FILED
NOV 16 2001
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-464 / 00-1591
Filed November 16, 2001

CRAIG ALLEN LANG,
Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,
Appellee.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

The petitioner appeals the district court's ruling on judicial review, which affirmed the respondent's revocation of his driver's license for a chemical test refusal. **AFFIRMED.**

John M. Trewet, of Rutherford, Trewet & Knuth, Atlantic, for appellant.

Thomas J. Miller, Attorney General, and David A. Ferree, Special Assistant Attorney General, and Noel C. Hindt, Assistant Attorney General, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Craig Lang appeals the district court ruling that affirmed the Iowa Department of Transportation's decision to revoke his driver's license, under Iowa Code Chapter 321J, for a chemical test refusal. We find substantial evidence in support of the revocation decision and affirm.

Background Facts and Proceedings. Craig Lang admitted to driving a motor vehicle involved in a one-vehicle accident in Jasper County and was arrested by Iowa State Trooper Neil Wellner for operating while intoxicated. During Lang's transportation to jail, portions of the conversation between Lang and Wellner were captured by Wellner's in-vehicle camera. The mutual exchanges were cordial and, in addition to accident and alcohol related issues, included topics such as Lang's work and his mother's health.

Shortly before arriving at the jail, Lang initiated a series of general inquires related to his arrest. He asked about his length of incarceration, to which Wellner responded with general information about the initial appearance the following morning. Lang then asked if he would be able to call his mother and sister, and Wellner confirmed that he would be able to do so, and that a phone would be available at the jail. Finally, Lang inquired as to whether he would be provided dinner and whether he would be able to attend church the following morning.

Once at the jail Wellner read Lang the implied consent and requested that he undergo a chemical breath test. Implied consent was invoked after Lang failed four attempts to complete the test. At no time did Lang make a phone call of any kind. Lang's driver's license was revoked, and he appealed the decision.

At the agency hearing, Wellner testified that once at the jail, Lang made no request to call a family member or an attorney, even though a phone was close by. Wellner further testified that if a request had been made at the jail, Lang would have been allowed to place a call. Lang did not testify at the hearing. The revocation was affirmed by the administrative law judge and by the Department of Transportation's reviewing officer. Lang then filed a petition for judicial review, and the district court affirmed the agency decisions. Lang now appeals the district court ruling.

Scope of Review. Our review of agency decisions is governed by Iowa Chapter 17A and is limited to correction of errors at law. Iowa Code § 17A.19 (West Supp. 1999). *See also Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 625 (Iowa 1997). A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a) (West Supp. 1999). This can be shown in a number of ways, including proof that the action was unsupported by substantial evidence in the record, when that record is viewed as a whole. Iowa Code § 17A.19(10)(f) (West Supp. 1999). Substantial evidence is that which would allow a reasonable mind to reach the same conclusion as the decision maker. *Lubka v. Iowa Dept. of Transp. Motor Vehicle Div.*, 599 N.W.2d 466, 468 (Iowa 1999).

Right to Consultation with Counsel or Family. Lang contends he was wrongfully denied the right to call his mother or sister before submitting to the chemical test, after making such requests in the patrol car during transport. An arrested person must be permitted to call, consult, or see a family member after

arriving at jail. Iowa Code § 804.20 (1999). When implied consent is invoked by the arresting officer, the arrestee has a limited right to make such a call before deciding whether to submit to chemical testing. *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978) (noting right to consultation must not be allowed to interfere with need to timely administer the test). This right applies to administrative revocation proceedings as well as criminal prosecutions. *Ferguson v. State, Dept. of Transp., Motor Vehicle Div.*, 424 N.W.2d 464, 466 (Iowa 1988).

While section 804.20 mandates that the detained person be allowed an opportunity to place a call, it does not require that the officer inform the detainee of his right to consultation. *Didonato v. Iowa Dept. of Transp., Motor Vehicle Div.*, 456 N.W.2d 367, 370-71 (Iowa 1990). Lang must have made a good faith request to speak with his family members, and whether such a request was made is determined by an objective consideration of the statements and conduct of Lang and Wellner, as well as the surrounding circumstances. *Ferguson*, 424 N.W.2d at 466. After reviewing the record, including the video tape, and applying such a standard, we find substantial evidence supports a finding that no section 804.20 request was made.

Lang never demanded to call family members. Rather, he asked about the potential for placing such calls in the context of general inquires about his detention. Although advised that calls would be allowed and that there was a phone at the station, Lang did not request to contact his mother or sister upon arriving at jail. Regardless of what Lang subjectively intended by his statements

in the patrol car, an objective consideration of the conversation does not reveal a demand to call family before submitting to chemical testing.

"The statutory mandate is that the officer shall allow the requested telephone call." *Didonato*, 456 N.W.2d at 369. Wellner cannot be charged with failing to allow a phone call when no request was made. We reject Lang's implicit contention that Wellner had an affirmative duty to inquire into whether Lang wished to call his family members before submitting to the chemical testing. *See id.* at 371 (officer has no duty to inform detainee of right to counsel). As the record before the department contained substantial evidence that section 804.20 was not violated in this case, we affirm the revocation decision.

AFFIRMED.

Vaitheswaran, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissents)

The question raised in this appeal is whether an exchange between Lang and a trooper, while Lang's liberty was restrained, made it mandatory that Lang be allowed to call his mother. I would find it was mandatory and disagree with the majority's conclusion to the contrary.

While being transported by a state trooper to jail the following exchange between Lang and the trooper occurred:

> Lang: Will I get, will I get, will somebody call my mom?"
> Trooper: Oh, absolutely, you'll be able to call your mom. . . .

(Emphasis supplied.)

Despite the trooper's promise Lang was not allowed to make the telephone call. Iowa Code section 804.20. Communications by arrested persons provides:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. . . .

The officer is not required to tell the person detained that he or she has a right to make the call. *See Didonato v. Iowa Dept. of Transp., Motor Vehicle Div.*, 456 N.W. 2d 367, 370-371 (Iowa 1990).

The main purpose behind enactment of section 804.20 is apparent on the face of the statute. *Id.* It is to provide an individual arrested the opportunity to consult with counsel or a family member after he or she has been arrested. *Id.* at 370. This statutory right is available in the context of Iowa implied consent law,

subject to certain limitations. *Id.*; *see also State v. Vietor*, 261 N.W.2d 828, 831-32 (Iowa 1978). Hence, the duty to provide the opportunity to make that call is mandatory. *Id.* An individual who is refused this right, upon proper request, is under no obligation to show that prejudice resulted in order to challenge a driver's license revocation. *Id.* An arrested person must thus be permitted to make a telephone call to an attorney or family member upon request, when charged with a violation of chapter 321J, subject to the limitations enumerated in *Vietor*, 261 N.W.2d at 832. *Vietor*, 261 N.W. 2d at 370.

The majority says Lang did not make a proper request to make a call. The majority reasons that he made no request after he arrived at jail and the conversation in the car was not a sufficient demand. I disagree with the majority's conclusion for two reasons.

First, at the time Lang talked of calling his mother his liberty was restrained. This is sufficient to meet the requirements of the statute and he need not be actually in jail to make it applicable. Second, while one might argue that Lang asked a question rather than making a demand, the trooper's statement, "absolutely, you'll be able to call your mom," indicates that permission for the call has been granted and Lang would be able to make it. Therefore if the trooper were true to his promise, and Lang would have no reason to believe the trooper was not, no further request or demand would be necessary.