STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1486

State of Minnesota,
Respondent,

vs.

Nicholas Oliver Ekelund,
Appellant.

Filed June 8, 2020
Affirmed
Rodenberg, Judge

Hubbard County District Court
File No. 29-CR-18-764

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jonathan D. Frieden, Hubbard County Attorney, Park Rapids, Minnesota (for respondent)

Luke T. Heck, Drew J. Hushka, Vogel Law Firm, Fargo, North Dakota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

In this direct appeal from his conviction for driving while impaired (DWI) and carrying a pistol while under the influence of alcohol, appellant Nicholas Ekelund argues that the district court erred in denying his motion to suppress breath-test evidence because

law enforcement failed to vindicate his limited right to counsel, and that law enforcement's reading of two breath-test advisories violated appellant's procedural-due-process rights. We affirm.

FACTS

On June 16, 2018, at 1:17 a.m., a Hubbard County police officer conducted a routine traffic stop after having observed a motor vehicle cross lane lines. The police officer identified the driver of the vehicle as appellant. While investigating appellant for DWI, the officer discovered in the vehicle two unsecured and loaded firearms and a half-empty can of beer. After appellant failed a field sobriety test, the officer determined that appellant was under the influence of alcohol and arrested him. Appellant was then transported to the Beltrami County Jail in preparation for the implied-consent process.

At approximately 2:23 a.m., the officer read appellant the implied-consent advisory, which appellant stated he understood. Appellant invoked his right to contact an attorney before deciding whether to submit to a breath test. Appellant was provided with a telephone and telephone directories at 2:24 a.m. Appellant looked through the directories for several minutes and placed three telephone calls, but was unable to contact an attorney. Appellant then asked for his personal cell phone, explaining to the officer that he wanted to speak with a nonattorney friend who could put him in contact with an attorney. The officer declined to give appellant his personal cell phone at that time. Appellant returned to the directories and placed five more unanswered telephone calls.

At 2:33 a.m., the officer gave appellant's cell phone to him. Appellant used it to send a text message to a friend in an attempt to facilitate contact with an attorney. When

he did not receive an immediate response, appellant stated that it "might take a second" because "it's kind of late at night." Appellant made two more calls on his cell phone, both of which went unanswered.

Eventually, appellant was able to complete a cell-phone call with a friend who indicated that he could provide appellant with the telephone number of an attorney. Appellant ended that call at 2:44 a.m. and made no further calls using either his cell phone or the telephone provided by police. At 2:50 a.m., the officer asked whether appellant had received the attorney's phone number, and appellant stated, "[y]ep, I'm getting the number," but specified that he was waiting for his friend to call him back

While appellant was waiting for his friend to call, the officer read appellant the firearms breath-test advisory. Appellant stated that he understood the advisory. Appellant made no phone calls after he was read the firearms breath-test advisory despite having access to both his own cell phone and the police telephone.

At 2:57 a.m., the officer informed appellant that his time to contact an attorney would end at 3:00 a.m. Appellant continued to sit passively—despite the ready availability of two different phones—and made no additional calls and sent no additional text messages. The officer declared appellant's attorney time at an end just after 3:00 a.m. and asked appellant if he would take a breath test. Appellant agreed to take the test. The test revealed a 0.22 alcohol concentration.

The state charged appellant with two counts of DWI, two counts of carrying a pistol while under the influence of alcohol, and possessing an open bottle of alcohol in a motor vehicle. Appellant moved to suppress the result of the breath test, and the district court

denied the motion. The district court concluded that appellant's "limited right to counsel was vindicated because he had ceased to make good faith efforts to contact an attorney at the time law enforcement requested that [appellant] submit to a chemical test."

Appellant entered into a stipulation under Minn. R. Crim P. 26.01, subd. 4, and the district court found appellant guilty of both counts of driving while impaired, both counts of carrying a pistol while under the influence of alcohol, and possessing an open bottle.

This appeal followed.

D E C I S I O N

The record supports the district court's determination that appellant's right to counsel was vindicated.

Appellant argues that his right to counsel was violated when the officer ended his attorney time and required appellant to decide whether to provide a breath sample without the advice of counsel just after 3:00 a.m. "The determination of whether an officer has vindicated a driver's right to counsel is a mixed question of law and fact." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). We review the district court's factual findings for clear error. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). Appellate courts review questions of law de novo. *Axelberg v. Comm'r of Pub. Safety*, 831 N.W.2d 682, 684 (Minn. App. 2013), *aff'd*, 848 N.W.2d 206 (Minn. 2014).

"[T]he Minnesota Constitution gives a motorist a limited right to consult an attorney before deciding whether to submit to chemical testing for blood alcohol." *State v. McMurray*, 860 N.W.2d 686, 692 (Minn. 2015). This limited right "cannot unreasonably

delay the administration of the test." Minn. Stat. § 169A.51, subd. 2(4) (2016). The state vindicates this right when it provides the driver with a telephone before testing and gives the driver a "reasonable time to contact and talk with counsel. If counsel cannot be contacted with a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (quotation omitted).

"A reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell*, 757 N.W.2d at 713. Rather, courts consider the totality of the circumstances in determining whether the state provided a reasonable amount of time to consult an attorney. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). Factors considered by a reviewing court include: the efforts made by the driver balanced against the efforts made by the officer; the time of day; and the length of delay since the driver's arrest. *Mell*, 757 N.W.2d at 713. Police officers are required to "assist in the vindication of the right to counsel." *Mulvaney v. Comm'r of Pub. Safety*, 509 N.W.2d 179, 181 (Minn. App. 1993). But 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 v. Comm'r of Pub. Safety*, 536 N.W.2d 912, 915 (Minn. App. 1995).

A DWI arrestee must make a "good-faith and sincere effort" to contact an attorney with the time afforded him. *Mell*, 757 N.W.2d at 713. If the driver is not making a good-faith effort to contact an attorney, police need not afford additional time to contact an attorney. *Id.*

The district court found as a fact that appellant had ceased making a good-faith effort to contact an attorney by the time the officer ended appellant's time to contact an attorney. Therefore, it concluded, his right to consult with counsel was not violated. Appellant argues on appeal that he did not cease his good-faith effort to contact an attorney and that police did not allow him a reasonable amount of time to contact an attorney. The state argues that the officer provided appellant a reasonable amount of time to contact an attorney and that, regardless of the length of time granted him, appellant failed to make a good-faith and sincere effort to contact an attorney.

The officer informed appellant that he had a right to contact an attorney and provided appellant with a telephone and telephone directories. Appellant looked through the directories and made several phone calls. When police provided appellant with his own personal cell phone, he made several additional calls and sent several text messages. Appellant was, for a time, making a good-faith effort to reach an attorney. However, the district court found as a fact that appellant later "ceased to make good faith efforts to contact an attorney."[1] The record supports this finding. Specifically, the recording of the implied-consent process shows appellant standing around, drinking water, and waiting for his friend to return his call. When the officer notified appellant at 2:57 a.m. that his attorney

[1] This determination that appellant ceased his good-faith efforts to contact an attorney is located in what the district court styled as its conclusions of law. However, we are not bound by the characterization a judicial statement as a "finding of fact" or as a "conclusion of law." *Dailey v. Chermak*, 709 N.W.2d 626, 631 (Minn. App. 2006), *review denied* (Minn. May 16, 2006). Instead, the nature of the statement determines its status. The judicial statement that appellant "ceased to make good faith efforts" is a finding of fact.

time would end at 3:00 a.m., appellant continued to sit passively and made no additional attempts to contact an attorney or anyone else.

We conclude that the record adequately supports the district court's finding that the officer vindicated appellant's right to counsel by providing appellant with a telephone, appellant's own personal cell phone, telephone directories, and a reasonable amount of time to make contact with an attorney. The record also amply supports the district court's finding that appellant ended his good-faith effort to contact an attorney by the time the officer required appellant to decide whether to take the breath test. We therefore affirm the district court's determination that appellant's limited right to counsel was vindicated.

The district court did not err in determining that law enforcement's reading of two breath-test advisories did not deny appellant procedural due process.

Appellant argues that "[w]hile requesting a single breath test, [law enforcement]'s competing test advisories to [appellant] were misleading so as to deny [appellant] due process."

Although not cited by appellant, this issue involves application of the Minnesota Supreme Court's decision in *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991). Under *McDonnell*, a driver's due process rights may be violated when a police officer affirmatively misleads the driver as to his rights and consequences of his testing decision. *Id.* at 854-55. However, in *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506, 508-09 (Minn. 2018), the supreme court clarified the requirements for a successful due-process challenge under *McDonnell*. In *Johnson*, the supreme court held that a license revocation may violate due process when "(1) the person whose license was revoked

submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo testing; and (3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to the testing." 911 N.W.2d 508-09. Although *Johnson* involved only revocation of the driver's license to drive and did not involve loss of a permit to carry a firearm, the driver in that case and appellant in this one both alleged a due-process violation. *Id.* at 507. The three-part test applied in *Johnson* therefore guides our analysis by implication, because both cases involve the same claimed constitutional violation. *Id.* at 508-09.

In this case, appellant submitted to a breath test, thereby satisfying the first *Johnson* element. *See id.* But appellant cannot possibly establish the second or third *Johnson* elements on this record. Concerning the second element, the driver in *Johnson* did not prejudicially rely on the implied consent advisory, and the supreme court therefore determined that the driver's right to due process was not violated. *Id.* The record here contains no evidence of prejudicial reliance. Appellant did not testify at his contested omnibus hearing. And he produced no evidence of any sort at the hearing that he prejudicially relied on any confusion that might have resulted from the two slightly different advisories, each of which stated that Minnesota law required appellant's consent to the requested breath test. Appellant agrees that the standard advisories were properly read. Appellant asked no questions, indicated no confusion, and expressly stated that he understood both advisories before he readily agreed to supply one breath sample for both purposes. There is absolutely nothing in the record to reveal any confusion or prejudicial reliance on the differences between the two advisories.

Additionally, the record is devoid of any evidence concerning the third *Johnson* element. Appellant's counsel at oral argument agreed that both the implied consent advisory and firearms consent advisory were properly read to appellant. Each accurately informed appellant of the legal consequences of declining to provide a breath sample. The fact that there were *different* consequences as between appellant's driving privileges and his permit to carry a firearm as a result of appellant's being impaired by alcohol does not satisfy the third element of *Johnson*.

In sum, the district court did not err in determining that appellant's right to counsel was vindicated. And appellant was not denied procedural due process as a result of the police officer having read appellant two breath-test advisories—one concerning appellant's driving privileges and the other concerning his permit to carry a firearm.

Affirmed.