IN THE COURT OF APPEALS OF IOWA

No. 2-1127 / 12-1294
Filed February 27, 2013

NATHAN CHARLES JOHNSTON,
Petitioner-Appellant,

vs.

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

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

Petitioner appeals the decision of the district court affirming the revocation of his driver's license for six years under Iowa Code section 321J.4(4) (2011).

REVERSED AND REMANDED.

Matthew T. Lindholm, Des Moines, of Gourley, Rehkemper & Lindholm, P.L.C., for appellant.

Thomas J. Miller, Attorney General, and Michelle R. Linkvis, Assistant Attorney General.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Petitioner Nathan Johnston appeals the decision of the district court affirming the revocation of his driver's license for six years under Iowa Code section 321J.4(4) (2011) based on the Iowa Department of Transportation's determination he had three convictions for operating while intoxicated (OWI). He claims one previous conviction should not be considered because it was a violation of a municipal ordinance. He also asserts that even if a violation of an ordinance could be considered, the ordinance was not "substantially equivalent" to section 321J.2(1), and therefore, may not be considered as a prior offense based on section 321J.2(8)(c). We conclude the term "statute" in section 321J.2(8)(c) does not encompass violations of city ordinances. We reverse the decision of the district court and the Department, and remand for further proceedings.

I. Background Facts & Proceedings

On October 8, 2011, the Iowa Department of Transportation gave notice to Johnston that his driving privileges were revoked for six years under Iowa Code section 321J.4(4) because he had three previous convictions for OWI within the last twelve years. The Department noted Johnston had a convictions for OWI in Nebraska on July 16, 2002, in Iowa on April 7, 2005, and another in Iowa on May 30, 2011.

Johnston appealed to the Department, arguing that his conviction in Nebraska should not be counted as a previous conviction under section 321J.2(8). Johnston claimed his Nebraska conviction did not qualify as a

previous offense because it was based on a violation of a city ordinance, Omaha City Municipal Code chapter 36, article III, section 36-115.[1] He asserted section 321J.2(8)(c) only applied to statutes of other states, not ordinances. He also asserted that the Nebraska ordinance was not "substantially equivalent" to section 321J.2(1), the Iowa statute setting out the elements of OWI.

Section 321J.2(8)[2] provides:

> In determining if a violation charged is a second or subsequent offense for purposes of criminal sentencing or license revocation under this chapter . . . .
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> . . .
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> c. Convictions or the equivalent of deferred judgments for violations in any other states under statutes substantially corresponding to this section shall be counted as previous offenses. The courts shall judicially notice the statutes of other states which define offenses substantially equivalent to the one defined in this section and can therefore be corresponding statues. Each previous violation on which conviction or deferral of judgment was entered prior to the date of the violation charged shall be considered and counted as a separate previous offense.

The Department denied his request, stating, "Our official notice concerning your sanction indicated that you were not entitled to an appeal because Iowa Law mandates our action. We have no discretion, so an appeal can not be provided."

Johnston then filed a petition for judicial review in district court, claiming the agency did not consider relevant and important matters as required by

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[1] The Omaha municipal ordinance was subsequently invalidated and determined to be unenforceable by the Nebraska Supreme Court because it was inconsistent with the Nebraska state statute. *State v. Loyd*, 655 N.W.2d 703 (Neb. 2003.)

[2] This subsection was previously found at Iowa Code § 321J.2(4). The statute was amended in 2010, and the section renumbered, but the language of this subsection remained the same. *See* 2010 Iowa Acts ch. 1124, § 1. The amendment became effective December 1, 2010. *Id*. § 9. We will refer to this subsection by its current designation, 321J.2(8).

section 17A.19(10)(j), and its decision was unreasonable, arbitrary, capricious, and an abuse of discretion under section 17A.19(10)(n). The case was submitted to the court based on the written record.

The district court affirmed the decision of the Department. The court found the Omaha ordinance was substantially equivalent to section 321J.2(1), stating, "The penalty provisions, scope, and level of detail in the ordinance and the Iowa law may differ in some ways, but both forbid the same conduct." The court found, "there is no requirement that the provision of law underlying the out-of-state conviction be absolutely identical to Iowa Code section 321J.2." The court also determined, "the statute/ordinance distinction is irrelevant for purposes of license revocation." The court noted that "[t]he conduct for which Johnston was convicted in Omaha would have also constituted a criminal offense under Nebraska's state OWI statute." The court concluded the Department properly considered the Omaha offense.

Johnston filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court denied the motion. Johnston now appeals.

II. Standard of Review

In judicial review of agency actions, the district court reviews for the correction of errors at law. *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011). We apply the standards of section 17A.19(10) to the agency action to determine whether our conclusions are the same as those of the district court. *Lee v. Iowa Dep't of Transp.*, 693 N.W.2d 342, 344 (Iowa 2005). On factual issues, the agency's findings should be affirmed if supported by substantial

evidence. *CMC Real Estate Corp. v. Iowa Dep't of Transp.*, 475 N.W.2d 166, 174 (Iowa 1991).

On legal issues, our review is determined by whether the statutory provision in question has been delegated to the authority of the agency. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). The Iowa Supreme Court has stated:

> We give deference to the agency's interpretation if the agency has been clearly vested with the discretionary authority to interpret the specific provision in question. If, however, the agency has not been clearly vested with the discretionary authority to interpret the provision in question, we will substitute our judgment for that of the agency if we conclude the agency has made an error of law. Deference may be given to an agency's interpretation in a specific matter or an interpretation embodied in an agency role. Indications that the legislature has delegated interpretive authority include "rule-making authority, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the subject or on the term to be interpreted."

Id. at 518-19 (citations omitted).

Under section 321J.4(4) the Department "shall revoke" a driver's license if the person has three or more OWI violations. Section 321J.2(8)(c) provides parameters as to whether a violation should be considered a prior offense for purposes of license revocation. Specifically Section 321J.2(8)(c) provides:

> Convictions or the equivalent of deferred judgments for violations in any other states under statutes substantially corresponding to this section shall be counted as previous offenses. The courts shall judicially notice the statutes of other states which define offenses substantially equivalent to the one defined in this section and can therefore be considered corresponding statutes. Each previous violation on which conviction or deferral of judgment was entered prior to the date of the violation charged shall be considered and counted as a separate previous offense.

We conclude the Department's enforcement authority requires it to interpret section 321J.2(8)(c) in order to effectuate its statutory duty to revoke driver's licenses. We therefore conclude the legislature has delegated interpretive authority over this provision to the Department. Despite this deference, we may still reverse if we find there has been an error of law. *See Furry v. Iowa Dep't of Transp.*, 464 N.W.2d 869, 873 (Iowa 1991).

Johnston has the burden to show that his driver's license should not be revoked. *See Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996).

III. Merits

Johnston contends the Omaha ordinance is not a statute, and section 321J.2(8)(c) specifically refers to "violations in any other states under statutes substantially corresponding to this section . . . ." He states that only violations of *statutes* of other states can be considered in determining whether a violation in Iowa is a second or subsequent offense. We note that under section 321J.2(8)(c), "any OWI conviction or deferred judgment that occurs within the previous twelve years counts as a prior offense." *Bruno v. Iowa Dep't of Transp.*, 603 N.W.2d 596, 599 (Iowa 1999). We must determine whether the violation of an ordinance may be considered a prior OWI conviction under section 321J.2(8)(c).

Our first goal in interpreting a statute is to determine legislative intent. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). We consider the language of the statute, "the statute's subject matter, the object

sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." *Cox v. State*, 686 N.W.2d 209, 213 (Iowa 2004). "In interpreting statutes, we will assume that the legislature intends to accomplish some purpose and that the statute was not intended to be a futile exercise." *State v. Reed*, 596 N.W.2d 514, 515 (Iowa 1999).

Our supreme court has also recited:

> "That intent is evidenced by the words used in the statute." *State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997). "When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms." *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998). In the absence of legislative definition, we give words their ordinary meaning. *State v. White*, 545 N.W.2d 552, 555 (Iowa 1996).

State v. Hearn, 797 N.W.2d 577, 583 (Iowa 2011). If, however, the language is ambiguous, "'the manifest intent of the legislature is sought and will prevail over the literal import of the words used.'" *State Pub. Defender v. Iowa Dist. Ct.*, 633 N.W.2d 280, 283 (Iowa 2001) (quoting *State v. McSorley*, 549 N.W.2d 807, 809 (Iowa 1996)).

Our first step in our analysis is to determine if the language chosen by the legislature is ambiguous. *Hearn*, 797 N.W.2d at 583. However, we will briefly acknowledge the statute's purpose. In considering an earlier version of section 321J.2(8)(c),[3] the Iowa Supreme Court has stated:

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[3] The supreme court was discussing section 321.281(9)(a), which had been enacted in 1982. *State v. Blood*, 360 N.W.2d 820, 822 (Iowa 1985). This section has since been repealed. *See Stille v. Iowa Dep't of Transp*., 646 N.W.2d 114, 117 n.1 (Iowa Ct. App. 2001). Section 321J.4 is substantially similar to previous section 321.281(9). *State v. Dunmire*, 443 N.W.2d 338, 339 n.1 (Iowa Ct. App. 1989).

> Upon a third or subsequent violation, subsection [ ] triggers a court order directing an administrative agency to revoke the defendant's driving privileges. Such revocation "is not intended as a punishment to the driver, but is designed solely for the protection of the public in the use of the highways." We conclude that the purpose of the legislature in enacting section [ ] was to protect the public by providing that drivers who have demonstrated a pattern of driving while intoxicated be removed from the highways. The peril created by a repeated violator is not lessened by the fact that one of the violations resulted in a deferred judgment. The legislative purpose of subsection [ ] requires that the term "violations" be interpreted to include those previous determinations of guilt that resulted in deferred sentences.

State v. Blood, 360 N.W.2d 820, 822 (Iowa 1985) (citation omitted).

Unlike sentencing, which is a punishment, license revocation is a safeguard. *State v. Maher*, 618 N.W.2d 303, 305 (Iowa 2000). The sole purpose of the statute providing for license revocation for those convicted of OWI is protection of the public. *Hills v. Iowa Dep't of Transp*., 534 N.W.2d 640, 641 (Iowa 1995); *Loder v. Iowa Dep't of Transp.*, 622 N.W.2d 513, 515 (Iowa Ct. App. 2000). The purpose of section 321J.2(8) is to "protect the public by providing that drivers who have demonstrated a pattern of driving while intoxicated be removed from the highways." *See State v. Carney*, 584 N.W.2d 907, 909 (Iowa 1998). The legislature has placed a high priority on the enforcement of laws prohibiting drunk driving. *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995).

"Ordinarily, where the legislature defines its own terms and meanings in a statute, the common law and dictionary definitions which may not coincide with the legislative definition must yield to the language of the legislature." *Laundsen v City of Okoboji Bd. Of Adjustment*, 554 N.W.2d 541, 543 (Iowa 1996).

However, here the term "statute" is not specifically defined in chapter 321J. In general, a statute is considered to be a bill enacted the legislature and signed by the governor. *See* Iowa Code ch. 3 ("Statutes and Related Matters"). The term "ordinance" is defined as "a city law of a general and permanent nature." Iowa Code § 362.2(16). An "ordinance" is legislation passed by a city council. *See* Iowa Code ch. 380 ("City Legislation").

Johnston relies upon *Bergeson v. Pesch*, 117 N.W.2d 431, 433 (Iowa 1962), in support of his argument to distinguish between statutes and ordinances. That case considered whether a driver's license could be revoked under section 321.209 for "three charges of any speed restriction violation under the provisions of sections 321.285 to 321.287, inclusive, committed within a twelve month period,"[4] when the speed violations were based on the violation of a city ordinance. *Bergeson*, 117 N.W.2d at 432.

The Iowa Supreme Court noted that section 321.209 limited license revocation to convictions for speed violations under certain specific code sections. *Id.* at 433. The violation of ordinances did not come within the statutory language of section 321.209. *Id.* The court also noted section 321.209 "confers no authority upon the department to revoke a license for violations of an ordinance." *Id.* The court found, "If the legislature intended to direct the department to revoke an operator's license for violations of speed restrictions contained in a city ordinance we must presume it would have so stated." *Id.* The

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[4] The subsection specifically discussed in *Bergeson*, 117 N.W.2d at 432, is no longer in force.

court concluded that revocation of a driver's license based on violations of city ordinances was not then authorized by the statute. *Id.* at 434-35.

The court in *Bergeson*, however, made a distinction between the subsection in question, which linked license revocation with a violation of specific code sections, with another subsection, which mandated revocation "upon two charges of reckless driving." *Id.* at 433. The court stated, "There appears to be a clear distinction between [these] subsections [ ] on the point at issue. The former is fairly open to construction that two convictions of reckless driving, whether under 321.283 or a valid city ordinance, afford cause for revocation."[5] *Id.*

Subsequently, in *Sellers v. Osmundson*, 202 N.W.2d 54, 56 (Iowa 1972), the Iowa Supreme Court determined that municipal speed ordinances were included within the meaning of another statute, section 321.210(6),[6] which provided for suspension of a person's license if the person "[h]as committed a serious violation of the motor vehicle laws of this state." The court's decision, however, was based on explanatory language which no longer appears in section 321.210. *See Sellers*, 202 N.W.2d at 55-56.

In considering the meaning of section 321J.2(8)(c), we also note the section provides in part, "The Court shall judicially notice the statutes of other states which define offenses substantially equivalent to the one defined in this section and can therefore be considered corresponding statutes." However, "[t]he general rule is that a court of general jurisdiction will not take judicial notice

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[5] This statement was later clarified in *City of Vinton v. Engledow*, 140 N.W.2d 857, 860-61 (Iowa 1966), where the court stated, "A city ordinance cannot be allowed to change the statutory definition either by enlargement or diminution."

[6] At the time of the decision in *Sellers*, this provision was found at section 321.210(7).

of a city ordinance." *City of Cedar Rapids v. Cach*, 299 N.W.2d 656, 658 (Iowa 1980); *see also Cohen v. Iowa Dist. Ct.*, 508 N.W.2d 78, 82 (Iowa Ct. App. 1993).

Under section 622.62(1), "When properly pleaded, the courts of this state shall take judicial notice of ordinances contained in a city code or city code supplement." This provision applies to ordinances which have been compiled in a city code pursuant to section 380.8.[7] Iowa Code § 622.62(1); *Cohen*, 508 N.W.2d at 82-83. If a city's ordinances have not been compiled into a city code under section 380.8, then the court does not take judicial notice, but a copy of the ordinance, "certified by the city clerk, shall be received in evidence for any purpose." Iowa Code § 622.62(2); *City of Cedar Rapids*, 299 N.W.2d at 659. It is often a question of fact as to whether a city's ordinances have been compiled pursuant to section 380.8. *Cohen*, 508 N.W.2d at 83.

The fact that section 321J.2(8)(c) directs courts to take judicial notice of statutes of other states militates against a finding that the legislature intended the word "statutes" in that section to include ordinances. As noted, the general rule in Iowa is that a court will not take judicial notice of a city ordinance. *City of Cedar Rapids*, 299 N.W.2d at 658. Certainly, under section 622.62, a court will not take judicial notice of an ordinance under all circumstances, but only where the ordinances are compiled into a city code under section 380.8. Because Iowa courts do not take judicial notice of the ordinances of Iowa cities under all circumstances, we do not believe the legislature was directing Iowa courts to take judicial notice of the ordinances of cities in other states in all circumstances.

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[7] Section 380.8 provides for the compilation and publication of a city's code of ordinances.

Section 321J.2(8) does not contain any exceptions to the direction to take judicial notice of statutes of other states, and we believe this shows the legislature did not intend to include ordinances within the meaning of the word "statutes" in this provision.

Moreover, in *Wright v City of Cedar Falls*, 424 N.W.2d 456, 457 (Iowa 1988), our supreme court was faced with the issue of whether a postconviction relief application could be filed for violating a city ordinance. The court noted that a postconviction relief action under chapter 663A could be filed if the applicant was convicted of a "public offense." *Wright*, 424 N.W.2d at 457. The term "public offense" was defined in Iowa Code section 701.2 as an offense "prohibited by statute and is punishable by fine or imprisonment." In its analysis of whether a public offense included violations of city ordinances, the court stated,

> Laws enacted by the general assembly have historically been referred to as "statutes." *See, e.g.,* Iowa Code §§ 4.1, 14.12(6)(j), 14.20. A piece of city legislation, on the other hand, has been referred to as "an ordinance." *See* Iowa Code §§ 380.1, 364.3(1). Consequently, the term statute as used in section 701.2 refers to an enactment by the general assembly rather than enactment by the legislative body of a city.

Id. at 458-59. We also note that Black's Law Dictionary 1420 (7th ed. 1990), defines the term "statute" as "an act of the legislature declaring, commanding, or prohibiting something."

In *Sellers*, our supreme court observed, "The interests of clarity would be served by legislation which would either include or exclude municipal traffic ordinances consistently throughout the motor vehicle code. However, proper

judicial concern in such matters is with legislative intent not with legislative standards." *Sellers*, 202 N.W.2d at 55. In section 321J.2(8)(c), the legislature has stated that convictions and deferred judgments "for violations in any other states under statutes substantially corresponding to this section" must be counted as previous offenses for purposes of license revocation. Here, in this statute, we believe the legislature has made clear that their legislative intent was to only encompass other state's statutes, not city ordinances, and conclude the language is unambiguous. We also find support in this conclusion because of the reference to taking judicial notice of "statutes of other states," without reference to taking judicial notice of city ordinances. Because we do not find that the statute is ambiguous, there is no need to analyze whether the "'manifest intent of the legislature" should "prevail over the the literal import of the words used.'" *See State Pub. Defender*, 633 N.W.2d at 283 (*quoting McSorley*, 549 N.W.2d at 809).

Accordingly, notwithstanding giving deference to the Department's interpretation, we conclude the term "statute" in section 321J.2(8)(c) does not include violations of city ordinances. We may reverse the decision of the district court and the Department if we find there has been an error of law. *See Furry*, 464 N.W.2d at 873. We conclude the district court and the Department erred in interpreting the meaning of section 321J.2(8)(c) by determining the term

"statutes" to include city ordinances. Because of this conclusion, we do not reach the question of whether the Omaha city ordinance was substantially similar to section 321J.2.

REVERSED AND REMANDED.

Bower, J., concurs; Eisenhauer, C.J., dissents.

EISENHAUER, C.J. (dissenting)

I dissent.

The majority concludes the Department erred in interpreting the meaning of section 321J.2(8)(c) to include a city ordinance within the term "statutes." Because of this conclusion, they do not reach the question of whether the Omaha city ordinance was substantially similar to section 321J.2. For the reasons set out below, I would conclude the Omaha city ordinance meets the definition of "statutes" and is substantially similar to section 321J.2. I would affirm the district court.

The majority concludes the statute is not ambiguous and there is no need to analyze whether the "'manifest intent of the legislature'" should "'prevail over the literal import of the words used.'" *See State Pub. Defender*, 633 N.W.2d at 283 (quoting *McSorley*, 549 N.W.2d at 809)). My reading of the statute leads me to conclude it is ambiguous, and I would analyze the intent of the legislature.

Noting the conduct for which Johnson was convicted under the Omaha municipal ordinance would have also constituted a criminal offense[8] under Nebraska's state OWI statute, the district court held Iowa's legislative intent was to include OWI convictions resulting from violations of a local or municipal code. It ruled: "In light of this legislative intent [to include out-of-state convictions for driving while intoxicated], and the similarity of the conduct involved in the Omaha

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[8] Johnston's Nebraska conviction occurred in 2002. The Nebraska Supreme Court's 2003 invalidation of the Omaha ordinance was based on the inconsistencies in the *penalty provisions* of the OWI ordinance as compared to the OWI statute. *State v. Loyd*, 655 N.W.2d 703, 706 (Neb. 2003) (ruling when an ordinance and statute "require the trial court to impose different sentences, the provisions cannot coexist and the ordinance is unenforceable").

and the Iowa convictions, the court finds the statute/ordinance distinction is irrelevant for purposes of license revocation."

In addition to the words chosen by the legislature, courts "consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied, seeking a result that will advance, rather than defeat, the statute's purpose." *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999) (quoting *Danker v. Wilimek*, 577 N.W.2d 634, 636 (Iowa 1998)). To hold OWI convictions under a substantially similar municipal ordinance[9] do not constitute a prior conviction for purposes of license revocation defeats the remedial purpose of the revocation statute. *See State v. Kocher*, 542 N.W.2d 556, 558 (Iowa 1996) (holding implied consent statute is remedial and a license revocation and subsequent OWI prosecution do not offend double jeopardy). A statute must be interpreted in a fashion that avoids unreasonable or absurd results inconsistent with legislative intent. *State v. Nail*, 743 N.W.2d 535, 543 (Iowa 2007) (stating "legislature, despite its clumsy wording, did not intend the absurd result"). Excluding convictions under the Omaha ordinance provides a "free pass" to anyone convicted of OWI at the municipal level, thus subverting the legislative purpose of the OWI statutes "to protect the public by removing repeat-offenders from our roadways." *State v. O'Malley*, 593 N.W.2d 517, 519 (Iowa 1999) (ruling Illinois conviction constituted a previous offense); *State v. Blood*, 360 N.W.2d. 820, 822 (Iowa 1985) (recognizing administrative revocation for OWI is not punishment,

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[9] I agree with the trial court's statement: "The penalty provisions, scope, and level of detail in the ordinance and Iowa law may differ in some ways, but both forbid the same conduct."

but is solely designed to protect the public's use of highways). Just as "the peril created by a repeat violator is not lessened by the fact that one of the previous violations resulted in a deferred judgment," neither is the peril lessened if one of the previous violations resulted from a violation of a municipal ordinance rather than a state statute. *See Blood*, 360 N.W.2d. at 822. In keeping with the remedial and public safety interests of Iowa's OWI statutes, just as OWI juvenile adjudications and OWI deferred judgments constitute final convictions for purposes of determining subsequent OWI offenses, so must municipal code OWI offenses. *See* Iowa Code § 321J.2(8)(b); *State v. Reed*, 596 N.W.2d 514, 515-16 (Iowa 1999) (ruling prior deferred judgment for OWI could be used to enhance subsequent OWI conviction); *State v. Schweitzer*, 646 N.W.2d 117, 120-21 (Iowa Ct. App. 2002) (holding juvenile OWI adjudication could be used to enhance subsequent OWI conviction).[10] I would affirm.

[10] We note Nebraska treats convictions under its city or village OWI ordinances the same as a conviction under its OWI statutes "with respect to the operator's license of such person." *Loyd*, 655 N.W.2d at 705.