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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1105

State of Minnesota,
Respondent,

vs.

Todd Alan Mickelson,
Appellant.

Filed March 5, 2012
Affirmed
Worke, Judge

Martin County District Court
File No. 46-CR-10-543

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

Terry W. Viesselman, Martin County Attorney, Michael D. Trushenski, Assistant County Attorney, Fairmont, Minnesota (for respondent)

Thomas K. Hagen, Jason C. Kohlmeyer, Rosengren Kohlmeyer Law Office, Mankato, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant challenges his convictions of second-degree driving while impaired (DWI)—test refusal and fleeing a peace officer, arguing that his limited right to counsel was not vindicated. We affirm.

D E C I S I O N

Appellant Todd Alan Mickelson moved to dismiss charges following a DWI arrest, arguing that the arresting officer failed to vindicate his limited right to consult with counsel prior to deciding whether to submit to chemical testing. The district court found that appellant's right was vindicated and denied his motion. The case was submitted on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 4, and the district court found appellant guilty of DWI—test refusal and fleeing a peace officer on foot. *See State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980). Whether a driver's limited right to counsel has been vindicated presents a mixed question of law and fact. *State v. Collins*, 655 N.W.2d 652, 656 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). The facts here are not in dispute; thus, we make an independent legal determination as to whether appellant was given a reasonable opportunity to consult with an attorney. *See id.*

Drivers have a limited right to counsel before deciding whether to submit to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The driver "must be informed of the right to consult with an attorney and the police officers must assist in the vindication of that right." *State v. Fortman*, 493 N.W.2d 599, 601 (Minn. App. 1992). Police officers provide assistance by providing a telephone

and a reasonable amount of time to contact and speak with counsel. *Friedman*, 473 N.W.2d at 835. "A reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008).

We consider "the totality of the facts" in determining if a driver's right to counsel has been vindicated. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). The totality of the facts include whether the officer met his duty in assisting the driver, whether the driver diligently exercised his right by putting forth a "good faith and sincere effort to reach an attorney," the time of day that the driver attempted to contact an attorney, and the length of time that the driver was under arrest. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). If a driver cannot reach counsel within a reasonable amount of time, the driver may be required to decide whether to submit to chemical testing without the advice of counsel. *Friedman*, 473 N.W.2d at 835.

Deputy Clint Cole placed appellant under arrest for DWI at approximately 12:26 a.m. on May 29, 2010. Appellant immediately fled and lost his glasses while the deputy pursued him. The deputy read appellant the implied-consent advisory at 1:14 a.m., and gave appellant a phone and several phonebooks. Because appellant lost his eyeglasses, the deputy gave him a magnifying glass. After approximately four minutes, appellant stated that he was looking for the number for a particular attorney. Appellant then asked for a Mankato phonebook, which the deputy provided. Appellant looked through the directories for approximately 20 minutes without placing a single call. After another

three minutes, the deputy told appellant that he could call any attorney and that he did not have to contact the particular attorney that he wanted to contact. Appellant told the deputy that it was difficult for him to see without his glasses. After approximately 26 minutes from the time the deputy read the advisory, a jailer brought appellant two pairs of reading glasses. Nearly 32 minutes after the deputy advised appellant, appellant located his attorney's number, called his attorney, and left an incomplete voice message. Appellant then called his attorney again and left a return number. The deputy called the dispatcher and instructed that a return call should be forwarded to him. Approximately four minutes later, appellant stated that he might have his attorney's business card in his wallet and that it might have an alternative number. The deputy gave appellant his wallet. Appellant found the business card, but it did not have an alternative number on it.

Approximately 37 minutes after the deputy read the advisory, he told appellant that he should try to reach another attorney. Three minutes later, appellant told the deputy that he would speak only to his attorney. Approximately 42 minutes after the deputy read the advisory, he told appellant that he needed to make a decision regarding whether he would submit to chemical testing. One minute later, appellant refused a breath test, a blood test, and a urine test. The deputy determined that appellant refused testing at 1:54 a.m., more than forty minutes after the deputy read appellant the advisory.

The district court did not err in concluding that appellant's limited right to counsel was vindicated. Deputy Cole satisfied his duties in assisting appellant by providing appellant with a telephone, several directories, a magnifying glass, eyeglasses, his wallet, and a reasonable amount of time to contact and consult with an attorney. Appellant failed

to exercise diligence in putting forth a good-faith effort in contacting an attorney. He called an attorney approximately 32 minutes after he was advised of his right. Appellant flipped aimlessly through the directories. The deputy advised appellant that he could contact any attorney, but appellant, without explanation, told the deputy that he would talk only to his attorney. Further, appellant had been placed under arrest at approximately 12:30 a.m. It was not until approximately one-and-a-half hours later that the deputy informed appellant that he needed to make a decision. Appellant had sufficient time in which to contact an attorney.

Affirmed.