IN THE COURT OF APPEALS OF IOWA

No. 1999-577 (9-838) / 99-0325
Filed June 14, 2000

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CLERK SUPREME COURT

JANICE DREW WIESLANDER,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

The respondent appeals from the district court's ruling on judicial review reversing the revocation of the petitioner's driver's license pursuant to Iowa Code section 321J.12 (1995). **REVERSED.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

David L. Brown of Hanson, McClintock & Riley, Des Moines, and J. Patrick Deveny, Des Moines, for appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

The Department of Transportation appeals a district court ruling on judicial review reversing the Department's revocation of Janice Wieslander's license. We reverse the district court and reinstate the final agency decision.

I. Background Facts and Proceedings

On December 1, 1996, Iowa State Patrol Officer Gregory Cox stopped Janice Wieslander as she was driving on a highway east of Des Moines. In a videotape of the stop, Wieslander admitted to consuming at least three beers. Officer Cox found one open beer bottle in her car. Cox took Wieslander to a police station where she submitted to an intoxilyzer test which revealed a blood alcohol content of .179. Cox revoked Wieslander's drivers license for 180 days and required her to surrender her license. Wieslander filed an administrative appeal.

Following a telephone hearing at which Cox was the only witness, the administrative law judge sustained the Department's decision to revoke Wieslander's driving and registration privileges. The Department's reviewing officer affirmed the decision and Wieslander sought judicial review.

The State filed criminal charges against Wieslander, based on the same incident. Following trial, the district court granted Wieslander's motion to suppress the intoxilyzer test results. Wieslander sought to have this ruling admitted as additional evidence in the licensing proceeding. The district court on judicial review remanded the case to the Department to receive and consider the suppression order and to determine the effect of the order under applicable law. Neither the administrative law judge nor the reviewing officer changed the original decisions in light of the suppression order and the case again arrived before the district court.

On May 8, 1998, the court affirmed an agreement of the parties for a limited remand to the agency to consider specified additional evidence, including the suppression order and the transcript of Cox's testimony at the criminal trial.[1]

On remand, the agency considered and rejected this additional evidence and the case arrived before the district court for the third time, for final disposition of the judicial review petition. On February 16, 1999, the district court reversed the agency decision revoking Wieslander's license. The Department appealed.

II. Standard of Review

On appeal from a district court judicial review ruling, we apply the standards of Iowa Code section 17A.19(8) to our review of agency action, to assess whether our conclusions coincide with those reached by the district court. *Wieslander v. Iowa Dep't of Transp.*, 596 N.W.2d 516, 520 (Iowa 1999). Our review of agency action is "severely circumscribed." *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). Where the question is whether agency action is supported by substantial evidence, we ask whether a reasonable person would find the evidence adequate to reach a given conclusion. *Id.* We will not find a lack of substantial evidence merely

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[1] Wieslander also separately petitioned the Department to reopen the license revocation proceeding and rescind the revocation, asserting that an old law applied to her and required rescission in light of the suppression ruling. The Department denied the request to reopen and Wieslander filed a second, separate petition for judicial review of this action. In a ruling dated December 1, 1997, the district court concluded the old law did not apply to Wieslander and, therefore, the criminal suppression ruling did not mandate rescission of the license revocation action. The court affirmed the agency action revoking her license. The Iowa Supreme Court affirmed that ruling. *Wieslander v. Iowa Dep't of Transp.*, 596 N.W.2d 516, 525 (Iowa 1999). The State does not raise issue preclusion as a defense to Wieslander's effort to introduce evidence from the criminal proceeding. The State also does not contend Wieslander was impermissibly attempting to collaterally attack the district court's judicial review ruling in the related proceeding. *See Burns v. Bd. of Nursing*, 528 N.W.2d 602, 604 (Iowa 1995); *Fetters v. Degnan*, 250 N.W.2d 25, 30 (Iowa 1977). Therefore, we do not consider these issues.

because inconsistent conclusions may be drawn from the same evidence. *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 126 (Iowa 1995). "Because review is not de novo, the court must not reassess the weight to be accorded various items of evidence." *Burns*, 495 N.W.2d at 699. We are bound by the agency's factual findings "unless a contrary result is demanded as a matter of law." *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 677 (Iowa 1995) (citation omitted).

III. Substantial Evidence

The Department contends the agency decision is supported by substantial evidence and the district court erred in concluding otherwise. Wieslander counters that she so extensively impugned the credibility of the State's sole witness, that nothing he said or wrote could be believed. Therefore, she maintains his statements do not constitute substantial evidence.

The district court concluded "substantial evidence was introduced to show that the .179 BAC was inaccurate or invalid, and therefore the evidence does not support the findings actually made by the Ruling Officer." We disagree.

Iowa Code section 321J.12 (1995) states in pertinent part:

> Upon certification, subject to penalty for perjury, by the peace officer that there existed reasonable grounds to believe that the person had been operating a motor vehicle in violation of section 321J.2, that there existed one or more of the necessary conditions for chemical testing described in section 321J.6, subsection 1, and that the person submitted to chemical testing and the test results indicated an alcohol concentration as defined in section 321J.1 of .10 or more, the department shall revoke the person's motor vehicle license . . . .

Iowa Code section 321J.2 referenced above addresses the offense of operating while under the influence and Iowa Code section 321J.6(1) lists conditions for chemical testing, including: "[t]he preliminary breath screening was administered

and it indicated an alcohol concentration as defined in section 321J.1 of .10 or more."

In its final agency decision, the Department concluded:

> The pertinent facts and circumstances known to the peace officer at the time he requested the licensee to submit to testing were that the licensee had a strong odor of alcohol, the licensee admitted drinking three drinks, there was an open container in the licensee's vehicle, the licensee failed the horizontal gaze nystagmus field sobriety test, and the licensee refused to perform field sobriety tests when requested. . . . the record supports a finding there existed reasonable grounds to believe the plaintiff had been operating a motor vehicle in violation of section 321J.2.

The agency also noted Wieslander submitted to a chemical breath test and did not challenge the accuracy or validity of the test result, which revealed a blood alcohol content of .10 or more.

We have carefully reviewed the transcript of administrative proceedings, a videotape of the stop, and the evidence submitted to the agency on remand. Although Wieslander cast serious doubt on Cox's overall credibility and raised serious questions about the validity of the stop, she did not directly contradict the key agency findings set forth above.

A revocation decision will be upheld if the statutory revocation grounds are satisfied, even if an officer lacked reasonable cause to stop the vehicle. *Westendorf v. Iowa Dep't of Transp.*, 400 N.W.2d 553, 555 (Iowa 1987). Wieslander did not testify in the administrative proceedings, and the transcript of her testimony in other proceedings was not introduced into this record. There is also no record evidence that the test was manipulated, a contention that Wieslander raised for the first time in her petition for rehearing filed with our court. She therefore, failed to preserve

this issue for review.[2] *See Fenske v. State*, 592 N.W.2d 333, 338-39 (Iowa 1999). Additionally, Wieslander did not deny taking the chemical test and stipulated to its accuracy.[3] Therefore, the record contains evidence supporting each of the requirements set forth in Iowa Code section 321J.12. *Id.* (noting all of listed statutory conditions were present).

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[2] Assuming Wieslander had preserved error on this issue, we note the record does not contain evidence the test was manipulated. Wieslander could have called experts to opine about the age and reliability of the intoxilyzer. She did not do so, relying instead on her attorney's assertion that she did not display the signs of intoxication set forth in Iowa's Law Enforcement Academy Manual. The agency acted well within the scope of its authority in declining to base its ruling on this comparison. *See State v. Van Hoff*, 371 N.W.2d 180, 186 (Iowa App. 1985) (noting statements of counsel are not evidence).

[3] The transcript of a related criminal proceeding submitted to the agency contains the following interchange in connection with the State's questioning of Officer Cox:

> Q: What was the result of the defendant's breath test?
>
> A: .179.
>
> Q: And what time was that test obtained?
>
> A: At 12:29 a.m. That was when the sample was given.
>
> Q: And this was within two hours of your observations of her driving, correct?
>
> A: Yes.
>
> MS. VENS: Your Honor, for the record it has been agreed by the defense that they will stipulate to the accuracy of this Intoxilyzer test.
>
> MR. OWENS: That's correct, Your Honor.
>
> THE COURT: So noted.

We acknowledge that the district court suppressed these test results afer concluding that Officer Cox's investigatory stop was unreasonable. However, the effect of that suppression ruling on the revocation proceeding is not before us and, as noted, was the subject of a separate appeal, decided against Wieslander.

Left with this undisputed testimony, the only question is whether, in light of Cox's propensity for untruthfulness, the agency was required by law to reject all his testimony. Although we, like the district court, are troubled by Cox's dissembling, we answer no to this question. *See Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995) (holding officer's certification of reasonable grounds, standing alone, is substantial evidence of reasonable grounds); *cf. Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366, 371 (Iowa 1991) (noting even absent credibility determinations, essentially uncontested evidence sufficient to warrant board action); *Arthur Elevator Co. v. Grove,* 236 N.W.2d 383, 388 (Iowa 1975) (stating ruling requiring court to reject all testimony of witness who testified falsely on any matter would invade province of trier of fact to determine credibility of witnesses and weight of evidence). Because the record as a whole contains substantial evidence to support the Department's decision to revoke Wieslander's license, we reverse the district court's ruling and reinstate the final agency decision.

REVERSED.

Zimmer, J. concurs; Mahan, J., specially concurs.

MAHAN, J. (concurring specially)

I concur specially. The agency had evidence Wieslander stipulated to the accuracy of the intoxilyzer test. This evidence supports the majority decision.

However, I am concerned by the actions of Officer Cox. Cox admitted he gave perjured testimony and admitted to fabrication of charges. The district court found his testimony was repeatedly impeached. I fully agree with the findings and conclusions of the district court with regard to Cox's credibility. His credibility was so completely destroyed the proceedings have been tainted. However, the agency proceedings and the district court criminal proceedings are different. The district court judge in the criminal proceedings had the discretion to disregard the evidence of the test results based on his credibility findings. However, as the majority points out, the agency was not required by law to reject the evidence of the stipulation and test results in light of Cox's "overall propensity for untruthfulness." I reluctantly agree the agency decision should be upheld based upon the stipulation.