

**IN THE COURT OF APPEALS OF IOWA**

No. 6-1091 / 06-1181  
Filed March 14, 2007

**DAVID WAYNE LOWRY,**  
Petitioner-Appellant,

**vs.**

**IOWA DEPARTMENT OF TRANSPORTATION,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

David Lowry seeks further judicial review of an agency decision revoking his driver's license. **AFFIRMED.**

Ward A. Rouse of Berg, Rouse, Spaulding & Schmidt, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General and Noel C. Hindt, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VAITHESWARAN, J.**

David Lowry seeks further judicial review of an agency decision revoking his driver's license. We affirm.

***I. Background Facts and Proceedings***

A citizen notified the Mahaska County Sheriff's office of a truck that was stuck in a ditch. A deputy sheriff was dispatched to the site. When he arrived, he saw a man walking around in the vicinity of the truck. The man turned out to be David Lowry.

The deputy noticed that Lowry appeared intoxicated. He administered field sobriety tests and a preliminary breath test, which Lowry failed. The officer then arrested Lowry for operating a motor vehicle while intoxicated. Iowa Code § 321J.2 (2005). He later attempted to administer a DataMaster breath test to gauge the level of alcohol in Lowry's system. After two tries, the deputy determined that Lowry "refused" the test.

Based on this test refusal, the Iowa Department of Transportation revoked Lowry's driver's license. Iowa Code § 321J.9. Lowry sought judicial review. The district court affirmed the agency decision and Lowry now seeks further judicial review.

Lowry contends (A) "the Deputy lacked reasonable grounds to invoke implied consent" and (B) "there is no valid basis for a revocation based upon a refusal, when the DataMaster readings are 'invalid' and the peace officer does not offer an alternate DataMaster machine, or offer a blood or urine test." Our review of these issues is governed by the judicial review standards of Iowa Code section 17A.19(10).

## **II. Analysis**

### **A. Reasonable Grounds**

A driver is deemed to have consented to alcohol testing where the driver operates a motor vehicle under circumstances giving a peace officer reasonable grounds to believe the driver is intoxicated. Iowa Code § 321J.6(1). Lowry does not seriously dispute that the deputy had reasonable grounds to believe he was intoxicated at the scene. Instead, he contends the deputy lacked reasonable grounds to believe he was “operating a motor vehicle” in an intoxicated state. This issue implicates the substantial evidence test of Iowa Code section 17A.9(10)(f). See *Pointer v. Iowa Dep’t of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996).

The record contains substantial evidence to support the agency’s finding that Lowry drove to the scene while intoxicated. Lowry admitted as much while speaking to the deputy. Although Lowry later changed his story, an acquaintance at the scene confirmed that Lowry drove there. Given these facts, the absence of eye-witness evidence that Lowry was in the vehicle is not controlling. See *Pointer*, 546 N.W.2d at 625-26 (finding substantial evidence based on several facts including evidence that Pointer was sitting in driver’s side of the car when found); cf. *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996) (concluding defendant, “who was sleeping in a motionless vehicle with the engine not running was not operating a vehicle when he was approached by the officers” but finding substantial evidence to support OWI conviction based on Boleyn’s admissions); *Munson v. Iowa Dep’t of Transp.*, 513 N.W.2d 722, 724 (Iowa 1994) (reversing license revocation decision where Munson was behind the wheel but

vehicle was not in motion or running and Munson's admission that he drove to scene not made until after officer invoked implied consent); *State v. Braun*, 495 N.W.2d 735, 739 (Iowa 1993) (noting Braun was asleep in driver's seat and finding "an abundance of circumstantial evidence that Braun had driven his car to the location" where he was found).

Additional admissions also support the agency's finding. Lowry told the deputy that he had two beers before the accident. While Lowry now suggests that this amount could not have rendered him intoxicated before the accident, the officer noted that Lowry was "staggering around quite a bit" and his appearance suggested "he had more than two beers." The officer specifically stated Lowry smelled of alcohol and his eyes were bloodshot and watery.

Lowry counters this evidence by suggesting he became intoxicated after he got out of the vehicle. He points to the officer's admissions that there might have been a beer cooler in the truck and Lowry might have said he had a beer at the scene. However, the officer also stated there were no beer cans in or around the vehicle. Additionally, the citizen who contacted the sheriff's office told the dispatcher that Lowry appeared heavily intoxicated.

Based on this evidence, we affirm the agency finding that the officer had reasonable grounds to believe Lowry was operating a motor vehicle while intoxicated.

#### ***B. Refusal to Submit to Chemical Testing***

Lowry contends the deputy who administered the DataMaster test should not have deemed his actions a refusal to take the test. Citing the DataMaster operating manual, he maintains that, following two "invalid" results, the deputy

should have administered the test on a different machine or collected another type of bodily fluid. In his view, the officer's failure to follow this procedure prevented him from construing Lowry's actions as a refusal.

The agency rejected this argument, finding that Lowry's actions in blowing into the machine amounted to a "de facto refusal." Whether Lowry's conduct constituted a de facto refusal is a question of fact. *Hoppe v. Iowa Dep't of Transp.*, 402 N.W.2d 392, 393 (Iowa 1987). See also *State v. Weidner*, 418 N.W.2d 47, 49 (Iowa 1988). Cf. *Ginsberg v. Iowa Dep't of Transp.*, 508 N.W.2d 663, 664 (Iowa 1993) ("Whether Ginsberg's conduct constituted refusal pursuant to Iowa Code section 321J.6(2) is a legal question."). Therefore, our review is governed by the substantial evidence standard of Iowa Code section 17A.19(10)(f).

The record contains substantial evidence of a test refusal. After transporting Lowry to the local law enforcement center, the deputy sheriff asked him to take a breath test. Lowry agreed to take the test and the officer administered it two times. During the first test, Lowry blew into the DataMaster and then began to suck the air back. The result was recorded as "invalid." During the second test, Lowry blew air from the sides of his mouth. The result was again recorded as "invalid." At this point, the deputy construed Lowry's actions as a refusal to submit to the test. Iowa Code § 321J.6(2).

Lowry does not dispute the evidence of his non-compliance. Instead, he focuses on the deputy's admission that he did not press a "refused" button on the machine, which would have triggered a printout stating Lowry refused the test. The deputy explained this omission. He testified that he did not press the

“refused” button because Lowry initially agreed to submit to the test and it was only during the test that the officer noticed “he was not actually doing so.” As the deputy succinctly stated, Lowry “failed to perform the test as instructed.” This testimony amounts to substantial evidence in support of the agency’s finding of a “de facto refusal.”

**AFFIRMED.**