STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1338

David Michael Turner, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed March 18, 2008
Affirmed
Kalitowski, Judge

Chisago County District Court
File No. 13-C8-04-001057

Charles A. Ramsay, Ramsay & DeVore, P.A., 450 Rosedale Towers, 1700 West Highway 36, Roseville, MN 55113 (for appellant)

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Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellant David Michael Turner challenges the district court judgment sustaining his driver's license revocation pursuant to the implied-consent law, arguing that his due process rights were violated. We affirm.

D E C I S I O N

Appellant argues that the length of time between his petition for judicial review of his driver's license revocation and his implied-consent hearing violated his due-process rights because (1) he was without a driver's license for several months before it was temporarily reinstated; and (2) the unreviewed revocation was used to enhance a subsequent DWI offense. We disagree.

Because the issues raised in this appeal involve applying the law to undisputed facts, we review appellant's arguments de novo. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007).

The United States and Minnesota Constitutions provide that a person's life, liberty, or property will not be deprived by the government "without due process of law." U.S. Const. amend. XIV; Minn. Const. art. I, § 7. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). Thus, when it is argued that procedural protections are insufficient, a court must evaluate (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). In the implied-consent context, retaining the driving privilege pending an implied-consent hearing is a recognized private interest. *Bendorf*, 727 N.W.2d at 416. And "the duration of the [driver's license] revocation and the availability of hardship relief are relevant to the determination of the impact on the driver's private interest." *Id.* (quotation omitted).

The Minnesota Supreme Court held that the 2003 amendments to the implied-consent statute that eliminated language specifying that an implied-consent hearing must be held within 60 days of the filing of the petition for review offended due process. *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 346-48 (Minn. 2005) (holding that prompt and meaningful postrevocation review is required). But the Minnesota Supreme Court has rejected the argument that, following *Fedziuk*, it is a per se due-process violation when an implied-consent hearing is held more than 60 days after a petition requesting judicial review is filed. *Bendorf*, 727 N.W.2d at 415. Instead, the court explained that the proper inquiry is "whether the delay caused any prejudice." *Id.*

Appellant argues that his situation is distinguishable from the unprejudiced appellant in *Bendorf* because, "[u]nlike Bendorf, who was without his license for nine days, [appellant] was deprived of his license for more than two months before it was temporarily reinstated." But the record indicates that appellant did not request that his driver's license revocation be stayed until 58 days after his driver's license was revoked,

and that the stay was granted two days later. We note that in *Bendorf* the Minnesota Supreme Court "express[ed] no opinion as to whether there might be a due-process violation when a driver fails to move for a stay of his revocation." 727 N.W.2d at 416 n.7. But because the record indicates that any prejudice appellant suffered is not based on government action, but rather his own inaction, we conclude that there is no due-process violation here.

Moreover, the record indicates that appellant, by letter dated November 10, 2004, requested that the implied-consent hearing be postponed: "[Appellant] will be out of town and therefore unable to attend the hearing . . . . It is my understanding, [appellant] is aware, that the next available court date would be sometime in April of 2005." Because appellant's conduct caused a five-month postponement, we reject his argument that he was prejudiced by the delay between his petition for judicial review and his implied-consent hearing.

Appellant also argues that he was prejudiced by the delay in his implied-consent hearing because he claims that his unreviewed driver's license revocation impermissibly enhanced a subsequent DWI charge. We disagree.

First, we decline to address the merits of this argument here because it is not properly before us. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that this court generally will not consider matters not presented to the district court). Appellant requested that this court take judicial notice of the complaint in the subsequent offense. But even if judicial notice would be appropriate, our record does not indicate how the charge progressed beyond that stage. It is not our role to determine if facts exist

to support appellant's claim of prejudice. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (stating that the role of the court of appeals is to correct errors, not to find facts). Thus, any challenge appellant may have based on an alleged enhancement is not appropriately made in this proceeding.

In addition, to allow appellant to claim prejudice here because he was charged with a subsequent DWI is contrary to public policy. If we accept appellant's argument, an offender charged with a subsequent DWI while his first implied-consent hearing was pending can assert prejudice and attempt to rescind his first driver's license revocation, while an offender not charged with another DWI before his implied-consent hearing could not. And finally, the record here indicates that if appellant had not requested a continuance of his implied-consent hearing, it would have been held two months before appellant's subsequent DWI arrest. To recognize prejudice here would reward an offender who, after requesting a continuance, was charged with an additional DWI.

Affirmed.