STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0120

State of Minnesota,
Respondent,

vs.

Bradley Alan Freeman,
Appellant.

Filed January 21, 2020
Affirmed
Jesson, Judge

Stearns County District Court
File No. 73-CR-16-11804

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, Jilian Frueh, Certified Student Attorney, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Bradley Alan Freeman, who was pulled over for running a stop sign in Avon, had about 28 cans of beer in his back seat and smelled of alcoholic beverages.

Following his subsequent conviction for refusal to submit to chemical testing and driving in violation of a restricted license, Freeman challenges the district court's denial of his motion to suppress evidence of his chemical test refusal. According to Freeman, the officer prevented him from vindicating his right to consult counsel before deciding whether to submit to the test. Because we discern no error in the district court's determination that Freeman failed to invoke his right to an attorney, we affirm.

FACTS

A police officer patrolling in Avon observed a black car fail to stop at a stop sign. The officer turned around to follow the car, intending to initiate a traffic stop, but briefly lost sight of it. He found the car parked nearby with its lights off. Then its lights turned back on and it pulled away. The officer confirmed that it was the same car because it had the same license plate. The officer followed the car and pulled it over, identifying appellant Bradley Alan Freeman as the driver.

As he spoke to Freeman through the car window, the officer smelled the odor of alcoholic beverages and heard Freeman's slurred speech. Freeman said he came from his home and not from Avon but later admitted he stopped in Avon at a liquor store to buy beer for his friend. An unopened 18-pack of beer and ten loose cans of beer sat in the back seat of Freeman's car. Freeman said he had not been drinking and that he had been sober for ten years. The officer asked Freeman to step out of his car to perform field sobriety

tests. During the horizontal-gaze-nystagmus test, the officer noticed a lack of smooth pursuit.[1] And during the one-legged-stand test, Freeman swayed.

After observing Freeman's performance on these tests, the officer believed Freeman was impaired and asked him to submit to a preliminary breath test. Freeman refused, and "became upset" and "uncooperative," arguing that he should not have to take the test. According to Freeman, he had been sober for ten years and that if the officer smelled alcohol coming from him, he should "get [his] nose checked." While he continued to refuse the test, Freeman said that he knew his rights, thought that the test was an illegal expansion of the traffic stop, and that he did not "have the patience right now to sit here and go through all the bullsh-t, I got other things to do." Based on the odor, slurred speech, and sobriety-test performance, the officer arrested Freeman on suspicion of driving while intoxicated (DWI). When looking Freeman up in the squad car's computer system, the officer discovered that Freeman's driver's license had a restriction that invalidated his license if he consumed any alcohol.

With Freeman in the back of his squad car in handcuffs, the officer read him the implied-consent advisory. In this advisory, the officer told Freeman that refusing to take a chemical test is a crime but that Freeman had the right to talk to an attorney before deciding whether to take the test. The officer explained that the test could not be "unreasonably

[1] During the horizontal-gaze-nystagmus test, officers observe involuntary eye movements that may indicate if someone is impaired. *See State v. Klawitter*, 518 N.W.2d 577, 579 (Minn. 1994). During this test, officers look for rapid, involuntary eye movements while the subject's eyes focus on a point and follow the point from side to side. *Id.* Additionally, Freeman had a prior leg injury so the officer did not perform the walk-and-turn test. The officer also had Freeman state a portion of the alphabet, which he did correctly.

delayed" or it would be considered a test refusal. The officer asked if Freeman understood and he said he did. And Freeman said, "I'm gonna contact [an attorney] but it ain't gonna be tonight."

The officer read the advisory once more and asked again whether Freeman wanted to consult with an attorney, and Freeman said that he was not going to talk to an attorney at that moment. He said, "I don't need to contact one beforehand" and "I will talk to one afterwards."

The officer asked one last time, "[d]o you wish to consult with an attorney? Yes or No?" and Freeman responded, "[a]t this moment, no. Not before that." Then the officer offered him one last chance to take the test and Freeman said no. The officer recorded Freeman's test refusal and took him to jail.

The state charged Freeman with three counts: DWI, test refusal, and violating driving restrictions relating to alcohol. At the contested omnibus hearing, Freeman moved to suppress evidence of his test refusal and dismiss the charges. He contended, among other things, that the officer did not have probable cause to arrest him on suspicion of DWI, and that his limited right to counsel was not vindicated.

The district court heard testimony from the arresting officer and considered squad-car video of the incident. Based on that evidence, the district court found that the officer had probable cause to arrest Freeman on suspicion of DWI. The district court also concluded that Freeman "did not invoke his limited right to counsel prior to testing" and subsequently declined to submit to a breath test. Consequently, the district court denied Freeman's motion to dismiss.

Following trial on the three criminal counts, the jury found Freeman guilty of test refusal and driving in violation of a restricted driver's license, and not guilty of DWI. The district court sentenced him to 42 months in prison. Freeman appeals.

D E C I S I O N

Freeman seeks reversal of his conviction for test refusal, arguing that evidence of his refusal should be suppressed because his right to consult with counsel before submitting to chemical testing was not vindicated. Whether an officer has vindicated a driver's right to counsel presents a mixed question of law and fact. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). Accordingly, this court reviews factual findings for clear error and legal conclusions de novo. *Id.* The district court concluded that Freeman did not invoke his limited right to consult with counsel. We discern no error in this conclusion and the factual findings are supported in the record.

Drivers have a state constitutional right to seek legal advice, upon request, before deciding whether to comply with chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). An officer must assist the driver in vindicating this right. *State v. Collins*, 655 N.W.2d 652, 656 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). But this right "is triggered only when the implied-consent advisory is read." *State v. Hunn*, 911 N.W.2d 816, 820 (Minn. 2018). And the right is "limited" to "ensure that consultation does not unreasonably delay the administration of the test." *Mell*, 757 N.W.2d at 712.

Here, the officer read Freeman the implied-consent advisory, thereby triggering his limited right to counsel. During their subsequent conversation, Freeman stated that he was

going to be talking to an attorney but not in that moment or that night, noting that he wanted to contact an attorney he had worked with before.

When a driver expresses his interest in consulting with an attorney, the officer must either clarify the driver's request or vindicate that right by providing a phone and an opportunity for consultation. *State v. Slette*, 585 N.W.2d 407, 410 (Minn. App. 1998). And courts consider the totality of the circumstances in determining whether the right to consult counsel was vindicated. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000).

Here, the transcript shows that the officer tried to clarify whether Freeman was invoking this right. The officer demonstrated this through his follow-up questions and efforts to confirm Freeman's wishes. And Freeman ultimately stated that he did not want to consult an attorney before making his decision not to submit to chemical testing. By doing so, Freeman declined to exercise his limited right to consult with an attorney.

Our conclusion is bolstered by the requirement that drivers not frustrate the implied-consent testing process. *Collins*, 655 N.W.2d at 658. For example, when a driver is disruptive by swearing and screaming, the driver may be deemed to have retracted his request to consult counsel and to have refused testing. *Id.* Here, Freeman admits that he was uncooperative and "boorish" in his interactions with the officer. The transcript of the exchange confirms this and more. It shows Freeman frequently interrupting the officer and arguing with him about his authority for the traffic stop and the testing.[2] The officer

[2] In the transcript of the implied-consent advisory, the officer repeatedly tried to get Freeman to stop talking and listen to him. The officer asked, "[c]an you let me get through

diligently attempted to explain Freeman's rights to him in spite of this. Considering the totality of this interaction—including Freeman's behavior and decision not to consult with an attorney before declining chemical testing—the district court's conclusion that he did not invoke his right to counsel is well-supported by the facts and legally sound.

Yet Freeman argues that the "coercive conditions" and the officer's demeanor prevented him from exercising his right to consult an attorney. Freeman asserts that when he asked the officer how he could contact an attorney when he did not have a phone number with him or access to his phone, the officer should have—but did not—explain that Freeman would be provided a phone and could look up a phone number at the jail. But the record demonstrates that the officer did just that. The officer said, "we're gonna go up to jail, so would you like—" and then was apparently interrupted by Freeman saying he did not have the phone number on him. The officer replied, "[d]id you not hear what I said before" and then repeated the implied-consent advisory, stating, "If you wish to consult with an attorney, a telephone and directory will be available to you."

In addition, Freeman contends that his right to consult counsel was not vindicated because the officer did not actually provide him with a phone and time to make a call. *See Duff v. Comm'r of Pub. Safety*, 560 N.W.2d 735, 737 (Minn. App. 1997) (describing that the right to consult counsel before submitting to chemical testing "is vindicated when the driver is provided with a telephone and given reasonable time to contact and talk with an attorney"). But the officer appeared unsure whether Freeman was invoking his right so he

---

this?" and "[c]an you hang on a second?" And he said three times, "[c]an you listen, please?"

asked clarifying questions. *See Slette*, 585 N.W.2d at 410 (noting that officers must *either* clarify the driver's request *or* provide a phone and an opportunity to consult with counsel). And when Freeman declined to consult an attorney, the officer was not required to provide him with a phone.

Freeman also suggests that the officer exploited his heightened emotional state and made little effort to help him exercise his right. He focuses on the officer's insistence that Freeman decide whether to contact an attorney "right now," seeming to argue that such a comment was coercive. But the officer had a duty to inform Freeman that his decision whether to consult an attorney could not "unreasonably delay administration of the test." Minn. Stat. § 169A.51, subd. 2(4) (2016). His insistence on Freeman making a decision soon was warranted.

Finally, Freeman submitted a supplemental brief on his own behalf that contains a recitation of the facts of this case from his point of view. But this recitation is at odds with the record and the district court's factual findings, which we determined are not clearly erroneous. And because he makes no legal arguments and cites no legal authority, his claims do not alter our conclusion. *See State v. Ture*, 632 N.W.2d 621, 632 (Minn. 2001) (concluding that claims made in a pro se brief without any authority or argument to support them are waived).

In sum, the district court's factual findings are supported by the record and it did not err by concluding that Freeman did not invoke his right to consult an attorney before declining to submit to chemical testing.

Affirmed.