STATE OF MINNESOTA
IN COURT OF APPEALS
A07-689

State of Minnesota,
Respondent,

vs.

Rocky Padilla,
Appellant.

Filed April 29, 2008
Affirmed
Connolly, Judge

Mower County District Court
File No. 50-K9-05-000984

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

Kristen Nelson, Mower County Attorney, Jeremy Clinefelter, Assistant County Attorney, 201 First Street N.E., Austin, MN 55912 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of felony first-degree test refusal arguing that the approximately 23-hour gap between the time of his arrest and the initiation of the implied-consent advisory prevented him from having a reasonable opportunity to consult with an attorney. Because appellant was given an opportunity to contact an attorney before deciding to refuse the test and then chose not to contact an attorney, we affirm.

FACTS

At approximately 12:30 a.m. on July 29, 2005, Officer Clennon of the Austin Police Department made contact with appellant Rocky Padilla after observing him driving a car with only one headlight. Officer Clennon arrested appellant after a check of his license indicated that it was cancelled as inimical to public safety. Following the arrest, Officer Clennon searched appellant's car and discovered a glass pipe of the type that is commonly used to smoke methamphetamine. Officer Clennon took appellant into custody on the license charge.

Appellant was already on felony probation when he was arrested. His probation stemmed from his May 19, 2005 conviction for felony fifth-degree possession of a controlled substance. The terms of his probation required him to remain law abiding, refrain from using any illegal drugs, and submit to random chemical testing. Appellant had been previously scheduled to take a drug test on July 29, 2005. At approximately

11:00 a.m. on July 29, 2005, appellant submitted to a urine analysis administered by his probation officer. The test came back positive for methamphetamine.[1]

Sometime between 3:00 p.m. and 4:00 p.m. on July 29, 2005, Officer Clennon, who by this time was off-duty, checked his home answering machine and discovered a message from a city attorney informing him of appellant's positive drug test. Officer Clennon called the city attorney and they agreed it would "probably be fine" to initiate the implied-consent advisory when he returned to duty at 10:00 p.m. that night. Under cross-examination, Officer Clennon testified that, although he could have called someone else into the police department and asked them to administer the test, he decided to wait to administer the test himself because "I felt that I had plenty of time to get the test." There is no suggestion in either the record, or the parties' briefs, that Officer Clennon acted in bad faith in delaying the implied-consent advisory.[2]

At approximately 11:45 p.m. on July 29, 2005, Officer Clennon read appellant the implied-consent advisory. This conversation was recorded on audiotape. Appellant was generally non-cooperative and belligerent throughout the implied-consent procedure. After being informed of his right to counsel under these circumstances, appellant asked to contact an attorney. At 11:48 p.m., Officer Clennon stopped the tape to give appellant an

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[1] Appellant was kept in a secured portion of the jail following his arrest, and there is no claim that he consumed drugs after his arrest.

[2] While appellant focuses extensively on the 23-hour gap between his arrest and the initiation of the implied-consent advisory, the more accurate measure of the gap is between the time Officer Clennon found out about the positive drug test and when he read the implied-consent advisory, which is at most nine hours. This is because at the time of the arrest, Officer Clennon had no suspicion that appellant was under the influence of alcohol or a controlled substance and consequently there was no reason to invoke the implied-consent law.

opportunity to contact an attorney. Appellant was then given access to a telephone and a telephone directory. The tape recording was resumed at 11:53 p.m. Officer Clennon then indicated that appellant "has not made any attempts to contact an attorney." Officer Clennon then proceeded with the rest of the implied-consent advisory. When Officer Clennon asked appellant if he would take a blood or urine test, appellant replied "I'm not doing nothing until I talk to an attorney." Officer Clennon stated that appellant "is now walking away from me and requesting to go back to his cell. He will be refused."

Appellant was eventually charged with first-degree refusal to test, first-degree driving while impaired (DWI) (controlled substance in body), driving after cancellation, and possession of drug paraphernalia. At an omnibus hearing on October 3, 2005, appellant argued that the refusal-to-submit count should be dismissed because "the timing of [his] implied consent advisory, whether intentional or not by the state, tended to hamper, rather than vindicate [appellant's] right to counsel." The district court rejected appellant's argument noting that he "alone is to blame for his failure to contact an attorney" because "after trying to contact an attorney for *only* 5 minutes, [appellant] stopped attempting to reach an attorney." Thus, the district court concluded that appellant did not make a "good faith and sincere effort to reach an attorney." On August 28, 2006, appellant waived his right to a jury trial, and agreed to a stipulated facts trial on the test-refusal count. The other counts were dismissed. On August 29, 2006, appellant was found guilty of first-degree test refusal. He was ultimately sent to prison for 60 months. This appeal follows.

D E C I S I O N

In Minnesota, drivers arrested for driving while impaired have a limited right to consult with counsel prior to testing so long as the consultation does not unreasonably delay testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). "[T]his limited right is 'contingent upon the driver's physical ability to consult with counsel and the reasonably timely exercise of this ability.'" *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000) (quoting *State, Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979)). Whether a driver's right to counsel has been vindicated is a mixed question of law and fact. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). Where the facts are not in dispute, like the present case, this court reviews de novo whether an individual was afforded a reasonable opportunity to consult with counsel. *Groe*, 615 N.W.2d at 841.

When determining whether a driver had a reasonable opportunity to contact an attorney, this court considers the "totality of the facts." *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). While no definitive factors have been articulated, this court in the past has considered the time of day that a driver has to contact an attorney, whether the driver has made a good-faith and sincere effort to contact an attorney, and the length of time the driver has been under arrest. *Kuhn*, 488 N.W.2d at 842. The length of time the driver has been under arrest is relevant because "the longer [a driver] is under arrest the less probative value the chemical test may ultimately have." *Id.*

In this case, appellant argues that Officer Clennon "did not accord appellant a reasonable opportunity to contact and consult with counsel" because his "decision to wait until nearly midnight before giving appellant the opportunity to contact an attorney, rather than having another officer offer the test during normal business hours, constructively denied appellant the right to counsel." Notably, appellant does not dispute the district court's finding that he voluntarily ended his efforts to contact an attorney after only five minutes of trying. Instead, appellant argues that the delay between the arrest and the implied-consent advisory constructively denied him his right to counsel because it forced him to try to contact an attorney after business hours. Under the circumstances of this case, appellant's argument is without merit.

First, it is clear from the facts of this case that appellant did not make "a good faith and sincere effort to reach an attorney." *Id.* Appellant never tried to contact an attorney before standing up and requesting to go back to his cell. Throughout the implied-consent advisory, appellant was uncooperative and belligerent. *See Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000) ("If a driver does frustrate the process, his conduct will amount to a refusal to test."). For appellant's argument to have any merit, he would have had to, at the very least, made a good-faith attempt to contact an attorney. He did not. Absent such an attempt, it is difficult to understand how the delay, as opposed to his own conduct, caused appellant any harm.

Second, neither the statutes of the State of Minnesota nor existing caselaw establish an absolute timeline during which the implied-consent statute may be invoked. As the district court correctly noted: "Since controlled substances have different

elimination rates from the human body, and since the legislature has made driving with *any* amount of Schedule I or II drugs in the system illegal . . . , setting specific timelines for 'implied consent' invocation by statute is impractical."

Third, this court has consistently held that requiring a driver to contact counsel outside of normal business hours does not by itself frustrate a driver's limited right to counsel during an implied-consent procedure. *See, e.g.*, *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501-02 (Minn. App. 1992) (holding that, under the circumstances, providing a driver with 40 minutes at 1:39 a.m. gave her a reasonable amount of time to exercise her constitutional right to consult an attorney).[3] Appellant points to the fact that the delay caused him to have to attempt to contact an attorney at midnight as being the basis for his constructive denial-of-counsel claim. He does not argue that the delay, in and of itself, caused him a constructive denial. The problem with this argument is that requiring appellant to contact an attorney at night does not violate his limited right to counsel as long as he was given a reasonable opportunity to contact an attorney.[4] Here, appellant was given the opportunity to contact an attorney but stopped after five minutes. There is nothing in the record which indicates he was not given a reasonable opportunity to contact an attorney prior to his refusal to be tested. Thus,

[3] However, this court has recognized that "[a] driver should be given more time in the early morning hours when contacting an attorney may be more difficult." *Kuhn*, 488 N.W.2d at 842.

[4] Indeed, to hold otherwise would be illogical given that most drunk-driving arrests occur late at night or in the early morning hours.

appellant should not be able to claim that he was denied a reasonable opportunity to contact an attorney when he made the decision to stop trying in the first place.

Affirmed.