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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1121**

Jeffery John Buermann, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

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

Stearns County District Court
File No. 73-CV-10-11419

Robert D. Stoneburner, Stoneburner Law Office, Paynesville, Minnesota (for appellant)

Lori A. Swanson, Attorney General, David S. Voigt, Deputy Attorney General, Jeffrey S. Bilcik, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Collins,
Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's order sustaining the revocation of his license to drive under the implied-consent law, arguing that his limited right to pre-test counsel was not vindicated. Because we conclude that appellant failed to make a good-faith effort to contact an attorney, we affirm.

FACTS

Police arrested appellant Jeffery Buermann on suspicion of driving while impaired in the early-morning hours of October 16, 2010. Officer Bruce Elfering drove appellant to the Paynesville Police Department and read appellant the Minnesota Implied Consent Advisory at 2:16 a.m. Officer Elfering informed appellant that test refusal was a crime, that he had a right to consult with counsel, and that he had a reasonable amount of time to contact counsel. Officer Elfering also informed appellant that if he was unable to contact an attorney he “must make [his] decision on [his] own.” When Officer Elfering asked if appellant wanted to contact an attorney, he replied “probably.” Officer Elfering told appellant that there was a telephone available in the room and placed several telephone directories on the interview table where appellant was seated. Appellant did not make a telephone call at that time, and Officer Elfering asked appellant what he wished to do; appellant replied “we’ll wait.”

At about 2:20 a.m., Officer Elfering asked appellant to submit to a urine test, and appellant indicated that he wished to talk to “my attorney.” Appellant retrieved an attorney's contact information from his wallet and, over the next 12 minutes, proceeded

to place four calls to that attorney from his cellular telephone. All four telephone calls went unanswered. Appellant did not consult the available telephone directories in an attempt to contact a different attorney. After the fourth unsuccessful attempt to contact his attorney, Officer Elfering asked appellant if he would take a urine test. Appellant refused, stating “I don’t have my lawyer and I don’t know my rights.” Appellant did not indicate that he wished to attempt to contact a different attorney. Officer Elfering cited appellant with test refusal at 2:33 a.m.

Appellant’s driver’s license was revoked by respondent Commissioner of Public Safety based on his refusal to submit to chemical testing. Appellant petitioned for judicial review of the revocation. At the ensuing implied-consent hearing, appellant argued that his right to pre-test counsel was not vindicated. The district court sustained the revocation of appellant’s driver’s license. The district court found that appellant “exhausted his good-faith effort to contact the particular attorney that he had in mind”; that appellant “gave no indication, either through his words or actions, that he wished to make a good-faith effort to contact any attorney other than ‘[his] attorney’”; and that “as best depicted in the DVD received as Exhibit 3, [appellant’s] limited right to counsel was vindicated.” The district court concluded that appellant had “exhausted his good-faith effort to contact the particular attorney he wished to consult.”

Appellant moved for amended findings of fact and conclusions of law. In addressing appellant’s motion, the district court explicitly addressed and applied the factors outlined by this court in *Kuhn v. Comm’r of Pub. Safety*, 488 N.W.2d 838 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). The district court acknowledged that

“[t]he time of day of the arrest, as well as the length of time [appellant] had been under arrest are factors which support [appellant]’s claim that he should have been afforded more time.” But the district court concluded that “these considerations are overridden by the fact that [appellant] had exhausted all reasonable efforts to contact the one and only attorney that he wished to consult.” The district court denied appellant’s motion to amend, and this appeal follows.

D E C I S I O N

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). That right is vindicated if the driver “is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel.” *Friedman*, 473 N.W.2d at 835 (quotation omitted). Police officers must assist in the exercise of the right to counsel. *Id.* But the driver must make a good-faith effort to contact an attorney. *Kuhn*, 488 N.W.2d at 842. “The question of whether a person has been allowed a reasonable time to consult with an attorney is a mixed question of law and fact.” *Palme v. Comm’r of Pub. Safety*, 541 N.W.2d 340, 344 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Feb. 27, 1996). Once the facts are established, their significance constitutes a question of law reviewed de novo. *Parsons v. Comm’r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992).

The court considers the totality of the circumstances in determining if a driver’s right to counsel has been vindicated. *Kuhn*, 488 N.W.2d at 842. “[T]he relevant factors

focus both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of the right." *Id.* The "threshold matter" is whether the driver made "a good faith and sincere effort to reach an attorney." *Id.* Whether a driver made a good-faith effort to contact an attorney is a factual question, which we review for clear error. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

The district court found that appellant ceased making a good faith and sincere effort to contact an attorney after he made his fourth telephone call to the same attorney, received no response, left no message, and made no attempt to contact another attorney. This court has recognized that "refusing 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. In *Kuhn*, this court concluded that the driver had made a good-faith effort to contact an attorney when he "tried to contact an attorney three times" and "he wasn't faking or stalling." *Id.* at 839. This court reasoned that there was nothing in the record to indicate that the driver was "using delay[] tactics or decided on his own to stop trying to reach an attorney." *Id.* at 842. The same cannot be said here.

Officer Elfering provided appellant with telephone directories and access to a land-line telephone, and he allowed appellant to use his cellular telephone. Appellant made four calls to the same attorney. But the attorney did not answer the calls, and appellant did not leave a message for the attorney. Even though appellant could not reach his attorney of choice, he did not consult the telephone directories or make any effort to

contact another attorney. After three calls, appellant said he would try “one more time.” After the fourth call, he did not request additional time to contact an attorney. On this record, the district court did not clearly err in finding that appellant had abandoned any good-faith and sincere effort to contact an attorney. And because appellant did not continue to make a good-faith and sincere effort to contact an attorney, his limited right to counsel was not violated. *See id.* at 841.

Appellant argues that Officer Elfering “constructively” interfered with his effort to contact an attorney by “making immediate and repeated requests for testing after each call.” Essentially, appellant contends that the officer’s repeated requests for testing did not give him time to think. Respondent counters that Officer Elfering in no way interfered with appellant’s effort to contact an attorney and contends that exhibit 3, the audio/visual recording of the interactions between Officer Elfering and appellant, supports respondent’s position. This court has reviewed the exhibit and agrees with respondent: the officer did not interfere with appellant’s effort to contact an attorney.

Affirmed.