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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IMMANUEL MICHAEL HOPPE,

Plaintiff-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Defendant-Appellant.

Filed November 26, 1986

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6-257
85-1682

Appeal from the Iowa District Court for Muscatine County (No. 3448-685) - Margaret S. Briles, Judge.

Defendant Iowa Department of Transportation (DOT) appeals the district court's reversal of its action which revoked plaintiff's license under the provisions of Iowa Code sections 321A.17 and 321B.13 for refusing to submit to a chemical test. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Robert P. Ewald, Assistant Attorney General, for defendant-appellant.

Kathryn Egenberger, Coralville, Iowa, for plaintiff-appellee.

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

SCHLEGEL, J. 117

Defendant Iowa Department of Transportation (DOT) appeals the district court's reversal of its action which revoked plaintiff's license under the provisions of Iowa Code sections 321A.17 and 321B.13 (1985) for refusing to submit to a chemical test. The DOT asserts that there is substantial evidence in the record to support its finding that plaintiff refused to submit to chemical testing. We affirm.

The plaintiff, Immanuel Hoppe, was stopped by Davenport police officer Gayle Leitholf on May 16, 1984, at approximately 2:00 o'clock in the morning after Officer Leitholf observed Hoppe drive through a red light. Noting an odor of alcohol on his breath, Officer Leitholf had Hoppe attempt a number of field sobriety tests which he executed poorly. When Officer Leitholf requested that Hoppe take a preliminary breath test, Hoppe became "indifferent" and stated he wanted to contact his attorney. Officer Leitholf refused this request and Hoppe refused to submit to the preliminary breath test, at which time he was arrested for OWI.

Hoppe was then transported to the Davenport Police Department where the implied consent advisory was read to him in its entirety. After this point the facts are in dispute. At the administrative hearing, Officer Leitholf testified that Hoppe was then asked if he wanted to speak to a lawyer, at which time Hoppe attempted to call his attorney in Muscatine. Officer Leitholf testified that Hoppe attempted six different times to dial the number but was not able to hit the buttons correctly. Hoppe finally made contact with a female with whom he talked for about five minutes and, realizing that it was not his attorney, stated, "Well, who the hell is this?" Officer Leitholf then took the phone and determined that Hoppe had been talking with a stranger who Officer Leitholf said appeared to be upset and distraught.

Officer Leitholf then testified that she offered Hoppe a local telephone book so that he could find local counsel, but Hoppe refused. Officer Leitholf then stated to Hoppe that it was time for him to decide if he would consent to the testing. Officer Leitholf testified that at that point Hoppe became "cocky and profane," and began stomping around the room using loud and abusive language, so loud in fact the supervising officer had to come in and restrain him.

Officer Leitholf then testified that she handed Hoppe a written implied consent form. Hoppe verbally consented to the test, checked the consent box, and signed the form. Officer Leitholf testified that Hoppe again became loud, abusive, and combative. Officer Leitholf told him to sit down or she would refuse to offer him the test because of his attitude and language. The officer testified that Hoppe then threw the form at her and told her to "Kiss my ass." Officer Leitholf considered this an act of refusal and checked the "refuse" box on the implied consent form.

Hoppe testified that he only became combative after Officer Leitholf refused to give him the test. He further testified that he had difficulty reaching his attorney only because his attorney, while residing in Iowa City, maintained a temporary residence in Muscatine and that he could not reach her at that number and had to make several phone calls to locate her. Hoppe also testified that when speaking with the stranger on the telephone, he was not loud and abusive but very calm and polite. The stranger to whom he spoke, Kathy Weaver, testified that Hoppe did not seem to be drunk and was not loud and abusive.

Subsequently, a DOT hearing was held on that revocation of Hoppe's license, at which time his license revocation was sustained pursuant to Iowa Code sections 321B.4 and 321B.13 (1985). On judicial review, the district court reversed the decision, rescinding the revocation on the grounds that Hoppe's actions did not constitute a refusal as a matter of law.

Review of an agency decision is at law and depends upon whether the decision is supported by substantial evidence in the record made before the agency when viewed as a whole. Fernandez v. Iowa Dept. of Human Services, 375 N.W.2d 701, 705 (Iowa 1985). Evidence is substantial to support an agency's decision if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference. Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 811-12 (Iowa 1985). On appellate review of a judgment of the district court reviewing a final agency action, we are confined to the correction of errors of law made by the district court; we review the agency action as the district court should have. Mary v. Iowa Dept. of Transp., 382 N.W.2d 128, 131 (Iowa 1986).

Hoppe contends that the agency erred in revoking his license on the grounds that he had consented to take the test by signing the implied consent form, but that he was denied the chance to take the test. We agree. We believe that the district court should be affirmed in its decision that, as a matter of law, defendant did not refuse to take the test.

The district court had the following facts to deal with:

1) The defendant checked the "consent" box on the form and signed his name to the form.

2) The test was never offered to the defendant; there was not even a "scintilla" of evidence to suggest the officer offered the test to defendant.

3) There was still a 45-minute period in which the test could have been administered.

4) A disinterested and impartial witness, Kathy Weaver, testified to a different version of defendant's attitude and state of mind during the sequence of events in question.

A reviewing court may set aside an agency decision if it decides that it cannot conscientiously find that the evidence supporting that decision is substantial.

City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 312 (Iowa 1979). Given the record from the department of transportation, we agree with the district court that there is not substantial evidence to support the decision that the defendant refused to submit to the test.

The overall conduct of the licensee must be looked at to determine if there was a refusal in fact. In Buda v. Fulton, 261 Iowa 981, 991, 157 N.W.2d 336, 341-42 (1968), the licensee explicitly refused to take the request for a specimen. The licensee in Buda did not dispute his refusal; he only contended that he did not fully understand that his refusal would result in the revocation of his license. In McCrea v. Iowa Department of Transportation, 336 N.W.2d 427 (Iowa 1983), the licensee said he could not urinate because he usually didn't "stand out in front of somebody." The supreme court found that this withholding of evidence was tantamount to a refusal. Id. at 430. The other types of withholding cited by the court that would constitute refusal were failure to breath deeply enough for a breathalyzer test and failure to blow hard enough for a breathalyzer test. In the instant case, the licensee was never given the opportunity to take the test. It was not a matter of noncompliance with an offered test. An officer should not be allowed to interpret statements of a licensee prior to the offering of a test as "tantamount" to refusal. Furthermore, unlike McCrea, the licensee here gave more than verbal consent to the test. The licensee here checked the consent box on the form and signed the form. Even if the licensee did utter the execrable phrase attributed to him, we do not think an officer, without more, can then tell the licensee that he has, by that phrase, rejected the test. This must particularly be true when such a phrase is uttered before the test is offered.

The district court had before it the testimony of all the witnesses, including the testimony of an impartial witness who contradicted the officer's testimony.

The district court was aware that no test had been offered to the licensee. The district court knew that the licensee had signed the consent form. The district court knew there was still a 45-minute period in which the test could have been administered. In light of all this, we do not think we can now say that the district court was incorrect in finding that the evidence supporting the agency decision was not substantial.

AFFIRMED.

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

DONIELSON, P.J. (dissenting)

I respectfully dissent. The majority apparently believes that because there was a 45-minute period in which the test could have been administered, the police could not interpret Hoppe's loud and combative behavior as a refusal to take the test, despite the fact that each time Hoppe was confronted with the decision of whether or not to submit to testing he became loud and abusive. I do not believe that police officers, male or female, are required to withstand such "bullying" and abuse, and I therefore believe that the police were justified in refusing to administer the test.

Hoppe contends, and the majority agrees, that the agency erred in revoking his license on the grounds that he had consented to take the test by signing the implied consent form, but that he was denied the chance to take the test. Hoppe also contends that his alleged throwing of the form at Officer Gayle Leitholf and his statement "Kiss my ass" could not be construed as a refusal and that therefore no substantial evidence exists to support the agency's finding of a refusal. I disagree.

In Buda v. Fulton, 261 Iowa 981, 991, 157 N.W.2d 336, 342 (1968), the Iowa Supreme Court held that total failure on the part of the defendant in that case to cooperate in submitting to a blood test was, under the circumstances, tantamount to a refusal. In McCrea v. Iowa Dept. of Transp., 336 N.W.2d 427, 428 (Iowa 1983), the defendant verbally consented to a urine test. However, he could not produce a urine sample at that time, so the police officers suggested that they complete the paperwork before the defendant tried again. 336 N.W.2d at 428. The defendant then signed a written consent form. Id. Twenty minutes later the defendant still could not produce a urine sample. Id. The police officer considered this a refusal to submit to the chemical test. Id. The Iowa Supreme Court concluded that the defendant's subjective intentions were not enough

to show an intention to comply with the officer's request. Id. at 430. Instead, "[t]he determination of compliance must be based on objective standards: '[t]he licensee's words, acts, overall conduct and other manifestations of a willingness or unwillingness to take the [chemical] test will be considered . . . ." Id., (citing Hoban v. Rice, 25 Ohio St. 2d 111, 117, 267 N.E.2d 311, 315 (1971). Therefore it is the reality of the situation which must govern, and a refusal in fact can be as convincing as an express refusal. See also Village of Elkhart Lake v. Borgyskowski, 366 N.W.2d 506, 510 (Wisc. Ct. App. 1985) (Defendant who verbally consented to a breath test but whose actions prevented the proper taking of the test was held to have refused to take the test).

In the present case, there was substantial evidence in the record made before the agency to find that despite Hoppe's subjective intent to submit to testing, his words and overall conduct could be interpreted as a refusal to submit to the chemical tests. The fact that Hoppe verbally agreed to the tests and signed the consent form does not take away the fact that Hoppe's overall conduct effectively prevented the police from administering the test. Hoppe failed to do what was necessary in order that the test be performed, and I believe that even where such conduct occurs before the test is actually offered, such conduct constitutes a refusal. Though evidence was offered at the agency hearing by Kathy Weaver purporting to show that Hoppe was not loud and abusive and that he did not appear intoxicated, the agency's findings of fact are conclusive when the facts are in dispute or when reasonable minds may differ on the inferences to be drawn from the evidence. Hyvee Foods Stores, Inc. v. Iowa Dept. of Revenue, 379 N.W.2d 37, 45 (Iowa Ct. App. 1985). I would therefore hold that the district court erred in holding that Hoppe's actions could not be construed as a refusal.