STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1853

State of Minnesota,
Respondent,

vs.

Jenna Lee Wessing,
Appellant.

Filed July 15, 2013
Affirmed
Bjorkman, Judge

Olmsted County District Court
File No. 55-CR-12-882

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges her conviction of gross-misdemeanor driving while impaired (DWI), arguing that the district court erred by denying her motion to suppress evidence of her alcohol concentration. We affirm.

FACTS

In the early morning of December 24, 2011, appellant Jenna Wessing lost control of her vehicle, which rolled over and crashed. When Minnesota State Patrol Trooper Steven Willert responded to the accident scene at approximately 2:45 a.m., paramedics were actively tending to Wessing, so he was unable to speak with her. Passenger J.K. told Trooper Willert that he and Wessing had been at a bar and she had been drinking, but he was unsure how much. Wessing was airlifted to a hospital, and Trooper Willert followed to seek a blood or urine sample for alcohol testing.

Upon arriving at the hospital, Trooper Willert learned that Wessing was getting a CT scan and would subsequently be admitted to the hospital. Trooper Willert waited for the doctors to finish the scan, then received permission to speak with her while the doctors reviewed the results. When Trooper Willert entered the CT area, Wessing was lying on the CT board. She had intravenous tubes attached to her and an oxygen mask over her face, and her eyes were swollen shut. Trooper Willert questioned Wessing, and she responded, but it was difficult for Trooper Willert to discern whether Wessing understood him. He also had difficulty understanding her responses through the oxygen mask and had to ask her to repeat herself several times.

At approximately 4:07 a.m., Trooper Willert asked Wessing how much she had to drink that night, and she responded, "Enough." He then read Wessing the implied-consent advisory and asked if she wanted to speak with an attorney. Wessing responded affirmatively. However, Trooper Willert believed that Wessing's medical condition would prevent her from using a phone book or a phone, neither of which was in the CT area, and that time constraints requiring testing within two hours of driving also made it difficult for her to consult with an attorney. Trooper Willert advised Wessing of these concerns and informed her that he believed it was impractical for her to speak with an attorney under the circumstances; she did not respond. Trooper Willert then asked Wessing if she would be willing to provide a urine sample. She agreed, and Trooper Willert obtained a urine sample from her catheter bag at 4:12 a.m. Scientific testing indicated an alcohol concentration of .13.

Wessing was charged with two counts of gross misdemeanor DWI (driving under the influence of alcohol and driving with an alcohol concentration above .08 within two hours). She moved to suppress the evidence of her alcohol concentration, arguing that Trooper Willert obtained the urine sample in violation of her right to counsel. The district court denied the motion and, after a stipulated-facts trial, found Wessing guilty as charged. The district court stayed imposition of sentence and placed Wessing on probation. This appeal follows.

D E C I S I O N

Under the Minnesota Constitution, a driver has a limited right to obtain legal counsel before deciding whether to submit to chemical testing. *Nelson v. Comm'r of*

Pub. Safety, 779 N.W.2d 571, 573-74 (Minn. App. 2010). The determination of whether an officer vindicated a driver's right to counsel is a mixed question of fact and law. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). We review the district court's factual findings for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). "Once the facts are established, their significance becomes a question of law for de novo review." *Groe*, 615 N.W.2d at 841.

A driver's right to counsel is contingent on his or her "physical ability to consult with counsel and the reasonably timely exercise of this ability." *State, Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979). That right is not violated if the driver's need for medical treatment makes it impossible for the driver to consult with an attorney within a reasonable time before deciding whether to submit to chemical testing. *Groe*, 615 N.W.2d at 842. The evanescent nature of alcohol also bears on the amount of time reasonably accorded to a driver to consult with an attorney. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). If counsel cannot be contacted within a reasonable time, or if consultation would unreasonably delay the administration of the test, the driver may be required to make a decision regarding testing in the absence of counsel. *Id.*

The district court determined that Wessing's right to counsel was not violated because her medical condition and passage of most of the two-hour time frame for testing made it impossible for her to consult with an attorney before chemical testing. Wessing

argues that the record does not support the district court's finding that her medical condition made it impossible for her to consult with an attorney. We disagree.

Trooper Willert testified that paramedics constantly attended to Wessing at the crash scene, then airlifted her to the hospital for emergency medical care. When Trooper Willert saw Wessing at the hospital, she was lying on a CT board with her eyes swollen shut, intravenous tubes attached to her, and an oxygen mask on her face. Wessing gave only very brief responses to his questions and did not shake or nod her head, attempt to remove her oxygen mask, or move in any other way. Trooper Willert could not determine whether Wessing understood him, and he had difficulty understanding her responses through the oxygen mask. In light of all of these circumstances, Trooper Willert believed it would be impossible for Wessing to effectively use a phone to consult with an attorney, even if a phone and phone book could be located. And when he informed Wessing of this belief, she did not disagree or respond in any way. While the state did not offer expert testimony about Wessing's medical condition, we upheld a district court's impossibility finding based on markedly similar evidence in *Groe*. *See* 615 N.W.2d at 842 (affirming impossibility finding based on responding officer's testimony as to severity of driver's injuries and extent of medical attention). We conclude that Trooper Willert's observations amply support the district court's finding that Wessing's medical condition made it impossible for her to consult with an attorney.

Moreover, the record amply supports, and Wessing does not directly challenge, the district court's finding that the passage of time affected Wessing's ability to consult an attorney. Approximately one and one-half hours had elapsed since Wessing's crash when

Trooper Willert read her the implied-consent advisory. A DWI conviction based on alcohol concentration requires proof of alcohol concentration "at the time, or as measured within two hours of the time, of driving." Minn. Stat. § 169A.20, subd. 1(5) (2010). This timing requirement left less than one-half hour to effectuate Wessing's request for an attorney. The district court did not clearly err by finding that it was impossible for Wessing to contact and consult with an attorney and provide a testable sample within the two-hour time frame, particularly in light of Wessing's condition and the fact that neither a phone nor phone book was in the vicinity. On this record, we discern no error in the district court's denial of Wessing's suppression motion.

Affirmed.