STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0556

Bimal Ratilal Vadhani, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 17, 2012
Affirmed
Peterson, Judge

Olmsted County District Court
File No. 55-CV-1-3715

Charles Alan Ramsay, Ramsay Law Firm PLLC, Roseville, Minnesota (for appellant)

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

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Crippen, Judge.*

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

PETERSON, Judge

This appeal is from an order that sustains the revocation of appellant's driver's license in an implied-consent proceeding. We affirm.

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

FACTS

After stopping appellant Bimal Ratilal Vadhani for speeding at about 1:00 a.m., Minnesota State Patrol Trooper Steven Willert observed indicia of impairment, arrested appellant for driving while impaired, and transported him to jail. At about 1:30 a.m., Willert read appellant the implied-consent advisory. Appellant indicated that he understood the advisory and wished to speak to an attorney.

Willert allowed appellant to get his attorney's telephone number from appellant's cell phone but, pursuant to jail policy, required appellant to use a telephone in the jail to call the attorney. Appellant asked Willert where he was but did not ask for a telephone number that his attorney could use to call back. At about 1:31 a.m., appellant called attorney Charles Ramsay and left a voicemail message stating that he was at the Olmsted County jail but he did not know the number. Appellant asked Ramsay to "take his case" but did not ask Ramsay to call back.

At appellant's request, Willert hung up the phone. Willert then asked appellant if he was done using the phone. Willert also asked appellant if he wanted to try to contact another attorney. Appellant stated that Ramsay was the only attorney that he wanted to contact and that he had a friend who might be able to help him find an attorney. Appellant called the friend, but the friend did not answer the phone, and appellant did not leave a message. Appellant declined Willert's offer to allow him to use a telephone book to find an attorney.

Appellant called his wife and told her that he just "wanted to let [her] know." He also told her that he had left a message for Ramsay but "obviously it's one-thirty in the

morning, I'm sure he's asleep." Appellant asked Willert for a telephone number that his wife could use to call him back. Willert said that he had only the number for the telephone in the room that they were in, that they would be moving on soon, and that the phone would "ring to nobody." Willert said that he would later provide a number that appellant's wife could use to reach appellant.

Willert asked appellant if he was done using the telephone, and appellant replied, "I guess so." Appellant then asked to make another call to the friend that he had called earlier. Willert responded, "One more, okay?" This time, appellant reached his friend, and he said that he "just wanted to let [her] know" about his situation and that he did not know if she could do anything to help him. He also said that he had left a message for Ramsay, but "obviously it is one-thirty in the morning; he's not going to answer."

At approximately 1:43 a.m., Willert asked appellant if he would submit to a breath test. Appellant stated that he wanted to speak to his attorney first. Willert stated that appellant had been unable to contact his attorney, and appellant stated that he was sure his attorney was asleep and that he wanted to wait for Ramsay to respond to his voicemail before making a decision. Willert read again to appellant paragraph four of the implied-consent advisory, which states:

> Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone and directory will be made available to you. If you are unable to contact an attorney, you must make the decision on your own. You must make your decision within a reasonable period of time.

Appellant asked, "What is a reasonable time?" Willert again asked appellant if he would submit to a breath test. Appellant said that he wanted to speak to his attorney, and Willert responded, "We can't wait forever." Appellant again asked about the duration of a reasonable time for testing. Willert stated that there was no "set time" and that appellant was not attempting to contact an attorney. Appellant stated that he had tried to contact his attorney but was sure that the attorney was asleep. Willert stated that they could not wait for Ramsay to awaken in the morning. Appellant did not respond, and Willert asked if appellant understood. Appellant asked, "What do you want me to do?" Willert again asked appellant if he would submit to a breath test, and appellant repeated that he wanted to speak to his attorney. Willert stated that he was going to put appellant down as a refusal, and appellant stated, "That's up to you."

Ramsay's wife testified at the implied-consent hearing that she picked up the telephone after appellant's call had rolled over to voicemail. Ramsay called the number that was displayed on caller identification and got a recorded message stating that the caller had reached the Olmsted County caller-ID information line. The message also instructed the caller to consult a local directory for the telephone number of the building or department the caller wished to reach. Ramsay's wife testified that neither she nor Ramsay checked a telephone book or smart phone for a phone number because it was "1:30 in the morning, and you know, I really didn't think of that." She also testified that it had been their experience that, at that time of the morning, they had been unable to obtain a number other than the public information line. They made no further effort to contact appellant.

Appellant's driver's license was revoked under the implied-consent law, and he petitioned for judicial review. The district court sustained the revocation. This appeal followed.

D E C I S I O N

Under the Minnesota Constitution, a driver has 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). This 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 a driver must make a good-faith effort to contact an attorney. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). "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 that is 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 whether 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:

> [Appellant] did initially make a good faith and sincere effort to reach an attorney. He called his attorney on both his office and cell phones and left a message. After leaving that message, however, [appellant] made no further attempts to contact an attorney. He informed his attorney that he was at the Olmsted County Jail and that he would like him to take his case, but he did not specifically ask for a return call and did not ask Trooper Willert for advice on how his attorney could reach him other than asking where he was. He also mentioned to the other two people he called that he left a message for his attorney, but did not ask them to attempt to contact his attorney and specifically noted to both of them that he assumed his attorney was asleep and would not be available until the morning. [Appellant] also repeatedly made it clear to Trooper Willert that he was not going to try to contact any other attorney. It is clear from the audio recording of the Implied Consent process that [appellant] had one lawyer he wanted to speak with. When his call to that lawyer went to voicemail, he used his phone access to inform his wife and a friend of his situation and assumed he would not be able to talk to his attorney until the morning.

Citing *Mulvaney v. Comm'r of Pub. Safety*, 509 N.W.2d 179 (Minn. App. 1995), appellant argues that Willert did not vindicate his right to counsel. In *Mulvaney*, this court concluded that "six minutes was not a reasonable amount of time to obtain an attorney where the officer made only one attempt to reach the attorney requested by the driver" and did not attempt to contact that attorney again when the driver repeated that he wanted that attorney. *Id.* at 182. Instead, when the driver repeated that he wanted a

particular attorney, the officer stated that the attorney was probably not in his office at 12:22 a.m. and suggested that the driver try to contact another attorney. *Id.* at 180. As in *Mulvaney*, appellant indicated that he wanted only Ramsay for his attorney, but unlike *Mulvaney*, appellant also indicated that he did not expect Ramsay to be available until morning. Also, unlike *Mulvaney*, in which the officer made telephone calls for the driver, Willert provided appellant with a phone, and appellant did not attempt to contact Ramsay a second time.

Appellant objects to Willert's "one more call" ultimatum after appellant called his wife. Appellant argues that Willert limited appellant's right to consult an attorney because "[n]ine minutes after being informed that he had a right to counsel, and five minutes after leaving a message for his attorney, [appellant] was told he would only be allowed one more phone call." But, as the district court found, "Willert only restricted [appellant] to 'one more' call after [appellant] stated he only wanted one more call three separate times and had made it clear that he was only informing friends and family of his situation, not attempt[ing] to reach an attorney or obtain help finding an attorney." Also, appellant did not attempt to call Ramsay a second time and declined Willert's offer of a telephone book to try to contact a different attorney.

Appellant argues that Willert hampered his right to counsel by not allowing him to use his personal cell phone to make calls and by not providing appellant with a call-back number for the jail. Appellant correctly asserts that when a driver invokes his limited right to counsel, police must assist in vindicating that right. *Friedman*, 473 N.W.2d at 835. But appellant cites no authority that supports his argument that police are obligated

to allow a driver to use a personal cell phone or to provide a call-back number absent a request for one. Although appellant requested a call-back number, it was when he called his wife, not when he called his attorney.

Citing *Jones v. Comm'r of Pub. Safety*, 660 N.W.2d 472, 476 (Minn. App. 2003), appellant argues that "it is implicit throughout the caselaw that in providing a telephone, the police must also not 'hamper' an attorney's attempt to respond to messages and actually reach their clients." Appellant contends that "[i]t is so obvious so as to go without saying that drivers must have the ability to not only make calls to attorneys, but to receive them in return." In *Jones*, a police-department dispatcher refused to connect a call from the driver's attorney, and the state did not explain why the dispatcher concluded that appellant's time to contact an attorney had expired. Based on the state's failure to explain why the dispatcher concluded that the driver's time had expired, this court reversed the revocation of the driver's license. *Id.* Unlike *Jones*, Willert did nothing to hamper appellant's right to counsel. Rather, appellant objects to Willert's failure to affirmatively assist appellant. But a driver's right to counsel is vindicated when a driver is given a "telephone prior to testing and is given a reasonable time to contact and talk with counsel." *Id.* Appellant was given a telephone, which he used to try to contact a specific attorney. When he could not reach that attorney, Willert offered to allow him to use a telephone book to find another attorney, but appellant declined the offer. Willert's offer was sufficient to vindicate appellant's limited right to counsel before deciding

whether to submit to chemical testing. The district court did not clearly err in finding that appellant did not make a good-faith effort to contact an attorney.

Affirmed.