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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1448**

James B. Martin, Jr., petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed July 29, 2008
Affirmed
Johnson, Judge**

Ramsey County District Court
File No. C3-06-9241

James B. Martin, Jr., 5110 Hilltop Avenue North, Lake Elmo, MN 55042 (pro se appellant)

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

James B. Martin, Jr. was arrested at the scene of a single-vehicle accident after a preliminary breath test (PBT) showed an elevated alcohol concentration. Martin's driver's license was revoked because he refused to take a chemical test, and the district

court sustained the revocation. On appeal, Martin argues that (1) he was denied his limited right to counsel before being asked to submit to a breath test; (2) the district court erred by admitting the result of the PBT at the implied-consent hearing; (3) the district court erred by finding that Martin's refusal to test was not reasonable; and (4) the district court failed to file its order within 14 days after the implied-consent hearing and failed to forward his license to the commissioner of public safety. We conclude that there was no reversible error with respect to any of these contentions and, therefore, affirm.

FACTS

On August 26, 2006, at approximately 3:00 a.m., State Patrol Trooper Carrie Rindal was dispatched to a single-vehicle accident in Ramsey County on the ramp from southbound Interstate Highway 35E to eastbound Interstate Highway 694. When she arrived at the scene, she found Martin inside a pickup truck that had rolled over. Martin informed her that the accident had occurred 15 minutes prior to her arrival. When Martin got out of his truck, Trooper Rindal observed several indicia of alcohol consumption, including the odor of alcohol, slurred speech, and glassy eyes. She administered a PBT, which showed an alcohol concentration of .187.

Trooper Rindal placed Martin under arrest and took him to the Ramsey County Law Enforcement Center, where she read him the implied-consent advisory. Martin indicated that he understood what she had explained, and he asked to consult with an attorney. At 5:00 a.m., Trooper Rindal made a telephone and telephone books available to Martin. At 5:04 a.m., Martin called his mother. At 5:11 a.m., he hung up and told Trooper Rindal that he was done with the telephone.

Trooper Rindal then asked Martin if he would take a breath test. He responded by saying that he would like to talk with an attorney. At 5:13 a.m., Trooper Rindal made the telephone and telephone books available to Martin again. Martin referred to the telephone books again and began placing additional calls. Trooper Rindal observed that Martin called his mother, wrote down some attorneys' telephone numbers, and hung up at 5:37 a.m. Martin then asked if he could call an attorney, and Trooper Rindal told him to go ahead and dial. Beginning at 5:38 a.m., he made a series of short telephone calls. At 5:45 a.m., Trooper Rindal advised him that he had five more minutes before he would be done with the telephone. At 5:48 a.m., he made another short telephone phone call and hung up. Trooper Rindal then advised Martin that he had two more minutes. He dialed another number and then hung up. Trooper Rindal then told him that he had one more opportunity to call an attorney. At 5:49 a.m., he dialed a number and hung up at 5:52 a.m.

Trooper Rindal then asked Martin for a second time if he would take a breath test. Martin responded that he would not take the test without an attorney being present. Trooper Rindal asked him about his reason for refusing, and he stated that he was not refusing. Trooper Rindal advised Martin that it would be considered a refusal if he did not take the test. She then asked him a third time if he would take the breath test, and he stated that he would not take it without an attorney being present or at least until after obtaining the advice of an attorney.

Because Martin refused to submit to testing, Trooper Rindal issued a notice of revocation, pursuant to which the commissioner of public safety revoked his driver's

license for a period of one year. *See* Minn. Stat. § 169A.52, subd. 3(a) (2006). On September 14, 2006, Martin filed a petition for an implied-consent hearing. On September 28, 2006, and again on February 20, 2007, the district court stayed the revocation of his license pursuant to Minn. Stat. § 169A.53, subd. 2(c) (2004), which permits a reviewing court to order a stay if a hearing has not been conducted within 60 days after the filing of the petition.

At the implied-consent hearing on April 30, 2007, Martin argued that his refusal to take the breath test was reasonable. On June 11, 2007, the district court issued an order sustaining the revocation of Martin's driving privileges. Martin appeals.

ISSUES

I. Did the district court err by concluding that Martin was not denied his limited right to counsel by Trooper Rindal's termination of his access to a telephone and telephone books after 50 minutes?

II. Did the district court abuse its discretion by admitting Martin's PBT result into evidence at the implied-consent hearing?

III. Did the district court clearly err by finding that Martin's refusal was not reasonable?

IV. Did the district court's failure to file its order within 14 days, or its alleged failure to forward Martin's license to the commissioner of public safety, violate Martin's statutory rights or his right to due process?

DECISION

I. Limited Right to Counsel

Martin argues that he was denied his limited right to counsel because he was required to decide whether to submit to a breath test while he still was making efforts to contact an attorney. A person has a limited right to consult with an attorney before deciding whether to submit to chemical testing. *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). When an officer requests a chemical test, the officer must advise the individual that, among other things, he or she “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.” Minn. Stat. § 169A.51, subd. 2(4) (2006). A person’s limited right to consult with counsel prior to testing is “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.” *Friedman*, 473 N.W.2d at 835 (quotation omitted). The court considers the “totality of the facts” in determining whether a driver’s right to counsel has been vindicated. *Parsons v. Commissioner of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). A district court’s findings of fact will not be reversed unless they are clearly erroneous, *Gergen v. Commissioner of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996), and a district court’s conclusion of law is subject to de novo review, *Kuhn v. Commissioner of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

Trooper Rindal provided Martin with an opportunity to call an attorney and informed him that if he were unable to contact an attorney, he would need to make a decision within a reasonable period of time as to whether to submit to a test. Martin appears to have made a few calls to his mother and several short calls to lawyers or law firms. (The record is silent as to whether his mother is an attorney.) After 50 minutes, Trooper Rindal determined that Martin had had enough time. “A driver cannot be permitted to wait indefinitely . . . , and an officer must be allowed to reasonably determine that the driver has had enough time.” *Palme v. Commissioner of Pub. Safety*, 541 N.W.2d 340, 345 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). In other cases, this court has held that approximately half an hour was a reasonable length of time to allow a driver to contact an attorney. *See id.* (holding that 29 minutes was a reasonable amount of time in which to contact an attorney); *Ruffenach v. Commissioner of Pub. Safety*, 528 N.W.2d 254, 257 (Minn. App. 1995) (holding that right to counsel was satisfied where telephone was made available for motorist to call attorney for 36 minutes). Fifty minutes was a reasonable length of time to allow Martin to contact counsel.

Another relevant factor is the length of time between the arrest and the request to test, which is due to the fact that evidence of alcohol concentration dissipates over time. *Friedman*, 473 N.W.2d at 835 (“the evanescent nature of the evidence in DWI cases requires that the accused be given a limited amount of time in which to contact counsel”). Here, Martin was first asked to submit to a breath test approximately one and a half hours

after his arrest, which is longer than the one-hour interval in *Kuhn*. See 488 N.W.2d at 842.

Thus, we conclude that Martin's limited right to counsel was vindicated, despite his lack of success in contacting an attorney, because, under the totality of the circumstances, he was afforded a "reasonable opportunity" to contact an attorney. See *Friedman*, 473 N.W.2d at 835; see also *Palme*, 541 N.W.2d at 344; *Ruffenach*, 528 N.W.2d at 257; *Kuhn*, 488 N.W.2d at 840.

II. Admissibility of PBT Result

Martin argues that the district court improperly admitted the PBT result into evidence at the implied-consent hearing. "Evidentiary rulings concerning materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are within the [district] court's sound discretion and will only be reversed when that discretion has been clearly abused." *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994) (quotation omitted).

The results of a preliminary screening test "must not be used in any court action," except in several enumerated instances, including "to prove that a test was properly required of a person pursuant to section 169A.51, subdivision 1," which is the implied-consent law. Minn. Stat. § 169A.41, subd. 2(1) (2006). The admission of Martin's PBT result is squarely within this statute because the result proves that Trooper Rindal properly requested a test pursuant to the implied-consent law.

Martin also contends that the PBT result was not relevant. But the revocation of Martin's license depended, in part, on whether "there existed probable cause to believe

[he] had been driving . . . a motor vehicle” while impaired. *See* Minn. Stat. § 169A.52, subd. 3(a) (2006). A PBT result is relevant to a law-enforcement officer’s determination of probable cause. *Reeves v. Commissioner of Pub. Safety*, 751 N.W.2d 117, ___, 2008 WL 2492347, at *2 (Minn. App. June 24, 2008). In fact, the statute contemplates that the results of a PBT will be “used for the purpose of deciding whether an arrest should be made.” Minn. Stat. § 169A.41, subd. 2. Thus, the district court did not abuse its broad discretion concerning the admissibility of evidence when it admitted Martin’s PBT result into evidence at the implied-consent hearing. *See State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006) (“evidentiary rulings--including the admission of chemical or scientific test reports--are within the discretion of the district court”).

III. Reasonableness of Refusal

Martin argues that the district court erred by finding that his refusal to submit to the test was not reasonable. More specifically, he contends that he was confused about the information provided to him by Trooper Rindal. “On appeal, a district court’s factual findings will not be disturbed unless clearly erroneous.” *Busch v. Commissioner of Pub. Safety*, 614 N.W.2d 256, 258 (Minn. App. 2000).

“It is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner’s refusal to permit the test was based upon reasonable grounds.” Minn. Stat. § 169A.53, subd. 3(c) (2006). “A refusal may be reasonable if the police have misled a driver into believing a refusal was reasonable, or if the police have made no attempt to explain to a confused driver his obligations.” *Norman v. Commissioner of Pub. Safety*, 412 N.W.2d 22, 23 (Minn. App. 1987). Whether the officer caused the

confusion that led to the refusal is a question of fact to be decided on a case-by-case basis. See *Department of Pub. Safety v. Nystrom*, 299 Minn. 224, 225, 217 N.W.2d 201, 202 (1974) (holding that appellant's refusal was not reasonable where officer explained statute at least twice, despite appellant's claim he did not understand that refusal would result in revocation); *Department of Highways v. Beckey*, 291 Minn. 483, 487, 192 N.W.2d 441, 445 (1971) (holding that appellant's refusal to test was reasonable because police gave misleading information about his rights, which caused appellant to believe he had constitutional right to talk to attorney); see also *State v. Melde*, 725 N.W.2d 99, 106 (Minn. 2006) (holding that appellant was not denied due process by officer's failure to inform him that refusal was gross misdemeanor that may result in harsher penalties than test failure).

The district court found that Martin "was not confused" but was "oriented, responsive and able reasonably to reply to the questions and directions of the trooper." The district court found that Martin's lack of success in communicating with an attorney "was not due to any confusion caused by Trooper Rindal." The district court did not accept Martin's statement that he was "not refusing to take the test but seeking the advice of counsel effective to establish the reasonableness of his failure to test." The record does not indicate that Martin ever expressed confusion to Trooper Rindal regarding the breath-test process. After Trooper Rindal read the implied-consent advisory to him, Martin agreed that he understood what she had read to him. Martin did say at one point that he had a question about "a reasonable amount of time," but Trooper Rindal answered the question. Martin refused the test three times, and when he was asked the reason for

his refusal, he responded that wanted to speak with an attorney, which is not a reasonable ground for refusal. He never stated that he was confused. If a driver does not inform a police officer that he is confused, his refusal to submit to testing is not reasonable. *See Gunderson v. Commissioner of Pub. Safety*, 351 N.W.2d 6, 7 (Minn. 1984). In that event, the officer has “no reason to clear up appellant’s alleged confusion as to his obligation to take the test.” *Norman*, 412 N.W.2d at 24. The district court’s findings that Martin was not confused and, therefore, that his refusal to test was not reasonable are not clearly erroneous.

The district court also found, in the alternative, that if Martin was confused, the confusion “was not caused by any conduct of the officer.” Martin asserts that Trooper Rindal implied that he did not need to submit to testing and that testing would be delayed until Martin successfully consulted with an attorney. If a police officer misleads a driver about the obligation to submit to testing, the driver’s due-process rights are violated. *McDonnell v. Commissioner of Pub. Safety*, 473 N.W.2d 848, 853-55 (Minn. 1991) (holding that police officer made “active[ly] misleading” statements when threatening criminal charges that state was not authorized to impose on that particular driver). Nonetheless, a police officer does not have an independent duty to clear up a driver’s confusion over the consequences of a refusal to take a test. *Maietta v. Commissioner of Pub. Safety*, 663 N.W.2d 595, 598 (Minn. App. 2003) (“it is the responsibility of the attorney, not a police officer, to clear up any confusion on the part of a driver concerning the legal ramifications of test refusal”), *review denied* (Minn. Aug. 19, 2003).

Martin's assertion that he was misled by Trooper Rindal is unsupported by the record. Trooper Rindal read the implied-consent advisory to Martin, including the following provisions: "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. If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test." Trooper Rindal allowed him 50 minutes with a telephone and telephone books, during which time he made approximately eight calls, before asking him to take the breath test and informing him that his failure to take the breath test would constitute a refusal. Martin has not identified any statements by Trooper Rindal that would have allowed him to reasonably conclude that he would not be penalized by his refusal to test or that he did not need to submit to testing until counsel was secured. In this situation, even if Martin were confused, Trooper Rindal had no duty to clear up his alleged confusion. *See Maietta*, 663 N.W.2d at 598; *State v. Gross*, 335 N.W.2d 509, 510 (Minn. 1983) (holding that police are required to give advice only as required by implied-consent statute). Thus, the district court did not clearly err in its alternative finding that Trooper Rindal did not cause Martin to be confused.

IV. Compliance with Deadline

Martin argues that his statutory rights and right to due process were violated because the district court failed to issue a written order within 14 days after his implied-consent hearing and allegedly failed to forward his driver's license to the commissioner. Martin relies on a statute that provides:

The court shall order that the revocation or disqualification be either rescinded or sustained and forward the order to the commissioner. The court *shall file its order within 14 days* following the hearing. If the revocation or disqualification is sustained, the court *shall also forward the person's driver's license or permit to the commissioner* for further action by the commissioner if the license or permit is not already in the commissioner's possession.

Minn. Stat. § 169A.53, subd. 3(e) (2006) (emphasis added). The application of law and constitutional principles to undisputed facts is a question of law, which this court reviews *de novo*. *State v. Wiltgen*, 737 N.W.2d 561, 566 (Minn. 2007); *Bendorf v. Commissioner of Pub. Safety*, 712 N.W.2d 221, 223 (Minn. App. 2006), *aff'd*, 727 N.W.2d 410 (Minn. 2007).

The district court issued its order 42 days after the implied-consent hearing. Although the statute states that the court “shall” file its order within 14 days, *see* Minn. Stat. § 169A.53, subd. 3(e), the untimeliness of the order is legally insignificant because the applicable statute is merely directory, not mandatory. In *Ives v. Commissioner of Pub. Safety*, 375 N.W.2d 565 (Minn. App. 1985), this court held that a statute consisting of essentially the same language is “directory.” *Id.* at 566. The court reasoned, “Since the statute does not provide any consequences for the court’s failure to act, the court’s failure did not deprive it of the power to make a valid decision.” *Id.* The *Ives* decision is consistent with long-standing precedent that “statutory provisions defining the time and mode in which public officers shall discharge their duties . . . are . . . designed . . . to secure order, uniformity, system, and dispatch in public business are . . . deemed directory.” *First Nat’l Bank v. Department of Commerce*, 310 Minn. 127, 132, 245

N.W.2d 861, 864 (1976) (quotation omitted); *see also Riehm v. Commissioner of Pub. Safety*, 745 N.W.2d 869, 873-76 (Minn. App. 2008) (holding that timing requirements in section 169A.53, subdivision 3(a), which requires judicial-review hearing of license revocation within 60 days of petition for review, is directory and not mandatory), *review denied* (Minn. May 20, 2008). Thus, the district court's failure to file its order within 14 days does not require any remedy.

In addition, the untimeliness of the district court's order does not constitute a violation of Martin's due-process rights. Because of the district court's stay orders, Martin maintained full driving privileges between the April 30, 2007, hearing and the issuance of the district court's order on June 11, 2007. Thus, Martin's due-process rights were not violated by the delay in the issuance of the order. *See Bendorf v. Commissioner of Pub. Safety*, 727 N.W.2d 410, 415-16 (Minn. 2007) (holding that revocation of license for nine days before stay of revocation did not violate Due Process Clause).

The evidence in the record is unclear regarding whether Martin's driver's license was forwarded to the commissioner. Regardless, even if Martin's license was not forwarded to the commissioner, the statutory requirement is directory, not mandatory. *See First Nat'l Bank*, 310 Minn. at 132, 245 N.W.2d at 864; *Ives*, 375 N.W.2d at 566; *Riehm*, 745 N.W.2d at 873-76. Furthermore, Martin has not demonstrated that he sustained any prejudice so as to give rise to a violation of his right to due process. *See Bendorf*, 727 N.W.2d at 415-16.

Affirmed.