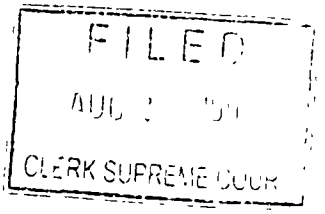
IN THE COURT OF APPEALS OF IOWA

No. 1999-91 (9-278) / 98-1490
Filed August 27, 1999



JASON W. DEVOS,
Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
Appellant.

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge.

Respondent appeals from the district court's ruling on judicial review reversing the respondent's decision to revoke the petitioner's driver's license. **REVERSED.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Carolyn J. Olson, Assistant Attorney General, for appellant.

William B. Ridout of Sanderson & Ridout, Estherville, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

The Department of Transportation appeals the trial court's reversal of its revocation of Jason Devos's driver's license pursuant to Iowa Code section 321J.6. Because we find Devos had a reasonable opportunity to have meaningful contact with his attorney before implied consent was invoked, we reverse the trial court and reinstate the DOT's revocation of Devos's driver's license.

I. Background Facts & Proceedings.

In January of 1998, Devos was arrested for OWI after failing a preliminary breath test at approximately 1:30 a.m. Upon arriving at the jail he was asked to take a breath test for alcohol pursuant to Iowa Code section 321J.6. Devos refused to take the test before contacting his attorney. He called his attorney at 2:04 a.m.

After the call, Devos told the arresting officer his attorney was traveling from Estherville, a distance of fifteen to seventeen miles, to meet with him. He refused to take the test before his attorney arrived. After consulting with the assistant county attorney, the officer told Devos to call his attorney back. Devos insisted he talk to his attorney in-person. Devos did not say when the attorney would arrive. The officer recorded that Devos refused to submit to testing.

Devos's attorney arrived at 2:30 a.m. As a result of Devos's refusal to submit to the breath test, his license was revoked. Devos appealed. An administrative law judge rescinded the revocation. On appeal, the Department of Transportation

reversed the decision and revoked his license. Devos sought judicial review. The district court reversed the DOT. The DOT appeals.

II. Standard of Review.

Our review of the DOT's decision is governed by Iowa Code chapter 17A and is confined to the correction of errors of law. Iowa Code § 17A.19 (1997); *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. *Zenor v. Iowa Dep't of Transp.*, 558 N.W.2d 427, 430 (Iowa App. 1996). If the district court correctly applied the law, we must affirm. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624,625 (Iowa 1997). We will uphold the agency's action if supported "by substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code § 17A.19(8)(f). Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *Pointer*, 546 N.W.2d at 625.

III. The Merits.

The DOT appeals contending the trial court's decision was based on propositions set forth in our opinions in *Haun v. Crystal,* 462 N.W.2d 304 (Iowa App. 1990), and *Short v. Department of Transportation,* 447 N.W.2d 576 (Iowa App. 1989). The DOT argues those opinions suggest when an arrestee has contacted an attorney who is en route to the jail, officers must wait a full two hours before demanding consent or refusal to submit to the breath test. As such, the DOT argues,

Haun and *Short* are contrary to other court of appeals and supreme court opinions and should be overruled. The State's characterization of these cases is overbroad.

Under Iowa law, a person arrested for OWI has a right to contact an attorney prior to deciding whether to consent or refuse to chemical testing.[1] *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997) (citing *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)). The right is limited to circumstances which will not materially interfere with the administration of testing within the two-hour time limit imposed by Iowa Code section 321J.6(2). *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa App. 1991). However, the two-hour period during which testing must occur does not mean every arrestee is granted two full hours before he or she must consent to testing. *Id.*

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[1] Section 804.20 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 or 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.

Iowa Code § 804.20 (1997).

> 1. When a person arrested for operating a motor vehicle while under the influence of an alcoholic beverage asks to call his lawyer, he shall be afforded a right to do so under § [804.20] before being required to elect whether he shall submit to a chemical test.
>
> 2. If he is denied that opportunity, evidence of his refusal to take a chemical test shall be inadmissible at a later criminal trial.
>
> 3. His right to prior consultation with an attorney is limited to circumstances when that course will not materially interfere with the taking of the test within the [two hours] specified in § [321J.6(2)].

> It is common knowledge that the human body dissipates alcohol rapidly . . . . Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene . . . . If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel.

Vietor, 261 N.W.2d at 831.

Generally the right to counsel is satisfied by allowing the arrestee to make a telephone call. *Bromeland*, 562 N.W.2d at 626 (citing *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988); *Short v. Iowa Dep't of Transp.*, 447 N.W.2d 576, 578 (Iowa App. 1989)). Section 804.20 has never been interpreted as providing an absolute right to talk to one particular attorney if that person is unavailable or unable to be reached. *Id.* Additionally, any request for counsel must be made in good faith. *Id.* Whether the request is made in good faith is determined by an objective consideration of the statements and conduct of the arrestee and peace officer, as well as the surrounding circumstances. *Id.*

The trial court held Devos was denied his right to counsel because he had to decide whether to consent or refuse to submit to chemical testing before expiration of the two-hour time period in which the test could be given. Our interpretation of section 321J.6(2) and our prior case law does not lead to this conclusion when applied to these facts and circumstances. For this reason, we reverse the trial court. Our holding does not require we overrule *Short* or *Haun*.

The key determination in whether an arrestee has been denied his right to counsel in these cases is whether the person is given a reasonable and meaningful opportunity to consult with his attorney. This is a determination made by the looking at the particular facts and circumstances of each case.

In *Short* we held the arrestee was not given such an opportunity. Short had not spoken to his attorney. Rather, Short contacted a friend who contacted the attorney. The attorney, from the same community, lived within five minutes from the police station and was on his way. Short wanted to wait until he spoke with the attorney before submitting to testing. The police officer said an attorney was not allowed in the secured area of the jail and Short could only talk to the attorney by telephone. The police officer treated Short's response as a refusal, and Short's license was revoked. Short did not speak with his attorney at all before he was deemed to have refused to consent to chemical testing. This was not a reasonable opportunity to consult with an attorney.

In *Haun*, the arrestee spoke with his attorney via telephone and when he hung up he said the attorney wanted to "check into the situation" and would call him back. He did not ask for a delay to allow the attorney to travel to the jail. The police requested Haun submit to testing immediately after he spoke with his attorney. We held an arrestee must be afforded a reasonable opportunity to have meaningful contact with his counsel and that, in a circumstance where an arrestee is "awaiting further communication" from his or her attorney, not allowing Haun's counsel to call him

back after checking into the situation denied Haun's reasonable opportunity to have meaningful consultation with his attorney. *Haun*, 462 N.W.2d at 306.

In this case, we reverse because Devos was allowed a reasonable opportunity to confer with counsel in a meaningful way before implied consent was invoked. The officer had a legitimate concern about the dissipation of the evidence of Devos's blood alcohol content; over an hour had passed from the time Devos was driving and it would take Devos's attorney several minutes to arrive at the jail if he left his home immediately. *See* Iowa Code § 321J.2(7) (alcohol concentration established by analysis of a specimen withdrawn *within two hours after defendant was driving* presumed to be the alcohol concentration at the time of driving) (emphasis added); *see also Moore*, 473 N.W.2d at 232 (it is common knowledge the human body dissipates alcohol rapidly). Devos actually spoke to his attorney who lived in the next county. Although the conversation lasted only a short time, Devos could have opted to be advised by his attorney in that t lephone call. Further, at a later point the officer told Devos to call his attorney again and speak with him over the phone. Devos insisted on a personal consultation. Devos did not tell the officer when his attorney was expected to arrive. In this way, Devos's insistence appears to have been a delay tactic.

We reiterate our holding in past cases that every arrestee is not entitled to two full hours before he or she must consent to testing and officers to await the arrival of

attorneys who are not within a short distance from the police station. *See Moore v. Iowa Dept. of Transp.*, 473 N.W.2d 230, 232 (Iowa App. 1991).[2]

The rationale for these limitations on the right to counsel was explained in *Vietor*:

> An arrested person should not be allowed to sabotage the purpose of Chapter [321J] by delay. His right to consult a lawyer must be exercised within a period which will still permit a test to be taken. If counsel is not available within that time, the right is lost.

Vietor, 261 N.W.2d at 831.

Because, under the facts and the circumstances of this record, Devos was afforded a reasonable opportunity to have meaningful contact with his counsel before implied consent was invoked, we reverse the trial court's decision and reinstate the DOT's revocation of Devos's driver's license.

REVERSED.

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[2]The situation here is different from *Harper v. Iowa Department of Transportation*, No. 98-2173 (Iowa App. July 22, 1999), decided by us today. In *Harper*, the arrestee consulted with his attorney by telephone, but was interfered with by the officer's taking the implied consent form away from the arrestee while he consulted on the telephone with his attorney. *See id.*