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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1048**

State of Minnesota,
Respondent,

vs.

Kimberly Carmen Cordova,
Appellant.

**Filed March 25, 2013
Affirmed
Stoneburner, Judge**

Beltrami County District Court
File No. 04CR113495

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Timothy R. Faver, Beltrami County Attorney, David P. Frank, Assistant County
Attorney, Bemidji, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and
Kirk, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges her conviction of gross-misdemeanor test refusal, arguing that the state failed to prove beyond a reasonable doubt that she refused testing. We affirm.

FACTS

Appellant Kimberly Carmen Cordova was arrested in Beltrami County based on probable cause that she had been driving while impaired (DWI). She was taken to the law enforcement center, and Beltrami County Sheriff's Deputy Lyan Karger read the implied-consent advisory to her. Cordova indicated that she understood the advisory. Deputy Karger asked if she wanted to consult with an attorney about testing. Cordova indicated she could not afford an attorney and inquired about a public defender, stating that she felt she had been harassed by being arrested in her own yard.

Deputy Karger explained that the purpose of contacting an attorney "right now" was about whether or not to take the breath test he was going to ask her to take. He explained that even if she did not consult with an attorney before deciding whether to take the test, she still could get an attorney "later on." He asked again if she wanted to consult with an attorney "right now" and offered her a telephone and a telephone book. Deputy Karger also asked if she wanted to call anybody else about contacting an attorney, indicating that she could use her cell phone. Cordova said, "Not right now."

Deputy Karger asked if she would take the test, whereupon Cordova began to argue about her arrest. Deputy Karger discussed the circumstances of the arrest, then

asked again if Cordova would take the breath test. Cordova said, “We already did a breath test.” Deputy Karger explained that she had taken a preliminary test and that he was now asking her to take “an evidentiary one.” Cordova replied: “Well, I refuse because I want to talk to a lawyer, or attorney, or public defender, or somebody.” Deputy Karger then asked: “So you don’t want to take the breath test right now?” Cordova replied: “Not right now. No I don’t. I feel like I’ve been harassed . . . harassed in my own yard.” Deputy Karger considered Cordova to have refused testing and proceeded with processing a test refusal. He read the *Miranda* rights to Cordova. After a few questions, Cordova exercised her right to an attorney and the questioning stopped.

When Cordova realized that she was not going to be released that morning, she asked, “[s]o if I took the breath test . . . I could possibly get out tomorrow?” Deputy Karger told her that he could not answer that question.

Cordova was charged with third-degree DWI: refusal to submit to chemical testing, in violation of Minn. Stat. § 169A.26, subd. 1(b) (2010). She waived her right to a jury, and the district court found her guilty. After sentencing, Cordova appealed the conviction.

D E C I S I O N

Cordova argues on appeal that the evidence is insufficient to support the district court’s finding that she refused to test because the record reflects that (1) she wanted to talk to an attorney and (2) she did not clearly understand that her opportunity to consult with an attorney had expired.

In considering a challenge to the sufficiency of the evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient" to permit the fact-finder to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "Evidence is sufficient to support a conviction if, on the facts in the record and the legitimate inferences to be drawn from those facts, the trier of fact could reasonably conclude that the defendant committed the crime charged." *State v. Fleck*, 763 N.W.2d 39, 41 (Minn. App. 2009), *aff'd*, 777 N.W.2d 233 (Minn. 2010). The district court's factual findings are reviewed for clear error. *Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 258 (Minn. App. 2000).

Minn. Stat. § 169A.20, subd. 2 (2010), makes it a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine. An officer can require a person to submit to a test "when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle" while impaired. Minn. Stat. § 169A.51, subd. 1(b) (2010). A person who violates Minn. Stat. § 169A.20, subd. 2, is guilty of third-degree DWI, a gross misdemeanor. Minn. Stat. § 169A.26, subds. 1(b), 2 (2010).

Under the Minnesota Constitution, a driver has a limited right to counsel before deciding whether to submit to chemical testing. Minn. Const. art. I, § 6; *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). A police officer must inform the driver of the limited right to counsel and assist in vindicating this right. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review*

denied (Minn. Aug. 6, 1996). A driver's limited right to consult with an attorney prior to testing is vindicated "if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Friedman*, 473 N.W.2d at 835 (quotation omitted). A reviewing court considers the "totality of the facts" in determining whether a driver's limited right to counsel has been vindicated. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). But a threshold matter is whether the driver made "a good faith and sincere effort to reach an attorney." *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). If not, a reviewing court need not engage in further analysis. *See id.*

The record supports the district court's finding that Deputy Karger asked Cordova three times if she would submit to a test and that Cordova refused to test each time. That Cordova knew she had refused to test is evidenced by her question to Deputy Karger more than six minutes later, after learning she would not be released in the morning: "So if I took the breath test . . . I could possibly get out tomorrow?"

Cordova argues that, despite her refusals, she did not actually refuse to take the breath test because she was confused about her limited right to counsel. Specifically, she argues that Deputy Karger misled her into believing that she could wait for a public defender before making the decision to test, and failed to inform her that her time to consult with an attorney had expired. The record reflects that Cordova's interest in consulting with counsel related to the circumstances of her arrest rather than the decision about whether to test. And Deputy Karger immediately attempted to clarify her request for counsel and to vindicate her limited right to counsel. *See State v. Slette*, 585 N.W.2d

407, 410 (Minn. App. 1998) (holding that when a suspect's request for an attorney is ambiguous, officers are required "either to vindicate the underlying right by providing a telephone and a reasonable opportunity to consult with an attorney or clarify [the] request").

First, Deputy Karger clarified the purpose of speaking to an attorney by telling Cordova that "the purpose of contacting an attorney *right now* is about whether or not to take the breath test It's up to you, but you can consult with an attorney *about that testing procedure* if you want to do so." (Emphasis added.) He then asked again if Cordova wanted to consult with an attorney, and when Cordova responded by asking if she could say "yes," Deputy Karger vindicated her limited right to counsel by providing her with a phone, a phone book, and an opportunity to call other individuals with her own cell phone. *See Friedman*, 473 N.W.2d at 835.

Cordova contends that Deputy Karger did not give her a reasonable opportunity to contact counsel, but the record plainly shows that Cordova chose not to exercise her limited right to counsel. She made no effort to contact an attorney or anyone else, and, when Deputy Karger again clarified her decision by asking, "So you don't need an attorney right now," Cordova said, "No." Cordova's failure to make a good-faith and sincere effort to contact an attorney is dispositive of her arguments regarding the vindication of her limited right to counsel. *See Kuhn*, 488 N.W.2d at 842 (Minn. App.

1992) (noting that a driver’s good-faith and sincere effort to reach an attorney is a threshold matter in determining whether police vindicated limited right to counsel).¹

Cordova argues that even if her statements amount to test refusal, she “immediately” changed her mind and, therefore, cannot be found to have refused to submit to testing. An initial waiver of the limited right to counsel may be withdrawn if the “change of mind is immediate and does not interfere with police officers’ processing of a case or their ability to administer an Intoxilyzer test.” *Slette*, 585 N.W.2d at 409. But the record in this case supports the district court’s finding that at no point in time did Cordova revoke her refusal to test. Cordova, on learning that test refusal may have delayed her release, merely asked Deputy Karger whether, *if* she changed her mind, she would get released from custody in the morning. Cordova never told Deputy Karger that she had changed her mind.² The evidence is sufficient to convict Cordova of third-degree DWI; test refusal.

Affirmed.

¹ Cordova also asserts that Deputy Karger never told her she would have to make the testing decision on her own if she did not consult with an attorney, but that assertion is clearly refuted by Deputy Karger’s reading of the implied-consent advisory in which he told Cordova, “If you are unable to contact an attorney, you must make the decision on your own.”

² Even if Cordova had communicated a change of mind after being informed that she was considered to have refused testing, Cordova has cited no authority for the assertion that an officer is required to honor a change of mind that is not immediate.