IN THE COURT OF APPEALS OF IOWA

No. 9-1064 / 09-1059
Filed February 10, 2010

MATTHEW EDWARD SWANSON,
Plaintiff-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,
Defendant-Appellee.

Appeal from the Iowa District Court for Hancock County, John S. Mackey, Judge.

Matthew Swanson appeals from the district court's finding that his license revocation adjudication by the Iowa Department of Transportation was supported by substantial evidence. **AFFIRMED.**

David R. Johnson of Brinton, Bordwell & Johnson, Clarion, for appellant.

Noel C. Hindt of the Iowa Department of Transportation, Ames, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

DANILSON, J.

Matthew Swanson appeals from the district court's finding that his license revocation adjudication by the Iowa Department of Transportation (DOT), pursuant to Iowa Code section 321J.2 (2007), was supported by substantial evidence. Swanson, a minor, argues the court erred in finding there was a valid waiver of his right to counsel. He also contends the court erred in finding there was a constitutional stop of his motor vehicle. We affirm.

I. Background Facts and Proceedings.

On August 30, 2008, around 6:52 p.m., Garner Police Officer Mark Yates received information about a complaint that high school boys driving a red Dodge Durango were placing cassette tape across the highway.[1] Later that night, at 1:55 a.m., Officer Yates was still on patrol when he identified the Durango in Garner, and stopped the vehicle. He approached the vehicle and informed the driver that the reason for the stop was because he had received a report that the vehicle was involved in an incident earlier that evening. Officer Yates learned the driver was seventeen-year-old Swanson. Swanson appeared to be under the influence of alcohol and admitted he had been drinking. He failed field sobriety testing as well as a preliminary breath test.

Officer Yates asked Swanson where his parents were, and Swanson advised that they were staying overnight in Mason City or Clear Lake. Officer Yates requested the cell phone numbers of the parents and tried unsuccessfully

[1] Officer Yates learned through the dispatch that the Durango was registered to Ed or Kimberly Swanson of Goodell. He left a message on the Swanson's home answering machine about the incident and asked them to contact the police department.

to contact them. Officer Yates told Swanson he was under arrest, placed him in the squad car, and transported him to the Hancock County Sheriff's Office.

At the sheriff's office, Officer Yates tried more extensively to locate Swanson's parents. He called their cell phones again several times, and asked the dispatcher to call hotels in Clear Lake. Officer Yates asked Swanson several times whether he had any other relatives available. Swanson said no. Officer Yates read Swanson the consent advisory and asked him if he wanted an attorney. Swanson said no. Swanson then failed the breathalyzer test. His license was revoked pursuant to section 321J.12(1)(a).

The DOT found the validity of Officer Yate's stop of Swanson's vehicle was not to be considered in an administrative license revocation hearing. Further, the DOT determined that Swanson's rights under section 232.11 were not violated,[2] because Officer Yates had made a good faith effort to contact Swanson's parents and had asked Swanson whether he wanted an attorney, which Swanson declined.

On appeal, the DOT affirmed its decision. Swanson then filed a petition for judicial review to the district court. After a telephone hearing, the district court affirmed the decision of the DOT. Swanson now appeals.

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[2] Pursuant to section 232.11(1)(a), a minor is entitled to counsel while in custody. Pursuant to section 232.11(2), a minor who is at least sixteen years old can waive his right to counsel. The waiver is valid

> only if a good faith effort has been made to notify the child's parent, guardian, or custodian that the child has been taken into custody and of the alleged delinquent act for which the child has been taken into custody, the location of the child, and the right of the parent, guardian, or custodian to visit and confer with the child.

Id.

II. Scope and Standard of Review.

In reviewing an agency decision, we apply the standards of Iowa Code section 17A.19(10) to assess whether our conclusions coincide with those reached by the district court. *Board of Supervisors v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 254 (Iowa 1998). Ordinarily, our review is confined to whether the district court correctly applied the law. *Bennett v. Iowa Dep't of Natural Res.*, 573 N.W.2d 25, 27 (Iowa 1997). Our review of the factual findings of the DOT is limited to a determination of whether the evidence is substantial to support the findings made. *See CMC Real Estate Corp. v. Iowa Dep't of Transp.*, 475 N.W.2d 166, 173-74 (Iowa 1991). Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Id.*

III. Merits.

Pursuant to section 232.11(1)(a), a minor has a right to be represented by counsel from the time he was taken into custody, and during any questioning thereafter by a peace officer. In this case, Swanson contends he was not informed of his right to be represented by counsel pursuant to section 232.11(1)(a), and as such, that he could not have given a proper waiver of this right. *See* Iowa Code § 232.11(2). Swanson therefore argues the DOT erred in revoking his license.

This appears to be an issue of first impression. Our supreme court has determined that a violation of section 232.11 would result in the evidence being excluded in criminal case. *See In re J.A.N.*, 346 N.W.2d 495, 498-99 (Iowa

1984). The court, however, has not yet addressed the issue with regard to a license revocation proceeding.

In this case, we agree with Swanson that he was not properly advised of his right to counsel. *Cf. State v. Means*, 547 N.W.2d 615, 620-21 (Iowa Ct. App. 1996). Officer Yates asked Swanson whether he wanted to call an attorney,[3] but did not elaborate that Swanson was entitled to be represented by counsel after being taken into custody and during any questioning while in custody as provided in section 232.11(1)(a). However, we conclude the officer's failure to formally advise Swanson of these rights does not prohibit the evidence from being considered in the license revocation proceeding. We believe this conclusion follows the general rule recognized by Iowa courts that evidence that has not yet been determined inadmissible in a criminal proceeding is admissible in an administrative proceeding. *Westendorf v. Iowa Dep't of Transp.*, 400 N.W.2d 553, 557 (Iowa 1987). In this case, there has been no criminal proceeding as to this issue. We conclude the DOT's consideration of the evidence of Swanson's arrest and questioning in the license revocation proceeding was proper.

In reaching this conclusion, we first observe that section 232.11 does not specifically require the law enforcement officer to inform the juvenile or the juvenile's parents of the juvenile's right to counsel.[4] However, to obtain a waiver

[3] Swanson does not dispute on appeal that Officer Yates complied with section 804.20, which provides that an arrested person is entitled to call, consult, or see a family member or an attorney. *See* Iowa Code § 804.20.

[4] Statements obtained from juveniles arrested on suspicion of crime without valid waiver of counsel are per se inadmissible. A child's right to counsel during questioning by police officials, however, can be waived. [Pursuant to section 232.11(2), if] the child is under sixteen years of age, the waiver requires the written consent of the child's parents, guardian, or

of counsel, clearly the juvenile would be required to first be informed of his rights to counsel as provided by section 232.11 and *Miranda*.

We also note that a violation of an individual's *Miranda* rights does not bar license revocation proceedings. Our supreme court has stated, "Because the implied consent procedure does not constitute interrogation it need not be preceded by the *Miranda* warning." *State v. Stroud*, 314 N.W.2d 437, 438 (Iowa 1982). However, we acknowledge that our supreme court has concluded a juvenile's statutory right to counsel is broader than the juvenile's constitutional rights to counsel:

> Iowa's Juvenile Code implements and goes beyond the constitutional right to counsel provided for juveniles by explaining the stages of proceedings when a child may be represented, the effect of denial of the right to counsel on statements offered in evidence, and the specific methods by which police officers may obtain a waiver of the child's right to counsel.

> legal custodian. In contrast, if the child is at least sixteen years of age, a waiver is valid without parental consent as long as police make a good faith effort to notify the parent, guardian or custodian the child has been taken into custody, of the alleged delinquent act, the location of the child, and the right of the parent, guardian, or custodian to visit and confer with the child.
>
> The statute does not grant an absolute right of parents of children at least sixteen years of age to receive this information. Rather, it requires police to make a good faith effort to contact parents before obtaining a waiver from their sixteen or seventeen-year old child. The good faith relates not only to the efforts to initiate contact with the parent or caretaker, but extends to the content of the contact as well. A four part message is required to be conveyed if contact is made. The purpose of this message is to impress upon the parent, guardian, or custodian the importance of going to the side of the child to give parental advice to him or her on whether they should waive their right to counsel.

State v. Means, 547 N.W.2d 615, 620 (Iowa Ct. App. 1996) (internal citations omitted).

State v. Walker, 352 N.W.2d 239, 241 (Iowa 1984). We also recognize that Iowa Code section 232.45(10) adopts a per se exclusionary rule in criminal cases when a juvenile has not effectively waived counsel.

Notwithstanding, neither section 232.11 nor 232.45(10) imposes a per se exclusionary rule to implied consent procedures. We believe that if the legislature intended for the per se exclusionary rule in section 232.45(10) to apply to implied consent procedures, in addition to criminal cases, it could have so provided. Thus, although a juvenile's right to counsel is broadened statutorily, the exclusionary rule was not broadened to encompass implied consent procedures. Because the legislature did not expand the exclusionary rule statutorily, we believe the reasoning supporting distinguishing the criminal proceedings from the civil proceedings is equally applicable to juveniles. *See Westendorf*, 400 N.W.2d at 557; *Heidemann v. Sweitzer*, 375 N.W.2d 665, 668-69 (Iowa 1985).

Swanson also argues that the initial stop was unreasonable. The DOT argues, citing *Westendorf*, that the exclusionary rule does not apply in this license revocation proceeding and that Swanson's argument regarding the reasonableness of the stop is therefore irrelevant. We agree.

Although there has been a shift in the law since *Westendorf*, and some of the barriers separating the administrative and criminal proceedings in OWI cases have been removed, our supreme court has consistently considered the constitutionality of a stop to be immaterial with respect to the initial license revocation proceedings. *See Lubka v. Iowa Dep't of Transp.*, 599 N.W.2d 466,

469 (Iowa 1999); *Wiebenga v. Iowa Dep't of Transp*., 530 N.W.2d 732, 734-35 (Iowa 1995); *Krueger v. Iowa Dep't of Transp.*, 493 N.W.2d 844, 845-46 (Iowa 1992) (as applied to a minor in a license revocation proceeding for possession of fictitious license); *Brownsberger v. Iowa Dep't of Transp.,* 460 N.W.2d 449, 451 (Iowa 1990). One statutory exception, under section 321J.13(6), applies when a person's license has been revoked under section 321J.9 or 321J.12 and a criminal action on the same circumstances results in a decision that the chemical test for blood alcohol was inadmissible or invalid. *See* Iowa Code § 321J.13(6); *Brownsberger*, 460 N.W.2d at 451. In that limited situation, an administrative proceeding may be reopened, and evidence that was inadmissible in the criminal proceeding would also be inadmissible in the administrative proceeding.

The record in this case does not contain any evidence of criminal proceedings and, specifically, of any finding that Officer Yate's stop was unreasonable, which could trigger section 321J.13(6), and require a similar finding in this civil proceeding. Furthermore, the record does not contain new evidence relating to the legality of the stop, another trigger for the remedy provided in section 321J.13(6).

We have also reviewed the district court's ruling in respect to the illegality of the stop of Swanson's vehicle as it was raised in these proceedings. Although seven hours had elapsed since the commission of the crime of littering on a roadway, the officer knew the type of vehicle involved in the crime, the vehicle's color, and the vehicle's license plate. These facts support the district court's reasoning and conclusion that the officer had reasonable cause to stop

Swanson's vehicle. We therefore find the DOT did not err in failing to find the stop of Swanson's vehicle was unreasonable. *See Manders v. Iowa Dep't of Transp*., 454 N.W.2d 364, 366-67 (Iowa 1990).

AFFIRMED.