STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0797

Alex Jeffrey Mayer, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed February 10, 2020
Affirmed
Bryan, Judge

Olmsted County District Court
File No. 55-CV-18-7993

Jay S. Adkins, Godwin Dold, Rochester, Minnesota (for appellant)

Keith Ellison, Attorney General, William Young, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Bryan, Judge.

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

BRYAN, Judge

Appellant challenges a district court order sustaining the revocation of his driving privileges. He argues that his right to counsel was not vindicated and that he did not consent to a breath test. We affirm.

F A C T S

In September 2018, an officer arrested appellant Alex Jeffrey Mayer for driving while impaired (DWI). The officer transported appellant to a detention center and read him the breath-test advisory. The officer informed him of his right to speak with an attorney before deciding whether to submit to testing. Appellant chose to speak with an attorney.

The officer provided appellant with a phone and phonebooks and helped him locate the number of a specific attorney, but appellant was unable to reach that attorney. The officer recommended certain phonebooks with attorneys that would "answer 24 hours." Appellant flipped through the books, but he did not make further attempts to contact an attorney. He asked the officer how much time he had, and the officer told him that he would give him time to make calls. Appellant told the officer that he had "three books" and it was not "fair" to the officer for him to continue searching for a lawyer.

The officer then stated, "From what I've seen about any attorney in that book, he's probably going to give you the same advice." Appellant asked, "What advice do you think that is going to be?" The officer clarified:

> Again, this is not legal advice coming from me. I don't think that I've ever had anybody contact an attorney and the attorney tell them to not take a breath test. The attorney usually tells them to take a breath test. Now what they say in their conversation . . . I'm not sure exactly. But, the majority of people, pretty much everybody who contacts an attorney ends up taking a breath test at the attorney's advice.

The officer also gave appellant information about the levels of criminal offenses in Minnesota. He told appellant that a first time DWI would be a misdemeanor so long as

appellant blew under twice the legal limit, but test refusal would be a gross misdemeanor. Appellant told the officer that he wanted to hear that information from an attorney, and the officer encouraged him to contact an attorney.

Appellant told the officer, "Based off of what you said, I should probably take the test." The officer responded, "That's what I see most people do, but . . . it's your decision." Appellant expressed concern about finding a phone number for a local attorney. The officer told him that, if he wanted to speak with an attorney, he should "forget about the area code" and just get in touch with any attorney. Appellant stated, "The way that you're making it sound, it doesn't seem beneficial." Appellant indicated that he wanted to test and stated, "They're just going to tell me to take the test, most likely." The officer responded, "Most likely, yes, but, again, I'm not an attorney, so I don't know for sure."

Though he did not speak with an attorney, appellant chose to end his attorney time and submit to a breath test. Appellant's attorney time lasted approximately 11 minutes. The breath test indicated an alcohol concentration above the legal limit, the state revoked appellant's driver's license, and appellant petitioned for an implied-consent hearing to challenge the revocation.

At the hearing, the officer and appellant testified, and the officer's body-camera footage was admitted into evidence. Following the hearing, the district court affirmed the revocation of appellant's license. The court concluded that appellant's right to counsel was vindicated. The court found that appellant "voluntarily chose to end his phone time," and though the officer provided appellant with information, it was neither coercive nor misleading. The court also found that, under the totality of the circumstances, appellant

voluntarily consented to the breath test. Specifically, the court found that the officer subjected appellant to a routine DWI investigation, read appellant the breath-test advisory, and provided appellant an opportunity to speak with an attorney. The court also found that appellant voluntarily ended that attorney time, was a "typical driver," and that the officer's statements were not coercive or threatening. This appeal followed.

D E C I S I O N

I. Vindication of Appellant's Right to Counsel

Appellant first argues that the officer violated his right to counsel by giving him improper legal advice, which dissuaded him from making further attempts to contact an attorney.

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). Whether an officer vindicated a driver's right to counsel presents a mixed question of fact and law and requires an examination of the totality of the circumstances. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). "Establishing the historical events is a question of fact. Once those facts are established, their significance becomes a question of law." *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992). The right is generally vindicated if a DWI arrestee "is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Friedman*, 473 N.W.2d at 835 (citation omitted). We consider the officer's efforts to comply with his duty to vindicate the driver's right to counsel and the driver's diligence in exercising that right. *Kuhn v. Comm'r of Pub. Safety*,

488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). On one hand, officers must not obstruct the driver's efforts. *See Mulvaney v. Comm'r of Pub. Safety*, 509 N.W.2d 179, 180, 82 (Minn. App. 1993) (concluding that the driver's right to counsel not vindicated where the officer retained control of the telephone, provided the driver with only six minutes to contact an attorney, and hung up the phone without redialing the number even though the driver again stated that he wanted that specific attorney). On the other hand, a driver must make diligent efforts to contact an attorney. *See Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008) (concluding that the driver's right to counsel was vindicated even though the driver spent less than three minutes with the telephone, never attempted to call an attorney, called his spouse instead, and walked away from the telephone).

Here, appellant does not challenge the district court's findings that the officer provided him with a phone, phonebooks, and an opportunity to contact an attorney. Rather, he challenges the district court's conclusion that he voluntarily ended his attorney time, arguing that he was coerced by the officer's statements. We are not persuaded. There is no dispute that the officer expressed to appellant that, in his experience, attorneys advise their clients to take the test. This statement, however, must be considered in context of the officer's other undisputed conduct and statements. For instance, the officer provided this opinion in response to appellant's questions and statements. More importantly, the officer repeatedly qualified his statements to appellant by explaining that he was not an attorney and was not providing legal advice. At no time did the officer directly or expressly obstruct or impede appellant's opportunity to contact and consult with an attorney. Instead, the

officer repeatedly encouraged appellant to contact an attorney and made specific efforts to help appellant contact counsel, such as locating the phone number for his preferred attorney and suggesting that he call attorneys who are not in the surrounding area code in order to have a better chance of speaking with an attorney. The officer made no threats or promises to induce appellant to end his consultation time. On this record and under these circumstances, the district court did not err in concluding that appellant's right to counsel was vindicated.

II. Voluntariness of Appellant's Consensual Breath Test

Appellant next argues that he was coerced into consenting to the breath test.[1] The Fourth Amendment protects against unreasonable searches. U.S. Const. amend. IV. A breath test is a search under the Fourth Amendment. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). Searches conducted without a warrant are generally unreasonable, unless an exception to the warrant requirement applies. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007) ("[T]he search is unreasonable unless the state proves that the search fell within one of the exceptions to the warrant requirement."). Consent is one such exception.[2] *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

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[1] In his brief, appellant references both due process and the Fourth Amendment. We see no basis for a due-process argument, and therefore analyze his claim under the Fourth Amendment. Minnesota recognizes a due-process violation if a driver is misinformed to their detriment of the consequences of test refusal by an inaccurate advisory. *See McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991). But this case does not involve an inaccurate or incomplete advisory, and appellant fails to point to any of the officer's statements as being inaccurate or incomplete.

[2] A breath test may be administered as a search incident to arrest. *Birchfield*, 136 S. Ct. at 2185. The state did not advance an argument that the search-incident-to-arrest exception is applicable and confirmed at oral argument that the issue is not before this court.

The state must show by a preponderance of the evidence that the defendant freely and voluntarily consented to a search. *Id*. Courts consider the "totality of the circumstances" to determine whether consent is voluntary. *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (citation omitted). The relevant circumstances include "the nature of the encounter, the kind of person the [suspect] is, and what was said and how it was said." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). For example, an officer's body language and movement, as well as the manner of his questions, factor into a court's consideration of voluntariness. *See id*. at 881 ("The officer's questions, though couched in nonauthoritative language, were official and persistent, and were accompanied by the officer's body movement in leaning over towards the defendant seated next to him."). In addition, courts look to an officer's representations and omissions, *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App.), *review denied* (Minn. 2003), and whether a suspect understood the representations and statements of the requesting officer, *State v. Barajas*, 817 N.W.2d 204, 218 (Minn. App. 2012).

"[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact." *Diede*, 795 N.W.2d at 846 (citation omitted). Therefore, the "clearly erroneous" standard controls our review of a district court's finding of voluntary consent. *State v. Hummel*, 483 N.W.2d 68, 73 (Minn. 1992); *State v. Alayon*, 459 N.W.2d 325, 330 (Minn. 1990). Findings of fact are clearly erroneous if, on the entire evidence, "we are left with the definite and firm conviction that a mistake occurred." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010).

Here, the district court considered the totality of the circumstances and concluded that appellant's consent to testing was voluntary. The court found that the officer subjected appellant to a routine DWI investigation, read appellant the breath-test advisory, and provided appellant an opportunity to speak with an attorney. The court also found that appellant voluntarily ended that attorney time, was a "typical driver," and that the officer's statements were not coercive or threatening. The district court's finding of voluntariness is supported by the record and is not clearly erroneous.

Affirmed.