**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1396**

James R. Bray, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed July 1, 2008**
**Affirmed**
**Peterson, Judge**

Hennepin County District Court
File No. 27-CV-07-6691

Larry E. Reed, Law Office of Larry E. Reed, 2000 Plymouth Avenue North, Minneapolis, MN 55411 (for appellant)

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Peterson, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

**PETERSON,** Judge

In this implied-consent proceeding, appellant challenges the district court's finding that he refused to submit to a breath test. We affirm.

## FACTS

Appellant James R. Bray was arrested for driving while impaired (DWI) and transported to the Eden Prairie Police Department. At the station, an officer read appellant the implied-consent advisory. When asked if he understood, appellant answered, "Yes, I do." Appellant indicated that he wanted to talk to an attorney. Appellant was provided with a telephone and telephone books. The officer also gave appellant his wallet because appellant said that it contained the phone number of an attorney. Appellant called and left a message for the attorney. The officer suggested that appellant call another attorney, but appellant insisted that he wanted to speak to that particular attorney. The officer testified that she told appellant several times that if he was not able to reach an attorney, he would have to make a decision about testing on his own. Appellant testified that he was never told that he would have to make the decision on his own. After about 45 minutes, the officer asked appellant whether he would submit to a breath test, and appellant said that he would not do anything until he talked to his attorney. Appellant's driver's license was revoked for refusing testing, and he petitioned for judicial review. After an implied-consent hearing, the district court sustained the revocation. This appeal followed.

## D E C I S I O N

A person arrested for DWI in Minnesota has "the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The right to counsel is a limited right and exists only to the extent that it does not unreasonably delay the administration of the test. *Id.* "If counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel." *Id*. (quotation omitted).

> [L]aw enforcement officials must give the driver notice that the search for an attorney is over when a driver has failed to contact an attorney after being provided with a reasonable opportunity to do so. Officers must then, before charging the driver with refusal, clearly offer the driver one final opportunity to make an uncounselled decision regarding testing.

*Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 810 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). This obligation is fulfilled when the officer communicates to the driver that he has been "given an adequate opportunity to contact an attorney" and then gives the driver "a final opportunity to make a testing decision." *Id.*; *See* Minn. Stat. 169A.51, subd. 2(4) (2006) (setting out terms of implied-consent advisory that inform driver about limited right to counsel). Refusal to submit to a test can result in revocation of an individual's license to drive. Minn. Stat. § 169A.52, subd. 3(a) (2006).

Appellant argues that the district court erred in finding that he refused to take the test. Appellant contends that the officer never informed him that he would have to make a decision on his own when he was unable to reach his attorney or that his time to contact

an attorney had expired. We will not reverse the district court's findings of fact unless they are clearly erroneous. *Thompson v. Comm'r of Pub. Safety*, 567 N.W.2d 280, 281 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997); *see also* Minn. R. Civ. P. 52.01.

The district court found:

> A review of Ex. 2, an audio tape of the entire implied consent and booking procedure, makes it clear that [appellant] refused to take the test because he had not been able to talk to his lawyer. He made this statement multiple times. From his words and actions, it is clear that he was not going to take the test because he had not received a return call from his attorney.

Appellant has not shown that the district court's finding that he refused to take the test is clearly erroneous. A review of the audio tape of the implied-consent procedure reveals that appellant was told at least four times that if he was not able to reach an attorney, he would need to make a decision on his own. Appellant said he understood, and when asked what he would do if his attorney did not return his call, appellant replied: "If he doesn't [call back], then I'll just have to make that decision whether to do it or not." Appellant declined multiple opportunities to contact a different attorney and, in at least two separate conversations, told the officer that he would not take the test before talking to his attorney. Eventually the following exchange occurred:

> OFFICER: Alright, James, we've been waiting almost 45 minutes now. Are you sure you don't want to contact –
>
> APPELLANT: I'm not going to contact anybody else.
>
> OFFICER: Okay. Will you take a breath test?
>
> APPELLANT: No. I'm not gonna do that.

> OFFICER: Okay. What's your reason for refusing?
>
> APPELLANT: Because my attorney. I need to talk to him before I do anything else.

The officer then explained that appellant would be charged with the crime of test refusal. Appellant said that he understood and, after a few minutes of silence, volunteered: "I understand that (unintelligible.) I'm not going to do anything until I talk to my lawyer."

This exchange demonstrates that the officer communicated to appellant that he had been given an adequate opportunity to contact an attorney and then gave appellant a final opportunity to make a testing decision. After appellant explicitly stated that he was not going to contact another attorney, the officer clearly and unambiguously asked appellant whether he would take a breath test, and appellant said that he would not. The district court court's finding that appellant refused the test is amply supported by the record and is not clearly erroneous.

**Affirmed.**