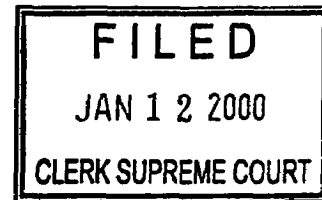


IN THE COURT OF APPEALS OF IOWA

No. 1999-202 (9-426) / 98-1912
Filed January 12, 2000



JEFFREY ALLEN HOSEA,
Petitioner-Appellant,

vs.

**IOWA DEPARTMENT OF
TRANSPORTATION, MOTOR
VEHICLE DIVISION,**
Respondent-Appellee.

Appeal from the Iowa District Court for Bremer County, Stephen P. Carroll,
Judge.

The petitioner appeals from the district court's ruling on judicial review
affirming the respondent's revocation of the petitioner's driver's license.

AFFIRMED.

Carter Stevens of Roberts & Stevens, P.L.C., Waterloo, for appellant.

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

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

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HUITINK, J.

Appellant, Jeffrey Hosea, appeals the district court's ruling on judicial review affirming the agency's revocation of his driver's license for refusing to take a chemical test under implied consent law procedures. Hosea claims the district court erred in determining there was substantial evidence supporting the agency's decision his right to counsel under Iowa Code section 804.20¹ was not denied. We affirm the district court.

Background. At about 2 a.m. a Waverly police officer arrested Hosea for operating while intoxicated. The officer took Hosea to the Bremer County Law Enforcement Center. The officer read Hosea his *Miranda* rights and gave Hosea the opportunity to make a telephone call. At about 2:20 Hosea called his wife. Hosea indicated to the officer that his wife was going to try to find an attorney. At about 2:30 the officer read the implied consent advisory to Hosea and asked him to take a test. Hosea refused and signed the implied consent form indicating his refusal. Hosea

¹ 804.20. Communications by arrested persons

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. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

did not ask the officer to wait until an attorney was found. He did not ask to check with his wife to determine whether or not she had contacted an attorney. After his refusal, no attorney or other person called Hosea at the Law Enforcement Center.

The DOT revoked Hosea's driver's license under Iowa Code section 321J.9 for refusing the test. Hosea began contested case proceedings before the DOT asserting he was denied his statutory right to counsel under Iowa Code section 804.20. An ALJ rescinded the revocation determining Hosea had been denied a reasonable opportunity to consult with an attorney at the time of his refusal. The DOT appealed. A reviewing officer reversed the ALJ's decision, concluding that Hosea was not denied his right to counsel. Hosea filed a petition for judicial review challenging the agency's final decision.

Judicial review. The district court, when exercising the power of judicial review conferred by section 17A.19, is itself functioning in an appellate capacity to correct errors of law, as specified in section 17A.19(8). *Jackson County Pub. Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429 (Iowa 1979); *Iowa Pub. Serv. Co. v. Iowa State Commerce Comm'n*, 263 N.W.2d 766, 768 (Iowa 1978). The district court affirmed the agency's revocation of Hosea's driver's license. The court concluded there was substantial evidence supporting the decision Hosea's statutory right to counsel was not violated. The court noted Hosea did not request to call anyone or request to wait longer at the time the officer requested the chemical testing. Hosea appealed.

Appellate claims. Hosea claims the finding he was not denied his right to counsel is not supported by substantial evidence. He also claims he was denied his right to counsel when he was allowed only ten minutes to have his wife contact an attorney.

Scope of review. The Iowa Administrative Procedure Act, Iowa Code section 17A.19, governs our review. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 257 (Iowa 1996). Our review is for the correction of errors at law, not de novo. *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991). The agency--not the court--weighs the evidence, and we are obliged to apply those findings broadly and liberally to uphold rather than defeat the agency's decision. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237 (Iowa 1981). On review, the question is not whether the evidence supports a finding different from the agency's, but whether the evidence supports the findings the agency actually made. *Id.* at 238. In other words, the agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 436 (Iowa 1997). The burden is on Hosea to demonstrate compliance with all lawful requirements for the retention of the license. *McCrea v. Iowa Dep't of Transp.*, 336 N.W.2d 427, 429 (Iowa 1983). If, after applying the standards of Iowa Code section 17A.19(8) to the agency action, our conclusion is the same as that of the district court, we will affirm.

Discussion. An individual has a limited right to counsel in implied consent situations. *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978). There must be a good faith request for counsel. *Ferguson v. Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988). If no request is made, no right is violated. See *State v. Meisner*, 315 N.W.2d 738, 740 (Iowa 1982). If that right is violated, the person's license cannot be revoked based on a test refusal. *Fuller v. Dep't of Transp.*, 275 N.W.2d 410, 411 (Iowa 1979).

We objectively consider the statements and conduct of the arrestee and officer, as well as the surrounding circumstances, in determining if a good faith request for counsel was made or if an arrestee has refused to submit to a chemical test. *Ferguson*, 424 N.W.2d at 466. The standard is "reasonableness." *State v. Bromeland*, 562 N.W.2d 624, 627 (Iowa 1997).

Hosea attempts to place the burden on the arresting officer when he says, "The officer could have and should have contacted Laurie Hosea to find out if she was actually going to find a lawyer or what had happened." There is no duty for the officer to follow up on an arrestee's phone calls. Hosea could have requested to speak with an attorney before deciding whether or not to refuse the test. He could have asked to call his wife again to determine whether she had contacted an attorney. He did not do either. He simply refused verbally and in writing. The officer testified he would have given Hosea a chance to contact a family member or attorney if he had asked. Certainly the officer could have waited longer before proceeding, but that is not the issue. Objectively considering the statements of the officer and Hosea, as well

as the surrounding circumstances, there was no good faith request for counsel. Hosea simply refused the test. Substantial evidence in the record supports the finding Hosea was not denied his right to counsel. Our conclusions are the same as those reached by the district court. Accordingly, we affirm.

AFFIRMED.

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