FILED
JAN 2 6 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IRVIN FRANK BENNING,)
Petitioner-Appellant.)
vs.)
IOWA DEPARTMENT OF TRANSPORTATION,)
Respondent-Appellee.)

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8-557
88-18

Appeal from the Iowa District Court for Hardin County (No. Eq. 73-189), Carl Baker, Judge.

Petitioner appeals revocation of his driver's license under the Implied Consent Law. **REVERSED AND REMANDED.**

Joseph G. Bertogli, Des Moines, for the petitioner-appellant.

Thomas J. Miller, Attorney General, and Ted Metier, Assistant Attorney General, for the respondent-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM 19

The Department of Transportation revoked Benning's driver's license under the Implied Consent Law for failure to submit to chemical testing requested by an arresting officer. Upon judicial review, the district court upheld the agency's revocation. Benning contends the revocation should be overturned because there was no reasonable cause for the stop of his vehicle. He also contends the district court erred by refusing to admit into evidence the favorable results of independent blood and urine tests taken at Benning's own expense after his arrest.

A highway patrol trooper stopped Irvin Benning's car, gave Benning some field sobriety tests, and arrested Benning for OWI. During this transaction the trooper asked Benning to take a breath test; however, Benning did not complete the breath test, allegedly because he did not trust the trooper.

After his arrest Benning was transported to a hospital. While there he had blood and urine tests taken at his own expense. The tests showed blood alcohol concentration well below the levels at which intoxication can be presumed in Iowa. The OWI charge against Benning was later dismissed. However, because of Benning's failure to complete the breath test offered by the arresting trooper, the Iowa Department of Transportation revoked Benning's driver's license under the provisions of the Implied Consent Law.

Benning contends the revocation should be overturned because there was no reasonable cause for the stop of his vehicle. He argues his driving performance gave the trooper no reasonable ground to believe he was operating while intoxicated. Benning also contends the district court erred by refusing to admit into evidence the favorable results of the independent blood and urine tests administered at the hospital.

We determine the agency erred in failing to admit the favorable tests into evidence. Iowa Code section 321J.9 provides:

> If a person refuses to submit to the chemical testing, a test shall not be given, but the department, upon the receipt of the peace officer's certification, subject to penalty for perjury, that the officer had reasonable grounds to believe the person to have been operating a motor vehicle in violation of section 321J.2, that specified conditions existed for chemical testing pursuant to section 321J.6, and that the person refused to submit to the chemical testing, shall revoke the person's motor vehicle license. . . .

To support a revocation under the section the department must show among other things the officer has reasonable grounds to believe a person has been operating his or her motor vehicle in violation of Iowa Code section 321J.2 (1987). See State v. Cooley, 229 N.W.2d 755, 759 (Iowa 1975). There is a factual dispute in the record over whether reasonable cause to stop existed and whether the officer had reasonable cause to believe Benning was intoxicated. There was conflicting testimony from the

trooper and Benning regarding Benning's driving before the stop and his actions afterward. There was a question before the agency of which was more credible.

The results of the blood alcohol analysis showed that Benning's blood alcohol content was .043. This amount is less than one-half of the statutory limit in Iowa of .10. The reviewing officer from the Iowa Department of Transportation found that since the petitioner refused the test requested by the peace officer he did not have any right to the evidence of the independent blood and urine tests to be admitted into evidence. The blood test was relevant and should have been admitted by the agency and considered by it on the issue of the stop.

We remand to the agency to consider the excluded evidence and render a new decision.

REVERSED AND REMANDED.

Hayden, P.J., concurs; Habhab, J. dissents.

HABHAB, J. (dissenting)

I respectfully dissent for the reasons which follow.

The question that must be answered is whether the arresting officer had reasonable grounds to believe appellant had been operating a motor vehicle while in an intoxicated condition and therefore whether his driver's license was properly revoked for refusing to submit to a chemical test.

A substantial part of the appellant's brief is directed to a showing that he was not under the influence of an alcoholic beverage, which is the major issue in an OWI action under section 321J.2. To substantiate his position, the appellant had the results of an independent blood and urine test which showed a blood alcohol content of .043 and a urine test showing 7 milligrams per deciliter, each substantially less than the statutory limit of .10.

The criminal charge of OWI was subsequently dismissed by the State. However, the outcome of the criminal prosecution is of no consequence in this civil proceeding, even though they arise out of the same motor vehicle operation. Shellady v. Sellers, 208 N.W.2d 12, 14 (Iowa 1973).

The issue before us is whether Trooper Hollander (the arresting officer) had reasonable grounds to believe appellant was operating a motor vehicle while under the influence of an alcoholic beverage. The hearing officer

and the trial judge held that he did, and I agree. There is no need to remand this case as suggested by the majority.

The determination of whether Hollander had reasonable grounds is to be made objectively and not subjectively. Crosser v. Iowa Dep't of Public Safety, 240 N.W.2d 682, 685 (Iowa 1986). "The 'reasonable grounds' test is met where the facts and circumstances known to the officer at the time he was required to act warrant a prudent man in believing the offense has been or is being committed." Id., citing Saunders v. Commissioner of Public Safety, 226 N.W.2d 19, 22 (Iowa 1975).

Thus, and as the court stated in Crosser, ". . . reasonable cause to revoke the implied consent law is not affected by facts later appearing, which may have dimmed or even demolished the State's chances of a conviction upon the initial charge." Crosser, 240 N.W.2d at 685.

On judicial review of agency actions, several other principles of law are established. In Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 809 (Iowa 1985), it is stated: "This case turns on the cardinal rule of administrative law: Judgment calls are the province of the administrative tribunal and not of the courts."

The court in the Mercy Health Center case also stated: "In order to succeed in challenging agency action, the petitioner must demonstrate prejudice to substantial rights and the prejudice must arise from agency action which falls within one or more of the grounds enumerated in section 17A.19(8)." Mercy Health Center, 360 N.W.2d at 811.

Based on the foregoing, I find there is substantial evidence in the record to support the hearing officer's findings. The transcript of the hearing officer contains the following testimony of Trooper Hollander:

> I was sitting at the intersection approximately, I thought it was about 200 feet west of where Mr. Benning -- this intersection we have been describing. I observed Mr. Benning's car come up to the intersection at what I considered was a fast rate of speed, proceed past the stop sign and when he came out onto the traveled portion of Rocksylvania he hit the brakes and he slid to a fast stop.

Trooper Hollander also testified:

> He stopped immediately, proceeded at again quite a -- took off fast, accelerated rapidly, this time right next to the curb for some reason or another. He was just inches from the curb. And right past me.

Trooper Hollander also testified:

> I walked up to the car and discussed his stop and told him that he did not stop back there at the stop sign until he was out in the middle of the traveled portion of Rocksylvania. I could smell an alcoholic beverage on his -- about his person. I asked him to come on back to the car and perform some sobriety tests for me.

Trooper Hollander described the sobriety tests and the manner in which petitioner attempted to perform them. He

failed the finger-count test twice; he failed the heel-to-toe test; he recited the alphabet so rapidly it couldn't be understood, then quit halfway through his second attempt. He refused to properly provide a preliminary breath test. Trooper Hollander concluded his description of the sobriety tests by testifying that petitioner had been given three field sobriety tests and he failed all three of them. The record in this case contains substantial evidence to support the agency's decision that Trooper Hollander had reasonable grounds to stop petitioner's vehicle and, after the stop, to believe that he was operating in violation of Iowa Code section 321J.2.

The appellant argues in his brief that "the independent blood and urine test . . . should have been considered as substantive evidence in determining whether or not appellant's license to operate and register motor vehicles should have been suspended." I disagree. Once probable cause has been established, the results of the independent blood and urine test is irrelevant to the issue of suspension.

It is next argued that the results of the blood and urine test should have been considered by the hearing officer in determining whether the arresting officer had reasonable grounds to stop the appellant. Even if there is merit in this contention, I do not find that the appellant was prejudiced by its exclusion.

As pointed out above, the reasonable grounds test is determined from the facts and circumstances known to the officer at the time he was required to act. This test has clearly been met. Thus, even assuming arguendo that the results of the blood test should have been considered by the hearing officer to refute the testimony of the arresting officer, I find that the appellant was not prejudiced by such failure for independent of it there is substantial evidence to support the findings of the hearing officer. "The erratic driving such as weaving across the center line of the street is sufficient to justify an officer in stopping the vehicle and conducting an investigation." Shellady, 208 N.W.2d at 14. True, there was not weaving across the center line in this case, but there is substantial evidence of erratic driving. I would affirm.