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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0866**

Randy Allen Polzin, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed March 18, 2008
Affirmed
Schellhas, Judge**

Isanti County District Court
File No. 30-CV-06-709

Howard Bass, Bass Law Firm, PLLC, 14101 Southcross Drive West, Suite 100, Burnsville, MN 55337 (for appellant)

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

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges a district court order sustaining the revocation of his driving privileges under the implied-consent statute, Minn. Stat. § 169A.52, subd. 4 (2006).

Appellant argues that his right to counsel was not vindicated. Because we find that

appellant was given a reasonable amount of time to contact an attorney of his own choosing, we affirm.

FACTS

On Friday, September 21, 2006, at 11:27 p.m., an Isanti County deputy sheriff arrested appellant Randy Allen Polzin for driving under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1 (2006). The deputy brought appellant to the county jail and read the implied-consent advisory to him. Appellant said he understood the advisory and wished to consult an attorney. The deputy allowed him to use a telephone and multiple phone books and offered to give appellant any assistance he could. Although the deputy did not permit appellant to dial the telephone himself, he assisted appellant by dialing every phone number appellant requested.

Appellant called his wife and asked her to retrieve contact information for an attorney he knew. Appellant waited on the telephone for his wife to get the information, which he estimated would take her 20 minutes. After more than five minutes of waiting on the phone, the deputy suggested that appellant hang up and try using a telephone book or directory assistance while his wife searched for the information on her own. Appellant did so and found the attorney's number, but was able only to reach the attorney's telephone message recording. Appellant did not leave a voice message, telling the deputy that "it won't do any good now."

After appellant hung up the phone, the deputy advised him that he could contact another attorney, and another deputy suggested that many attorneys listed in the telephone books advertised 24-hour phone services. Appellant refused to do so and

replied that he did not know any of those attorneys. For the next three minutes, appellant did not attempt to call anyone else, but engaged in a discussion about what kind of test he would take. Appellant then asked to call his wife again so that she could retrieve another attorney's contact information from his office for him. Appellant ended this conversation with his wife after more than four minutes by saying, "We'll try that, and I'll call you back if that [doesn't] work." The arresting deputy was only a few feet away from appellant when he said this, but claims that he was not listening to appellant at the time.

Appellant called the second attorney's phone number, but his voice mailbox was full. At 12:04 a.m., after appellant hung up the phone, the deputy told him that it had been 23 minutes since he read the implied-consent advisory to him, and added "I'll ask you now if you'll—if you want to take a blood test." Appellant responded "Yes, sir" and was taken to a medical center for the test, which showed that appellant's alcohol concentration exceeded the legal limit. On October 9, 2006, respondent Commissioner of Public Safety mailed notification to appellant that his driver's license would be revoked. Appellant filed a petition for judicial review and, after a hearing, the district court sustained the revocation.

D E C I S I O N

At issue in this case is whether appellant was given a reasonable amount of time after his arrest to consult an attorney of his own choosing before being required to submit to a chemical test under the implied-consent law. The question of whether a driver's right to counsel in this situation has been vindicated is a mixed question of law and fact. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992). This court

reviews the district court's findings of fact under a "clearly erroneous" standard. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). Once the facts have been established, the determination of whether appellant's right to counsel was vindicated is a matter of law, which this court reviews de novo. *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 809 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). The issues in this case are mixed questions of fact and law.

Because the implied-consent law is remedial in nature, it is interpreted in favor of the public's interest in gathering evidence, and against the individual driver's interest. *Parsons*, 488 N.W.2d at 502. Although a driver arrested for driving under the influence of alcohol has a right to consult an attorney before deciding whether to submit to an alcohol concentration test, this right is limited. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). This limited right is vindicated if a telephone is made available to the driver before testing and the driver is allowed a reasonable amount of time in which to contact an attorney. *Id.* If the driver cannot contact an attorney in a reasonable amount of time, he may be required to make a decision regarding testing without counsel. *Id.*

Here, appellant had approximately 23 minutes to contact an attorney. He correctly notes that in *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992), this court found that a driver's right to counsel was not vindicated where the driver had been given 24 minutes to contact an attorney. But in *Kuhn* and other implied-consent cases, in order to determine whether a driver's right to

counsel was vindicated, this court has looked to the totality of the circumstances and not strictly the amount of time the driver was given. *Id.* at 842; *Parsons*, 488 N.W.2d at 502.

Whether appellant made a continued good-faith effort to reach an attorney is a threshold issue in this case. *Kuhn*, 488 N.W.2d at 840. Appellant understood the implied-consent advisory that informed him that he had limited time in which to consult an attorney, but he used almost half of this time in phone conversations with his wife to find phone numbers for two attorneys he knew. Drivers are permitted to call family members to obtain an attorney's name and number. *Mulvaney v. Comm'r of Pub. Safety*, 509 N.W.2d 179, 181 (Minn. App. 1993). But where a driver is provided with a telephone and directories, is free to call anyone, and knows that his time to consult with an attorney is limited, this court may consider how much of his limited time the driver spends talking to a non-attorney in determining whether the driver diligently exercised his right to counsel. *Parsons*, 488 N.W.2d at 502. In this case, appellant waited on the telephone for his wife to retrieve information, even though he knew that she might need as long as 20 minutes to do so. He ceased doing so only at the suggestion of the deputy. Appellant's use of his limited time in this manner indicates a failure to diligently exercise his right to counsel.

Other elements of appellant's behavior indicate that he was not engaged in a continuing good-faith effort to contact an attorney. When told by the deputy that he would have to decide whether to submit to the test, appellant did not express any desire to call his wife back or to continue looking for an attorney. Moreover, between attempting to contact his first attorney of choice and accepting the deputy's suggestion to call his

wife back for information on other attorneys, appellant waited for approximately three minutes without making any further attempts to contact an attorney, despite another deputy's suggestion that the directories listed attorneys offering 24-hour services and the arresting deputy's suggestion that the appellant call an attorney at that time. Finally, appellant refused to leave a telephone message for his first attorney of choice. Regardless of the likelihood that this attorney would have called appellant back in a reasonable time, leaving a telephone message would have required minimal effort on appellant's part.

To the extent that appellant did search for an attorney, he attempted to contact only attorneys he knew and refused to consider any other attorney. Appellant argues that he had the right to limit his search to attorneys he "knew and trusted." A driver in appellant's position is entitled to contact an attorney of his own choosing. *McNaughton v. Comm'r of Pub. Safety*, 536 N.W.2d 912, 914-15 (Minn. App. 1995); *Delmore v. Comm'r of Pub. Safety*, 499 N.W.2d 839, 842 (Minn. App. 1993). However, this right entitles the driver only to the opportunity to consult such an attorney. *McNaughton*, 536 N.W.2d at 914-15. The deputy's duty was not to ensure that appellant could contact an attorney he knew and trusted, but only to facilitate appellant's right to counsel. *Id.* at 915 (citing *Butler v. Comm'r of Pub. Safety*, 348 N.W.2d 827, 828-29 (Minn. App. 1984)). This duty is satisfied "if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel," as was the case here. *Id.* (quotation omitted).

In both *McNaughton* and *Delmore*, the officers' conduct fell short of satisfying this duty. In *McNaughton*, the officer gave the driver a list of five attorneys to call. *Id.* at 913-14. When the driver asked to speak with a particular attorney he knew whose name was not on the list, the officer and dispatcher conducted a cursory search for the attorney's name in directory assistance without attempting to obtain the correct spelling of the attorney's name. *Id.* at 914. Here, appellant was given telephone directories and ample opportunity to speak to his wife and to directory assistance, and successfully found phone numbers for two attorneys he knew. That those attorneys were not available to answer his call does not negate that he had a reasonable opportunity to contact them. In *Delmore*, the officer dialed a public defender and handed the telephone to the driver, but offered the driver no other assistance and did not inform the driver of his right to consult an attorney of his own choosing. *Delmore*, 499 N.W.2d at 840. Here, the deputy informed appellant of this right and offered considerable assistance to appellant in exercising it. We conclude that appellant had a reasonable opportunity to contact an attorney of his choosing.

This court also considers the time of day the driver was arrested, because attorneys are generally more difficult to reach by telephone in the early morning, and the length of time for which the driver has been under arrest, because evidence of alcohol concentration becomes less probative over time. *Kuhn*, 488 N.W.2d at 842. Here, appellant was arrested shortly before midnight, and less than an hour had elapsed between his arrest and when he was asked to submit to a blood test. While these factors might have weighed in favor of giving appellant additional time, they are not dispositive.

Considering the totality of the circumstances, we conclude that the district court properly ruled that appellant's right to counsel was vindicated.

Affirmed.