IN THE COURT OF APPEALS OF IOWA

No. 9-090 / 98-0321
Filed March 31, 1999

TERRY LEE KENNEDY,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent-Appellee.

FILED
MAR 31 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge.

Petitioner appeals a district court ruling affirming a decision of the Iowa Department of Transportation revoking his driver's license for one year. **AFFIRMED.**

Stephen A. Rubes, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Kerry Anderson, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Terry Lee Kennedy appeals a district court ruling affirming a decision of the Iowa Department of Transportation revoking his driver's license for one year. He contends the district court erred in refusing to reopen the proceedings. We affirm.

On December 16, 1996, Kennedy was arrested for violating Iowa Code section 321J.2. He submitted to a breath test on an Intoxilyzer machine at 10:30 p.m. His blood alcohol concentration was measured at .106. Following the breath test, the arresting officer notified Kennedy his driver's license would be revoked for a period of one year and served him with a "Request for Temporary Restricted License (Work Permit) or Hearing." Kennedy was also notified he had ten days in which to appeal the revocation.

An independent blood test was conducted at 4:30 a.m. on December 17, 1996. This test showed a zero blood alcohol concentration and the doctor who performed the test stated it was unlikely Kennedy had a .106 blood alcohol concentration at 10:30 p.m.

The arresting officer submitted an affidavit to the Iowa Department of Transportation indicating he had reasonable grounds to believe Kennedy had been operating while intoxicated, Kennedy had refused to submit to a preliminary breath test, Kennedy was placed under arrest for OWI, and Kennedy submitted to chemical testing which indicated a blood alcohol concentration of ten hundredths or more.

Kennedy was hospitalized on December 17, 1996, for a nervous breakdown and did not hire an attorney until twenty to twenty-five days later, too late to appeal during the ten-day period. Kennedy did not request an evidentiary hearing and the driver's license was revoked for one year beginning December 27, 1996.

On June 16, 1997, the DOT received a handwritten letter from Kennedy which read: "I respectfully petition the DOT to review the suspension of my driving privileges due to evidence submitted. I suffered a nervous breakdown on this date which was not alcohol related." The evidence to which Kennedy refers is the Intoxilyzer printout card from the December 16, 1996 breath test, the results of the December 17, 1996 independent blood test, and the doctor's letter dated May 28, 1997, stating it was "most unlikely" Kennedy had a blood alcohol concentration of .106 at 10:30 p.m. on December 16, 1996.

Kennedy's letter was treated as a petition to reopen the proceedings. The DOT denied the petition on the basis Kennedy presented no "new evidence" to justify reopening the hearing. The DOT's denial was upheld by the administrative law judge, who also concluded the evidence was not new. Kennedy's petition for judicial review was overruled by the district court for the same reason.

I. STANDARD OF REVIEW. Our review of the DOT's decision is governed by Iowa Code chapter 17A and is confined to the correction of errors of law. Iowa Code § 17A.19 (1997); *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). A district court decision rendered in an appellate capacity is reviewed

to determine whether the district court correctly applied the law. *Zenor v. Iowa Dep't of Transp.*, 558 N.W.2d 427, 430 (Iowa App. 1996). If, after applying the standards set forth in section 17A.19(8) to the agency decision, our conclusion is that the district court correctly applied the law, we must affirm. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624,625 (Iowa 1997). If our conclusion is to the contrary, reversal may be required. *Id.* We will uphold the agency's action if supported "by substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code § 17A.19(8)(f). Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *Pointer*, 546 N.W.2d at 625.

II. NEW EVIDENCE. The issue on appeal is whether or not the district court erred in affirming the DOT's denial of Kennedy's petition to reopen proceedings. Kennedy maintains the Intoxilyzer printout card from the December 16, 1996 breath test and the doctor's May 28, 1997 letter constitute new evidence sufficient to reopen the proceedings. We disagree.

Former Iowa Code section 321J.13(4), which was in force at the time of the relevant events, would permit the reopening of proceedings if Kennedy could show either: (1) new evidence has been discovered which provides grounds for recision of the revocation; or (2) a district court order in a criminal OWI case indicating either the officer did not have reasonable grounds to believe the licensee was operating while intoxicated or the test results were inadmissible or invalid.

To rely on the new evidence prong, Kennedy must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the administrative hearing; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if the petition to reopen proceedings is granted. *See Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995).

Clearly the evidence in this case could have been discovered in the exercise of due diligence during the ten-day period for appeal; the Intoxilyzer results were available on December 16, 1996, and the independent blood test was performed on December 17, 1996, at the time of Kennedy's hospitalization. However, under Iowa law, "newly discovered evidence" sufficient to merit a reopening of proceedings is evidence which existed at the time of the hearing but which, *for excusable reasons*, the party was unable to produce at the time. *See id.* at 762-763 (citing *Embassy Tower Care, Inc. v. Tweedy*, 516 N.W.2d 831, 833 (Iowa 1994); *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986); *Mulkins v. Board of Supervisors*, 330 N.W.2d 258, 261 (Iowa 1983); *Wilkes v. Iowa State Highway Comm'n,* 186 N.W.2d 604, 607 (Iowa 1971); 58 Am.Jur.2d New Trial § 423, at 398 (1989)). Therefore, we must determine whether Kennedy's hospitalization the next day for a nervous breakdown and consequent delay in retaining an attorney constitutes an excusable reason for not having discovered the evidence within the ten-day period for appeal.

First, we note petitions to reopen based on new evidence are not favored primarily because "there must be repose to litigation." *Mays v. C. MacChambers Co., Inc.*, 490 N.W.2d 800, 804 (Iowa 1992) (quoting *Yoder v. Iowa Power & Light Co.*, 215 N.W.2d 328, 335 (Iowa 1974)). We conclude Kennedy's hospitalization may be an excusable reason for *some* delay. However, Kennedy did retain an attorney some time in January 1997 within twenty to twenty-five days after being released from the hospital. The Intoxilyzer printout card and the results of the independent blood test were available at that time. However, there was an additional five-month delay before Kennedy's letter of June 16, 1997, was sent to the DOT. No other paperwork was filed by Kennedy or his counsel within this five-month period. Such delay cannot be held to be excusable.

For these reasons, we affirm the district court ruling affirming a decision of the Iowa Department of Transportation revoking Kennedy's driver's license for one year.

AFFIRMED.