

IN THE COURT OF APPEALS OF IOWA

No. 0-325 / 09-1649
Filed February 23, 2011

DAVID WAYNE DEREUS,
Petitioner-Appellee,

vs.

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

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

The Iowa Department of Transportation appeals the district court's order reversing a driver's license revocation based on the driver's refusal of chemical testing. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Mark Hunacek, Assistant Attorney General, Des Moines, for appellant.

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

David Dereus was driving a personal vehicle, but held a commercial driver's license (CDL), when he refused chemical testing without being advised as to the consequences of his refusal on his CDL. We conclude the failure to give the complete implied consent advisory precluded revocation of Dereus's ordinary driver's license, as well as precluding disqualification of his CDL.

I. Background Facts & Proceedings

On February 7, 2009, Dereus was investigated for operating a private motor vehicle while intoxicated. Dereus held a CDL in addition to his ordinary driver's license. Dereus submitted to a preliminary breath test which indicated an alcohol concentration in excess of 0.08. The officer then requested chemical testing. It is undisputed the officer read an implied consent advisory to Dereus that did not include the provisions in Iowa Code section 321J.8(1)(c)(2) (2009), regarding the consequences of a chemical test failure or refusal on his CDL. Dereus refused chemical testing and the Iowa Department of Transportation (DOT) revoked his ordinary driver's license for one year.

Dereus contested the revocation of his driver's license. In the administrative proceeding, Dereus had the burden to prove why his license should not be revoked. See *Lee v. Iowa Dep't of Transp.*, 693 N.W.2d 342, 344 (Iowa 2005). In March 2009, after a hearing, an administrative law judge (ALJ) found the implied consent advisory in section 321J.8 is not mandatory and Dereus had not proven he suffered prejudice from the incomplete advisory. The ALJ concluded Dereus's driver's license revocation should be sustained.

In April 2009, Dereus filed an intra-agency appeal alleging failure to properly advise him of his pending decision's consequences on his commercial driving privileges violated: (1) his constitutional due process rights; and (2) Iowa Code section 321J.8(1)(c)(2). Also in April 2009, the State dismissed its OWI criminal case against Dereus.

On May 1, 2009, the agency, citing section 321J.8, found: "As an operator of a noncommercial motor vehicle and holding a commercial driver's license when requested to submit to chemical testing, [Dereus] should have been advised of section 321.208 [commercial driver's license disqualification]." However, the agency affirmed the ALJ's license revocation because "Dereus has not met his burden of proof to show how the incomplete implied consent advisory affected his decision to refuse the chemical test." The agency stated it lacked the authority to address constitutional questions and did not address the due process issue. On May 7, 2009, the DOT notified Dereus his "privileges to operate commercial motor vehicles are disqualified" for one year.

Dereus filed a petition for judicial review and the district court reversed the agency's decision. In October 2009, the court found section 321J.8 imposed a mandatory duty on an officer to inform a person about the consequences to both the ordinary driver's license and the CDL. The court also found the failure to read the full implied consent advisory deprived Dereus of his due process rights. The DOT appeals.

II. Standard of Review

Our review of the DOT's decision to revoke a driver's license is governed by Iowa Code chapter 17A. *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 210 (Iowa 2001). We review the district court's decision by applying the standards of section 17A.19 to the agency's decision to determine if our conclusions are the same as those reached by the district court. *Id.* If they are the same, we affirm; otherwise, we reverse. *Id.* We review constitutional challenges raised in an agency proceeding de novo. *Drake Univ. v. Davis*, 769 N.W.2d 176, 181 (Iowa 2009).

III. Implied Consent Advisory

Iowa's implied consent statute provides that in return for the privilege of using the public highway, a driver impliedly agrees to submit to chemical testing. *State v. Garcia*, 756 N.W.2d 216, 220 (Iowa 2008); see Iowa Code § 321J.6(1). However, a driver has the right to withdraw his implied consent and refuse to take the test. Iowa Code § 321J.9. Under Iowa Code section 321J.8, when an officer requests a driver to submit to chemical testing, the officer must advise the driver "of the consequences of refusing the test as well as the consequences of failing the test." *State v. Massengale*, 745 N.W.2d 499, 501 (Iowa 2008).

In 2007, the Iowa General Assembly amended section 321J.8 to expand the officer's implied consent advisory to include information regarding the potential for CDL disqualification when a person is operating a noncommercial vehicle. 2007 Iowa Acts ch. 69, § 1. This amendment ensured the officer's advisory reflected the 2005 amendments to Iowa Code section 321.208, which

created a one year CDL disqualification for a person who refused/failed chemical testing regardless of whether the person was operating a commercial or noncommercial vehicle.¹ See 2005 Iowa Acts ch. 8 § 23.

In *Massengale*, 745 N.W.2d 499, the Iowa Supreme Court considered the exclusion of breath test results in a criminal prosecution for a 2006 operating while intoxicated (OWI) charge. The officer gave the defendant an implied consent advisory which predated the 2007 amendments to 321J.8 and failed to inform him of the consequences of test failure on his CDL. *Massengale*, 745 N.W.2d at 502. The court found the advisory to be misleading “with respect to the revocation period for commercial driving privileges,” and concluded this substantive due process violation required suppression of the breath test results. *Id.* at 503-04. *Massengale* recognizes “under Iowa law, there are both civil and criminal penalties for” OWI, but does not address the question whether an administrative license revocation must be rescinded if the implied consent advisory did not comply with sections 321.208 and 321J.8(1)(c)(2).

The information in subsection 321J.8(1)(c)(2) was omitted from the implied consent advisory read to Dereus:

1. A person who has been requested to submit to a chemical test *shall be advised by a peace officer* of the following:

. . . .
c.

¹ The 2005 amendments also imposed a lifetime CDL disqualification for second-time offenders who were driving a noncommercial vehicle but held a CDL. See 2005 Iowa Acts ch.8, § 24.

(2) If the person is operating a noncommercial motor vehicle and holding a commercial driver's license . . . and either refuses to submit to the test or operates a motor vehicle while under the influence of an alcoholic beverage . . . the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable

(Emphasis added.)

Generally, the word "shall" imposes a duty. See Iowa Code § 4.1(30)(a). Section 321J.8 imposes a duty upon police officers to provide certain information to drivers who have been asked to submit to chemical testing. However, the duty imposed by the word "shall" may be either "directory" or "mandatory." *Downing v. Iowa Dep't of Transp.*, 415 N.W.2d 625, 628 (Iowa 1987). We look to legislative intent to determine whether "shall" is mandatory or directory. *Taylor v. Iowa Dep't of Transp.*, 260 N.W.2d 521, 522 (Iowa 1977).

If the duty imposed is "essential to the main objective of the whole statute, the provision is mandatory, and failure to perform the duty will invalidate subsequent proceedings under the statute." *Downing*, 415 N.W.2d at 628. When the duty is "not essential to accomplishing the principle purpose" of the statute, it "is directory, and a violation will not invalidate subsequent proceedings unless prejudice is shown." *Taylor*, 260 N.W.2d at 523. Statutory duties "designed to assure order and promptness in the proceeding," are ordinarily directory. *Id.*

Under section 321J.8, "the officer must advise the person of the consequences of refusing to submit to the test and the consequences of not passing the test, including the potential periods of license revocation." *Garcia*,

756 N.W.2d at 221. The overall purpose of the implied consent statute is “to help reduce the appalling number of highway deaths resulting” from intoxicated drivers. *Id.* at 220. However, the specific purpose of section 321J.8 is to provide a person who has been asked to submit to a chemical test “a basis for evaluation and decision-making in regard to either submitting or not submitting to the test.” *Voss*, 621 N.W.2d at 212. The purpose of the implied consent advisory is to give information to allow a person to make a reasoned and informed decision regarding chemical testing. *Massengale*, 745 N.W.2d at 504.

The district court determined the duty imposed by section 321J.8 was mandatory, stating:

The purpose of the statute is to fully inform the arrested individual of the impacts of refusal on his driver’s license and CDL. If one is not fully informed, a reasoned and well-informed decision cannot be made, especially in the case of one who holds a CDL but was stopped for driving a noncommercial vehicle. As the error lies with the DOT’s interpretation of the law, the Court is free to substitute its own interpretation.

We concur in the district court’s reasoning. The duty imposed by section 321J.8 is essential to the specific purpose of that statutory provision—to give vehicle drivers a basis for evaluating whether to submit to a chemical test. We conclude the duty to provide the information found in section 321J.8 is mandatory. Accordingly, the failure to provide the required information invalidates subsequent proceedings under the statute. *See Downing*, 415 N.W.2d at 628.

IV. Due Process

Because we have determined the revocation of Dereus's license should be rescinded on statutory grounds, we do not address the due process issue.

AFFIRMED.

Sackett, C.J., concurs; Mansfield, J., concurs specially.

MANSFIELD, J., (concur specially)

I specially concur. As I have explained in the companion case of *Morales v. Dep't of Transp.*, No. 0-324, I believe Iowa Code section 321J.8(1) is mandatory, but I would deny relief where the failure to comply with the statute could not have resulted in prejudice. This approach is consistent with precedent and with how our legal system normally operates. Generally, we do not deliver windfalls to parties who claim some law was violated but who could not have been adversely affected by that violation.

The facts of this case are different from *Morales*, thereby in my view compelling a different result. Here Dereus was not advised of any potential consequences to his commercial driver's license, as required by section 321J.8(1)(c)(2). Thus, as noted by the district court, it is possible Dereus could have believed there would be no impact on his CDL if he refused the test. Or Dereus could have thought that if he refused the test, the consequences for his CDL would be less serious than if he took the chemical test and failed it.

Since Dereus was potentially prejudiced by the officer's failure to read part of the implied consent advisory, I agree that the judgment below should be affirmed.