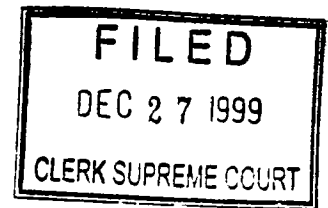


IN THE COURT OF APPEALS OF IOWA

No. 1999-213 (9-437) / 98-2180
Filed December 27, 1999



BILL B. BOYER,
Appellee,

vs.

**IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE
DIVISION,**
Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, .
Judge.

The respondent appeals the district court's ruling on judicial review reversing
the revocation of the petitioner's driver's license for refusal to take a chemical test.

AFFIRMED.

David L. Reinschmidt and Jay E. Denne of Munger & Reinschmidt, Sioux
City, for appellee.

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

Considered by Mahan, P.J., Hecht, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

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HABHAH, S.J.

The Iowa Department of Transportation appeals the district court's ruling on judicial review reversing the revocation of petitioner's driver's license for a chemical test refusal, pursuant to Iowa Code section 321J.9 (1997). The Department claims the court erred in finding petitioner was denied his right to counsel under section 804.20. We affirm on appeal.

On April 18, 1998, Sioux City police officers stopped a vehicle driven by Bill Boyer. Boyer appeared intoxicated and he failed a preliminary breath test. Police officer Christopher Groves arrested Boyer at 2:15 a.m. and took him to the Woodbury County jail.

Officer Groves requested a breath specimen from Boyer at 2:49 a.m. Boyer stated he wanted to talk to his attorney, David Reinschmidt. Officer Groves supplied Boyer with a Sioux City telephone book. Only Reinschmidt's business number was listed. Officer Groves observed it was unlikely Reinschmidt would be in the office at that hour. Boyer made no attempt to call Reinschmidt at his office.

Boyer remembered Reinschmidt lived in the area of Lawton or Merville, which are towns a few miles from Sioux City. These towns are within Woodbury County. Boyer told Officer Groves he wanted to call "a person" in the Lawton or Merville area. Officer Groves stated there was no telephone book for these areas at the jail. Officer Groves did not offer to call information and Boyer did not make such a request.

Officer Groves later testified he did not believe it was possible to call information from the jail.

Officer Groves asked Boyer if he wanted to call a different attorney from the numbers available in the Sioux City telephone book. Boyer declined the offer to call another attorney. Officer Groves then asked Boyer to make a decision about providing a specimen. At 2:55 a.m., Boyer refused the test. Officer Groves served Boyer with notice his driving privileges were revoked for a period of two years, pursuant to section 321J.9.

Boyer appealed the revocation of his driving privileges. After a hearing, the administrative law judge (ALJ) rescinded the revocation. The ALJ determined Boyer was denied the right to contact an attorney under section 804.20. The pertinent portion of this section 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 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.

Iowa Code § 804.20.

The ALJ found Boyer was not given a reasonable opportunity to contact his attorney. The ALJ found Officer Groves did not fulfill his duty under *Didonato v. Iowa Dept. of Transp.*, 456 N.W.2d 367 (Iowa 1990). When an arrested person requests to make a telephone call, section 804.20 is implicated and the officer should

~~then advise the arrested person~~ he or she has the opportunity to consult with counsel or a family member. *Id.* at 371. The ALJ determined Officer Groves did not explain to Boyer his rights under section 804.20. The ALJ also found it was unreasonable that the Woodbury County jail would not have the means to find telephone numbers within the county.

The ALJ's decision was appealed to the Department. The agency concluded Boyer was not denied his right to counsel. The agency noted Boyer was given the opportunity to contact another attorney, but he declined to do so. Section 804.20 does not provide an absolute right to talk to one particular attorney. *Bromeland v. Iowa Dept. of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). The revocation of Boyer's driver's license was reinstated.

Boyer sought further review in district court. The court found Officer Groves did not comply with the rule in *Didonato*. The court concluded once Boyer asked to make a telephone call, Officer Groves should have informed Boyer he was entitled to call either an attorney or a family member. The court determined compliance with the *Didonato* rule was mandatory. The court concluded the agency's decision was not supported by substantial evidence and Boyer's driving privileges should be reinstated.

~~The court noted~~ it was not necessary to address the second issue, whether Boyer was given a reasonable opportunity to contact his attorney. The court, however, addressed the issue and concluded Boyer was not given a reasonable opportunity to contact an attorney. The court felt Officer Groves could have located

a county telephone book, county attorneys directory, or even a pay telephone from which Boyer could have called directory assistance.

The Department appealed. On appeal, we apply the standard of review set forth in section 17A.19 to the agency decision, to determine if our conclusions are the same as those of the district court. *Ramsey v. Iowa Dept. of Transp.*, 576 N.W.2d 103, 106 (Iowa 1998). We will reverse an agency's findings if, after we review the record as a whole we determine substantial evidence does not support the agency's findings. *Pointer v. Iowa Dept. of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *Reed v. Iowa Dept. of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991).

The Department contends Boyer was not denied his right to counsel. It claims the rule in *Didonato* is not even implicated under the facts of this case. The Department asserts *Didonato* requires only that the officer not refuse to make any calls for an arrested person, and the officer here did more than *Didonato* requires.

Section 804.20 does not require an officer to tell an arrested person he has a right to counsel. *Didonato*, 456 N.W.2d at 371. However, the supreme court went on to state:

But when a request to make a phone call is made we do not believe the statutory purpose is met if the officer stands mute and refuses the request. Nor would there be any difference if the request is to call a friend. In these circumstances the statute is implicated and the officer should then advise for what purpose a phone call is permitted under the statute.

Id. The court also stated:

~~The main purpose~~ behind enactment of section 804.20 is apparent on ~~the face of the statute.~~ It is to provide an individual arrested the opportunity to consult with counsel or a family member after he or she has been arrested.

Id. at 370.

Thus, the rule in *Didonato* is that when an arrested person requests to make a telephone call, section 804.20 is implicated and the officer should then advise the arrested person he or she has the opportunity to consult with counsel or a family member. *Id.* at 371. See also *State v. Carter*, 577 N.W.2d 855, 857 (Iowa App. 1998). Compliance with this rule is mandatory. *Didonato*, 456 N.W.2d at 370.

In the present case, Boyer asked to call his attorney. There is no evidence Officer Groves informed Boyer he had the right to consult with an attorney or a family member, or both, as the statute suggests. If Boyer had been so informed, perhaps Boyer would have called a family member for assistance in contacting an attorney. As the Department itself points out, it is probable Boyer knew the telephone number of a family member or friend he could call. Because Officer Groves failed to comply with the rule in *Didonato*, we conclude the district court properly reversed the agency's decision and reinstated Boyer's driving privileges.

~~The Department~~ also asserts the district court erred in finding Boyer was denied a reasonable opportunity to consult his attorney. Since we have affirmed the district court on the first issue, we need not address this issue. The district court noted this second issue was not necessary to its decision.

We affirm the decision of the district court. The court properly reversed the agency's decision and reinstated Boyer's driving privileges.

AFFIRMED.