IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 26, 1984

vs.)

RICHARD ROBERT MUNDORF,) 4-452 / 84-694

Defendant-Appellant.)

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Appeal from the Iowa District Court for Linn County - Robert E. Sosalla, District Associate Judge.

Defendant appeals the portion of his sentence revoking his driver's license for a period of six years following his conviction for two counts of second offense of operating a motor vehicle while intoxicated. VACATED AND REMANDED FOR RESENTENCING.

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., Schlegel, and Hayden, JJ., but decided en banc.

SCHLEGEL, J.

Defendant, Richard Mundorf, appeals the portion of his sentence revoking his driver's license for a period of six years following his conviction for two counts of second offense of operating a motor vehicle while intoxicated. We vacate and remand for resentencing.

I. Background. Mundorf, prior to being charged for the violations leading to this appeal, was convicted of two counts of first offense operating a motor vehicle while intoxicated in violation of Iowa Code section 321.281. Although the two prior offenses occurred on separate days, Mundorf was convicted of both offenses on the same day.

Mundorf was subsequently arrested for violating section 321.281 of the Iowa Code (1983). He was charged with a third offense in violation of that section, a class D felony. Iowa Code § 321.281(2)(c). However, upon a motion by Mundorf, the trial court ruled that the holding of State v. Hollins, 310 N.W.2d 216, 217 (Iowa 1981), prevented the State from charging Mundorf for a third offense. The charge was accordingly reduced to second offense in violation of section 321.281, an aggravated misdemeanor. Iowa Code § 321.281(2)(b) (1983). Before Mundorf faced trial for that charge, he was again arrested for violating section 321.281 and was charged with another count of second offense violation of section 321.281. On February 3, 1984, he pleaded guilty to both charges.

The trial court sentenced Mundorf to a term of jail and subsequent period of probation. The trial court also invoked subsection (9)(a) of section 321.281 and revoked Mundorf's driver's license for a period of six years.

On appeal Mundorf challenges the legality of the license revocation. Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

II. Revocation of Mundorf's License Under Section 321.281(9)(a). The trial court revoked Mundorf's license pursuant to Iowa Code subsection 321.281(9)(a) (1983). That subsection provides in part:

> Upon a plea or verdict of guilty of a third or subsequent violation of this section, the court in which the plea was entered or the verdict was returned shall order that the defendant's license or permit to operate motor vehicles be revoked by the department and that the defendant shall remain ineligible for a new license or permit for a period of six years.

Mundorf argues that subsection cannot be invoked when sentencing a person convicted of a charge of second offense operating a motor vehicle while intoxicated. Instead, he argues that the subsection is applicable only when a third offense or subsequent offense has been charged. In essence, he contends that characterization of the illegal act as "a third or subsequent violation" is to be determined from the charging instrument and the nature of the offense for which he is convicted: i.e. first, second, or third offense. See Iowa Code § 321.281(2) (1983) (classifying violations of § 321.281).

Mundorf argues in the alternative that the holding of State v. Hollins, 310 N.W.2d at 217-18, applies in this case and bars application of subsection 321.281(9)(a).

The State argues that the word "violation" in subsection (9)(a) is different from the word "offense" found in the subection (2) classification scheme and in other subsections of the statute. The State contends the different wording indicates the legislature did not intend operation of subsection (9) to be controlled by the classification scheme found in subsection (2). Thus, the State argues a sentencing judge can count all lifetime convictions for violating section 321.281 when determining whether subsection (9)(a) mandates revocation of the offender's driver's license. If the State's interpretation of the statute is correct, the trial court was obligated to revoke Mundorf's license because Mundorf had been convicted of violating section 321.281 four times.

When faced with an issue of statutory construction, we must give effect to the entire statute. State v. Hesford, 242 N.W.2d 256, 258 (Iowa 1976). Therefore, we will also consider Iowa Code sections 321.555-.560 (1983). Under those sections

a driver with three convictions for violating section 321.281 is to be adjudicated a "habitual offender" and have his license revoked for a period of up to six years.

In Iowa Department of Transportation v. Marvin, 307 N.W.2d 10 (Iowa 1981), the supreme court had to decide the proper interaction between the license revocation provision in section 321.281 and the revocation provision in section 321.560. The court stated, "Although both deal with driving privileges, section 321.281 sets forth criminal sanctions while sections 321.555-.561 are civil in nature." Id. at 11. Section 321.281 has been amended since the Marvin decision, but we believe the revocation sanction found in that section remains criminal in nature.

Because the revocation sanction found in section 321.281(9)(a) is a criminal penalty, the holding of State v. Hollins, 310 N.W.2d at 217-18, applies to this case. In Hollins, the supreme court adopted the general rule that for purposes of enhanced punishment based on previous convictions "'. . . each succeeding conviction must be subsequent in time to the previous convictions, both with respect to commission of the offense and to conviction.'" Id. (quoting 39 Am. Jur.2d Habitual Criminals, Etc. § 6). Under this rule, Mundorf's first two convictions for violating section 321.281—which were entered the same day—count as one conviction, and the two convictions being appealed in this case—which were also entered on the same day—count as a second conviction. Mundorf, therefore, could not have been subjected to the increased penalty of license revocation for conviction of a third violation of section 321.281. We must vacate the sentence and remand for resentencing.

On appeal the State argued vigorously that there are good policy reasons for revoking Mundorf's driver's license. We agree. However, the proper proceeding for revoking his license is an action under Iowa Code sections 321.555-.560, which permit a revocation of up to six years.

VACATED AND REMANDED FOR RESENTENCING.

All judges concur except Donielson and Sackett, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. Although section 321.281 of the Iowa Code imposes criminal penalties, I believe the majority's reliance on State v. Hollins is misplaced. Hollins involved a habitual offender statute and the court's ruling should be appropriately limited to that particular statute. Requiring that the succeeding offenses necessary to revoke a license be subsequent in time to the previous convictions is contrary to legislative intent. Clearly, the legislature chose as a matter of policy to remove the operator's licenses of those who repeatedly choose to endanger the lives of others. See State v. Dalton, 254 Iowa 96, 103, 116 N.W.2d 451, 455 (1962). The defendant in this case has endangered the lives of others four times by driving while intoxicated. This is precisely the situation section 321.281 was intended to cover. I do not believe it is proper for this court to impose artificial limitations which seriously impair the effectiveness of the statutory provision. A driver who repeatedly violates section 321.281 presents a danger to himself and others regardless of when the offenses occur. Accordingly, I would affirm the revocation.

Sackett, J., joins this dissent.