**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1273**

State of Minnesota,
Appellant,

vs.

Michael John Rice,
Respondent.

**Filed December 18, 2017**
**Affirmed**
**Connolly, Judge**

Olmsted County District Court
File No. 55-CR-16-8545

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

Mark A. Ostrem, Olmsted County Attorney, Byron H. Black, Assistant County Attorney, Rochester, Minnesota (for appellant)

Matthew J. Mankey, Mankey Law Office, Golden Valley, Minnesota; and

Jeffrey B. Ring, Jeffrey B. Ring & Associates, Minneapolis, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Cleary, Chief Judge; and Connolly, Judge.

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

**CONNOLLY**, Judge

Appellant challenges the district court's dismissal of the felony test-refusal charge filed against respondent, arguing that the district court's determinations that respondent made a good and sincere effort to contact an attorney and that respondent's right to counsel was not vindicated because a state trooper declined to phone an attorney for him were clearly erroneous. Because we see no error in these determinations, we affirm.

## FACTS

In December 2016, a state trooper clocked respondent Michael Rice driving 11 miles over the speed limit and stopped him. The trooper administered three field sobriety tests, which respondent failed. The trooper then arrested respondent on suspicion of driving under the influence and transported him to a detention center. After reading respondent the implied-consent advisory, the trooper asked if respondent would like to contact an attorney. Respondent said he would, and the trooper provided him with a telephone and directories.

Without opening the directories, respondent told the trooper he would not be able to read them without reading glasses and asked for some. The trooper made two efforts to find reading glasses or a magnifying glass for respondent, but his efforts were unsuccessful. The trooper also suggested that respondent telephone a friend or family member to assist him in contacting an attorney, but respondent declined to do this and said the trooper or another officer should get the glasses that respondent had in his car and bring them to the

detention center. The trooper replied that neither he nor another officer could leave the detention center to go to respondent's car for his glasses.

Respondent had difficulty recalling the name of the attorney he wanted to call and whose number he wanted. He specifically asked the trooper, "Would you look the number up for me?" The trooper answered, "No sir, I'm not gonna look up a number for you." Respondent did not take a breath test.

Respondent was charged with one count of driving while impaired—operating a vehicle under the influence of alcohol (Count I) and one count of driving while impaired—test refusal (Count II). Following a contested omnibus hearing, the district court concluded that respondent had not been allowed to vindicate his right to counsel prior to taking a breath test and granted respondent's motions to suppress the evidence of his exchange with the trooper during the implied-consent advisory and to dismiss the test-refusal charge.

Appellant the State of Minnesota challenges the dismissal, arguing that the district court erred by determining that respondent made a good and sincere effort to contact an attorney and that respondent's right to contact an attorney was not vindicated because the state trooper denied respondent's request to call an attorney.

**D E C I S I O N**

An individual who invokes his right to counsel before taking a breath test "must make 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). Whether a good faith and sincere effort was made is a factual determination that this court reviews for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

The district court determined that respondent "made a good faith effort to contact an attorney" because he repeatedly asked for reading glasses or a magnifying glass so he could read the directories. We agree with the district court that the trooper had no obligation to retrieve respondent's reading glasses from his car or to send another officer to do so, and we note that detention centers have no obligation to provide reading glasses in order to satisfy a driver's right to contact an attorney. Analogously, not providing a sign-language interpreter for a driver who can read and write, but cannot speak or hear, does not violate the driver's right to contact an attorney. *State v. Kail*, 760 N.W.2d 16, 21-22 (Minn. App. 2009), *review dismissed* (Minn. May 7, 2009). In *Kail*, the officer wrote the driver a note saying that the officer would speak to an attorney on the phone and write down what was said for the driver, but the driver had to select the attorney and dial the number. *Id.* at 18. The driver did so, and they waited 15 minutes for the attorney to respond to calls and text messages. *Id.* When no response arrived, the driver chose to take the breath test. *Id.* "[The driver] made an independent decision to submit to the breath test after he was given a reasonable opportunity—unaffected by his speech-and-hearing impairment or by the lack of an interpreter—to contact an attorney." *Id.* at 21-22. We specifically held that "a police officer may help a deaf driver to contact an attorney by speaking to the driver's attorney by telephone and transcribing the oral communications to the driver." *Id.* at 21.

The district court here determined that respondent made a good faith effort to contact an attorney when, "[i]n the 22 minutes [he] was given to contact an attorney, he unequivocally requested to speak with an attorney ten times." The district court went on

to conclude that the trooper "could have easily assisted [respondent] in vindicating his right to counsel by looking in the phone book and providing [respondent] with the phone number of the attorney [respondent] requested." Because respondent did not identify the attorney whose phone number he wanted, the trooper should have asked him for the attorney's name. Had the trooper done so, respondent would have either identified an attorney, whose number the state trooper could have looked up, or have been unable to identify an attorney, and, in that case, the state trooper would have had neither the ability nor the obligation to look up a number. While an officer has no obligation to read a driver all or any part of the list of attorneys provided in a directory, there is an obligation under *Kail* to assist a driver who is unable to read the directory by asking if there is a specific attorney whom the driver wants to call and, if possible, providing the number of that attorney.[1]

**Affirmed.**

[1] Of course, whether or not a driver cannot read a directory is a credibility determination we leave to the sound discretion of the district court. In this case, the district court found respondent credible.