

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1348**

Tina Michelle Livingston, petitioner,  
Appellant,

vs.

Commissioner of Public Safety,  
Respondent.

**Filed May 21, 2012  
Affirmed  
Ross, Judge**

Wright County District Court  
File No. 86-CV-11-1032

Geoffrey R. Saltzstein, Appelman Law Firm, St. Louis Park, Minnesota (for appellant)

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; (for respondent)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

A state trooper arrested Tina Livingston for drunk driving and drove her to the Wright County jail, where Livingston requested to speak with an attorney before deciding whether to take a chemical test. After Livingston made only three brief calls in 25

minutes, the trooper required her to decide whether to take the test and she refused. The district court affirmed the Commissioner of Public Safety's revocation of Livingston's driver's license, concluding that the trooper did not violate her limited pretest right to legal counsel. Because the facts support the district court's underlying findings and its holding that the trooper gave Livingston a reasonable amount of time to consult an attorney, we affirm.

### **FACTS**

Late one evening in February 2011, Minnesota trooper Dennis Bloch was investigating a collision near Clearwater. The collision involved Tina Livingston, whom Trooper Bloch suspected of driving while impaired. He arrested her and drove her to the Wright County jail, where he read her the Motor Vehicle Implied Consent Advisory and asked her if she wanted to speak with an attorney. She said yes, and at 10:35 p.m. Trooper Bloch brought her to a room where a telephone and eight phone books were available.

Livingston had access to the telephone for 25 minutes. She did not immediately make a call, but instead told Trooper Bloch, "I'm in a county I don't live in, and I know that I have the right to an attorney and you guys have to provide one for me. I don't know attorneys in this county."

Trooper Bloch responded, "That's why I gave you all of the phone books there. You can get yourself acquainted with an attorney pretty quick."

After several minutes more, Livingston asked Trooper Bloch for her cellular telephone, which he retrieved for her. She used it to telephone a friend who lived nearby, but he did not answer.

Livingston asked the trooper when she would be released. Trooper Bloch told her that he was not sure of the county's release policy. Livingston pressed him on it further, and the trooper explained, "Right now is your time to contact an attorney." Livingston again asked about Wright County's release policy, and Trooper Bloch left to ask a jail staff member for an answer. He returned and relayed that her release depended on whether she agreed to a chemical test and what the results were.

Less than a minute later Livingston asked Trooper Bloch how she could recover her vehicle from the towing company. He told her that the information was in the other room and that he did not know the towing company's telephone number. Two and a half minutes later Livingston asked the trooper if she could call an attorney in private. He explained that he had to watch her, but he did step out of the room. It was 10:44 p.m. Livingston then asked the trooper how to make a call outside the building on the jail telephone. He explained that she needed to first dial 9.

Trooper Bloch continued to observe Livingston's actions after he left the room. At 10:48 p.m., she placed a call using her cellular telephone to a person in the phone's directory. At 10:52 p.m., she opened a phonebook for the first time. At 10:55 p.m., she made a brief call using the jail phone. Livingston was never on a call for more than one minute, and she opened a phonebook only once. Trooper Bloch re-entered the room at 10:57 p.m. At that time, Livingston was typing on her cellular phone. He asked her if she

was trying to make a telephone call. She didn't answer, but she told him that she could not reach an attorney because the phone book listed only St. Cloud attorneys, not Wright County attorneys.

Trooper Bloch then asked Livingston if she would take a breath test. She replied that she would not do anything until she spoke with an attorney. The trooper asked her reason for refusing the test, and she responded that she did not know Minnesota law and did not want to do anything without an attorney present. She asked for more time, and the trooper declined the request, stating that she had spent almost thirty minutes and made only three calls. At 11:00 p.m., he turned Livingston over to county personnel for booking for DWI test refusal.

Because of the test refusal, the Commissioner of Public Safety revoked Livingston's driver's license under Minnesota Statutes section 169A.52, subdivision 3(a) (2010). Livingston challenged the revocation in district court at an administrative hearing during which Trooper Bloch explained that, based on his lengthy law enforcement experience, he believed that Livingston was "absolutely not" making a good-faith effort to call an attorney. Livingston did not testify.

The district court found that Livingston did not make a good-faith effort to contact an attorney during the 25 minutes she had access to a telephone. It also held that she was provided a reasonable amount of time to consult with an attorney and that her pretest right to counsel had been satisfied. It sustained the revocation, listing seven factors bearing on its decision:

[Livingston's] need to consult an attorney, the evanescent nature of the alcohol, the need to return Trooper Bloch to the street, the fact that [Livingston] was provided a telephone, phone books, and unlimited access to a phone for at least 25 minutes, and the fact that it had been around an hour and a half since Trooper Bloch first made contact with [Livingston].

Livingston appeals.

## DECISION

We are persuaded that Livingston's pretest right to counsel was vindicated. A driver has a limited right to counsel before deciding whether to take a chemical test, arising from article I, section 6 of the Minnesota Constitution. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The right is satisfied when the driver is given access to a telephone and afforded a reasonable amount of time to reach and consult with an attorney before testing. *Id.*

Whether the right is satisfied is a mixed question of law and fact. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). We first decide whether Livingston made a good-faith effort to contact an attorney. *See Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). We then determine whether she had a reasonable opportunity to consult with an attorney before submitting to testing. *See id.* at 840.

Livingston asks us to decide *de novo* whether she acted in good faith. But we are convinced instead that a disputed question of good faith is a factual matter that we review only for clear error. *See Gergen*, 548 N.W.2d at 309 (holding that whether the defendant made a good-faith effort to reach an attorney is "a fact-specific inquiry" by the district

court reviewed on appeal for clear error). We will rely on the district court's fact findings unless we are left with a "definite and firm conviction that a mistake has been made." *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 597 (Minn. App. 1995).

### ***Good-Faith Effort to Reach an Attorney***

Livingston argues that the district court erred by finding that she did not in good faith attempt to contact an attorney. The argument fails. A driver does not make a good-faith effort to reach an attorney if she uses delaying tactics or stops trying. *Kuhn*, 488 N.W.2d at 842. It may be that a district court might have come to a different finding, but the finding here is supported by evidence that the district court reasonably deemed persuasive. It heard from Trooper Bloch that he informed Livingston of her right to contact an attorney and that he gave her access to the jailhouse phone, to her personal cellular phone, and to eight phone books, and that she had 25 minutes to reach an attorney. Livingston spent almost 10 of those 25 minutes questioning Trooper Bloch about when she would be released and how she could recover her car—issues that a reasonable trooper, and a reasonable fact finder, might deem to have been interjected only to delay. The district court also learned that Livingston opened only one of the phone books, that she waited almost 10 minutes before asking how to make an outside call, and that she made only three calls (all unanswered) and left no messages to prompt a return call.

Livingston asserts that "at no point did Trooper Bloch interrupt [her] questioning or inform her that this was the time for her to contact attorneys and not the time for her to ask questions of him." The record belies the assertion. After five minutes of Livingston

asking questions unrelated to the chemical test or to her reaching an attorney, Trooper Bloch specifically warned, “Now is your time to contact an attorney.” A defendant must diligently use the time allotted by the officer to make a good-faith effort to reach an attorney. *See Palme v. Comm’r of Pub. Safety*, 541 N.W.2d 340, 345 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). The district court did not clearly err by finding that Livingston did not diligently attempt to reach an attorney during her 25-minute opportunity.

### ***Reasonable Opportunity to Contact an Attorney***

We are equally unconvinced by Livingston’s argument that she was not given a reasonable amount of time to contact an attorney. An alleged drunk driver’s pretest right to counsel is necessarily limited by the evanescent nature of detectable chemicals in the body. *Friedman*, 473 N.W.2d at 835. So she has the right only to a reasonable opportunity to contact and obtain legal counsel before deciding whether to submit to testing. *Id.* The length of time that an officer gives for this contact is not determinative. *Davis v. Comm’r of Pub. Safety*, 509 N.W.2d 380, 386 (Minn. App. 1993), *aff’d*, 517 N.W.2d 901 (Minn. 1994). Instead, the focus is on the totality of the circumstances arising from various factors, such as the time of day when the driver tries to contact an attorney; the driver’s need to consult with an attorney for legal advice; the rate alcohol dissipates in the blood stream; that the legislature wanted to coerce drivers into taking the implied-consent test; the remedial nature of the implied-consent law; and the officer’s need to return to patrol. *Kuhn*, 488 N.W.2d at 842; *Parsons v. Comm’r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992).

Livingston had a reasonable amount of time to reach an attorney beginning at 10:35 p.m. We recognize that “[a] driver should be given more time in the early morning hours when contacting an attorney may be more difficult.” *Kuhn*, 488 N.W.2d at 842. Of course it is more difficult to contact an attorney late at night than during business hours, but we agree with the district court’s implicit assessment that a person making reasonable efforts could have reached an attorney and discussed whether to take the test within a half hour of 10:30 p.m. Having used only a tiny fraction of the 25 minutes to attempt to contact an attorney, Livingston is in an impossible position to contend that 25 minutes was not reasonably long enough.

**Affirmed.**