STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1461

State of Minnesota,
Respondent,

vs.

John Steven Kietzman,
Appellant.

Filed July 1, 2013
Affirmed
Ross, Judge

Chisago County District Court
File No. 13-CR-11-76

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

Janet Reiter, Chisago County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Center City, Minnesota (for respondent)

Thomas C. Gallagher, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

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

ROSS, Judge

Appellant John Kietzman challenges the district court's admission of his urine test into evidence and his conviction of third-degree driving while impaired. Kietzman argues

that his right to pretest counsel and right to an additional test were violated when the arresting deputy did not give him a reasonable opportunity to contact a lawyer before submitting to chemical testing and then did not advise him of his right to an additional test. Because the deputy afforded Kietzman a reasonable amount of time to contact an attorney and because police have no duty to advise a defendant of the right to an additional test, we affirm.

FACTS

Forty-five minutes after midnight on a Friday night in October 2010, Chisago County Deputy Jim Mott stopped a car driven by John Kietzman on Interstate 35. Suspecting that Kietzman was intoxicated, Deputy Mott administered field sobriety tests and a preliminary breath test. He then arrested Kietzman for impaired driving and took him to a hospital for chemical testing.

At the hospital, Deputy Mott recited to Kietzman the Minnesota Motor Vehicle Implied Consent Advisory. It was 1:39 a.m. Kietzman stated that he understood the advisory and that he wanted to speak with an attorney. Deputy Mott asked a nurse to provide telephone directories for Kietzman to find an attorney. The nurse returned with telephone books after two to three minutes, and Kietzman immediately began making calls to area attorneys. No attorney answered the phone, and Kietzman did not leave any voice messages, supposing that he would have to decide whether to submit to a chemical test before the time it would take for any of them to call him back.

At 2:05 a.m., Deputy Mott told him that he had five more minutes of phone use. Kietzman continued attempting unsuccessfully to contact an attorney. Deputy Mott did

not interrupt until 2:13 a.m., ending Kietzman's phone access after about 30 minutes. Deputy Mott did not want to allow any more time because Kietzman's preliminary breath test had registered only slightly above the *per se* violation level and he was concerned that the alcohol would dissipate to below that level if testing was delayed any longer.

Deputy Mott offered Kietzman a blood test at 2:14 a.m. He later gave Kietzman the choice between a blood or urine test. Kietzman agreed to submit to a urine test and provided his sample at 2:21 a.m. The Bureau of Criminal Apprehension analyzed the urine sample and reported an alcohol concentration of .10.

The state charged Kietzman with third-degree driving while impaired. Kietzman moved the district court to suppress the evidence of his alcohol concentration and to dismiss the charge. He based his motion on his theory that his right to counsel had been violated because he was not given a reasonable amount of time to contact an attorney before agreeing to be tested. He also based it on his assertion that he was improperly denied his right to additional testing because he was not advised of the right. The district court conducted an omnibus hearing and then denied Kietzman's motion, finding that Deputy Mott had given Kietzman a reasonable amount of time to contact an attorney under his valid concern about the dissipation of alcohol. It also found that the deputy did nothing to prevent an additional test and held that he had no duty to inform Kietzman of his right to one.

Kietzman and the state then agreed to a stipulated-facts trial, which preserved Kietzman's challenge to the pretrial rulings for appeal. The jury found Kietzman guilty of third-degree driving while impaired, and this appeal follows.

D E C I S I O N

Kietzman argues that his right to pretest counsel was violated by Deputy Mott's allegedly unreasonable interruption of his phone access after about 30 minutes. Kietzman is correct that arrestees have a limited right to counsel before deciding whether to submit to chemical testing under the Minnesota Constitution. Minn. Const. art. I, § 6; *Friedman v. Com'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The limited right to counsel is vindicated when the 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). Whether a person has been allowed a reasonable time to consult with an attorney is a mixed question of law and fact. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992). We rely on the district court's fact findings unless they are clearly erroneous. *Thompson v. Comm'r of Pub. Safety*, 567 N.W.2d 280, 281 (Minn. App. 1997), *review denied* (Minn. Sep. 25, 1997). Based on the supported findings or undisputed facts, we make a legal determination as to whether the officer gave the defendant a reasonable opportunity to consult with an attorney. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

On the supported factfindings of the district court, we reject Kietzman's contention that Deputy Mott failed to vindicate his limited right to counsel by ending his good-faith effort to contact an attorney after 30 minutes. This court has generally found the right to counsel vindicated when the driver received access to a telephone and directories, and was given a reasonable amount of time to make phone calls. *Palme v.*

Comm'r of Pub. Safety, 541 N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 26, 1996) (holding the right to counsel vindicated after the driver had access to a telephone and phone books for 29 minutes and later spoke to his attorney); *Parsons*, 488 N.W.2d at 502 (holding the right to counsel vindicated after the officer provided the driver a phone and directories and decided that 40 minutes was a reasonable amount of time to call an attorney). But when the officer ended or restricted the amount of time arbitrarily or unreasonably obstructed the driver's ability to consult with an attorney, we have found that the right to counsel was not vindicated. *See Duff v. Comm'r of Pub. Safety*, 560 N.W.2d 735, 737–38 (Minn. App. 1997) (holding that the driver's right to counsel was not vindicated when the officer ended the call with the driver's attorney before the driver could obtain advice about testing); *Kuhn*, 488 N.W.2d at 842 (holding that the right to counsel was not vindicated when the officer ended the driver's good-faith attempt to contact an attorney arbitrarily after 24 minutes).

Looking at the totality of the circumstances to determine whether the time Deputy Mott allowed Kietzman to consult an attorney was reasonable, *see Kuhn*, 488 N.W.2d at 842, we conclude that it was. The deputy assisted Kietzman by providing him a telephone and summoning directories as soon as Kietzman asked to speak with an attorney. We recognize that 30 minutes is not a great deal of time for an accused drunk driver to identify, contact, and consult with an attorney, particularly after midnight when fewer attorneys make themselves available. But the evanescent nature of evidence in impaired-driving cases is a factor that an officer may consider when defining the time allotted. *Friedman*, 473 N.W.2d at 835; *Parsons*, 488 N.W.2d at 502. Deputy Mott was

particularly mindful that a lengthy delay could prevent him from securing inculpatory chemical evidence for the state to prove a *per se* DWI violation in light of Kietzman's low preliminary breath test. He was also concerned that his testing must meet the requirements of the driving while impaired statue. That statute defines driving while impaired as driving with an alcohol concentration of .08 or greater "at the time, or *as measured within two hours* of the time, of driving." Minn. Stat. §169A.20, subd. 1(5) (2010), (emphasis added). Kietzman was stopped at 12:45 a.m., so by the time the deputy ended his telephone access, only about 30 minutes remained for him to have secured a testable sample from Kietzman within the two-hour statutory timeframe. Deputy Mott testified that he anticipates delays when administering blood or urine tests. He predicts that nurses, restrooms, and urine kits will not always be immediately available and that the arrested driver cannot always immediately urinate. Considering the deputy's reasonable and legitimate concerns, we hold that he gave Kietzman a reasonable amount of time to contact an attorney and that Deputy Mott did not arbitrarily end Kietzman's good-faith effort to consult with an attorney.

Caselaw readily defeats Kietzman's next argument. He maintains that Deputy Mott improperly failed to advise him of his right to an additional test. He is correct that he has a right to an additional or alternative test. *See* Minn. Stat. § 169A.51, subd. 7(b) (2010). But he is wrong in contending that the deputy had a duty to advise him of the right. *See Duff*, 560 N.W.2d at 738. His argument therefore fails.

Affirmed.