**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A21-0751**

Joseph Lawrence Weber, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed April 4, 2022**
**Affirmed**
**Reyes, Judge**
**Dissenting, Johnson, Judge**

Washington County District Court
File Nos. 82-CV-20-1280; 82-CR-20-1180

Jeffrey S. Sheridan, Sheridan & Dulas, P.A., Eagan, Minnesota (for appellant)

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Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

**NONPRECEDENTIAL OPINION**

**REYES**, Judge

Appellant challenges the district court's order sustaining the revocation of his driver's license, arguing that (1) the district court erred by denying summary judgment because it did not hold a hearing within 60 days of the filing of his petition for judicial

review and (2) law enforcement did not vindicate his right to consult with counsel before deciding to take a breath test. We affirm.

## FACTS

The facts in this case are undisputed. A police officer arrested appellant Joseph Lawrence Weber for driving while impaired at approximately 2:00 a.m. on March 15, 2020. The officer brought appellant to jail and read him an implied-consent advisory twice which notified appellant that he had the right to consult an attorney before deciding whether to submit to a breath test. The advisory also stated, "If you are unable to contact an attorney, you must make the decision on your own. You must make your decision within a reasonable period of time." Appellant confirmed that he understood the advisory. The officer asked appellant if he wanted to consult an attorney, and appellant responded that he "probably should."

The officer gave appellant telephone directories and allowed him to use his cell phone. Appellant did contact one attorney in Wisconsin, but none of the multiple Minnesota attorneys he attempted to contact answered his calls.

After appellant had spent 32 minutes calling attorneys, the officer asked a deputy how much time the deputy usually provided to drivers to contact attorneys. The deputy replied that he usually gave about 20 minutes. The officer told appellant, "I've given you 32 minutes, so that was your time to speak to an attorney." Appellant asked if he could make one more call. The officer agreed, and appellant called another Minnesota attorney and left another voicemail message. The officer allowed appellant to call attorneys from

2:44 a.m. to 3:17 a.m., for a total of 33 minutes. No Minnesota attorneys answered their phones or responded to appellant's messages during this period.

The officer then asked appellant if he would take a breath test. He agreed and did so. The test showed appellant's blood-alcohol concentration as 0.08, which is over the legal limit. The officer issued appellant a notice and order of revocation notifying him of revocation of his driver's license for 90 days effective March 22, 2020. On March 17, 2020, appellant filed a petition for judicial review of his license revocation.

Appellant did not request a stay of revocation pending his hearing. Nor did he apply for a limited license or the ignition-interlock program.

The district court did not schedule a hearing on appellant's petition, and on June 24, 2020, appellant moved for summary judgment, arguing that the lack of a hearing within 60 days of his petition violated his procedural due-process rights, entitling him to rescission of his license revocation. On November 18, 2020, the district court denied appellant's summary-judgment motion, concluding that appellant's due-process rights were not violated because he had a stay-of-revocation remedy available to him under Minn. Stat. § 169A.53, subd. 2(c), but he failed to seek it.

At an evidentiary hearing on his implied-consent petition, appellant argued that the officer failed to vindicate his right to counsel. The district court rejected appellant's argument and sustained respondent Minnesota Commissioner of Public Safety's revocation of appellant's driver's license. This appeal follows.

## DECISION

### I. The district court did not err by denying appellant's summary-judgment motion because appellant's due-process rights were not violated by the delayed hearing on his petition for judicial review.

Appellant argues that (1) the implied-consent law is unconstitutional as applied to him because no emergency justified a prehearing revocation and (2) his procedural due-process rights were violated when his hearing occurred more than 60 days after he filed his petition for judicial review. We disagree.

We review a district court's summary-judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Whether appellant was deprived of his constitutional right to procedural due process is a question of law which we likewise review de novo. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007).

#### A. There is no constitutional requirement that an emergency exist to justify the prehearing revocation of appellant's license.

Appellant argues that in *Bell v. Burson*, the United States Supreme Court held that, except in emergency situations, a state must afford notice and a hearing before depriving a person of a protected property interest. 402 U.S. 535, 542 (1971). Appellant contends that no emergency existed in appellant's case and that the implied-consent law under which the commissioner revoked his license is unconstitutional as applied to him.

But, as appellant acknowledges, since *Bell*, the United States Supreme Court and the Minnesota Supreme Court have decided that we need not determine that an emergency existed to justify a prehearing license revocation. Instead, the Supreme Court in *Mackey*

*v. Montrym* stated that the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), should be applied to determine whether the prehearing deprivation of a driver's license violates an appellant's due-process rights. 443 U.S. 1, 11 (1979). The Minnesota Supreme Court first applied the *Mathews* test in *Heddan v. Dirkswager*, concluding that Minnesota's implied-consent scheme satisfies due process, and it has since continued to apply that test. 336 N.W.2d 54, 59-63 (Minn. 1983); *see also Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722-24 (Minn. 1999); *Bendorf*, 727 N.W.2d at 416-17. As a result, we conclude that appellant's due-process claims are properly analyzed under the *Mathews* test.

### B. Applying the three-factor *Mathews* test, appellant was not denied procedural due process when his implied-consent hearing was not held within 60 days of his judicial-review petition.

A driver's license is a protected property interest which may not be deprived without procedural due process. *Heddan*, 336 N.W.2d at 58-59. Generally, procedural due process requires adequate notice and a meaningful opportunity to be heard. *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 (Minn. App. 2007) (citing *Mathews*, 424 U.S. at 333). A person whose driver's license is revoked under Minnesota's implied-consent statutes may petition for judicial review of the revocation. Minn. Stat. § 169A.53, subd. 2(a) (2020). The judicial review hearing "must be held at the earliest practicable date, and in any event no later than 60 days" after the petition is filed. *Id.*, subd. 3(a). But the statute also recognizes that a hearing may not be held within 60 days, because it provides that "[t]he reviewing court may order a stay of the balance of the revocation or disqualification if the

hearing *has not* been conducted within 60 days after the filing of the petition upon terms the court deems proper." *Id.*, subd. 2(c) (emphasis added).

As noted above, we consider the *Mathews* factors to determine whether the prejudice the driver suffered rose to the level of a procedural due-process violation. *See Bendorf*, 727 N.W.2d at 415-16. Under the *Mathews* test, we consider (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the government's interest. *Id.* (quoting *Mathews*, 424 U.S. at 335). Appellant neither cites to nor analyzes the three-part *Mathews* test but appears to focus only on the first factor. We consider and review all three factors.

On the first factor, although appellant had a private interest in the continued use of his driver's license, "the actual weight given the private interest depends upon three [sub]factors: (1) the duration of the revocation; (2) *the availability of hardship relief*; and (3) the availability of prompt post-revocation review." *Heddan*, 336 N.W.2d at 60 (emphasis added). As to the first and second subfactors, the supreme court has noted that those factors do not weigh heavily in favor of the private interest because prehearing revocations for over a year have been upheld, and Minnesota provides hardship relief. *See Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 346 n.6 (Minn. 2005). Here, the commissioner revoked appellant's license for only 90 days, and he did not seek hardship relief. And while the delay in his hearing did affect the availability of prompt postrevocation review, appellant could have reduced the adverse effect on his private interest by requesting a stay of revocation pending review.

Appellant argues that, because the supreme court held in *Fedziuk* that a prior version of the statute that did not have any hearing deadline violated due process, the failure to comply with the 60-day limit here necessarily means that appellant's due-process rights were violated. 696 N.W.2d at 346-47. But we note that, while the *Fedziuk* opinion focused on the constitutionality of the prior implied-consent statute, the constitutionality of the current statute is not at issue here.

Moreover, the supreme court in *Bendorf* rejected the argument that a failure to hold a hearing within the 60-day statutory deadline is a per-se due-process violation, focusing instead on the level of prejudice suffered by the appellant as determined by the *Mathews* test. 727 N.W.2d at 415. In *Bendorf*, the supreme court noted that the availability-of-relief subfactor of the first *Mathews* factor weighed against the appellant when a stay of revocation had been requested by the appellant and then granted by the district court. *Id.* at 416. It expressed "no opinion as to whether there might be a due process violation when a driver *fails to move for a stay of his revocation*." *Id.* at 416 n.7 (emphasis added). But this court addressed that very issue in *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 877-78 (Minn. App. 2008), *rev. denied* (Minn. May 20, 2008).

In *Riehm*, we noted that the supreme court stated in *State v. Wiltgen*, 737 N.W.2d 561, 569 (Minn. 2007), that a delayed hearing "would not violate due process . . . if the district court stayed the balance of the revocation period and reinstated the driving privilege." 745 N.W.2d at 877. Riehm had the opportunity to request a stay of his revocation but failed to do so. *Id.* at 872, 877. As a result, we held that, "[b]ecause appellant did not avail himself of a stay of the revocation of his driving privileges," his

due-process rights were not violated when his implied-consent hearing occurred more than 60 days after he filed his petition. *Id.* at 878.

The same reasoning applies here. Appellant could have sought a stay of revocation pending his implied-consent hearing to mitigate prejudice to him. He did not do so. He also did not seek any other form of hardship relief by, for example, applying for a limited license or the ignition-interlock program. As in *Riehm*, his failure to seek a stay of revocation weighs against his claim that his due-process rights were violated by the delay.

Appellant argues that *Riehm* is inapposite because, unlike in *Riehm*, appellant did not receive a letter notifying him that a stay was available and would be granted if he sought it. *See id.* at 872, 877. We do not find *Riehm* distinguishable on those grounds. In *Riehm*, we noted that "the *availability* of a stay of revocation" minimized any prejudice associated with a delayed hearing. *Id.* at 878 (emphasis added). Here, although appellant was not formally offered that stay, he nevertheless could have sought it under the statute and did not. Appellant's related argument that the stay was "discretionary," rather than guaranteed, is likewise unavailing. Before the district court can exercise its discretion as to whether to grant a stay of revocation, appellant must first request that stay. But appellant failed to request a stay; instead, he waited until the entire period of his license revocation had passed to seek any relief.

Appellant argues that "the statute and the federal and state constitutions place the burden on the government—the court and the Commissioner—to fulfill its responsibility" to "conduct a speedy hearing," citing to *Fedziuk*. But appellant fails to specify what parts of the constitutions or the statute impose this burden on the court or the commissioner. A

careful review of section 169A.53 refutes his contention. Minn. Stat. § 169A.52, subd. 6 (2020), requires the commissioner to send a notice of revocation that "advise[s] the person of the right to obtain administrative and judicial review." Under section 169A.53, subd. 2(a), the person can then "petition the [district] court for review." Noticeably absent from section 169A.53 is any comparable requirement that the district court or the commissioner notify a person of the availability of a stay of revocation. We cannot read into a statute language that is not there. *See State v. Noggle*, 881 N.W.2d 545, 550 (Minn. 2016) (noting that courts may not add words or meaning to a statute).

Our holding in *Riehm* confirms that appellant must request a stay of revocation available to him when review cannot be held within 60 days. *See Riehm*, 745 N.W.2d at 877-78. That holding is consistent with the well-established understanding that "due process is flexible and calls for such procedural protections as the particular situation demands." *See Bendorf*, 727 N.W.2d at 415 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). We therefore conclude that a careful analysis of the three subfactors under the first *Mathews* factor, including appellant's failure to request a stay of revocation, weighs against his private interest.

On the second *Mathews* factor, the likelihood of erroneous deprivation did not increase because of the delay. The reliability of the evidence here of the officer's bodycam video and appellant's breath-test result would not be affected by the delay. *See Hamilton*, 600 N.W.2d at 724 (noting that longer waiting period for limited license does not increase risk of erroneous deprivation because breath tests are a reliable method of testing blood alcohol).

Finally, as to the third factor, we have repeatedly concluded that the state has a "compelling interest in highway safety justifying efforts to keep impaired drivers off the road." *Bendorf*, 727 N.W.2d at 417; *accord. Heddan*, 336 N.W.2d at 62-63 ("The public interest in preserving the safety of our roadways is of great importance. . . . [D]runken drivers pose a severe threat to the health and safety of the citizens of Minnesota.").[1]

Accordingly, weighing (1) the lack of impact on appellant's private interest due to his failure to seek a stay; (2) the lack of any risk of erroneous deprivation of his private interest due to the reliability of the breath test and video evidence; and (3) the state's compelling interest in keeping impaired drivers off the road, we conclude that appellant's due-process rights were not violated.

**II. The police officer vindicated appellant's limited right to counsel.**

Appellant also argues that the officer did not vindicate his right to counsel because the officer did not give him a reasonable amount of time to contact an attorney before deciding whether to take a breath test. We are not persuaded.

Whether the officer vindicated appellant'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). When the facts are undisputed, as they are here, we review de novo the district court's legal conclusions based on those facts. *See Nelson v. Comm'r of Pub. Safety*, 779 N.W.2d 571, 573 (Minn. App. 2010). Drivers have a limited right under the state constitution to consult

[1] Appellant's hearing delay appears to have been related to the COVID-19 pandemic disruption to the courts: the public register of actions in appellant's case notes a "pandemic event" on April 28, 2020, and at appellant's summary-judgment hearing, the parties referred to pandemic-related delays.

an attorney before deciding whether to submit to a breath test. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991); *State v. Rosenbush*, 931 N.W.2d 91, 96-98 (Minn. 2019). Generally, that limited right is vindicated if a driver "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 (quotation omitted).

A "reasonable time" is not a fixed amount of time and cannot be based on a specific number of elapsed minutes. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 843 (Minn. App. 1992), *rev. denied* (Minn. Oct. 20, 1992). Instead, we consider the totality of the circumstances. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). We balance "the police officer's duties in vindicating the right to counsel and the [driver's] diligent exercise of the right." *Mell*, 757 N.W.2d at 713. Although there is no "definite or exclusive set of factors," the relevant factors we may consider include: (1) whether the driver made a good faith, sincere effort to reach an attorney; (2) the time of day, with drivers receiving more time late at night or early in the morning; and (3) the length of time the driver has been under arrest. *Parsons*, 488 N.W.2d at 502. We may also consider other factors such as the driver's access to a phone, the driver's freedom to use the phone as he wishes, and the driver's understanding that the time to contact an attorney is limited. *Id.*

Appellant points to the fact that the arresting officer asked another deputy how long he gives drivers to contact an attorney and proceeded to tell appellant his time was up after the other officer answered that he usually gives "about 20 minutes." Appellant argues that

this shows appellant's time was based on "a specific number of elapsed minutes" rather than a "reasonable time" under the circumstances.

While it is true that a "reasonable time" cannot be based on a specific number of elapsed minutes, we must consider all the relevant factors. Here, the district court concluded, and the parties agree, that appellant made a good-faith effort to reach an attorney. Appellant used all 33 minutes of his time attempting to consult an attorney. Appellant also attempted to contact attorneys in the early morning, when officers are expected to give more time. Those factors weigh in appellant's favor.

The other factors, however, suggest that the officer gave appellant a reasonable time. Appellant's attorney time ended approximately 1 hour and 17 minutes after the officer stopped him.[2] Although the officer did not tell appellant how much time he would be given, the implied-consent advisory read to appellant put him on notice that his attorney time would be limited. The officer gave appellant a stack of telephone directories and the use of his cell phone to call attorneys. The officer allowed appellant to use the time as he wished. Appellant called multiple attorneys and left messages for them. The officer also allowed appellant to make a final phone call after notifying him that his time had ended. Given those circumstances, we conclude that the officer vindicated appellant's limited right to counsel, and the district court did not err by sustaining the revocation of his driver's license.

**Affirmed.**

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[2] A breath test must be administered within two hours of driving. *See* Minn. Stat. § 169A.20, subd. 1(5) (2020).

**JOHNSON**, Judge (dissenting)

The supreme court has held that if a person petitions a district court for rescission of the revocation of a driver's license, the Due Process Clause requires either a hearing on the petition within 60 days or a stay of the revocation while the petitioner awaits a hearing. Weber petitioned for rescission of the revocation of his driver's license, but the district court did not conduct a hearing within 60 days and did not stay or offer to stay the revocation during that 60-day period. The applicable caselaw compels the conclusion that Weber's right to due process has been violated. Therefore, I respectfully dissent from part I of the opinion of the court.

**A.**

The commissioner of public safety shall revoke the driver's license of a person who is arrested for driving while impaired and either refuses to submit to chemical testing or submits to chemical testing but fails the test. Minn. Stat. § 169A.52, subds. 3, 4 (2020). A person whose driver's license has been revoked may petition a district court for judicial review of the revocation. Minn. Stat. § 169A.53, subd. 2 (2020). A district court is required by statute to hold a hearing on the petition "at the earliest practicable date, and in any event no later than 60 days following the filing of the petition." *Id.*, subd. 3(a). "The filing of the petition does not stay the revocation," but the district court "may order a stay of the balance of the revocation or disqualification if the hearing has not been conducted within 60 days after filing of the petition upon terms the court deems proper." *Id.*, subd. 2(c).

As a general rule, the Due Process Clause of the Fourteenth Amendment requires a hearing *before* a person is deprived of a property interest, such as a driver's license. *Heddan v. Dirkswager*, 336 N.W.2d 54, 58-59 (Minn. 1983) (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)). But in this particular context, a post-deprivation hearing may satisfy the requirements of the Due Process Clause if the familiar three-factor *Mathews* test is satisfied. *Id.* at 59-60 (citing *Mackey v. Montrym*, 443 U.S. 1, 19 (1979), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Weber's appeal is governed by three opinions of the supreme court and one opinion of this court. First, in *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340 (Minn. 2005), the supreme court considered a constitutional challenge to the 2003 version of section 169A.53, which did not require a hearing within any particular time period after the filing of the petition. *Id.* at 346. The supreme court applied the three-factor *Mathews* test and concluded that the statute did not satisfy due-process requirements because it did not require a prompt post-deprivation judicial hearing. *Id.* at 346-48. As a consequence, the supreme court reinstated a prior version of the statute, which included a 60-day requirement. *Id.* at 345, 349 (citing Minn. Stat. § 169A.53, subd. 3(a) (2002)). Shortly after *Fedzuik*, the legislature amended section 169A.53 to require a hearing within 60 days. *See* 2005 Minn. Laws ch. 136, art. 18, § 4, at 1158 (codified at Minn. Stat. § 169A.53. subd. 3(a)). Thus, Minnesota's statutory scheme satisfies due-process requirements—assuming a post-deprivation hearing is held within the statutory 60-day period. *See Fedziuk*, 696 N.W.2d at 345-47; *Heddan*, 336 N.W.2d at 59-63.

Second, in *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410 (Minn. 2007), the supreme court recognized an exception to the rule that due process requires a hearing within 60 days. The driver in that case petitioned for rescission of the revocation of his license, but the district court did not hold a hearing until 94 days after the filing of the petition. *Id.* at 412. But the driver had also filed a motion for temporary reinstatement of his license, which was granted only nine days after he filed his petition. *Id.* at 412 & n.3 (citing Minn. Stat. § 169A.53, subd. 2(c)). The supreme court applied the three-factor *Mathews* test and concluded that the driver was *not* denied his right to due process, primarily because he "was deprived of his driving privileges for only nine days" because he had "availed himself of relief *by obtaining a stay that . . . allowed him to maintain his driving privileges* throughout the process of judicial review." *Id.* at 417 (emphasis added). The supreme court summarized its decision as follows:

> The result reached here is not meant to indicate that conducting judicial review of a license revocation more than 60 days after the filing of a petition is never a due process violation. But where *the stay provision in the statute has been successfully invoked to restore the driver's privileges* and in the absence of a showing of prejudice beyond the short number of days at issue in this case, application of the factors set forth in *Mathews* . . . compels the conclusion that the driver's right to procedural due process has not been violated.

*Id*. (emphasis added) (footnote omitted). The supreme court also noted, "We express no opinion as to whether there might be a due process violation when a driver fails to move for a stay of his revocation . . . ." *Id.* at 416 n.7.

Third, in *State v. Wiltgen*, 737 N.W.2d 561 (Minn. 2007), the supreme court reiterated the importance of a stay of revocation while a petitioner awaits a hearing. After

the driver petitioned for rescission of the revocation of her license, the district court informed her of a standing order, which provided that a hearing would not occur until the "disposition of the associated criminal case." *Id.* at 565. But the district court also informed her that she "could request a stay of the balance of the revocation period" pursuant to section 169A.53, subdivision 2(c), "and represented that such a stay would be granted." *Id*. The driver then "requested a stay of the balance of the revocation period," which was granted. *Id*. While the petitioner's revocation was stayed, she again was arrested for driving while impaired, and the state used the revocation arising from the first incident to enhance the criminal charges arising from the second incident. *Id.* at 565-66. The issue on appeal was whether the enhancement violated the driver's due-process right with respect to her interest in not being criminally punished based on an unreviewed revocation. *Id.* at 566. Before resolving that issue, the supreme court commented on a person's interest in continuing to drive while awaiting a judicial hearing:

> Viewed in the light of *Fedziuk*, the district court's Standing Order would, by itself, violate due process in situations where it has the effect of eliminating the requirement of a prompt postrevocation review. Under the *Mathews* test, the lack of the availability of prompt postrevocation review would sufficiently increase the weight of the private interest that is adversely affected by the revocation to outweigh the other considerations, as it did in *Fedziuk*.
>
> Of course, the adverse effect on the private interest considered in *Fedziuk*, the loss of the driving privilege, could be reduced by *the prompt restoration of the driving privilege*. The Standing Order would not violate due process with respect to the driving privilege *if the district court stayed the balance of the revocation period and reinstated the driving privilege*. Thus, the combination of the Standing Order and the stay of the balance of the revocation period satisfied the concerns in

> *Fedziuk* about the driver's private interest in the driving privilege.

*Id.* at 569 (emphasis added). The supreme court also noted that a district court's authority to stay a petitioner's revocation pursuant to section 169A.53, subdivision 2(c), is "unclear" because "that provision does not explicitly authorize a stay before the 60-day period for an implied consent hearing has expired." *Id.* at 571 n.6.

Fourth, in *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869 (Minn. App. 2008), *rev. denied* (Minn. May 20, 2008), this court considered the effect of a standing order like the one in *Wiltgen* on a driver's interest in continuing to drive while awaiting a hearing. *Id.* at 872. After the driver petitioned for rescission of his license revocation, the district court "sent a letter to appellant informing him that, in accordance with a Ramsey County standing order, a stay of the balance of his driver's-license revocation pending resolution of the implied-consent matter was available, and would be automatically granted upon written request." *Id.* But the driver in *Riehm* did *not* take advantage of the district court's offer of a stay. *Id.* We concluded that there was no violation of the driver's right to due process because he "could have avoided suffering a 'direct and personal harm' by availing himself of the remedial stay offered to him." *Id.* at 878.

**B.**

In this case, the district court did not conduct a hearing on Weber's petition within 60 days, and Weber's revocation was not stayed during the 60-day period. Whether Weber's right to due process has been violated depends on an application of the three-factor *Mathews* test. *See Bendorf*, 727 N.W.2d at 417. The *Mathews* analysis in this case

is essentially the same as the *Mathews* analysis in *Fedziuk*, in which the supreme court considered the constitutionality of a statute that did not require a hearing within any particular time period. 696 N.W.2d at 344-46. The *Fedziuk* court concluded that, in the absence of a requirement that a hearing occur within 60 days, the statute would violate a petitioner's right to due process. *Id.* at 347-48. In *Wiltgen*, the supreme court reaffirmed that the lack of a prompt post-deprivation hearing, by itself, would be a due-process violation. 737 N.W.2d at 569. Because Weber did not get a hearing on his petition within 60 days and because the revocation was not stayed during the 60-day period, his right to due process has been violated.

**C.**

The district court reached a contrary conclusion by citing this court's *Riehm* opinion and stating that a "stay of revocation remedy was available but never sought by the Petitioner." But a stay was not "available" to Weber in the same way that a stay was made available to the petitioner in *Riehm*. In that case, the district court proactively communicated to the petitioner that a stay of the revocation "would be automatically granted upon written request." 745 N.W.2d at 872. Consequently, the petitioner easily could have obtained a stay simply by responding affirmatively to the district court's offer. *Id.* at 876. In this case, however, there was no such communication from the district court to Weber. Weber had an opportunity to file a motion for a stay, but he had no assurance that the district court would grant such a motion. The statute authorizing a stay provides that a district court "may" grant a stay, which indicates that a stay is a matter of discretion, not a matter of right. *See* Minn. Stat. § 169A.53, subd. 2(c). In addition, the possibility of

a stay was uncertain because the *Wiltgen* court had stated that it is "unclear" whether the statute authorizes a district court to grant a stay before the end of the 60-day period. *See* 737 N.W.2d at 571 n.6. Thus, the facts and circumstances of this case are meaningfully different from those of *Riehm*.

In addition, the facts and circumstances of this case are too far removed from *Bendorf* to allow the conclusion that a stay was "available." In *Bendorf*, the petitioner "*availed himself of relief by obtaining a stay*," and the supreme court reasoned that there was no due-process violation because a stay procedure had been "*successfully invoked* to restore the driver's privileges." 727 N.W.2d at 417 (emphasis added). In contrast, Weber did not successfully invoke the stay procedure. *See id.* This case should be resolved by adhering to *Wiltgen*, in which the supreme court stated that the lack of a prompt post-deprivation hearing, by itself, would result in a due-process violation but that the absence of such a hearing would not violate due process "*if the district court stayed the balance of the revocation period and reinstated the driving privilege*." 737 N.W.2d at 569 (emphasis added). In Weber's case, the district court did not stay the balance of his revocation period and reinstate his driving privilege. *See id.* To reject Weber's argument is to hold him responsible for the district court's failure to conduct a prompt post-deprivation hearing. But neither the statute, *Bendorf*, *Wiltgen*, nor *Riehm* imposes on petitioners an obligation to file *both* a petition for rescission *and* a motion for a stay.

**D.**

The state argues, in part, that the first *Mathews* factor—Weber's interest in continuing to drive—must be discounted by the possibility of hardship relief, such as a

limited license or an ignition interlock. The state's argument does not alter the conclusion stated above because the possibility of hardship relief was incorporated into the analysis and the result in *Fedziuk*. In discussing the first *Mathews* factor, the *Fedziuk* court expressly considered "the availability of hardship relief," such as advance notice, a temporary license, and a limited license. 696 N.W.2d at 346 n.6. But the availability of hardship relief did not alter the supreme court's determination that the absence of a prompt post-deprivation hearing would adversely affect a person's interest in continuing to drive and would result in a due-process violation. *See id.* at 346-47.

For these reasons, I would conclude that the district court's failure to conduct a hearing on Weber's petition within 60 days, during which time his revocation was not stayed, results in a violation of his right to due process. Therefore, I would reverse the district court's denial of Weber's motion for summary judgment and remand with instructions to grant his motion and order an appropriate remedy. For that reason, I would not reach the second issue, which is discussed in part II of the opinion of the court.