STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1113

State of Minnesota,
Appellant,

vs.

Nathan Willard Schuck,
Respondent.

Filed January 20, 2009
Reversed and remanded
Crippen, Judge*

Hennepin County District Court
File No. 27-CR-08-7179

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

Anna Krause Crabb, Minnetonka Prosecuting Attorney, 14600 Minnetonka Boulevard, Minnetonka, MN 55345 (for appellant)

Scott A. Lewis, 225 Commerce at the Crossings, 250 Second Avenue South, Minneapolis, MN 55401; and

Mark D. Nyvold, Suite W-1610, 332 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Johnson, Judge; and Crippen, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

This appeal is premised on the state's claim that respondent was given a reasonable opportunity to consult with an attorney. The district court disagreed, suppressed respondent's alcohol breath test results, and dismissed two DWI charges. Because respondent's good-faith effort to contact counsel had ceased before he was asked to submit to testing, we reverse.

FACTS

On February 7, 2008, Minnetonka Police Officer Steve Paschke stopped and arrested respondent Nathan Schuck for driving while under the influence of alcohol and transported him to police headquarters. At 12:17 a.m. on February 8, Paschke read the implied consent advisory to respondent, informing him of his obligation to take an alcohol-concentration test. Respondent indicated that he wanted to speak to an attorney before deciding whether to take the test, and he was provided access to a phone and phone books. Respondent was told that he had a "reasonable period of time" to contact an attorney and that if he was unable to reach an attorney, he would need to decide whether to take the test on his own.

Over the next 20 minutes, respondent tried to contact two specific attorneys whose phone numbers he knew or obtained, and made several other calls to get additional numbers for the attorneys. Despite his efforts, he was unable to reach an attorney. Paschke advised respondent to continue making a "constructive effort" to make calls until he reached an attorney, instead of using time to wait for return calls, and told respondent

that if he could not reach a specific attorney, he needed to call someone else. Paschke noted that the phone books listed attorneys with "twenty-four-hour numbers that . . . can give advice." Respondent later testified that he did not call other attorneys because he only wanted to reach an attorney he knew.

Respondent completed his last phone call and stated, "I keep getting voice mail. Let's proceed." Respondent then explained that he still wished to consult an attorney but could not reach one. Paschke again explained that if respondent could not reach an attorney he knew, he needed to try another attorney or make the decision regarding the test on his own. Respondent told Paschke that he understood his situation but that, because he only wanted to contact someone he knew, could not reach anyone he knew, and did not know anyone else, he would proceed with the breath test. Respondent reiterated that he was "done trying to contact [his] attorneys" and that he would take the breath test. Paschke proceeded to test respondent, and the results led to two DWI charges under Minn. Stat. § 169A.20, subd. 1(1), (5) (2006).

Respondent moved to suppress the test results, and at a subsequent hearing he testified that he said only that he was done calling because he felt that he was running into a time limit, that he heard Paschke explain that he was losing his patience with him, and that he felt rushed. Paschke disagreed with this characterization, testifying that the process ran smoothly and without rush and that if respondent had wanted additional time to reach an attorney, he would have allowed him to do so. The court granted respondent's motion, holding that his right to pre-testing counsel was impeded, and the court dismissed both charges against him.

D E C I S I O N

When the state appeals a pretrial suppression order, it "must clearly and unequivocally show both that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *See State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quoting *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995)). Because critical impact is not disputed, the only issue is whether the order constituted error. Under Article 1, Section 6, of the Minnesota Constitution, drivers have the right, "upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). This pre-testing right to counsel is limited and considered vindicated when the driver is provided with a telephone prior to testing and given a reasonable amount of time to contact and consult with an attorney. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

Where, as here, the facts are not disputed, we independently review the facts and determine, as a matter of law, whether respondent's right to counsel was vindicated. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996); *Kuhn*, 488 N.W.2d at 841-42 (defining the issue as whether respondent "was accorded a reasonable opportunity to consult with counsel").

Whether a driver has been given a reasonable time cannot be based on elapsed minutes alone or determined by applying a definite set of factors. *Kuhn*, 488 N.W.2d at 842. In making this determination, we examine the totality of the circumstances, *Parsons*

v. Comm'r of Pub. Safety, 488 N.W.2d 500, 502 (Minn. App. 1992), and recognize that the legislature did not intend to protect drivers who are too confused or too intoxicated to exercise their rights. *Gergen*, 548 N.W.2d at 310.

When considering the issue, we balance the efforts made by the driver against the efforts made by the officer. *Kuhn*, 488 N.W.2d at 842 (stating that the court's focus is "both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of the right"); *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 809 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999) ("[T]he driver must make a diligent effort to contact an attorney."). The threshold factor is whether the driver's effort was sincere and made in good faith. *Gergen*, 548 N.W.2d at 310.

It is undisputed that Paschke provided respondent a telephone and phone books and informed him that he had a reasonable time to call an attorney, and respondent unsuccessfully tried for 20 minutes to reach an attorney he knew, resisted advice regarding contacting other attorneys, and then chose to proceed by taking the breath test. The dispute is whether Paschke made statements during this time that unduly pressured respondent to forego his reasonable opportunity to contact an attorney and consent to testing.

The district court noted that respondent expressed angst over his failure to reach his attorneys, and, when respondent asked Paschke about the time allowed for making calls, the officer's responses never specified an amount of time but instead informed respondent that he should continue making a "constructive effort" to contact an attorney. Such comments, according to the district court, impeded respondent's right to pre-

counsel testing. In light of respondent's inability to reach an attorney of his choosing, it is evident that the statements may have increased his level of urgency, sense of futility, or embarrassment, but the officer accurately characterized the rule found in *Kuhn*, *Linde*, and *Gergen* that requires a driver to make a diligent and good-faith effort to reach an attorney. The statements were appropriate for the situation and did not impede respondent's right or ability to use the phone to call an attorney.[1]

Because respondent refused to contact other attorneys, there is also merit in appellant's contention that respondent abandoned his good-faith effort to do so. A driver does not have a right to counsel with the attorney of his choice when that attorney is not available. *Linde*, 586 N.W.2d at 810. In *Linde*, we held that the driver was solely to blame for his failure to contact an attorney when he could not reach his attorney and repeatedly refused to contact local counsel. *Id.* In another case, we stated that "refusing to try to contact more than one attorney or giving up trying to contact an attorney is fundamentally different from making a continued good-faith effort to reach an attorney." *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 345 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996) (quotation and footnote omitted). We also stated that "an officer must be allowed to reasonably determine that the driver has had enough time." *Id.*

After respondent failed to reach attorneys he knew, he made numerous statements uniformly tending to show that he had no more calls to make, that he wanted to talk to a

[1] The district court also expressed concern that by telling respondent to continue making phone calls instead of waiting for return calls, the officer could have caused him to miss calls. But there is no evidence permitting the inference that respondent requested return calls, that he otherwise expected any to come to the police station, or that any return calls were not brought to his attention.

lawyer he knew and knew of no more to call, that he was done, and that testing should proceed. Paschke properly and repeatedly advised respondent to call other lawyers, showing him a list of lawyers who have 24-hour numbers. Respondent's arguments on appeal, which address the apparent pressure that he felt to make a decision, do not confront the absence of any evidence that he had any plans for additional calls. This record does not support the conclusion that respondent maintained a good-faith effort to contact an attorney.

After failing to reach an attorney he knew, respondent neither asked to contact another attorney nor requested additional time from the officer. Respondent's decision to take the test did not result from undue pressure by Officer Paschke, who met his obligation to respondent and vindicated respondent's limited right to counsel by providing a telephone, directory, and a reasonable amount of time to make contact with an attorney. Because respondent was not denied a reasonable opportunity to consult with an attorney, we reverse the suppression of the test results, and, because suppression of the test results was the sole basis for the dismissal of both DWI charges, we reverse the dismissal of both DWI charges.

Reversed and remanded.