STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1333

David Lloyd Beito, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 20, 2010
Affirmed
Worke, Judge

Lincoln County District Court
File No. 41-CV-08-240

Thomas M. Beito, Beito & Lengeling, P.A., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Natasha Karn, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant challenges the district court's decision sustaining the revocation of his driver's license, arguing that (1) he did not refuse testing and (2) his right to counsel was not vindicated. We affirm.

D E C I S I O N

A proceeding to cancel a driver's license under the implied-consent statute is civil in nature, not criminal. *State v. Dumas*, 587 N.W.2d 299, 303 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999). In reviewing the revocation of a driver's license, the district court must take evidence and determine whether the driver is entitled to a license or whether the license should be revoked. Minn. Stat. § 171.19 (2008). A district court's conclusion of law is reviewed de novo. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). A district court's findings of fact will not be reversed unless clearly erroneous. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

Test Refusal

Appellant David Lloyd Beito argues that the district court erred by concluding that he unreasonably refused to submit to chemical testing. Drivers can communicate test refusal through their words or acts. *Gabrick v. Comm'r of Pub. Safety*, 393 N.W.2d 23, 25 (Minn. App. 1986). A failure to respond can be deemed a test refusal. *Id.* Whether a driver refused testing is a question of fact which will not be set aside unless clearly erroneous. *State, Dep't of Highways v. Beckey*, 291 Minn. 483, 486-87, 192 N.W.2d 441, 445 (1971).

Appellant was arrested at a local hospital while receiving treatment for minor injuries sustained in a one-car, rollover accident. The arresting officer read appellant the Minnesota Implied Consent Advisory (ICA) at approximately 2:06 a.m. Over the next 45 minutes, the officer read the ICA to appellant eight more times. Appellant requested

to speak to an attorney around 2:30 a.m. and was given access to a phone for approximately 25 minutes. During this time, appellant made only one phone call while repeatedly waffling about whether he wanted to continue attempting to contact an attorney. At approximately 2:52 a.m., the officer asked appellant if he would provide a blood or urine test. Appellant stated that he would not do so until he contacted an attorney, despite indicating that he no longer wanted to contact an attorney several times over the previous 20 minutes. The officer deemed appellant to have refused testing in violation of Minn. Stat. § 169A.51, subd. 1(a) (2008). The district court found that appellant refused to make a decision regarding the test and that his actions unreasonably delayed the test and constituted a refusal.

Appellant argues that at no point did he explicitly refuse testing and was simply awaiting a return phone call from the attorney he attempted to contact. But paragraph 5 of the ICA states that "[i]f the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test." The officer read this paragraph to appellant nine times in 45minutes and appellant failed to reply "yes" or "no" when asked if he would submit to testing. This indecision constitutes a failure to respond to testing, and the district court did not err in considering appellant's failure to respond to be a test refusal.

Alternatively, appellant argues that if he did refuse testing, his refusal was reasonable. Appellant expressly waived all issues at the implied consent hearing except whether he actually refused testing and whether his right to counsel was vindicated. This

court will not consider matters not raised before the district court for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Right to Counsel

Whether a driver received reasonable time to consult with counsel is a mixed question of law and fact. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992). Once the district court establishes the facts, their significance becomes a question of law. *Id.* The Minnesota Constitution provides drivers with a limited right to counsel before deciding whether to submit to chemical testing. Minn. Const. art. I, § 6; *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The right to counsel exists "provided that consultation does not unreasonably delay the administration of the test." *Friedman*, 473 N.W.2d at 835.

A driver's "right to counsel is considered vindicated when [he] is provided with a telephone prior to testing and given a reasonable amount of time to contact and consult with an attorney." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). To determine whether a driver's right to counsel was vindicated, courts examine the totality of the circumstances, such as whether the driver received reasonable time, whether the driver made a good-faith effort to reach an attorney, whether the officer aided the driver, and whether the driver exercised the right. *Kuhn*, 488 N.W.2d at 840; *Parsons*, 488 N.W.2d at 502.

Appellant argues that his right to counsel was not vindicated for four reasons: (1) he was not allowed a reasonable opportunity to contact an attorney, (2) he made a good-faith effort to contact an attorney during the allotted time; (3) the officer failed to

offer him adequate assistance; and (4) the officer failed to give him final notice that he must decide whether to take the test without the assistance of counsel.

Reasonable Opportunity

"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). The district court found that appellant had a reasonable opportunity to contact an attorney. Appellant was allotted approximately 25 minutes to contact an attorney. This court has determined that roughly half an hour was a reasonable length of time to allow a driver to contact an attorney. *See id.* at 342, 345 (concluding that 29 minutes was a reasonable amount of time to contact an attorney); *Ruffenach v. Comm'r of Pub. Safety*, 528 N.W.2d 254, 255, 257 (Minn. App. 1995) (concluding that access to a phone for 36 minutes sufficed).

But "[r]easonable time is not based on elapsed minutes alone." *Mulvaney v. Comm'r of Pub. Safety*, 509 N.W.2d 179, 181 (Minn. App. 1993). The driver's diligence in exercising the right is also relevant to whether a reasonable opportunity was provided. *Id.* In *Mell*, a driver was given a telephone and a directory. 757 N.W.2d at 713. The driver spent only three minutes with the phone, attempted to call his wife instead of an attorney, and returned from the phone telling the officer that "he couldn't get a hold of [an attorney]." *Id.* We concluded that "the record adequately support[ed] the district court's finding that [the officer] vindicated [the driver's] right to counsel by providing a telephone, directory, and time to make contact with an attorney." *Id.* Here,

appellant had access to a telephone for nearly 25 minutes yet made just one phone call amidst constant indecision about whether to contact an attorney. The district court did not clearly err in determining that appellant had a reasonable opportunity to contact counsel.

Good-Faith Effort

This court reviews a district court's determination of whether a driver made a good-faith effort to contact an attorney for clear error. *Gergen*, 548 N.W.2d at 309. In order to make a good-faith effort to contact an attorney, a driver must diligently use the time allotted by the officer and may not wait indefinitely for a return phone call. *Palme*, 541 N.W.2d at 345. "[R]efusing to try to contact more than one attorney or giving up trying to contact an attorney is fundamentally different than making a continued good-faith effort to reach an attorney." *Kuhn*, 488 N.W.2d at 841.

The district court did not make a specific finding regarding appellant's effort to contact an attorney but did note appellant's unreasonable "refusal and/or unwillingness to contact an attorney or another party to assist him in contacting an attorney." This broader finding is sufficient for us to infer that the district court did not believe appellant made a good-faith effort to contact an attorney. *See Welch v. Comm'r of Pub. Safety*, 545 N.W.2d 692, 694 (Minn. App. 1996) (stating that remand is unnecessary when we are able to infer findings from the district court's conclusions).

During the 25-minute period when appellant had access to a telephone, he attempted to contact only one attorney while vacillating about whether he wanted to

speak with counsel. This does not constitute a good-faith effort to contact counsel, and the district court did not clearly err in determining that appellant refused or was otherwise unwilling to contact counsel.

Adequate Assistance

Officers must assist in the vindication of a driver's right to counsel. *McNaughton v. Comm'r of Pub. Safety*, 536 N.W.2d 912, 914 (Minn. App. 1995). This requisite assistance includes allowing a driver the opportunity to speak with an attorney of his choosing. *Id.* at 915. The officer need not ensure that the driver actually contacts an attorney, especially when the driver elects to stop calling. *Kuhn*, 488 N.W.2d at 841-42.

Appellant contends that he wanted to speak to an attorney prior to testing but was physically unable to do so, and that the officer failed to provide him with reasonable assistance. The record reflects otherwise. The officer helped search through appellant's wallet for an attorney's phone number, provided a phone book, enlisted help from hospital staff, and even relayed the hospital's phone number to appellant when he was leaving a voice message for the attorney of his choice. Setting aside the validity of appellant's professed injuries, the record demonstrates that appellant was less engaged in contacting an attorney than was the officer. The officer went beyond the basic assistance required of an officer; thus, appellant's argument is unavailing.

Fair Notice

Finally, appellant asserts that he did not receive fair notice that he needed to make a decision to submit to testing without the assistance of counsel. Appellant relies on

Linde v. Comm'r of Pub. Safety to support his contention that officers must notify a driver when the search for an attorney is over and "must then . . . clearly offer the driver one final opportunity to make an uncounselled decision regarding testing" before charging the driver with a refusal. 586 N.W.2d 807, 810 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). This argument is unconvincing for two reasons. First, *Linde* requires that a driver be given one final opportunity to make an uncounselled decision regarding testing, not that he be told that the offered opportunity would be his last chance to contact an attorney. *Id.* Second, this case is distinguished from *Linde* by the simple fact that appellant was the one who ended the search for the attorney by telling the officer for a seventh time that he no longer wished to contact anyone after leaving the voicemail for his preferred attorney. Because the officer offered appellant a final opportunity to submit to testing after appellant indicated that he did not want to contact another attorney, appellant received fair notice prior to the officer deeming his unresponsiveness to be a test refusal.

The totality of the circumstances support the district court's conclusion that appellant's right to counsel was vindicated. Accordingly, the district court's findings were not clearly erroneous and the decision to sustain the revocation of appellant's driver's license was correct as a matter of law.

Affirmed.