STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1917

State of Minnesota,
Respondent,

vs.

Scott Thomas Hohag,
Appellant.

Filed March 4, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 06053713

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Desyl L. Peterson, Minnetonka City Attorney, Anna Krause Crabb, Assistant City Attorney, 14600 Minnetonka Boulevard, Minnetonka, MN 55345 (for respondent)

Joseph P. Tamburino, 525 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Crippen, Judge.*

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

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

PETERSON, Judge

In this appeal from a conviction of third-degree driving while impaired (DWI), appellant argues that the district court erred in ruling that jail personnel did not prevent additional testing by failing to relay to appellant an incoming message from a testing service that appellant had called. We affirm.

FACTS

Appellant Scott Thomas Hohag was arrested for DWI and transported to the Minnetonka Police Department. Appellant agreed to submit to an Intoxilyzer test, which showed an alcohol concentration of .23.

When the Intoxilyzer test was complete, appellant requested an additional test and was provided with access to telephone books and a telephone. Appellant reached the paging service for Additional Testing, Inc. After calling Additional Testing, appellant was transported to the Hennepin County Jail.

Hennepin County Sheriff's Detention Deputy Gregory Tomlinson received a telephone call for appellant from a representative from Additional Testing. Tomlinson gave the information about the call to the deputy in the area where appellant was located. The evidence in the record does not indicate that appellant received any message about the call.

Appellant was charged with two counts of gross-misdemeanor third-degree DWI and one count of misdemeanor open-bottle violation. Appellant moved to suppress the Intoxilyzer test results, arguing that jail personnel violated his right to additional testing

under Minn. Stat. § 169A.51, subd. 7(b) (2006). The district court denied appellant's motion, and the parties submitted the case to the court for trial on stipulated facts. The district court found appellant guilty as charged and sentenced him to a stayed term of 361 days in jail. This appeal followed.

D E C I S I O N

The issue of whether a driver's right to an independent test was prevented or denied presents a mixed question of law and fact. *Haveri v. Comm'r of Pub. Safety*, 552 N.W.2d 762, 765 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). The district court's findings of fact must be sustained unless clearly erroneous, but this court reviews de novo whether, as a matter of law, the driver's right to an independent test was prevented or denied. *Id.*; *see also State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) ("When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing – or not suppressing – the evidence.").

The implied-consent statute provides that after a person submits to a chemical test, he has the right to have an additional test at his own expense. Minn. Stat. § 169A.51, subd. 7(b) (2006). "The failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer." *Id.*

The statutory right to obtain an additional test is a limited right. *Theel v. Comm'r of Pub. Safety*, 447 N.W.2d 472, 474 (Minn. App. 1989), *review denied* (Minn. Jan. 8,

1990). This court has distinguished between cases when a peace officer failed to assist and those when the officer hampered an attempt to obtain an additional test. *Id.*

Appellant argues that Tomlinson's failure to notify the intake sergeant of the call for appellant from Additional Testing violated his right to an additional test. Under the jail policy governing additional testing, the intake sergeant was responsible for ensuring that proper procedures were followed in the additional-testing process. An officer's failure to follow department policy governing additional testing does not by itself constitute a violation of the statutory right to an additional test. *See Hotchkiss v. Comm'r of Pub. Safety*, 553 N.W.2d 74, 79 (Minn. App. 1996) (stating that issue was whether, on the facts of this particular case, officer denied appellant's right to additional testing and that police department's policy was not at issue), *review denied* (Minn. Oct. 29, 1996).

In *Cosky v. Comm'r of Pub. Safety*, after requesting a second test, Cosky was repeatedly given access to a telephone. 602 N.W.2d 892, 893 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000). Cosky called a clinic but was told that the clinic would not send anyone to the jail to perform a blood test. *Id.* He then tried to call his attorney but reached the attorney's answering service, which refused to give him the attorney's home telephone number and, instead, offered to contact the attorney and give him a message. *Id.* Cosky asked an officer for a telephone number where his attorney could contact him, but the officer said that inmates were not allowed to receive telephone calls at the jail. *Id.* The officer gave Cosky the opportunity to make another call, but Cosky did not know anyone else to call, so he declined. *Id.* Cosky did not make any further requests to use the telephone or continue his efforts to obtain additional testing. *Id.*

Based on authority holding that an officer's only affirmative obligation is to allow a driver the use of a telephone, the *Cosky* court concluded:

> Cosky's right to additional testing was vindicated even though he was not allowed to receive incoming phone calls while he was in jail. Permitting Cosky to receive incoming telephone calls might have made it easier for him to arrange an additional test. But there is no basis for us to conclude that not permitting incoming calls prevented Cosky from arranging a test. Cosky could have used outgoing calls to arrange a test, as he attempted to do when he called the Park Nicollet Clinic. Or he could have left instructions for his attorney to arrange a test.

Id. at 894.

This case is controlled by *Cosky*. If not allowing Cosky to receive an incoming telephone call at all did not interfere with his right to obtain a second test, failing to relay an incoming message to appellant cannot be deemed interference with his right to obtain a second test. The district court did not err in denying appellant's motion to suppress the Intoxilyzer test results.

Appellant raises additional issues regarding the number of calls by Additional Testing and a comment by the district court about the lack of evidence that appellant did not receive a message about the call taken by Tomlinson. Appellant contends that the district court's comment indicates that the district court improperly drew an adverse conclusion from appellant's failure to take the stand and testify that he did not receive any message about the call from Additional Testing. Because the failure to relay an incoming message did not interfere with appellant's right to obtain a second test, the number of calls is irrelevant to our decision. Also, the record as a whole does not

indicate that the district court misunderstood the burden of proof. But even if it did, any error was harmless because any failure to inform appellant about the call did not violate appellant's right to an additional test. *See State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989) ("A ruling is prejudicial and therefore reversible [error] if there is a reasonable possibility the error complained of may have contributed to the conviction.").

Affirmed.