STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0588

State of Minnesota,
Respondent.

vs.

Thomas W. Knutson,
Appellant

Filed July 1, 2008
Affirmed
Minge, Judge

Sherburne County District Court
File No. K1-05-1250

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

Kathleen Heaney, Sherburne County Attorney, Arden Fritz, Assistant County Attorney, Government Center, 13880 Highway 10, Elk River, MN 55330 (for respondent)

John D. Ellenbecker, 803 West St. Germain Street, P.O. Box 1127, St. Cloud, MN 56301 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Wright, Judge.

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

MINGE, Judge

This appeal is from a conviction of driving while impaired by alcohol. Appellant argues that the district court should have suppressed the evidence against him because he was not accorded a reasonable opportunity to consult with counsel. We affirm.

FACTS

Shortly after midnight on June 5, 2005, Officer Theodore Layton of the Becker Police Department arrested Thomas W. Knutson for driving while impaired by alcohol and transported him to the Sherburne County Jail. At the jail, Officer Layton read Knutson the implied consent advisory. After hearing the advisory, Knutson asked for attorney John Ellenbecker.

At 1:09 a.m., a telephone and multiple telephone books were made available to Knutson. Because Knutson claimed he was missing his eyeglasses and could not read the books, Officer Layton provided him with a pair of reading glasses. Knutson said the glasses did not help. At 1:22 a.m., Officer Layton located a telephone number for attorney Ellenbecker, dialed it, and handed the telephone to Knutson. Knutson listened for a short time, then hung up the telephone. Knutson asked if the number was for Ellenbecker's residence or his office. Officer Layton said he did not know, and Knutson persisted in demanding a residence number. Officer Layton again responded that he was unsure if it was a home number. At 1:39 a.m., Officer Layton asked Knutson if he would take the urine test. Knutson at first resisted, saying he still wanted to reach Ellenbecker,

and then agreed to the test. The test results showed Knutson's alcohol concentration was .15.

Knutson moved to suppress the evidence of his urine test, arguing that his right to counsel had not been vindicated. The district court denied the motion and found Knutson had been accorded his right to counsel. Knutson waived his right to a jury trial and submitted the matter to the district court on stipulated facts and exhibits. The district court found Knutson guilty of two counts of third-degree driving while impaired and sentenced him to 365 days in jail stayed for probation, and a $3,000 fine plus costs. This appeal followed.

D E C I S I O N

The issue on appeal is whether Knutson was accorded a reasonable opportunity to consult with legal counsel before being required to decide whether to submit to chemical testing. The determination of whether an officer vindicated a driver's right to counsel is a mixed question of law and fact. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992). Once the facts are established, this court makes a legal determination as to whether the defendant "was accorded a reasonable opportunity to consult with counsel based on the given facts." *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

A driver has a right to consult a lawyer before making the decision. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). Police officers must inform the driver of this right to counsel and "must assist in its vindication." *Id.* (quotation omitted). The right is considered vindicated if, prior to testing, police give the driver a

telephone and a reasonable amount of time to contact and talk with counsel. *Id.* If the driver cannot contact an attorney in a reasonable time, he may be required to make a decision regarding testing without counsel. *Id.*

Whether a driver had a reasonable opportunity to consult with an attorney is determined from 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). Among the nonexclusive factors a court should consider are (1) whether the driver has made a good faith effort to reach an attorney; (2) the time of day that the driver was arrested, and how accessible an attorney is at that time of day; and (3) the length of time the driver has been under arrest, because delay may make the DWI evidence less probative and make prompt testing more urgent. *Kuhn*, 488 N.W.2d at 842.

Knutson primarily argues that considering the time of day, Officer Layton should have ensured that he was dialing attorney Ellenbecker's home telephone number. The officer was under no such obligation. *See McNaughton v. Comm'r of Pub. Safety*, 536 N.W.2d 912, 915 (Minn. App. 1995) (stating that officers need not ensure that a driver actually contacts an attorney, particularly when the driver chooses to stop calling). Officer Layton provided Knutson with a telephone and telephone books as required. The officer found reading glasses in response to Knutson's stated inability to read the telephone books. Finally, Officer Layton looked up Knutson's choice of attorney, dialed the number he found, and gave Knutson the telephone. Knutson hung up after listening to whatever ringing occurred and any answering machine. The officer was available to dial the telephone numbers of other attorneys, but Knutson made no such request.

Officer Layton was not obligated to decide whether the telephone number was Ellenbecker's residence or office.

Notably, the district court found that Knutson's claim that he was unable to read the telephone books "did not appear genuine," given that the books contained large-print advertisements for attorneys and that Knutson had not mentioned earlier in the arrest that he needed reading glasses. There was no vision impairment noted on Knutson's driver's license. Knutson claimed that there were a pair of glasses in his vehicle, and he demanded that someone go to his vehicle and retrieve them. Although no one did so at that time, a later search of the vehicle failed to turn up any glasses.

Knutson also argues that he should have been provided more than 30 minutes to locate an attorney. Time is one factor, though not the only one, in determining whether a defendant's right to counsel was vindicated. *See Kuhn*, 488 N.W.2d at 842. What constitutes a reasonable length of time to reach an attorney is evaluated on a case-by-case basis. *Compare id.* (holding 24 minutes not to be reasonable, where the driver was making a sincere effort to reach an attorney, it was 2:03 a.m. on a Monday morning, and only about one hour had elapsed between the arrest and chemical test) *with Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995) (holding 37 minutes was reasonable, where at 9 a.m. the driver made only two phone calls and then gave up trying to reach an attorney). Here, Knutson made no other efforts to reach an attorney once his first call was unsuccessful, and the district court found 30 minutes was a "substantial amount of time."

Based on the record in this case, we conclude that the district court did not err in finding that Knutson did not make a good-faith effort to contact an attorney and that his right to counsel was vindicated.

Affirmed.

Dated: