STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1383

Pamela Marie Kichler, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed June 24, 2008
Affirmed
Worke, Judge

Crow Wing County District Court
File No. 18-C9-07-000252

Lori Swanson, Attorney General, Melissa Eberhart, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Richard C. Kenly, P. O. Box 31, Backus, MN 56435 (for appellant)

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

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

WORKE, Judge

Appellant challenges the district court's decision to sustain the revocation of her driver's license, arguing that she was coerced into submitting to a breath test. We affirm.

D E C I S I O N

Appellant Pamela Marie Kichler argues that her constitutional rights were violated when she was coerced by the arresting officer's statements into taking a breath test. Whether an officer's statements explaining or advising a driver of her rights under the implied-consent law violate due process by actively misleading the driver about her statutory obligation to submit to alcohol testing is a question of law. *Fehler v. Comm'r of Pub. Safety*, 591 N.W.2d 752, 754 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). "We overturn conclusions of law only upon a determination that the [district] court has erroneously construed and applied the law to the facts of the case." *Id.* (quotation omitted).

Appellant contends that her due-process rights were violated when she was told that she would not get out of jail until Monday if she refused to take a breath test. Appellant asserts that nowhere in Minnesota's implied-consent law is there any mention of immediate incarceration as a consequence for test refusal. The supreme court "has consistently noted its concern that law enforcement officials not mislead individuals with respect to their obligation to undergo [alcohol-concentration] testing." *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 853 (Minn. 1991). Due process is violated if an officer actively misleads an individual about her statutory obligation to submit to alcohol-concentration testing. *See id.*

This case is very similar to *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272 (Minn. App. 1986). In *Dehn*, the officer read the implied-consent advisory to the driver and the driver asked the officer what would happen if she "flunk[ed]" the test. 394

N.W.2d at 273. The officer told the driver that she would be spending the night in jail. *Id.* Dehn then stated: "So regardless I'll be spending the night." *Id.* The officer replied "[t]he only way you'll be released tonight is if you have a $1,000 cash bail or you blow a pass on this machine." *Id.* Dehn argued that the officer misstated the law and was coercive. *Id.* at 274. This court determined that the officer was merely responding to a question and that his answer reflected what he believed were the consequences of failing the test. *Id.* This court held that the advisory was accurately given and that there was no showing that the driver was coerced or intentionally misled. *Id.*

Here, after the officer invoked the implied-consent advisory, appellant told him that she wanted to talk to an attorney, and he transported her to jail. En route to the jail, appellant asked the officer how she was going to get home. The officer suggested a taxi cab, but added that appellant would not need a cab that night. Appellant then asked the officer how she could get out of jail before Monday (appellant was arrested on early Saturday morning), and the officer told her that it would depend on the degree of the charge. The officer's statements were in response to appellant's questions, which did not even relate to submitting to a test. The officer had already placed appellant under arrest for DWI; thus, he merely indicated to appellant that she would probably not need a ride home that night and that she might be in jail for the weekend depending on the charge.

At the jail, after appellant used the telephone, the officer asked her if she would take the breath test. Appellant said "no." The officer asked appellant if she understood that a refusal was a crime, and she acknowledged this. The officer again asked appellant if she understood that she could be charged with a refusal. Appellant asked what a

refusal charge was and the officer told her that it was a gross misdemeanor. Appellant asked what the fine was for a gross misdemeanor and the officer told her that it is a year in jail and a $3,000 fine. Appellant asked if she could "stay at the jail until somebody," but did not finish the sentence. The officer said something about court on Monday and deferred to the jailer who stated that the judge usually came in during the weekend, but if the judge did not come in appellant would go to court on Monday. Appellant then agreed to take the breath test, which showed that her alcohol concentration was .17.

The implied-consent advisory was accurately given, and appellant was not coerced or mislead into submitting to a test. The officer answered appellant's questions regarding the level of a test-refusal charge, the possible penalty, and the circumstances under which she would be in jail until Monday. Appellant was told that she might be in jail until Monday depending on whether the judge came in over the weekend; she was not told that she would be jail until Monday if she refused to submit to a test. Additionally, appellant fails to show that she was prejudiced because she was already under arrest for DWI.

Affirmed.