STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2416

Wendy Lea Ringwelski, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed February 12, 2008
Affirmed
Minge, Judge

Anoka County District Court
File No. C8-06-10482

W. Harvey Skees, Gerald Miller & Associates, P.A., 2915 Wayzata Boulevard, Minneapolis, MN 55405 (for appellant)

Lori Swanson, Attorney General, David J. Koob, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Halborkks, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges the district court's decision sustaining the revocation of her driving privileges after her DWI arrest, arguing that the district court erred by finding that

the police officer did not interfere with her right to an additional test of her alcohol concentration. We affirm.

FACTS

On October 6, 2006, appellant Wendy Lea Ringwelski was stopped by a Coon Rapids police officer while driving a vehicle and arrested after failing a field sobriety test. Her driver's license was subsequently revoked. Ringwelski timely sought judicial review, requesting rescission of the revocation.

At the review hearing in district court, both Ringwelski and the arresting officer testified. It is undisputed that, when Ringwelski was at the police station, the officer read her a Minnesota implied consent advisory and asked if she would like to contact an attorney. Ringwelski used her cell phone to call her mother and ask for assistance in finding an attorney. Ringwelski spoke with her mother for approximately 38 minutes. The officer testified that, after Ringwelski hung up, he asked her if she would submit to an Intoxilyzer breath test, that Ringwelski responded that she wanted to take a blood test, but that he (the officer) told her that he was offering a breath test, not a blood test, and that Ringwelski ultimately agreed to the breath test. The Intoxilyzer result showed that Ringwelski's alcohol concentration was .22.

Ringwelski testified that, before taking the Intoxilyzer breath test, she repeatedly asked the arresting officer for a blood test, but the officer ignored her requests. Ringwelski contended that, in addition to ignoring her requests, the officer interfered with her right to obtain a blood test in two ways: first, by indicating that she was not going to have a blood test that night because she was going to jail and, second, by not making a

telephone available to her after administering the Intoxilyzer test. The officer acknowledged that he rejected Ringwelski's request for a blood test in response to his offer of the Intoxilyzer breath test. The officer testified that after the Intoxilyzer test he never refused any request by Ringwelski for an alternate blood test. The officer further denied telling Ringwelski that she could not have an alternative blood test because she was going to jail.

The district court found that the arresting officer did not interfere with Ringwelski's right to request an additional test and sustained the revocation of Ringwelski's driving privileges. This appeal follows.

D E C I S I O N

The only issue on appeal is whether the arresting officer interfered with Ringwelski's right to an additional, independent alcohol concentration test. This issue includes both questions of law and of fact. *Haveri v. Comm'r of Pub. Safety*, 552 N.W.2d 762, 765 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). The district court's findings of fact must be sustained unless clearly erroneous, but this court reviews de novo whether, as a matter of law, the driver's right to an independent test was prevented or denied. *Id.* Findings of fact are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). On review by this court, "due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

Minnesota's implied-consent law provides that any person who operates a motor vehicle in this state consents to a state-administered chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol. Minn. Stat. § 169A.51, subd. 1(a) (2006). The peace officer who requires such a test has the authority to decide whether the test is of blood, breath, or urine. *Id.* at subd. 3 (2006). The statute allows for further testing:

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state. The failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer.

Id. at subd. 7(b) (2006). The additional test is available only to those who first submit to the state's test. *State v. Larivee*, 656 N.W.2d 226, 229-30 (Minn. 2003) (interpreting a then-current equivalent to § 169A.51 subd. 7(b)).

Our initial inquiry is whether the district court's finding that Ringwelski never requested a second blood test was clearly erroneous. This case is similar to *DeBoer v. Comm'r of Pub. Safety*, 406 N.W.2d 43, 45 (Minn. App. 1987), where the arrestee requested a blood test in response to the police officer's initial request that the arrestee take an Intoxilyzer breath test. After taking the Intoxilyzer test, the arrestee did not renew his request for a blood test. *Id*. This court held that the arrestee did not assert his right to an additional test and his rights were not violated. *Id*. at 46. We reached the

same result in *Przymus v. Comm'r of Pub. Safety*, 488 N.W.2d 829, 833 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992).

Here, Ringwelski requested a blood analysis when the officer was asking for her consent to the Intoxilyzer test as authorized under Minn. Stat. § 169A.51, subd. 3. The district court found, based on the testimony of Ringwelski and the arresting officer, that Ringwelski did not request a test in addition to the Intoxilyzer test. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (concluding that, in resolving the issue regarding denial of an additional test against the driver, the district court implicitly found the officer's testimony that driver did not request an additional test to be more credible than driver's contrary testimony), *review denied* (Minn. Aug. 30, 1995). Because we conclude that the district court was not clearly erroneous in finding that Ringwelski failed to renew her demand for a blood test *after and in addition to* the Intoxilyzer test, we rule that the officer did not prevent or deny Ringwelski's right to a second test.

Ringwelski also challenges the district court's finding that her use of a cellular phone for 38 minutes *before* the Intoxilyzer test provided her with an opportunity to arrange for an additional test. Ringwelski argues that this access to her cell telephone did not satisfy her right under the law to seek a second test because that right arose only *after* the Intoxylizer test. *See* Minn. Stat. § 169A.51, subd. 7(b) (2006); *Larivee*, 656 N.W.2d at 229-30. We agree. However, the issue is not whether Ringwelski had a right to an additional test if she so requested—she clearly had such a right. The issue here is whether she was denied a right to use a telephone to request a second test. Nothing in the

record indicates that Ringwelski asked to use a telephone a second time. Furthermore, the officer had no duty to inquire whether she wished to use a telephone to arrange for an additional test. *Hager v. Comm'r of Pub. Safety*, 382 N.W.2d 907, 911-12 (Minn. App. 1986). Nor was the officer required to instruct Ringwelski on how to obtain an alternate test. *See Ruffenach v. Comm'r of Pub. Safety*, 528 N.W.2d 254, 256-57 (Minn. App. 1995). Accordingly, we conclude that the district court's observation about the adequacy of the 38-minute phone call is not relevant to the resolution of the narrow issue presented in this case.

In sum, we conclude that there is adequate evidentiary support for the district court's finding that, after the state's Intoxilyzer test, Ringwelski did not request an additional test. Because Ringwelski did not request an additional test, we further conclude that the officer did not prevent or deny any attempt to obtain a second test. We hold that the district court did not err in sustaining the revocation of Ringwelski's driving privileges.

Affirmed.

Dated: