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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-640**

Daniel Stephen Kaine, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 6, 2008
Affirmed
Johnson, Judge**

Dakota County District Court
File No. C6-06-16472

Reid Goldetsky, 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415 (for appellant)

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

Considered and decided by Ross, Presiding Judge; Wright, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Daniel Stephen Kaine's driver's license was revoked after he was arrested for driving while impaired and failed a breath test. Kaine sought judicial review, arguing that he was denied his right to counsel before he submitted to the breath test. The district

court sustained the revocation of his license based on its finding that Kaine did not make a good-faith and sincere effort to contact counsel. The district court's finding was supported by evidence that, despite being given access to a telephone and two telephone books for 20 minutes, Kaine did not place a telephone call or make any effort to do so. We conclude that the district court's finding is not clearly erroneous and that the district court's legal conclusion is correct. Therefore, we affirm.

FACTS

Kaine was arrested in Eagan in the early morning hours of December 9, 2006, on suspicion of driving while impaired (DWI). The arresting officer, Anthony Lejcher of the Eagan Police Department, transported Kaine to the police station. The interactions between Officer Lejcher and Kaine at the police station were recorded, and the audio recording was admitted into evidence in the district court, and the record reflects that the district judge listened to the audio recording in addition to the testimony of Officer Lejcher and Kaine. We have reviewed the transcript of the district court hearing, and we have listened to the audio recording.

At 3:37 a.m., Officer Lejcher began reading the Minnesota Implied Consent Advisory to Kaine. Because Kaine seemed confused after the first reading of the advisory, Officer Lejcher read it to him again, and Kaine then responded that he understood the advisory.

At 3:41 a.m., Officer Lejcher asked Kaine whether he wanted to consult an attorney. Kaine responded in the affirmative. Officer Lejcher then provided access to a telephone and two telephone books. Kaine asked Officer Lejcher whether he was

permitted to call someone else to get an attorney's number, and Officer Lejcher replied that he was. It appears that Kaine then quietly looked at the telephone books for approximately 15 minutes but did not make any telephone calls.

At 3:55 a.m., Officer Lejcher told Kaine he had been looking at the telephone books for almost 15 minutes. Kaine asked Officer Lejcher how much time he had remaining, adding that he was "thinking about" Steve Meshbeshier but had not found an attorney he wanted to call. Officer Lejcher responded by saying that he was "going to move on pretty shortly" if Kaine did not make any telephone calls. Kaine continued to look at the telephone books but did not place a telephone call.

At 3:59 a.m., Officer Lejcher told Kaine that he had two more minutes, at which time "we're going to move on." Kaine did not audibly respond.

At 4:01 a.m., Officer Lejcher told Kaine that his telephone time was being terminated. Kaine then said, for the first time, that he wanted to call Ken Meshbeshier. Officer Lejcher reiterated that his time to contact an attorney had expired. Officer Lejcher asked Kaine whether he would submit to a breath test. Kaine responded, "yes, sir." Kaine took the breath test, which showed that his alcohol concentration was 0.11.

After his driver's license was revoked, Kaine petitioned for judicial review in the Dakota County District Court. The district court conducted an evidentiary hearing at which Kaine sought to prove only that his right to counsel had not been vindicated. The district court found that Kaine "did not make a good faith and sincere effort to contact counsel" and concluded that his "right to counsel was vindicated." Accordingly, the

district court sustained the license revocation. Kaine appeals, arguing that the district court erred in concluding that his right to counsel was vindicated.

DECISION

A person accused of DWI has a limited right to counsel before deciding whether to submit to chemical testing. Minn. Const. art. I, § 6; *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). When an officer requests an implied-consent 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) (2004). A person’s 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). In analyzing whether a driver’s right to counsel was vindicated, the threshold question is whether the driver made “a good faith and sincere effort to reach an attorney.” *Kuhn v. Commissioner of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

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 concerning whether a driver has made a good-faith and sincere effort to contact an attorney 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). A district court's conclusion as to whether the defendant "was accorded a reasonable opportunity to consult with counsel based on the given facts" is subject to de novo review. *Kuhn*, 488 N.W.2d at 840.

The district court found that Kaine did not make a good-faith and sincere effort to contact counsel. Kaine argues that this finding is clearly erroneous because he had identified by name the attorney he was seeking and still was in the process of looking through the telephone books when Officer Lejcher insisted on a decision whether he would submit to a breath test. The commissioner argues that Kaine did not make a good-faith and sincere effort because he never made a telephone call despite being given ample time to do so, even after being warned twice that his telephone time soon would end.

Several cases have considered the issue of good-faith and sincere effort in similar factual circumstances. In *Linde v. Commissioner of Pub. Safety*, 586 N.W.2d 807 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999), the appellant tried unsuccessfully to contact a nephew who was an out-of-state attorney but did not attempt to contact any local attorneys. *Id.* at 810. In *Palme v. Commissioner of Pub. Safety*, 541 N.W.2d 340 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996), the appellant called an attorney who told him to wait for another attorney to call him back, and the appellant did nothing further except wait for a return call. *Id.* at 342. And in *Gergen*, the appellant tried to call only one attorney, could not make contact, and gave up without trying to contact any other attorneys. 548 N.W.2d at 309-10. In each of these cases, this court affirmed a district court's finding that the appellant had not made a good-faith and sincere effort to

contact counsel. *Linde*, 586 N.W.2d at 810; *Gergen*, 548 N.W.2d at 310; *Palme* 541 N.W.2d at 345.

Here, Kaine paged through the telephone books, but he did not place a telephone call and did not make any effort to place a telephone call. Kaine testified that his brother previously had practiced law and was familiar with the Meshbesher & Spence firm, but Kaine also made no attempt to contact the brother, even though Officer Lejcher specifically told him that he could do so. Kaine did not ask for any assistance from Officer Lejcher in finding a particular attorney's telephone number. There is no evidence that Kaine was unable to use the telephone. Kaine explained his conduct by stating that he did not have his reading glasses (which were of the off-the-shelf variety, not with prescription lenses) and that he simply had not yet completed the process of deciding on an attorney and finding that attorney's telephone number. Kaine's testimony is not convincing based on our review of the transcript and the audio recording, and the district court was free to reject it. Thus, the record contains evidence that is sufficient to support the district court's finding that Kaine did not make a good-faith and sincere effort to contact counsel.

The district court's finding on the threshold question—whether Kaine made a good-faith and sincere effort to contact counsel—is sufficient to support the legal conclusion that Kaine's limited right to counsel was vindicated. *See Gergen*, 548 N.W.2d at 309-10. Kaine was “provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel,” and after “a reasonable time, [he was] required to make a decision regarding testing in the absence of counsel.” *Friedman*, 473

N.W.2d at 835 (quotation omitted). “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*, 541 N.W.2d at 345. Therefore, the district court did not err in sustaining the revocation of Kaine’s driver’s license.

Affirmed.