STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0593

State of Minnesota,
Appellant,

vs.

Luke Joseph Freeman,
Respondent.

Filed September 9, 2013
Reversed and remanded
Larkin, Judge
Dissenting, Cleary, Judge

Cass County District Court
File No. 11-CR-12-2585

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Christopher Strandlie, Cass County Attorney, Benjamin T. Lindstrom, Assistant County Attorney, Walker, Minnesota (for appellant)

Richard C. Kenly, Kenly Law Office, Backus, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cleary, Judge.

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

LARKIN, Judge

In this pretrial appeal, the state argues that the district court erred by suppressing respondent's alcohol-concentration test results, which were obtained under Minnesota's implied-consent law. The district court suppressed the test results based on its conclusion that a law-enforcement officer violated respondent's limited right to pretest counsel by listening to and audio recording both sides of respondent's attorney-client consultation. Because the proper remedy for violation of the right to a private attorney-client consultation is suppression of any overheard statements and not suppression of the test results, we reverse and remand.

FACTS

On December 7, 2012, respondent Luke Joseph Freeman was arrested for driving while impaired (DWI). State Patrol Lieutenant David Zumberge transported Freeman to the Cass County Jail and read Freeman the implied-consent advisory. The lieutenant audio recorded his reading of the advisory, but he did not turn off the recording device after he read the advisory. Freeman asked to speak to an attorney before deciding whether to submit to chemical testing. Freeman contacted an attorney by telephone, and the attorney advised Freeman to submit to testing. The attorney-client consultation occurred over a speaker phone. The lieutenant was present in the room while Freeman spoke with his attorney. Because the lieutenant had not turned off the recording device, both sides of the conversation between Freeman and his attorney were audio recorded.

Freeman submitted to a breath test, which revealed that his alcohol concentration was in excess of the legal limit.

The state charged Freeman with two counts of second-degree DWI. Freeman moved to suppress the test results, arguing, in part, that the lieutenant violated his right to counsel by audio recording his entire attorney-client consultation. The parties agreed that the district court would decide the suppression issue based on the parties' written submissions, as well as a copy of the audio recording. The district court therefore did not hold an evidentiary hearing on Freeman's motion, and the resulting record does not indicate why a speaker phone was used or whether the lieutenant's failure to turn off the recording device was intentional.

The district court granted Freeman's motion to suppress, reasoning that the lieutenant's conduct in listening to and recording both sides of the attorney-client conversation "constructively denied" Freeman's right to counsel. The state filed this pretrial appeal, in which Freeman has not participated.

D E C I S I O N

I.

When the state appeals a pretrial order suppressing evidence, it must "clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). Critical impact is shown "in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551

(Minn. 1987). As a result of the district court's suppression order, the state no longer has evidence to prove that Freeman's alcohol concentration was above .08, which is a necessary element of one of the charged offenses. *See* Minn. Stat. § 169A.20, subd. 1(5) (2012) (defining offense of driving while impaired). We therefore conclude that the critical-impact standard is satisfied.

II.

"[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the [district] court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). Whether a constitutional violation has occurred is a question of law, which is reviewed de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009).

The Minnesota Constitution guarantees an accused the right to have the assistance of counsel in his defense. Minn. Const. art. I, § 6. Moreover, "[t]he Minnesota Constitution, article I, section 6 gives [an individual] a limited right to consult an attorney before deciding whether or not to submit to chemical testing for blood alcohol." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 829 (Minn. 1991).

> [A]ny person who is required to decide whether he will submit to a chemical test shall have the right to consult with a lawyer of his own choosing before making that decision, provided that such a consultation does not unreasonably delay the administration of the test. The person must be informed of this right, and the police officers must assist in its vindication. The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with

> counsel. If counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel.

Id. at 835 (quotation omitted); *see also* Minn. Stat. § 169A.51, subd. 2(4) (2012) (requiring, as part of the implied-consent advisory, that a person be informed "that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test").

An individual who is in law-enforcement custody generally has the right to "a private interview" with an attorney or "private telephone access" to an attorney. Minn. Stat. § 481.10, subds. 1, 2 (2012). But the Minnesota Supreme Court has rejected the argument that law enforcement must provide a driver exercising his limited right to pretest counsel with a private telephone or private room in which to call an attorney, reasoning that "given the limited nature of the right to counsel in this context, police do not have to provide a DWI arrestee with a private telephone because the arrestee's rights will be sufficiently protected by the subsequent exclusion of any overheard statements or any fruits of those statements." *Comm'r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 269-70 (Minn. 1992); *see also State, Dep't of Pub. Safety v. Held*, 311 Minn. 74, 76, 246 N.W.2d 863, 864 (1976) (declining to impose a requirement that the police provide an arrestee with a private booth or room from which to telephone an attorney to discuss whether to submit to a chemical test). The supreme court noted that "proper testing procedures generally require that the officer remain in the presence of an arrestee in order to impeach any later testimony by an arrestee who submits to testing that ingestion of

something at the station might have affected the test results." *Campbell*, 494 N.W.2d at 270.

As to remedies, precedent establishes a distinction between cases in which the police refuse to allow an attorney-client consultation prior to testing and cases in which the police allow a consultation but do not honor the driver's statutory right to a private consultation. When law enforcement refuses to allow a driver to contact an attorney and the driver subsequently submits to chemical testing without the benefit of legal advice, suppression of the test results is the appropriate remedy. *See State, City of Belle Plaine v. Stradcutter*, 568 N.W.2d 545, 548 (Minn. App. 1997) (holding that because a driver "was not allowed to consult with counsel before testing, the district court properly suppressed the test results"). But the remedy is narrower when the police allow a driver to telephone an attorney but do not provide the driver with privacy during the call. In such cases, the remedy is suppression of any overheard statements, as well as the fruits of those statements, and not suppression of the test results. *See Campbell*, 494 N.W.2d at 269-70 (holding that when a driver is allowed a phone call to an attorney but is not given privacy while making the call, the remedy is suppression of any overheard statements and not suppression of the test results); *Held*, 311 Minn. at 76, 246 N.W.2d at 864 ("We believe that the driver's rights are sufficiently safeguarded by a rule which forbids the use in evidence of any statements made by defendant to his counsel over the telephone which are overheard by police. Such a rule fully satisfies the privacy requirement of Minn. [Stat. § 481.10] . . . .").

The supreme court has also discussed the appropriate remedy when the police violate an individual's statutory right to a private interview with an attorney at the place of custody, as opposed to a violation of the right to private telephone access. In *State, Dep't of Pub. Safety v. Kneisl*, a driver was arrested for operating a motor vehicle under the influence of alcohol. 312 Minn. 281, 282, 251 N.W.2d 645, 646-47 (1977). The driver called an attorney from jail, and the attorney went to the jail to confer with the driver. *Id.* at 282, 251 N.W.2d at 647. When the attorney arrived at the jail during administration of the driver's implied-consent advisory and asked to speak to the driver privately, the police refused the request. *Id.* at 283-84, 251 N.W.2d at 647-48. An officer testified that while the driver was in his custody, "he would not permit a private consultation between [the driver] and his attorney because [the officer] did not 'feel that he had the right to talk to him at that time.'" *Id.* at 284, 251 N.W.2d at 648. Because the police refused to allow a private attorney-client consultation, no consultation occurred; instead, the lawyer told the driver, "'[y]ou will just have to go it yourself, try to understand it.'" *Id.* The driver refused to take any test because he was not allowed to talk to his lawyer "'in private.'" *Id.*

The district court ruled that the driver had reasonable grounds to refuse testing as a matter of law. *Id.* On appeal, the supreme court applied the rationale of *Held* and explained that

> [i]f security permits and a private room is available, it should be provided to counsel. If such a facility is unavailable or impermissible under the circumstances, counsel should be allowed to confer with his client out of the earshot of others in the room. None of this conversation between the attorney

> and his client can be used against the defendant, no matter how obtained, unless the defendant agrees to the introduction of such evidence. We regard this as a practical solution to the statutorily imposed requirements of privacy.

Id. at 286-87, 251 N.W.2d at 649. The supreme court nonetheless affirmed the district court's ruling that the driver reasonably refused chemical testing, reasoning that "[u]nder these circumstances, it would be a sham to permit the telephone call and then deny the arrested person an opportunity to consult with his attorney at the jail." *Id.* at 286, 251 N.W.2d at 648. In sum, the supreme court provided a greater remedy because the police refused to allow an attorney-client consultation prior to testing.

With that precedential framework governing remedies in mind, we turn to the district court's suppression order. The district court acknowledged the rule from *Campbell* but nonetheless concluded that suppression of Freeman's test results is warranted because both sides of Freeman's attorney-client consultation were overheard and recorded by law enforcement. The district court reasoned that "[t]he intrusion upon [Freeman's] right to counsel is more pronounced where, as here, law enforcement listens to, and records, both sides of the conversation." The district court therefore found that "the conduct of law enforcement amounts to an unlawful intrusion upon [Freeman's] right to counsel, such that [Freeman] was constructively denied his right to consult with an attorney prior to the chemical test." Next, the district court concluded that, because Freeman "was denied his right to consult with an attorney prior to the chemical test, the results of that test must be suppressed."

We disagree that Freeman was "constructively denied" his right to consult with an attorney such that his test results must be suppressed. Freeman was allowed to contact an attorney prior to testing. He spoke with the attorney and received legal advice. Thus, this case is factually distinguishable from those cases in which test results were suppressed because the police did not allow drivers to contact an attorney. *See, e.g.*, *Stradcutter*, 568 N.W.2d at 548 (holding that the district court properly suppressed the test results because the driver was not permitted to contact counsel before deciding to submit to testing); *State v. Karau*, 496 N.W.2d 416, 418-19 (Minn. App. 1993) (holding that the district court erred by failing to suppress the test results when the driver was denied the opportunity to contact counsel prior to deciding to submit to testing). This case is also distinguishable from *Kneisl* in that the lieutenant's failure to honor Freeman's right to a private attorney-client consultation did not prevent a consultation from occurring. *Cf. Kneisl*, 312 Minn. at 284, 251 N.W.2d at 648.

Moreover, even though the intrusion in this case is more pronounced than the intrusion in *Campbell* in that both sides of the attorney-client conversation were overheard and recorded, the intrusion nonetheless amounts to a violation of Freeman's right to a private attorney-client consultation and not to a deprivation of counsel. The supreme court has held that the remedy for a violation of the right to a private attorney-client consultation is suppression of any overheard statements. *Campbell*, 494 N.W.2d at 269-70; *see also Kneisl*, 312 Minn. at 286-87, 251 N.W.2d at 649 (stating that when the police violate an individual's statutory right to a private interview with an attorney at the place of custody, allowing the police to hear both sides of the attorney-client

consultation, the remedy is suppression of any of the "conversation between the attorney and his client" that is overheard by law enforcement).

Because the proper remedy for the lieutenant's failure to honor Freeman's right to a private attorney-client consultation is suppression of any overheard statements and not suppression of Freeman's test results, we reverse the district court's order suppressing Freeman's test results and remand for further proceedings consistent with this opinion.

Reversed and remanded.

CLEARY, Judge (dissenting)

I respectfully dissent from this decision. I believe that the appropriate remedy for what occurred in this case, the listening-in by law enforcement of both sides of an attorney-client phone conversation and the recording of that conversation during the implied-consent advisory process, is suppression of the results of the chemical test, and thus I would affirm the district court's pretrial order.

The Minnesota Supreme Court has held that an individual has a right to obtain legal advice before deciding whether to submit to chemical testing under article 1, section 6 of the Minnesota Constitution. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). It has also held that, at the time that a driver is determining whether to submit to an implied-consent chemical test, law enforcement is not required to provide the driver with a private telephone or private room from which to call an attorney. *See Comm'r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 269–70 (Minn. 1992); *State, Dep't of Pub. Safety v. Held*, 311 Minn. 74, 76, 246 N.W.2d 863, 864 (1976). If the driver's side of the attorney-client conversation is overheard by law enforcement, the remedy for such an intrusion is suppression of the overheard statements and any fruits of those statements. *Campbell*, 494 N.W.2d at 269–70; *Held*, 311 Minn. at 76, 246 N.W.2d at 864 ("We believe that the driver's rights are sufficiently safeguarded by a rule which forbids the use in evidence of *any statements made by defendant* to his counsel over the telephone which are overheard by police.") (Emphasis added). Minnesota caselaw has

not addressed a situation where, as here, the attorney-client conversation occurs over a speaker phone, such that the attorney's questions and legal advice can also be overheard by law enforcement. It is hard to conceive of a more intrusive act on the part of law enforcement as it pertains to the right of a citizen to confer privately with his attorney. As the district court judge noted, "[t]here is a key distinction between a semi-private telephone conversation where those present can hear only one half of the conversation and a fully public communication where those present can hear both sides of the dialogue." If an attorney is aware that his or her side of the conversation is being overheard, this may inhibit the questions that the attorney asks and the advice that the attorney is inclined to give. Consequently, law enforcement eavesdropping may well result in truncated legal advice, serving as a de facto prohibition by law enforcement of a full attorney-client consultation.[1] If an attorney is unaware of the eavesdropping, his or her candid legal advice will be overheard, surreptitiously, by law enforcement. Simply suppressing the use of these overheard statements is an inadequate and inconsequential remedy. It will do little to discourage law enforcement from continuing to violate the right of a citizen to receive confidential legal advice, as these overheard statements, while

[1] The majority cites *State, Dep't of Pub. Safety v. Kneisl*, 312 Minn. 281, 285–87, 251 N.W.2d 645, 648–49 (1977). *Kneisl* involved a failed attempt by an attorney to speak to his client privately at a jail where an implied-consent advisory was taking place. *Id.* at 282, 251 N.W.2d at 647. The court's reasoning ("If security permits and a private room is available, it should be provided to counsel. If such a facility is unavailable or impermissible under the circumstances, counsel should be allowed to confer with his client *out of the earshot of others in the room*.") supports the finding that eavesdropping by police on both sides of an attorney-client consultation acts as a prohibition by law enforcement of a bona fide consultation, whether attempted in person or over the phone. *Id.* at 286–87, 251 N.W.2d at 649 (emphasis added).

inadmissible in court, may reveal strategy or information that the state can use to its advantage. Only a real consequence—suppression of the test results—will adequately provide a disincentive for this type of government intrusion.

The point at which a driver must decide whether to submit to an implied-consent chemical test is a "critical stage" in a DWI proceeding, during which the driver has a right to counsel for assistance and advice. *Friedman*, 473 N.W.2d at 833. As the district court found, where both sides of the attorney-client conversation are overheard by law enforcement, the driver is "constructively denied his right to consult with an attorney prior to the chemical test," and the proper remedy is suppression of the results of the chemical test.