STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1269

State of Minnesota,
Respondent,

vs.

Sandra Gail Tusow,
Appellant.

Filed August 12, 2008
Affirmed
Peterson, Judge

Koochiching County District Court
File No. 36-K6-07-93

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

Joseph M. Boyle, Jr., Office of the City Attorney, 235 Fourth Avenue, International Falls, MN 56649 (for respondent)

Steven A. Nelson, 210 Fourth Avenue, International Falls, MN 56649 (for appellant)

Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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 second-degree refusal to submit to chemical testing, appellant argues that (1) her limited right to counsel was not vindicated by the

opportunity to use a telephone and a telephone book because she could not read the telephone book without her glasses, which were in police custody; and (2) the evidence does not support the district court's finding that appellant's final indication was that she did not wish to contact an attorney. We affirm.

FACTS

International Falls Police Officer Grant DeBenedet stopped a vehicle being driven by appellant Sandra Gail Tusow for erratic driving and observed that appellant showed indicia of intoxication. DeBenedet administered field sobriety tests, which appellant failed, and DeBenedet arrested appellant for driving while impaired. Appellant was charged with third-degree driving while impaired and second-degree refusal to submit to a chemical test. She moved to dismiss the charges against her on the ground that her limited right to counsel was not vindicated.

At the omnibus hearing, DeBenedet testified:

> When I first asked her if she wanted to speak with an attorney she said yes. And then she made a statement that she wanted me to talk to Steve [attorney Steven Nelson]. I told her that I didn't want to talk to Steve and if she wanted to speak with an attorney, she could personally talk to Steve. I provided her with a telephone book and a phone and at that point she said she did not want to talk to an attorney. I asked her if she would provide a breath sample. She said no.

On cross-examination, DeBenedet testified that he understood that appellant wanted him to call Nelson for her, and he declined to do so. DeBenedet testified that appellant declined his offer to use a phone and phone book and said that she did not want to speak to an attorney.

Appellant testified that she is unable to read without glasses and that her glasses were in her purse, which an officer had taken from her. DeBenedet testified that appellant "never said anything that she needed reading glasses," did not indicate that she would have difficulty reading the phone book, and did not ask for a pair of glasses.

The district court denied appellant's motion to dismiss, and the case was tried to the court. At trial, appellant again moved to dismiss the charges against her on the ground that her limited right to counsel had not been vindicated. A video recording of DeBenedet's administration of the implied-consent advisory to appellant and the implied-consent-advisory form that DeBenedet used during the advisory were introduced at trial, and DeBenedet testified that appellant did not at any time say that she had a problem with her vision or that she needed a pair of glasses.

The district court found that appellant declined DeBenedet's offer to use a telephone without advising him of her need for glasses to look up a telephone number, found appellant guilty as charged, and sentenced her to a stayed term of one year in jail. This appeal followed.

D E C I S I O N

In Minnesota, drivers arrested for driving while impaired have a limited right to consult with counsel before 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). Whether a driver's right to counsel has been vindicated is a mixed question of law and fact. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *review denied*, (Minn. Dec. 11, 2001). Once the facts are established, this court makes an

independent legal determination as to whether the defendant "was accorded a reasonable opportunity to consult with counsel." *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). We review the district court's factual findings under the clearly erroneous standard. *Hartung*, 634 N.W.2d at 737.

The right to counsel "will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Friedman*, 473 N.W.2d at 835 (quoting *Prideaux v. Dep't. of Pub. Safety*, 310 Minn. 405, 421, 247 N.W.2d 385, 394 (1976)). DeBenedet testified that after appellant was provided with a telephone and a telephone book, appellant said that she did not want to talk to an attorney. Appellant argues that her limited right to counsel was not vindicated because DeBenedet "refused her request for assistance to call an attorney." But to vindicate appellant's right to counsel, DeBenedet was not required to do more than provide appellant with a telephone and a telephone book and give her a reasonable time to contact and talk with counsel. Appellant asserts that she was unable to read the telephone book without her glasses. But there is no evidence in the record that appellant asked for her glasses or indicated to DeBenedet that she was not able to read the telephone book without them.

Appellant relies in part on a transcript of the video recording of the implied-consent advisory to support her argument that her limited right to counsel was not vindicated. The transcript was not filed with the district court until October 5, 2007, which was several months after the omnibus hearing and trial. Because the transcript was

not submitted at the omnibus hearing or trial, we do not consider it on appeal. *See State v. Needham*, 488 N.W.2d 294, 296-97 (Minn. 1992) (discussing procedure and burden of proof for omnibus hearing); *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (explaining standard of review applicable to challenge to sufficiency of evidence). DeBenedet's testimony, together with the exhibits presented at trial (the implied-consent-advisory form and the video recording of the implied-consent-advisory process), support the district court's findings that (1) DeBenedet gave appellant "numerous opportunities to contact an attorney" and provided appellant with the use of a telephone and a telephone book, and (2) a final inquiry about whether appellant "wanted an attorney resulted in an answer of no." The district court's findings support the conclusion that appellant's limited right to counsel was vindicated.

Because appellant's limited right to counsel was vindicated, her claim that she did not have the opportunity to make an informed choice about whether to submit to testing fails.

Appellant's brief generally addresses other constitutional protections, but no claim is stated with sufficient precision to be considered by this court. *See State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue that was inadequately briefed).

Affirmed.