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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRIAN W. STANLEY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13174
Trial Court No. 3PA-17-00539 CR

MEMORANDUM OPINION

No. 7003 — May 11, 2022

Appeal from the Superior Court, Third Judicial District, Palmer, Vanessa H. White, Judge.

Appearances: Tristan Bordon, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Judge WOLLENBERG.

Following a bench trial, Brian W. Stanley was convicted of driving under the influence.[1] Stanley appeals his conviction, arguing that the superior court erred in

[1] AS 28.35.030(n).

denying his motion to suppress the result of a breath test administered following his arrest. According to Stanley, the arresting officer unreasonably impaired his statutory right to consult with an attorney following his arrest, and the proper remedy for this interference is the suppression of his breath test result.[2]

For the reasons discussed in this opinion, we uphold the superior court's denial of Stanley's motion to suppress, and we affirm his conviction.

Factual background

On April 13, 2017, shortly before 4:00 p.m., a citizen called the police to report a driver weaving within the lane of travel and driving erratically. Alaska State Trooper Peter Steen responded and conducted a traffic stop of the vehicle, during which he identified the driver as Brian Stanley. After noting signs of intoxication and conducting field sobriety tests, Steen arrested Stanley for driving under the influence and brought him to the trooper post in Palmer for DataMaster breath testing.

At the beginning of the fifteen-minute observation period prior to administration of the breath test, Stanley stated that he was refusing to submit to the test. After Steen warned Stanley that refusal constituted a separate crime and urged him to speak to his lawyer, Stanley decided to call his attorney. Steen offered Stanley a phone book and access to Stanley's cell phone. He further told Stanley, "I'll give you as much privacy as I can. Anything you say to him cannot be used against you and will not be used against you, okay? I just have to keep [you] in sight."

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[2] *See* AS 12.25.150(b); Alaska R. Crim. P. 5(b); *see also Copelin v. State*, 659 P.2d 1206, 1215 (Alaska 1983).

Steen helped Stanley place a phone call, as Stanley had difficulty using his phone while in handcuffs. Stanley first called an unknown individual to arrange for bail. Steen stepped into the hallway to allow Stanley some privacy.

Steen then returned to the room to assist Stanley in calling his attorney. Steen warned Stanley, however, that ten minutes had passed and that he only had "another five or ten and then that's about it." Steen helped Stanley recall the name of his attorney and, after dialing the attorney's number, Steen stepped into the hallway. According to Steen's later testimony, he was about eight to ten feet away from Stanley while Stanley spoke with his lawyer.

After about two minutes of consultation, Stanley put his attorney on speakerphone to talk with Steen. Steen and Stanley's attorney had the following exchange:

> *Attorney*: [W]ould you mind just giving me a couple minutes of privacy? I just need to go through some things for him so he can make that determination on whether or not he wants to take an independent test after he blows into that machine.
>
> *Steen*: Yeah, after we do the breath test, he can give you — he can call you right back.
>
> *Attorney*: Yeah, that sounds fine. Thanks very much.

After the call was taken off the speakerphone function, Stanley spoke briefly with his attorney and then hung up. Neither Stanley nor his attorney requested more time or privacy to discuss Stanley's decision whether to take the DataMaster test.

After the call ended, Stanley consented to taking the DataMaster test, which Steen administered. Before the machine returned a result, Stanley asked to call his lawyer again. Steen replied, "Yeah, yeah, absolutely. . . . [A]fter I read [the result] to you, you can give him a call back and tell him what the numbers are." A few moments

later, Steen advised Stanley of his right to an independent test, told Stanley that the DataMaster had indicated a blood alcohol content of .246 percent, and reiterated that nothing Stanley said during his conversation with counsel could be used against him.

After contacting his attorney a second time, Stanley asked Steen for privacy. Steen, who was standing in the hallway outside the processing room, told Stanley that this was "the best [he could] do."

Stanley — apparently relaying a question from his attorney — then asked whether Steen was recording the conversation. Steen replied, "Everything I do is recorded, sir." Stanley reported this back to his attorney. (As we explain later, Steen should not have been recording Stanley's interaction with his attorney, and he was incorrect that the troopers' operating policies required the recording.)

When Stanley asked Steen to turn off his recording device, Steen refused, stating, "No, sir, I cannot. I'm outside the room. Anything you say can't be heard." Stanley protested that his lawyer did not feel comfortable with the recording, but Steen responded, "[T]hat's on your attorney then, because I'm outside the room. I'm not listening to your conversation. I have nothing to do with your conversation."

Stanley then turned on the speakerphone function, so that his attorney could speak directly with Steen. When Stanley's attorney asked Steen directly to stop the recording device so that it would not capture Stanley's side of the conversation, Steen again refused to do so:

> [Counsel], you know very well what my policy is on dealing with these things. I must record convers — must record contacts with the public. I am outside the room. I am not listening to your conversation and this can be redacted at a later date. I do not care what you tell him because I — you and I both know it can't be used. It will not be used.

Steen then told Stanley to turn off the speakerphone function.

When Stanley took the call off of speakerphone for a brief discussion with his attorney, Steen's recorder picked up the following exchange, as reflected in the transcript prepared for this appeal:[3]

> *Stanley*: We're off speakerphone, [counsel]. No, we're off. Go ahead. I am. I am. I am. Okay, if you're not comfortable, then I will not answer any questions. Sure. All right. I would not like to have an independent test (indiscernible — away from microphone).[4] It's done.

After the call ended, Stanley declined the independent test, telling Steen, "I have to do what my lawyer tells me."

Proceedings

Because Stanley had two prior convictions for driving under the influence within the previous ten years, the State charged him with felony driving under the influence.[5]

Before trial, Stanley — represented by the same attorney — moved to suppress the result of the DataMaster test, citing interference with his statutory right to consult with counsel.[6] Specifically, Stanley argued that he was denied a reasonable opportunity to consult with his attorney in the first call — and that the second call, in which the trooper refused to turn off his recording device, only became necessary because of the inadequacy of the first call.

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[3] The portion quoted here, along with all quoted portions of the audio, were played at the evidentiary hearing on Stanley's motion to suppress without objection.

[4] A transcript of the recording introduced by Stanley's attorney during trial reflects that Stanley said, "I would not like an independent test, and we will talk about it later."

[5] AS 28.35.030(n).

[6] AS 12.25.150(b); *see also* Alaska R. Crim. P. 5(b).

At the evidentiary hearing, the State introduced portions of the audio recording from Stanley's processing. Steen testified that he believed that he was required by policy and direct order from his lieutenant to keep his recording device activated at all times when he was interacting with a member of the public — even when an arrestee was contacting counsel during the observation period.

Stanley, for his part, introduced a page from the Troopers' Operating Procedures Manual that instructs troopers to turn off their recording device during the arrestee's conversation with counsel.[7] Stanley did not testify at the evidentiary hearing.

In a written order, the superior court admonished Steen for recording Stanley's conversation with counsel. The court nonetheless denied Stanley's motion to suppress. The court addressed each phone call separately.

As to the first phone call, before the DataMaster test, the court found that — although Steen should not have recorded Stanley's conversation with his attorney — there was "no discernible impairment of Stanley's consultation with counsel." In support of this finding, the court observed that there was no evidence that Stanley or his attorney even knew they were being recorded at that point — and that Steen had told Stanley that he was standing outside the processing room and not listening to his conversation. The court further found that, after being placed on speakerphone, Stanley's attorney asked Steen if he could speak with Stanley *after* Stanley blew into the DataMaster machine — not to continue speaking privately with Stanley at that point. According to the court, this

[7] The Operating Procedures Manual states: "If during the observation period prior to administering the breath test the suspect requests to contact an attorney, reasonable efforts will be made to contact the attorney. All recording devices will be turned off during their conversation. If the suspect cannot be observed and be given privacy — e.g. a room with a large window — the attorney will be advised of that fact prior to giving the phone to the suspect. Any conversation between the attorney and the suspect that is overheard cannot be used against the suspect."

fact suggested that Stanley and his attorney had a sufficient opportunity to confer privately about the DataMaster test itself.

As to the second call, the court ruled that the call was not statutorily protected. The court found that Stanley's initial call to counsel satisfied his right to an unimpeded phone call with counsel, and relying on this Court's unpublished decision in *Dill v. Anchorage* — which in turn relied on our published decisions in *Babb v. Anchorage* and *Romo v. Anchorage* — the superior court concluded that Stanley did "not have a statutory right to consult with his attorney privately after taking the breath test and before the independent test."[8]

Stanley waived his right to a jury trial and proceeded to a bench trial. At trial, Stanley did not contest the sufficiency of the State's evidence to support his guilt. Rather, Stanley renewed his motion to suppress. Stanley acknowledged that, as a general matter, the police are not required to allow an arrestee to make a second phone call to counsel, after the arrestee has already spoken with an attorney. Stanley argued, however, that the superior court had erred in concluding that the first phone call satisfied Stanley's right to one unimpeded phone call. In particular, Stanley took issue with the court's previous finding that his attorney had asked to speak with him only after he provided a breath sample. Rather, he contended, counsel had asked to speak with him immediately in private about whether he should take an independent test and had only acquiesced to the trooper's suggestion that the phone call take place after the breath test.

The court denied Stanley's renewed motion to suppress and found Stanley guilty of felony driving under the influence. This appeal followed.

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[8] *Dill v. Anchorage*, 2009 WL 1773224 (Alaska App. June 24, 2009) (unpublished) (citing *Babb v. Anchorage*, 813 P.2d 312 (Alaska App. 1991), and *Romo v. Anchorage*, 697 P.2d 1065 (Alaska App. 1985)).

Why we affirm the denial of Stanley's motion to suppress

Under AS 12.25.150(b) and Alaska Criminal Rule 5(b), an individual has the right to contact an attorney following arrest.[9] In *Copelin v. State*, the Alaska Supreme Court held that, in the context of arrests for driving under the influence, this statute requires that an arrestee be afforded a reasonable opportunity to communicate with an attorney before being required to decide whether or not to submit to a breath test.[10] This opportunity typically takes place during the fifteen-minute observation period prior to the administration of the breath test because "no additional delay is incurred by acceding to a request to contact an attorney during that time."[11]

On appeal, Stanley argues that Steen's actions impaired his statutory right to consult with an attorney after his arrest. According to Stanley, Steen prevented him from meaningfully conferring with his attorney by recording his phone calls and refusing to discontinue the recording.

As an initial matter, we agree with the superior court's conclusion that Stanley's consultation with counsel was not impaired during the first call. Under *Copelin*, if an individual arrested for driving under the influence asks to contact counsel, the police must provide a reasonable opportunity for the arrestee to do so before deciding

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[9] AS 12.25.150(b) ("Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with the prisoner's attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friend of the prisoner, have the right to immediately visit the person arrested."); Alaska R. Crim. P. 5(b) (setting out the same right); *see also Wardlow v. State*, 2 P.3d 1238, 1249-50 (Alaska App. 2000) (interpreting the statutory phrase "immediately after arrest" as meaning upon arrival at the police station or other place of detention).

[10] *Copelin v. State*, 659 P.2d 1206, 1211-12 (Alaska 1983).

[11] *Id.* at 1211.

whether to take the breath test and must make reasonable efforts to afford the arrestee privacy during the conversation.[12] If the police fail to make reasonable efforts to provide privacy or directly interfere with the defendant's ability to consult with counsel, suppression of the breath test (or the refusal) is the appropriate remedy.[13]

We have recognized, however, that police officers have a duty to maintain custodial observation of a defendant prior to administration of the breath test and that the defendant's ability to confer with counsel is not violated "merely because the arresting officer maintains physical proximity to the defendant."[14] Rather, "in determining the extent of privacy that is reasonable in a given case, consideration should be given to the confidentiality of the attorney-client communications, and not to the separation of the arrestee from the arresting officers."[15] Thus, we have held that suppression of the breath test result is required only when, in addition to maintaining physical proximity, "the police engaged in additional intrusive measures, intrusions that convinced the defendants that the officers were intent on overhearing and reporting the defendants' conversations with their attorneys."[16]

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[12] *Farrell v. Anchorage*, 682 P.2d 1128, 1130 (Alaska App. 1984) (discussing *Copelin*, 659 P.2d at 1208, 1210-12).

[13] *Copelin*, 659 P.2d at 1215.

[14] *Kiehl v. State*, 901 P.2d 445, 446-47 (Alaska App. 1995).

[15] *Farrell*, 682 P.2d at 1130 (recognizing that the degree of privacy a person should be given to communicate with counsel must be determined by "balancing the individual's statutory right in consulting privately with counsel against society's strong interest in obtaining important evidence").

[16] *Kiehl*, 901 P.2d at 447.

Here, Steen's continued recording during Stanley's conversation with his attorney was "undeniably improper."[17] But, as the superior court recognized, there is no evidence in the record that Stanley and his attorney were even aware of the recording during their first conversation. We have previously declined to suppress a breath test result under similar circumstances — when, despite the impermissible recording of the conversation between the defendant and his counsel, there was no indication that the defendant was aware of the recording and thus no impairment of the consultation with counsel.[18]

In *Kiehl v. State*, for example, the trooper kept her audio recorder running and went in and out of the room while a defendant who had been arrested for drunk driving was talking to his attorney.[19] The defendant later moved to suppress the result of his breath test based on these actions.[20] At a hearing, the defendant testified that, although he did not directly notice the trooper's recorder running, he assumed that he was being recorded, and he asserted that the trooper's actions constrained his conversation with his attorney.[21]

On appeal, we affirmed the trial court's refusal to suppress the breath test result.[22] In particular, we reasoned that, while recording the defendant's conversation

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[17] *Id.*

[18] *See id.*; *see also Alexander v. Anchorage*, 15 P.3d 269, 271 (Alaska App. 2000) (rejecting argument that officer impaired handcuffed defendant's consultation with attorney when officer assisted defendant with phone and inadvertently recorded conversation).

[19] *Kiehl*, 901 P.2d at 445.

[20] *Id.* at 446.

[21] *Id.*

[22] *Id.*

with his attorney was "undeniably improper," there was no evidence that the conversation was affected to any appreciable degree by the trooper's conduct.[23] We therefore concluded that "suppressing the breath test result would not have been tailored to the injury suffered and so was not an appropriate remedy."[24]

We reach the same conclusion here as to the first call. As we noted earlier, there is no indication that Stanley or his attorney knew of the recording at the time of that call. Moreover, as the superior court found, Steen was standing in the hallway outside the room containing the DataMaster, and he told Stanley that he would give him as much privacy as possible and that nothing Stanley said to his attorney could be used against him. These findings are supported by the record, and they support the conclusion that Stanley's conversation with his attorney was not impaired.[25]

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[23] *Id.* at 447.

[24] *Id.* at 448 (internal quotations omitted). But we did not disturb the trial court's decision to suppress the recording of the defendant's conversation with the attorney, reasoning that it was a remedy adequately tailored to the violation of the defendant's rights. *Id.* at 447.

[25] *Compare Anchorage v. Marrs*, 694 P.2d 1163, 1166 (Alaska App. 1985) (holding that defendant was not entitled to suppression due to mere proximity of the arresting officer, even though defendant felt unable to communicate with counsel, because defendant was otherwise able to receive legal advice through "yes" or "no" answers), *with Reekie v. Anchorage*, 803 P.2d 412, 414 (Alaska App. 1990) (holding that officers "did virtually nothing to accommodate [defendant's] right to consult privately with his attorney," where officers stood close to defendant while he spoke to his attorney, interrupted, and recorded conversation), *and Farrell v. Anchorage*, 682 P.2d 1128, 1131 (Alaska App. 1984) (holding that defendant was deprived of his right to consult with an attorney, where the officer stood next to defendant, took notes on his conversation with his attorney, and "failed to make even a minimal effort to accommodate [defendant's] right to communicate privately with his attorney").

Stanley counters that the court applied the wrong burden of proof in determining whether his consultation with counsel was impaired. In particular, Stanley takes issue with the superior court's assertion that a defendant is only entitled to suppression of the breath test if the defendant shows that the police intrusions on the privacy of the call actually impaired the consultation with counsel.

But the superior court correctly stated the law. When an arrestee asks to contact counsel prior to administration of the breath test, the police must make a reasonable effort to accommodate that right and to afford the arrestee privacy during the conversation with counsel.[26] But if the arrestee contacts counsel and later claims that the police unreasonably interfered with the privacy of the call, it is generally the defendant/arrestee's burden to rebut the State's showing that they were afforded the opportunity to speak with counsel and to establish that an officer's actions impaired their consultation with counsel.[27] Thus, in *Mangiapane v. State*, we held that the officer's act of maintaining close proximity to the defendant did not violate the defendant's right to confer with counsel, in part, because the defendant had "offered no evidence" that the

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[26] *See Reekie*, 803 P.2d at 415 (recognizing that "the burden of taking reasonable steps to provide privacy is on the police"); *Romo v. Anchorage*, 697 P.2d 1065, 1071 (Alaska App. 1985) (observing that, if the police deny an arrestee the opportunity to consult with counsel, the "burden of proof is on the government to show that an accused demanded an unreasonable amount of time, thereby interfering with the 'prompt and purposeful investigation' of the case" (quoting *Copelin v. State*, 659 P.2d 1206, 1212 n.14 (Alaska 1983))); *see also Kameroff v. State*, 926 P.2d 1174, 1178 (Alaska App. 1996) (recognizing that the burden is on the State to prove that there was good reason to deny an arrestee the opportunity to contact an attorney).

[27] *See Kiehl*, 901 P.2d at 448 (upholding trial court's finding that "Kiehl *failed to show* that his telephone conversation with counsel was affected to any appreciable degree by [the trooper's] conduct" (emphasis added)).

officer's conduct actually deterred him from communicating with his attorney — which we described as "a necessary element of Mangiapane's suppression argument."[28]

But in any event, we do not interpret the court's ruling as turning on the burden of proof. Instead, the court stated that there was *no* evidence to suggest that Stanley's conversation was impaired — that is, the court stated that it was "unaware of *any* evidence tending to show [that] Stanley felt convinced that Steen was intent on overhearing and reporting his conversation" during the first call. (Emphasis added.) This finding is supported by the record. As we noted earlier, Stanley did not testify, and there is nothing in the evidentiary record that indicates any awareness of the recording at the time of the first call.

Stanley also challenges the superior court's conclusion that his second phone call to his attorney was not protected by statute. He notes that it was the trooper who broke his initial phone call to his lawyer into two phone calls, and he argues that the second phone call should be viewed as a continuation of the first phone call and subject to the same protections as the initial phone call.

The superior court relied on our decisions in *Romo v. Anchorage* and *Babb v. Anchorage* to conclude that Stanley's second phone call was not statutorily protected because he had already received one unimpeded phone call to his lawyer.[29]

In *Romo*, we held that AS 12.25.150(b) did not entitle an arrestee to a second phone call with counsel after the arrestee received one reasonable opportunity to consult with an attorney.[30] There, a defendant arrested for drunk driving called and

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[28] *Mangiapane v. Anchorage*, 974 P.2d 427, 429 (Alaska App. 1999).

[29] *Romo*, 697 P.2d at 1071; *Babb v. Anchorage*, 813 P.2d 312, 314 (Alaska App. 1991).

[30] *Romo*, 697 P.2d at 1071.

spoke with an attorney before refusing to take the breath test.[31] When an officer advised him that refusal constituted a separate crime, the defendant asked to contact the lawyer again, but the officer denied his request.[32] Although the officer testified that he usually allows arrestees to make a second call if doing so would not add unreasonable delay, he explained that, in this case, the observation period had long since passed.[33] We concluded that the requirements of *Copelin* were satisfied by the initial call to counsel and that the officer was not required to honor the defendant's second request.[34]

In *Babb*, we reiterated our conclusion from *Romo* that "once a DWI arrestee has been given a reasonable opportunity to contact an attorney, and has spoken with one, the terms of *Copelin* have been satisfied."[35] There, the defendant agreed to take a breath test after consulting with his attorney; he then indicated he wished to have an independent blood test.[36] After he was transported to the hospital and was awaiting the blood test, however, he asked for a second consultation with his lawyer; when the officers declined his request, the defendant refused to have his blood drawn.[37]

The defendant moved to suppress the result of the breath test on the grounds that he had not been allowed to consult with an attorney before deciding whether to have an independent blood test. He argued that he was effectively denied his right to obtain

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[31] *Id.* at 1067.

[32] *Id.*

[33] *Id.* at 1071.

[34] *Id.*

[35] *Babb v. Anchorage*, 813 P.2d 312, 314 (Alaska App. 1991) (citing *Romo*, 697 P.2d at 1071).

[36] *Id.* at 313.

[37] *Id.*

evidence that might have cast doubt upon the breath test result.[38] We upheld the trial court's denial of his motion to suppress, agreeing with the trial court that the defendant's initial call to counsel fully satisfied his statutory right to contact counsel under *Copelin*.[39]

We agree with Stanley that this case is distinguishable from *Romo* and *Babb* because the second phone call was essentially a continuation of the first. The superior court found that it was Stanley's attorney who asked for a second phone call, but the record does not support this factual finding. Instead, the audio from the trooper's recording device shows that the attorney asked to speak with Stanley immediately about the independent blood test, and it was the trooper who suggested that could be accomplished through a second phone call *after* Stanley took the breath test. We therefore agree with Stanley that the superior court's finding that Stanley's attorney requested a second call is clearly erroneous.

We nonetheless conclude that we need not decide what statutory protections, if any, applied to the second phone call because Stanley presented no evidence that his ability to consult with counsel was actually impaired.

We addressed a similar situation in our unpublished decision in *Dill v. Anchorage*.[40] In *Dill*, a defendant arrested for drunk driving asked to call his brother-in-law for advice on whether to submit to a breath test.[41] After taking the breath test, the defendant asked to call his brother a second time to seek advice on whether to obtain an

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38 *Id.*

39 *Id.* at 313-14.

40 *Dill v. Anchorage*, 2009 WL 1773224 (Alaska App. June 24, 2009) (unpublished).

41 *Id.* at *1. Under AS 12.25.150(b), a motorist arrested for driving under the influence is entitled to contact an attorney and "any relative or friend," upon request, before deciding whether to submit to a breath test. *See Zsupnik v. State*, 789 P.2d 357, 359-60 (Alaska 1990).

independent blood test. The police allowed the second call but placed it on speakerphone and recorded it.[42] The defendant declined the independent test, and later moved to suppress the result of his breath test, arguing that he was denied the right to privacy in the second call. The trial court denied his motion.[43]

On appeal, we declined to address whether the defendant had a statutory right to a second reasonably private phone call with his brother. Instead, we concluded that, even if such a right existed and the police violated that right, the defendant was not entitled to suppression because he failed to show that the police intrusions actually impaired his consultation with counsel.[44]

We reach the same conclusion here. The record shows that the purpose of the second phone call was to discuss Stanley's decision about whether to take an independent blood test. But neither Stanley nor his attorney testified at the hearing, so the superior court had no evidence from which to conclude that the recording impaired any right Stanley may have had to consult privately with counsel during a second phone call.[45] And the record contains no evidence that would otherwise suggest Steen was

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[42] *Dill*, 2009 WL 1773224, at *1.

[43] *Id.*

[44] *Id.* at *3.

[45] *See Batchelor v. State*, 2009 WL 1140453, at *3 (Alaska App. Apr. 29, 2009) (unpublished) (affirming denial of motion to suppress breath test result based on violation of AS 12.25.150(b) partly because defendant did not testify, so there was no evidence in the record showing that the defendant felt his conversation with his father, an attorney, was affected to any appreciable degree). *Compare Kiehl v. State*, 901 P.2d 445, 448 (Alaska App. 1995) (holding that suppression of the breath test was not warranted where, despite impermissible recording of defendant's conversation with his attorney, the defendant "failed to show that his telephone conversation with counsel was affected to any appreciable degree" by the officer's conduct), *with Reekie v. Anchorage*, 803 P.2d 412, 415 (Alaska App. 1990)
(continued...)

intent on overhearing and reporting Stanley's conversation with his attorney. To the contrary, Steen told Stanley multiple times that he was outside the room and not listening to his conversation, and that anything he did hear or record could not be used against him.

Moreover, the evidence that does exist in the record suggests that Stanley acquired a sufficient understanding of the independent test.[46] After Steen advised Stanley of his right to an independent test, Stanley did not ask any follow-up questions or express any confusion. And Stanley was able to have a brief conversation with counsel, during which he affirmatively decided not to submit to an independent test, subsequently informing Steen, "I have to do what my lawyer tells me."[47] Indeed, Stanley

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[45] (...continued)
(holding that suppression of refusal was proper remedy where both the defendant and his attorney testified that their lack of privacy due to police officers' continued presence, interruptions, and recording inhibited their communication).

[46] *Compare Ahtuangaruak v. State*, 820 P.2d 310, 311-12 (Alaska App. 1991) (concluding that suppression of the breath test result was the appropriate remedy where non-English speaking defendant did not acquire sufficient understanding of right to independent test to waive it), *with Nathan v. Anchorage*, 955 P.2d 528, 531 (Alaska App. 1998) (concluding that court's finding that deaf arrestee sufficiently understood right to independent test in order to waive it was not clearly erroneous and thus, suppression was not warranted on that basis).

[47] *See Batchelor*, 2009 WL 1140453, at *2-3 (affirming denial of motion to suppress breath test result, even though defendant's attorney/father testified that getting information from his son was a "laborious process" because of officer's proximity and recording, where father also testified that he had enough information to advise defendant to take breath test and defendant followed that advice); *see also Farrell v. Anchorage*, 682 P.2d 1128, 1131 n.3 (Alaska App. 1984) (recognizing that "[i]n many cases it may be possible for an attorney to minimize the risk of a client's communications being overheard simply by posing specific questions that the client can respond to with yes or no answers").

acknowledges in his brief that the recording may not have impaired his attorney's ability to ask questions of Stanley on the other side of the phone line.

We have previously held that waiver of the right to an independent test requires only a "'basic understanding of the right to an independent test,' which is satisfied if the driver is notified of the right to an independent test, is aware that he or she was arrested for driving under the influence, and generally understands that the purpose of the independent test is to obtain evidence of his or her blood alcohol level."[48] Here, Stanley presented no evidence that he failed to acquire a basic understanding of his right to an independent test. Moreover, he has not convinced us that suppression is the appropriate remedy on this record.

Conclusion

For the reasons stated in this opinion, we AFFIRM the judgment of the superior court.

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[48] *Zemljich v. Anchorage*, 151 P.3d 471, 475 (Alaska App. 2006) (quoting *Ahtuangaruak*, 820 P.2d at 311, and citing *Moses v. State*, 32 P.3d 1079, 1084 (Alaska App. 2001), and *Crim v. Anchorage*, 903 P.2d 586, 588 (Alaska App. 1995)).