FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

209

REED SMITH METZGAR,

Plaintiff-Appellant,

vs

IOWA DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

Filed August 26, 1987

7-156
86-852

Appeal from the Iowa District Court for Scott County (No. 412105), James E Kelley, Judge.

The plaintiff appeals from a district court decision which affirmed the agency findings revoking his driver's license on the grounds that he was operating a motor vehicle while intoxicated. **AFFIRMED.**

Dennis D. Jaspar of Stafne, Lewis, Jaspar & Payson, Bettendorf, for plaintiff-appellant.

Daniel W. Perkins, Assistant Attorney General, Ames, for defendant-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J.

In this appeal, petitioner Reed Metzgar challenges the district court opinion which affirmed a decision by the Iowa Department of Transportation to revoke his driver's license. Metzgar's license was revoked after he was involved in a one-car accident. The officers who arrived at the scene of the accident smelled a strong odor of alcohol about Metzgar and noticed that Metzgar's eyes were bloodshot and watery. Metzgar submitted to a preliminary breath screening test which indicated that he was intoxicated. He was then placed under arrest and taken to the Scott County jail. After consulting with an attorney, Metzgar refused to submit to a chemical test. His driver's license was subsequently revoked as provided in Iowa Code section 321B.13(1985). In this appeal, Metzgar argues that the revocation was improper because he was not able to consult with the attorney of his choice, and because the request that he submit to chemical testing was not made within two hours of his arrest or the preliminary screening test, as required pursuant to section 321B.4(2) of the Iowa Code. We conclude that both of Metzgar's arguments are without merit, and affirm.

It is well settled our scope of review is limited to a determination of whether the district court made errors of law when it exercised its power to review the department's decision. Mary v. Iowa Dept. of Transportation, 382 N.W.2d 128, 131 (Iowa 1986). In connection with this inquiry, it is incumbent upon us to ascertain whether the agency's decision is supported by substantial evidence in the record 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 though a reviewing court may draw a contrary inference. Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 811-12 (Iowa 1985).

Turning to the merits, we first address Metzgar's contention that he was denied the right to counsel when he was unable to consult with the attorney of his choice. Metzgar premises this argument upon the following set of facts. After Metzgar was arrested and taken to the police station, he requested assistance of counsel, and asked to speak to Dennis Jasper, an attorney who had represented Metzgar on several prior occasions. Because Metzgar did not recall Jasper's telephone number, he and a state trooper together searched for the number in the telephone directory. The trooper then placed three calls to Jasper's office; there was no answer. Metzgar then suggested calling an attorney named Earl Payson, a partner of Jasper's. The trooper was able to contact Payson, and told him that a client of Jasper's was at the jail, and that they had been unable to reach Jasper. Metzgar then talked to Payson, who advised him to refuse a chemical test. Payson had never represented Metzgar before, and was unaware that Metzgar had a prior arrest for OWI. Because Metzgar did have a prior OWI arrest, his refusal to submit to testing operated to preclude him from receiving a work permit, thus rendering him virtually unemployable. Metzgar argues that if he had spoken to Jasper, he would not have been advised to refuse the test, would have taken the test and have been found unintoxicated, and would be able to perform his job.

Although it is unfortunate that Metzgar received legal advice which he now maintains was unsound, we do not think that this is the equivalent of a denial of his right to counsel. Undeniably, a person arrested for violation of Iowa Code section 321B.13 has a limited statutory right to consult with an attorney before deciding whether to refuse or submit to chemical testing under implied consent procedures. State v. Victor, 261 N.W.2d 828, 831 (Iowa 1978); see also Iowa Code § 804.20 (1985). Nowhere, however, is there authority for Metzgar's assertion that this is an unequivocal right to consult with the attorney of the arrestee's

choice. In fact, the basis for the supreme court's definition of the right to counsel in these circumstances as being "limited" clearly implies the contrary: In Victor, the court noted that this right is "not absolute" but "must be balanced against the practical consideration that a chemical test is to be administered within two hours of the time of the arrest or not at all." 261 N.W.2d at 831.

Metzgar argues, however, that the state trooper who placed the calls to Jasper's office was "negligent" in failing to call Jasper at his residence. We note, however, that Metzgar assisted the trooper in placing the calls and Metzgar himself suggested contracting Payson. In these circumstances, we are unwilling to say that "actions by the State . . . [deprived Metzgar's] attorney of the opportunity to effectively assist [the] accused." Zacek v. Brewer, 241 N.W.2d 41, 50 (Iowa 1976).

Metzgar also argues that the revocation of his driver's license was improper because the request that he submit to chemical testing was not made within two hours of his arrest or the preliminary screening test, as required by section 321B.4(2) of the Iowa Code. We think that the record contains substantial evidence to the contrary. The record discloses that the accident in which Metzgar was involved occurred at approximately 5:30 p.m. Although there is no evidence in the record as to the exact time that law enforcement officers arrived at the scene, a written report indicates that the accident was first reported at 6:05 p.m. and that Metzgar was arrested at 6:40 p.m. Metzgar argues that he was in essence arrested at the time that the officers first arrived because he did not feel free to leave the scene of the accident. See Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229, 239 (1983). Metzgar himself testified, however, that he was not "actually placed under arrest [until] after 6:00." It is undisputed that the request for chemical testing was made at 7:32 p.m., after Metzgar consulted with counsel. In these circumstances, we conclude that

the agency's determination and the decision of the district court are supported by substantial evidence See Mercy Health Center v State Health Facilities Counsel, 375 N W 2d at 705 Accordingly, we affirm

AFFIRMED