IN THE COURT OF APPEALS OF IOWA

No. 7-749 / 06-1805
Filed November 15, 2007

COOPER A. OLMSTEAD,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
Respondent-Appellee.

Appeal from the Iowa District Court for Hamilton County, William C. Ostlund, Judge.

Motorist appeals the district court's ruling affirming the revocation of his driver's license and other privileges. **AFFIRMED.**

Paul Ahlers of Bottorff & Ahlers, Webster City, for appellant.

Thomas J. Miller, Attorney General, Noel C. Hindt, Iowa Department of Transportation, Ames, for appellee.

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

BAKER, J.

Cooper Olmstead appeals the district court's ruling affirming the revocation of his driver's license and other privileges. We affirm.

I. Background and Facts

Cooper Olmstead was arrested in the early morning hours of February 11, 2006. Webster City police officer Scott Ely observed Olmstead's black Chevrolet Avalanche speeding. Ely activated his emergency lights and pulled the vehicle over. Videotape of the police stop shows a bouncing motion of the vehicle after it had come to a stop. Upon approaching the vehicle, Ely observed Olmstead in the driver's seat, with the running vehicle. Ely observed at least one open container in the back seat of the vehicle.

Ely administered field sobriety tests to Olmstead, including a preliminary breath test, and then arrested him for operating while intoxicated (OWI). Ely transported Olmstead to the Hamilton County Law Enforcement Center, where Olmstead agreed to take a breath test, which registered an alcohol concentration of 0.146. En route to the center, Olmstead asked Ely what would be the consequence if he had switched seats with the driver. He later told Ely that is what had happened. Ely did not investigate the credibility of Olmstead's claim.

At the administrative hearing, Olmstead and the two back-seat passengers, Daniel Ruba and Nickolas Murphy, testified that Josh Bloomgren had been driving the vehicle and that Bloomgren and Olmstead quickly switched places after they pulled over and the vehicle was placed in park. They testified that Bloomgren "freaked out" when Ely activated his emergency lights, they were

afraid Bloomgren would try to run from the police, and Olmstead volunteered to switch places with Bloomgren so that he would pull over.

The Iowa Department of Transportation (DOT) revoked Olmstead's driving, registration, and other privileges. *See* Iowa Code § 321J.2(1)(b) and (2)(a)(3) (2005) (providing that, if an operator of a motor vehicle has an alcohol concentration of .08 or more, the person's driver's license is revoked). Olmstead challenged the DOT decision and proceeded to a contested hearing before an administrative law judge (ALJ). Following an adverse ruling from the ALJ, Olmstead appealed to the Director of the DOT, who affirmed the ALJ. Olmstead appealed the final agency action to the district court. The court affirmed the decision of the ALJ and DOT. Olmstead appeals, contending the record establishes that he switched places with the actual driver of the vehicle, and the DOT and district court erred in concluding he operated the vehicle.

II. Merits

Our review of a DOT revocation decision is governed by chapter 17A, Iowa's Administrative Procedure Act, and is confined to correction of errors of law. Iowa Code § 17A.19; *Scott v. Iowa Dep't of Transp.*, 604 N.W.2d 617, 619 (Iowa 2000); *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). When reviewing agency action, the district court

> acts in an appellate capacity to correct errors of law on the part of the agency. When we review such an action by the district court, we merely apply the standards of section 17A.19(10) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse.
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> The burden of proof in an administrative license proceeding is totally on the licensee. We will uphold the agency's action if supported by substantial evidence in the record before the court when that record is viewed as a whole.

Hager v. Iowa Dep't of Transp., 687 N.W.2d 106, 108 (Iowa Ct. App. 2004) (internal quotation marks and citations omitted). We are not, however, bound by the DOT's legal conclusions, and we may correct misapplications of the law. *Ginsberg v. Iowa Dep't of Transp.*, 508 N.W.2d 663, 664 (Iowa 1993).

Olmstead contends the record establishes that he switched places with Bloomgren and that substantial evidence does not support a finding that a switch did not occur. On appeal, the DOT's factual findings are binding on us if supported by substantial evidence, i.e., evidence a reasonable person could accept as adequate to reach the same findings. *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991). "[E]vidence is not insubstantial merely because it would have supported contrary inferences. Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it." *Id.*

We find substantial evidence exists to support a conclusion that a switch did not occur. Olmstead's credibility is placed in question by his changing story and interest in maintaining a clean driving record, as is the credibility of the passengers by their lack of forthrightness at the time of the stop. *See Laing v. State Farm Fire & Cas. Co*., 236 N.W.2d 317, 320 (Iowa 1975) ("[A] fact finder is not bound to accept testimony as true because it is not contradicted."). Further, the shaking vehicle could be explained by other reasons, including an attempt to hide open beverage containers. While the evidence could have supported Olmstead's claim that he and Bloomgren switched seats, it could also have supported the opposite conclusion.

The controlling issue in this appeal, however, is not whether a switch occurred, but whether Olmstead operated the vehicle. Olmstead contends he did not "operate" the vehicle because he did not take an initial step in carrying out the operation of the vehicle. He argues that, because he did not touch any foot pedals, gearshifts, or the ignition, he did not exercise actual physical control of the vehicle, and potential control is not enough.

OWI statutes "should be liberally interpreted in favor of the public interest and against the private interests of the drivers involved." *State v. Murray*, 539 N.W.2d 368, 369-70 (Iowa 1995). An "operator" is defined as "a person who is in actual physical control of a motor vehicle." Iowa Code § 321.1(48). "[T]he term 'operate' means the immediate, actual physical control over a motor vehicle that is in motion and/*or has its engine running*." *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d 722, 724-25 (Iowa 1994) (emphasis added). Even a driver asleep behind the wheel of a car that is running is "operating" that vehicle under the statute. *See, e.g., State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). We hold that whether he had touched the foot pedals, gearshifts, or the ignition is not dispositive of whether Olmstead had actual physical control of the vehicle. Olmstead was sitting in the driver's seat of a running vehicle and that alone is sufficient to demonstrate actual physical control. We therefore conclude the DOT and district court did not err in concluding Olmstead operated the vehicle.

AFFIRMED.