STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0480

State of Minnesota,
Respondent,

vs.

Gerhart Garrett Toller,
Appellant.

Filed February 10, 2009
Affirmed
Connolly, Judge

Carver County District Court
File No. 10-CR-06-1083

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

James W. Keeler, Jr., Carver County Attorney, Mary E. Shimshak, Assistant County Attorney, Carver County Justice Center, 604 East Fourth Street, Chaska, MN 55318 (for respondent)

Richard L. Swanson, 207 Chestnut Street, Suite 235, P.O. Box 117, Chaska, MN 55318 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant argues that he was denied a reasonable opportunity to contact an attorney after being arrested for driving while intoxicated. Because appellant was provided with a telephone and several telephone books, but made no attempt to contact an attorney in the 20 minutes provided to him by law enforcement personnel, we affirm.

FACTS

On November 22, 2006, appellant Gerhart Toller was arrested for driving while intoxicated and transported to the Carver County Jail. Carver County Deputy James Blatzheim read the implied-consent advisory to appellant at 11:46 p.m. Appellant indicated that he understood the implied-consent advisory and that he wished to speak with an attorney. Deputy Blatzheim provided appellant with a telephone and several telephone books at 11:47 p.m. One of the phone books, known as the blue pages, contains telephone numbers for attorneys who specialize in DWI defense, most of whom are available 24 hours a day, seven days a week.

Appellant told Deputy Blatzheim that he wished to contact his attorney in St. Cloud, but he could not find the number. While Deputy Blatzheim informed appellant that this was his opportunity to contact "an" attorney, and not necessarily a specific person, he also did nothing to discourage appellant from contacting someone who would have been able to provide his St. Cloud attorney's phone number.

Appellant made no attempt to contact anyone. Instead, he slouched in his chair and turned the pages of the telephone directory without appearing to even read the names

or numbers listed. After 20 minutes, Deputy Blatzheim advised appellant that his opportunity to contact an attorney had ended and asked appellant if he would take the breath test. Appellant replied that he had already taken the test, and Deputy Blatzheim explained that the preliminary test was not an official test. Deputy Blatzheim asked appellant one more time if he would take the breath test. Specifically, he said: "If the test is unreasonably delayed or you refuse to make a decision, you will be considered to have refused the test. I'm going to ask you one more time," and then asked him if he would take the test. In response, appellant stated that he would be "more than willing to call . . . an attorney." Deputy Blatzheim regarded this response as a test refusal.

Appellant was charged with third-degree driving while impaired test refusal, fourth-degree driving while impaired, possession of over 1.4 grams of marijuana in a motor vehicle, and possession of drug paraphernalia. An omnibus hearing was held and the district court held that appellant's right to counsel had been vindicated. After a court trial, appellant was convicted of third-degree driving while impaired test refusal and the other charges were dismissed. This appeal follows.

D E C I S I O N

Appellant argues that he was denied his right to counsel. A district court's findings of fact concerning whether a driver has made a good-faith and sincere effort to contact an attorney will not be reversed unless they are clearly erroneous. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). A district court's conclusion as to whether the defendant "was accorded a reasonable opportunity to consult with counsel based on the given facts" is subject to de

novo review. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

An individual suspected of driving while intoxicated must be given a reasonable opportunity to consult with an attorney before deciding whether to submit to an alcohol concentration test. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). However, due to the "evanescent nature" of the evidence sought in DWI cases, the arrested driver receives a limited amount of time to consult with an attorney. *Id.* Generally, the right to counsel is vindicated if the individual is given a telephone prior to testing and is provided with a reasonable amount of time to contact, and consult with, an attorney. *Id.*

Whether a driver had a reasonable opportunity to consult with an attorney is determined from the totality of the facts. *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). Among the nonexclusive factors a court should consider are (1) whether the driver has made a good faith effort to reach an attorney; (2) the time of day that the driver was arrested, and how accessible an attorney is at that time of day; and (3) the length of time the driver has been under arrest, because delay may make the DWI evidence less probative and make prompt testing more urgent. *Kuhn*, 488 N.W.2d at 842.

The district court concluded that appellant did not make a good faith effort to reach an attorney. This finding is not clearly erroneous. Appellant was provided with a telephone and several telephone books. Appellant made no attempt to contact an attorney. Appellant expressed a desire to contact his attorney in St. Cloud, but did not

call anyone to obtain that phone number. Deputy Blatzheim testified that he did not do anything to interfere with appellant's attempts to find a phone number for his attorney in St. Cloud. Appellant did not make a good faith attempt to reach an attorney during the 20 minutes that he was provided with a telephone and telephone directories.

This court should also consider the time of day that the driver was arrested and the length of time the driver has been under arrest when determining whether a driver has been given a reasonable opportunity to contact an attorney. Appellant was arrested at approximately 11:30 p.m. and was provided with a telephone directory containing the phone numbers of criminal defense attorneys, many of whom are available 24 hours a day, seven days a week. But appellant made no attempt to contact one of these attorneys. Appellant was initially stopped at approximately 11:00 p.m., arrested at 11:30 p.m., and the deputy's decision that appellant refused to take the test occurred at 12:07 a.m. Prompt testing was not urgent. *See Kuhn*, 488 N.W.2d at 842 (concluding that a one hour delay "does not by itself require a driver to submit to a chemical test"). Nonetheless, the totality of the circumstances indicates that appellant's right to an attorney was vindicated.

When a driver fails to contact an attorney, after being given a reasonable opportunity to do so, law enforcement must inform the driver that his or her opportunity to search for an attorney has ended. *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 810 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). "Officers must then, before charging the driver with refusal, clearly offer the driver one final opportunity to make an uncounseled decision regarding testing." *Id.*

Appellant argues that the district court erred in finding that his right to counsel was vindicated because he was not warned by Deputy Blatzheim that he had one last chance to contact an attorney. Appellant relies on the following language in *Linde* to support his assertion: "Officers must then, before charging the driver with refusal, clearly offer the driver one final opportunity to make an uncounseled decision regarding testing." *Id*. Appellant's reliance on this language is misplaced. This language requires that appellant be given one final opportunity to make an uncounseled decision regarding testing, not that he be told that he has one more chance to contact an attorney. Appellant was offered the chance to make a final uncounseled decision regarding testing when Deputy Blatzheim stated: "I'm going to ask you one more time . . . will you take the breath test?" Appellant responded that he wished to call an attorney and Deputy Blatzheim interpreted this response as a refusal. This interpretation was reasonable. Appellant's right to consult with an attorney was vindicated because he was given a telephone, several telephone books, 20 minutes during which he made no attempt to contact an attorney or someone who could give him his St. Cloud attorney's phone number, and a final opportunity to make an uncounseled decision regarding testing.

Affirmed.