STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0122

State of Minnesota,
Respondent,

vs.

Kirk Louis McIlraith,
Appellant.

Filed January 20, 2009
Reversed and remanded; motion denied
Worke, Judge

Hennepin County District Court
File No. 27-CR-07-101143

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

Steven M. Tallen, Tallen & Baertschi, 4560 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondent)

James H. Leviton, 216K Marsh Run I, 11900 Wayzata Boulevard, Minneapolis, MN 55305 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

WORKE, Judge

On appeal from a conviction of boating with an alcohol concentration of more than .08, appellant argues that his right to a second independent test administered by the

person of his choosing was not vindicated. Because we conclude that appellant's right to a second independent test was not vindicated, we reverse the conviction of boating with an alcohol concentration of more than .08. However, it is not clear from the record what the parties intended as to a disposition of the boating-under-the-influence-of-alcohol charge; therefore, we remand to the district court for a determination on this charge. We also deny the state's motion to strike appellant's citations to supplemental authority.

D E C I S I O N

The district court's determination of whether a driver's right to an additional independent test was vindicated includes both questions of fact and law. *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.* Findings of fact are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). On review, "due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

Under Minnesota's implied-consent law, a person who operates a motor vehicle on any boundary water of this state consents to a blood-alcohol-concentration test. Minn. Stat. § 169A.51, subd. 1(a) (2006). Additionally,

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace

> officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state. 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., subd. 7(b) (2006). "'Administer' means the collection of a specimen of blood, breath, or urine from a person for the purpose of analyzing the specimen to determine alcohol concentration." Minn. R. 7502.0100, subp. 2 (2005).

In *State v. Shifflet*, this court held that the requirement of an additional independent test for implied-consent purposes applied to criminal proceedings. 556 N.W.2d 224, 226 (Minn. App. 1996). The district court in the implied-consent matter found that the driver had been denied the opportunity to obtain an independent test and rescinded the revocation of the driver's license. *Id.* at 225. This court held that the test results should not have been admitted into evidence in the criminal matter because the police prevented the driver from obtaining additional testing. *Id.* at 228. In *Shifflet*, the arresting officer informed the jailer that the driver requested an independent test. *Id.* at 225. A person arrived at the jail to obtain the driver's urine sample, but was denied access to the driver for three hours and was finally told that he would not be permitted to conduct the test. *Id.*

We are presented with a similar case here. On July 19, 2007, at approximately 11:30 p.m., Deputy Patrick Chelmo arrested appellant Kirk Louis McIlraith for boating while intoxicated. Chelmo transported appellant to Water Patrol Headquarters and at

approximately 1:02 a.m., read appellant the implied-consent advisory. Appellant called three attorneys before agreeing to submit to a breath test. Appellant also requested a second independent test administered by a person of his choosing. Following the test, at approximately 1:25 a.m., appellant called his wife and told her about his arrest and that he was being transported to the jail in downtown Minneapolis. After appellant hung up, Chelmo told appellant that he failed to tell his wife about the second test. Appellant again called his wife and asked her to bring a Ziploc bag or container for a urine sample to the jail.

Appellant was transported to the jail and put in a cell at approximately 2:00 a.m. Approximately one hour later, while a records clerk was verifying appellant's information and taking his photo, appellant asked when he was going to have his second test administered. The clerk looked over some paperwork and noticed that appellant had requested a second test. The clerk told appellant that she did not know if the test would do him any good because more than two hours had elapsed since his arrest. The clerk told appellant that because there had been confusion surrounding his request she needed to talk to her supervisor.

In the meantime, appellant's wife arrived at the jail. At approximately 3:00 a.m., appellant's wife approached a counter where Deputy Tyra Sanders and a male officer were sitting. Appellant's wife set the Ziploc container on the counter and asked to see appellant. Sanders checked the system and told appellant's wife that appellant had not been checked in yet and that she could not see him. Appellant's wife waited approximately 45 minutes, asking two additional times to see appellant. The last time,

Sanders told appellant's wife that appellant had not been completely processed and the male officer offered to take a note to appellant. Appellant's wife asked how much longer until she could see appellant and Sanders told her it could be two to four hours. Appellant's wife left the jail; she returned a short time later and waited outside in her car.

The records clerk advised a deputy that appellant was requesting a second test. The deputy saw a note that appellant called his wife but that he was confused about the procedure. The deputy gave appellant access to phone books and a phone to arrange for another second test. The numbers to two testing agencies were pointed out to appellant and he called both. Appellant reached an agency and paid for a test. At approximately 5:00 a.m., appellant called his wife and told her that he would be there for at least another two hours and that she should go home. At approximately 5:30 a.m., a tester arrived at the jail to collect appellant's urine sample.

The district court concluded that appellant's right to a second test had been vindicated because appellant did not specifically state that he wanted his wife and no one else to do the second test. But the district's court's findings are not consistent with the district court's conclusion. The district court found that appellant told the arresting officer that he wanted to call his wife and that "he wanted her to make arrangements to come to the jail so that a urine sample could be collected." Appellant called his wife and told her to go to the jail downtown, rather than the Water Patrol office because "that is where she should come with respect to executing the request for a second test." The deputy stated that appellant told him "that he had not been able to have a second test; that he wanted to use the telephone to call his wife again." Appellant's wife went to the jail

and asked more than once to see appellant, but was told that his processing was not complete. The court found that appellant then called his wife and that it was clear from the phone calls that he "did not request that his wife *continue in her efforts to get a second test*." The record shows that appellant wanted his wife to go to the jail to collect the sample for the second test. Appellant's wife was not permitted to collect the sample for the second test; thus, appellant was denied his right to a second independent test administered by the person of his choosing. Therefore, we reverse appellant's conviction of boating with an alcohol concentration of more than .08. However, it is not clear from the record what the parties intended as to the disposition of the impaired charge and because our determination on the .08 charge does not negate a conviction on the impairment charge, we remand to the district court for a determination on the charge.[1]

Reversed and remanded; motion denied.

[1] Following oral argument, appellant submitted supplemental authorities, pursuant to Minn. R. Civ. App. P. 128.05. Respondent sent a letter requesting that this court strike the citations to supplemental authorities. Because the citations to supplemental authorities do not violate the no-argument prohibition in rule 128.05, respondent's motion is denied.