



IN THE COURT OF APPEALS OF IOWA

No. 9-491 / 89-423

MARK EDWARD MANDERS, JR.,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,

Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County,
Jack D. Levin, Judge.

Petitioner appeals a district court decision upholding
the revocation of his driver's license by the Department of
Transportation. **AFFIRMED.**

Joel W. Bittner, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Charles J.
Krogmeier, Special Assistant Attorney General, and Merrell
M. Peters, Assistant Attorney General, for the appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

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Petitioner-appellant Mark Edward Manders appeals a district court decision affirming the revocation of his driver's license by the Iowa Department of Transportation. He contends the district court made errors of law in finding (1) the issue of reasonable grounds to stop petitioner was irrelevant, (2) the agency finding that petitioner had refused to take a breath test was supported by substantial evidence, and (3) there is no exclusionary rule applicable to administrative proceedings under Iowa Code chapter 321J.

Our scope of review is for the correction of errors at law. Iowa Code § 17A.20 (1989); Dickenson v. John Deere Prods. Eng'g, 395 N.W.2d 644, 646 (Iowa App. 1986). We are bound by the agency's fact findings if they are supported by substantial evidence. Morgan v. Iowa Dept. of Transp., 428 N.W.2d 675, 677 (Iowa App. 1988). We affirm the district court decision.

Petitioner was pulled over by a Chariton, Iowa police officer at approximately 2:00 a.m. on November 21, 1989. The officer thought petitioner might be having car trouble, since his car was sitting in a no-parking zone near the town square. After the officer stopped petitioner, he notice a strong odor of alcoholic beverage and saw beer cans in the back seat of petitioner's car. Petitioner admitted he had been drinking. He failed field sobriety

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tests administered by the officer, was arrested, and was taken to a law enforcement center.

At the center, the officer requested a breath specimen from petitioner, who signed a form showing he consented to giving such a specimen. At some time before the test was administered, petitioner asked to phone his attorney. The officer agreed, but insisted on dialing the phone for the petitioner. Petitioner refused to give the officer a number to dial, insisting he be allowed to dial the phone himself. Petitioner later requested a blood test, done by his own doctor. Again, the officer insisted on doing the dialing and petitioner refused to provide a number to be called. The officer eventually determined petitioner was refusing to submit to testing. Petitioner's license was revoked for 540 days. A hearing officer upheld the revocation, and a final agency decision affirmed the hearing officer's decision. Petitioner appealed to the district court, which sustained the agency action.

We first address petitioner's contention that the exclusionary rule of the fourth and fourteenth amendments was applicable to this administrative proceeding. Our supreme court, in Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553 (Iowa 1987), has held that the exclusionary rule is inapplicable in license revocation proceedings. Id. at 557. Petitioner contends the Iowa Legislature has overruled Westendorf by the passage of Iowa Code § 321J.13(4) (1987). We disagree.

The statute at issue provides in relevant part:

A person whose motor vehicle license . . . has been revoked . . . may reopen a department hearing on the revocation if the person submits a petition stating that . . . a criminal action on a charge of [OWI] filed as a result of the same circumstances which resulted in the revocation has resulted in a decision in which the court has held that the peace officer did not have reasonable grounds to believe that a violation of section 321J.2 had occurred to support a request for . . . a chemical test Such a decision by the court is binding on the department.

Iowa Code § 321J.13(4) (1987). We do not believe the legislature intended, by passage of this section, to make the exclusionary rule applicable to administrative proceedings. If they wanted to do so, they would have clearly stated such an intention. "[L]egislative intent is expressed by omission as well as by inclusion." Barnes v. Iowa Dep't of Transp., 385 N.W.2d 260, 263 (Iowa 1986).

Furthermore, the statute addresses grounds to support a request for a chemical test; it does not directly mention grounds for stopping a vehicle. Even if we were to find the statute applicable to petitioner here, he has not filed a petition or made any showing as to a related criminal matter, as required by the statute. The district court conclusion that no exclusionary rule applies to this case was not affected by error of law.

Because of our holding as to the exclusionary rule, we need not address petitioner's contention that the police officer did not have reasonable grounds to stop him. In

the absence of an exclusionary rule, the agency is allowed to consider all evidence before it, even that gained as the result of an illegal stop. Westendorf, 400 N.W.2d at 556-67; Morgan, 428 N.W.2d at 678. The agency and the district court correctly found the issue of the stop to be irrelevant.

Petitioner's final argument involves his alleged refusal to submit to testing and his right to contact an attorney upon being arrested. Petitioner contends he did not refuse to take the test but was only insisting he be allowed to speak with his attorney first. The State contends petitioner had an opportunity to contact an attorney and, having failed to do so, he had to either submit to the testing or formally refuse. Petitioner alleges there are many inconsistencies between official police records and the testimony at the hearing regarding the course of events on the night of his arrest. We find there was substantial evidence in the record to support the conclusions of the agency. See Morgan, 428 N.W.2d at 677-78.

Iowa Code section 804.20 (1987) states that while a person in custody must be allowed to call an attorney, if that person is intoxicated the call may be made by the person having custody. At the hearing, the officer testified it was common practice in their department for the police officers to do the dialing when an arrested

person wishes to make a phone call. While we do not believe that such stubborn adherence to a "common practice" should stand in the way of an arrestee's constitutional rights, we believe petitioner here was given a reasonable opportunity to contact an attorney. Petitioner should have given the officer the name or number of his attorney if he wished to exercise that right. The district court decision on this issue was not affected by error of law.

The decision of the district court is affirmed.

AFFIRMED.