfunctions with the printed card, but also with the LED readout. Moreover, Officer Britt testified that the decision whether or not to revoke a driver's license is based upon the LED display and the printout. Therefore, by Officer Britt's own admission, the sole piece of evidence that was relied upon to revoke plaintiff's license, was apparently malfunctioning.

Defendant alleges the district court's second error is its "conclusory statement that having two numbers printed over the top of each other 'is only caused by malfunctioning of the instrument and cannot be relied upon in these proceedings.' " Defendant alleges that the plaintiff did not carry his burden of proof because he failed to reveal the cause for the additional numbers, or explain the scientific workings of the breathalyzer, that is, the relationship between a printout defect and a defect in measurement capacity.

If plaintiff was attacking the ability of the machine to accurately measure intoxication, we might be willing to accept defendant's argument. However, that is not the issue before us. We also assume, without deciding, that breathalyzer tests carry a presumption of validity, as long as they function properly. But that is the issue here. The defendant's witness himself testified that there was an apparent malfunction. The question then is, does this malfunction, in this case, rebut the presumption of validity, and in turn prevent the factual determination from being supported by substantial evidence. We hold the answer to both questions is yes. The presumption of validity for any machine necessarily depends upon its functioning properly. And, in this case, when the proper functioning, i.e., validity, of the machine provides the only source of evidence relied upon by defendant to revoke plaintiff's license, simple proof of a malfunction

should cast serious doubt upon its reliability. This, we hold is the same as saying it would be unsupported by substantial evidence. For the defendant to say that the plaintiff's results factually were .177 would be to completely ignore the plain evidence that the machine malfunctioned. Even under our limited review on factual findings, we cannot go so far.

Because we hold the factual findings of the defendant are unsupported by substantial evidence, we affirm the district court.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., dissents.

I determine the agency's finding was supported by substantial evidence. I would reverse the trial court.