STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1818

State of Minnesota,
Respondent,

vs.

Andre Lashon Carter,
Appellant.

Filed October 30, 2017
Affirmed in part, reversed in part, and remanded
Florey, Judge

Hennepin County District Court
File No. 27-CR-15-34321

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

Susan L. Segal, Minneapolis City Attorney, Heather P. Robertson, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Kirk, Judge.

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

FLOREY, Judge

On appeal from two driving-while-impaired (DWI) convictions, appellant argues that his right to consult with counsel prior to deciding whether to submit to a breath test

was not vindicated and that the results of the test must therefore be suppressed. Because appellant's right to counsel was vindicated, we affirm in part. However, appellant was improperly convicted of two counts of second-degree DWI, in violation of Minn. Stat. § 609.04 (2014), and we therefore reverse in part and remand to the district court with directions to vacate one of appellant's DWI convictions.

FACTS

On December 5, 2015, at around 3:00 p.m., appellant Andre Lashon Carter was driving on the interstate. A state trooper observed him driving on the shoulder, kicking up a spray of water. The trooper pulled up alongside his car and observed him talking on his cellphone and, according to the trooper, not wearing a seatbelt. The trooper pulled appellant's car over, and after approaching, noticed indicia of intoxication. Appellant was arrested on suspicion of DWI.

Appellant was taken to jail and read the implied-consent advisory.[1] When asked if he wanted to speak with an attorney, he responded, "Sure." The trooper made a landline telephone and directories available and also permitted appellant to use a cellphone. Appellant was informed that he needed to contact an attorney, not make personal calls.

Appellant's attorney time lasted approximately 32 minutes. During that time, he made a good-faith effort to contact an attorney, and he was successful in that endeavor, but he also engaged in delay tactics. Appellant was using the landline and cellphone at the

[1] Effective July 1, 2017, the language of Minn. Stat. § 169A.51, subd. 2 was changed, and the advisory at issue is now referred to as a breath-test advisory. 2017 Minn. Laws ch. 83, art. 2, § 3, at 355.

same time and making personal phone calls to discuss bail and to secure his release rather than discussing with his attorney whether to submit to testing.

Approximately 12 times, the trooper had to keep appellant on track and remind him that he was to contact an attorney, not make personal calls. During his attorney time, appellant repeatedly asked the trooper questions, such as what he had been arrested for, what county he was in, and when a prior DWI conviction had occurred. The trooper responded to these questions, and at one point, the trooper spoke loudly to inform the attorney on the phone that appellant had one prior DWI. Towards the end of the 32 minutes of attorney time, the trooper told appellant to "wrap it up." Appellant ended his phone call shortly thereafter.

After appellant's attorney time had concluded, the trooper asked appellant if he would take a breath test; appellant replied either, "I'm not sure," or "Why not? Sure."[2] Appellant submitted to a breath test, consisting of two subject samples. The first breath sample registered a blood alcohol content (BAC) of .179, and the second registered a BAC of .19.

Appellant was charged with two counts of second-degree DWI. He moved to suppress the results of his breath test, arguing that his right to consult with counsel was not

[2] The trooper testified that he understood appellant to respond, "Why not? Sure." A transcript of the exchange indicates that appellant responded, "I'm not sure." The district court noted this inconsistency, but made no finding as to appellant's exact response. For purposes of this review, determining appellant's exact response is inconsequential, as the only issue raised by appellant is whether his right to counsel was vindicated. Appellant does not contest that he voluntarily consented to a breath test.

vindicated because of the trooper's interruptions. The district court denied appellant's motion. Appellant was ultimately convicted of both DWI charges. This appeal followed.

D E C I S I O N

I.

Appellant's sole argument on appeal is that the trooper's interruptions interfered with his right to consult with an attorney prior to submitting to a breath test, and therefore the results of his breath test should have been suppressed.

A driver has the right to obtain legal advice prior to deciding whether to submit to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). This limited right is vindicated if a DWI arrestee "is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id.* (quotation omitted); *see State v. White*, 504 N.W.2d 211, 213 (Minn. 1993) (extending right to criminal proceedings). There is no fixed amount of time that constitutes a "reasonable time." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008). We consider the totality of the circumstances in determining whether a reasonable time was provided. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). We look to the officer's duties in vindicating the right to counsel, as well as the arrested driver's diligence in exercising the right. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). "The determination of whether an officer vindicated a driver's right to counsel is a mixed question of law and fact." *Groe*, 615 N.W.2d at 841. When the facts are undisputed, we review de novo whether a defendant's right to counsel was violated. *State v.*

Christiansen, 515 N.W.2d 110, 112 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). Here, appellant concedes that the facts are not in dispute.

Given the totality of the circumstances, we conclude that appellant's right to consult with counsel prior to testing was vindicated. Appellant was given a landline telephone, a cellphone, a telephone directory, and over 30 minutes to contact and consult with an attorney. Appellant was able to reach an attorney and speak with that attorney for some time. We have previously stated that when a defendant is able to consult with an attorney, his rights are vindicated. *Kuhn*, 488 N.W.2d at 841-42. *But see McNaughton v. Comm'r of Pub. Safety*, 536 N.W.2d 912, 915 (Minn. App. 1995) (stating that merely speaking to an attorney does not vindicate an arrestee's right if the attorney is unwilling to provide advice).

Appellant contends that the trooper invaded his personal time with his attorney, constantly interrupted the conversation, and "created a coercive atmosphere where [appellant] did not have the opportunity to speak unfettered with counsel." Regarding the interruptions, the trooper did interrupt appellant to some degree to ensure that he was calling an attorney. However, these interruptions were limited in duration, and the record supports the district court's finding that the interruptions were reasonable because appellant was making personal calls to discuss bail and to secure his release. A DWI arrestee "must make a diligent effort to contact an attorney." *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 809 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). An officer need not allow an arrestee "unfettered use of a telephone to call friends or relatives, unless the driver specifies that the reason for the calls is to contact an attorney." *McNaughton*, 536 N.W.2d

at 915; *see Mulvaney v. Comm'r of Pub. Safety*, 509 N.W.2d 179, 181 (Minn. App. 1993) (stating that drivers "may not call family members for advice"). Here, the record reveals that appellant never told the trooper that he needed to contact someone in order to locate an attorney. Although the trooper spoke loudly while trying to inform appellant's attorney that appellant had one prior DWI, this interruption was limited in duration. Moreover, the record reflects it was appellant who engaged the officer multiple times with repeated questions, which the trooper answered.

As to appellant's argument that the trooper's presence created a coercive atmosphere, the Minnesota Supreme Court has held that officers are not required to provide DWI arrestees with a private telephone, and though an officer's presence may inhibit the conversation, "proper testing procedures generally require that the officer remain in the presence of an arrestee in order to impeach any later testimony by an arrestee who submits to testing that ingestion of something at the station might have affected the test results." *Comm'r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 269-70 (Minn. 1992).

An officer's constant interruptions could restrict an arrestee's right to consult with an attorney to such a degree that the arrestee's right is not vindicated. "Police officers must assist in the vindication of the right to counsel." *Mulvaney*, 509 N.W.2d at 181. However, given the totality of the circumstances in this case, including the undisputed fact that appellant engaged in delay tactics and made personal calls, the trooper's actions were reasonable and did not appreciably impinge upon appellant's right to counsel, which was vindicated.

II.

Examination of the record establishes that appellant was improperly convicted of two counts of second-degree DWI, in violation of Minn. Stat. § 609.04. According to the warrant of commitment, appellant was convicted of both driving under the influence of alcohol and having an alcohol concentration of 0.08 or more within two hours of driving. Minn. Stat. § 169A.20, subd. 1(1), (5) (2014). *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (stating that a reviewing court may "look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated" (quotations omitted)). He received concurrent sentences for the two offenses committed on the same date. Neither party raised the issue of appellant's multiple DWI convictions on appeal.[3]

In *State v. Clark*, the defendant was convicted of both driving under the influence of alcohol and driving with an alcohol concentration of 0.10 or more. 486 N.W.2d 166, 167 (Minn. App. 1992). The defendant in *Clark* failed to challenge his multiple convictions before the district court or on appeal. *Id.* at 170. Nevertheless, this court held that convicting him of both DWI charges, arising under different subsections of the same statute, was prohibited by Minn. Stat. § 609.04. *Id.* at 170-71. We therefore vacated one of his convictions. *Id.* at 171.

[3] Courts are permitted "at any time" to correct sentences not authorized by law. Minn. R. Crim. P. 27.03, subd. 9; *see Spann*, 740 N.W.2d at 573 (addressing section 609.04 issue not raised at sentencing or on direct appeal); *see also* Minn. R. Civ. App. P. 103.04 (stating that this court may review other matters "as the interest of justice may require").

Likewise, appellant's two DWI convictions violate Minn. Stat. § 609.04, which prohibits '"multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.'" *Id.* at 170 (quoting *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985)). We therefore reverse and remand to the district court, with directions to vacate one of appellant's convictions.

Affirmed in part, reversed in part, and remanded.