STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0973

State of Minnesota,
Respondent,

vs.

Ronald William Beattie,
Appellant.

Filed June 23, 2009
Reversed
Lansing, Judge

Crow Wing County District Court
File No. 18-K2-06-002236

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

Matthew R. Mallie, Brainerd City Prosecutor, 510 Norwood Street, Brainerd, MN 56401 (for respondent)

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

Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

LANSING, Judge

Ronald Beattie appeals from his conviction of second-degree test refusal. He argues that the arresting officer violated his right to counsel because he did not allow Beattie a reasonable time to contact an attorney before asking him to submit to a chemical test. Because the officer allowed Beattie only six minutes to contact an attorney and the record fails to establish that Beattie had ended his good-faith and sincere effort to contact an attorney, we conclude that Beattie's right to counsel was not vindicated and we reverse.

F A C T S

A Brainerd police officer arrested Ronald Beattie for driving while impaired in the early morning hours of August 12, 2006. The officer took Beattie to the Crow Wing County Jail, where he read Beattie the implied-consent advisory and provided him with a telephone and telephone directories. Within five minutes Beattie had made at least two calls and left messages. A minute later the officer asked him to submit to a breath test. Beattie refused. The commissioner of public safety revoked Beattie's license, and the state charged Beattie with second-degree test refusal under Minn. Stat. §§ 169A.20, subd. 2, .25, subds. 1, 2 (2006).

Beattie petitioned the district court for review of his license revocation. *See* Minn. Stat. § 169A.53, subd. 2 (2006) (setting forth procedure for seeking judicial review). He requested review of the probable cause for his arrest and argued he had been denied a reasonable opportunity to consult with an attorney about the breath-test refusal.

At the implied-consent hearing, the arresting officer testified to the circumstances of the arrest and the implied-consent procedures. He said that he was dispatched to investigate a hit-and-run accident at about 1:55 a.m. on August 12; that he spotted a car that matched the description of the one that had fled from the accident; and that he stopped and questioned a man, later identified as Beattie, who was inspecting the car. The officer said that, based on the investigatory questioning, he arrested Beattie and drove him to the jail; that he read the implied-consent advisory to Beattie twice to make sure he understood; that he provided Beattie with a telephone and telephone directories at about 2:36 a.m.; that Beattie made a phone call and left a message; that the officer then asked Beattie if he "wished to call anybody else" and Beattie responded that "[h]e did not"; that the officer then asked Beattie if he would submit to a breath test; and that Beattie refused to take the test.

Beattie submitted a video recording of the implied-consent procedures at the jail. The video corroborated most of the officer's testimony and also confirmed that Beattie placed at least two calls; that, in leaving a message for one attorney, Beattie stated that he was at the Crow Wing County Jail and left the address for the jail; that Beattie stopped making his calls about five minutes after he was given the telephone directories; and that the officer asked Beattie if he would submit to a breath test about a minute later, six minutes after the officer gave Beattie the telephone directories.

At the conclusion of the implied-consent hearing, the district court asked Beattie and the state to submit their arguments in the form of written memoranda. The commissioner failed to submit a memorandum. The district court deemed the

commissioner "to have conceded the issues" and rescinded the revocation of Beattie's license.

After the district court rescinded the license revocation, Beattie moved to dismiss the criminal charge for second-degree test refusal. He argued that the arresting officer lacked probable cause to believe Beattie drove while impaired and that the officer had violated his right to counsel. At an omnibus hearing, the state and Beattie stipulated that the district court should rely on the record from the implied-consent proceedings to decide the pretrial motion. The district court denied Beattie's motion to dismiss. Beattie then agreed to submit the case under the procedure provided in *State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980), preserving his right to challenge the pretrial ruling. The district court found Beattie guilty of second-degree test refusal.

Beattie appeals from the conviction, primarily arguing that the district court erred when it determined that his right to counsel was vindicated.

D E C I S I O N

Under the Minnesota Constitution, a person who has been arrested for driving while impaired has a right to consult with an attorney before submitting to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). But, because of the "evanescent nature" of the evidence obtained through chemical testing, the arrestee's right is limited. *Id.* After giving the arrestee "a reasonable time to contact and talk with [an attorney]," an officer can require him to make the testing decision "in the absence of counsel." *Id.* If an officer violates the arrestee's right to counsel, the arrestee cannot be bound by his decision to refuse the test because "he might have otherwise

made [the decision] differently." *See Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992) (upholding rescission of license revocation based on violation of right to counsel), *review denied* (Minn. Oct. 20, 1992). If violation of this right is fatal to a license revocation, the violation also requires dismissal of a criminal charge for test refusal because the criminal implications of testing is the reason for the right in the implied-consent setting. *Friedman*, 473 N.W.2d at 832-34.

Beattie contends that the arresting officer violated his right to counsel because he did not allow Beattie a reasonable amount of time to contact an attorney before asking him to submit to a chemical test. When the facts are undisputed, the issue of whether an arrestee was allowed a reasonable time to contact an attorney is a legal question that we review de novo. *Kuhn*, 488 N.W.2d at 842.

Minnesota courts have declined to identify a set period of time—such as twenty or thirty minutes—that would always qualify as a reasonable amount of time to contact an attorney. *Id.* Instead, we consider the totality of the circumstances, including the purpose of the right to counsel and the nature of the proceedings. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). As a threshold issue, we evaluate whether the arrestee was still making a good-faith and sincere effort to contact an attorney when asked to submit to the test. *Kuhn*, 488 N.W.2d at 842. The caselaw supports the concept that sincere efforts may entail waiting for an attorney to become available or to return one's call. *See id.* at 839 (rescinding revocation when arrestee made only three attempts to call an attorney during a period of twenty-four minutes). At the same time, the law does not require an officer to allow the arrestee to "wait

indefinitely for a call that may never come." *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 345 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). If the arrestee has ended his good-faith and sincere effort to contact an attorney, an officer may ask him to make the testing decision without violating his right to counsel. *See Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008) (holding that three minutes was reasonable period of time when arrestee had "ended any good-faith effort to contact an attorney").

In considering whether the officer has interfered with the arrestee's ongoing good-faith effort, courts take into account factors that include whether the time of the call makes it more difficult for the arrestee to contact an attorney and whether allowing the arrestee additional time affects the probative value of the test results. *Kuhn*, 488 N.W.2d at 841-42. In *Kuhn*, we held that having only twenty-four minutes to contact counsel violated an arrestee's right because the record did not show a lack of good-faith effort, the arrest occurred in the early-morning hours, and less than one hour had elapsed since the arrest. *Id.* at 842.

The facts relating to the administration of the implied-consent procedures for Beattie are similar to the facts in *Kuhn*. It is undisputed that Beattie's attempt to contact an attorney occurred in the early morning hours; that less than one hour passed between the time of the arrest and the officer's request that Beattie submit to a chemical test; and that the officer allowed Beattie only six minutes to contact an attorney after providing him with a telephone and telephone directories. Thus, similar to *Kuhn*, the issue presented is whether, under the threshold factor, Beattie ended his good-faith and sincere

effort to contact an attorney before the officer asked him to submit to the chemical test. *See id.* (highlighting officer's duty to vindicate right and arrestee's diligent exercise of it).

The state does not dispute that Beattie spent five minutes looking up numbers and making phone calls and that he left at least one message for an attorney explaining that he was at the Crow Wing County Jail and giving the address for the jail. These actions demonstrate a good-faith and sincere effort to make contact with an attorney, which would then necessitate allowing a reasonable time for an attorney to return Beattie's call. *See Palme*, 541 N.W.2d at 342, 345 (holding that arrestee's right to counsel was vindicated when officer allowed arrestee to wait nineteen minutes after leaving message for attorney to call him back).

The state and the district court, however, rely on Beattie's statement, when asked "if he wished to call anybody else," that "[h]e did not" and the fact that Beattie did not affirmatively ask for more time to wait for his attorney to call him back. In these circumstances, however, the response that he did not intend to call anyone else and the failure to initiate a request for additional time does not establish that Beattie's right to counsel was vindicated.

Beattie's statement that he did not wish to call anybody else did not show that he had ended his effort because it does not take into account that he had left two messages and could reasonably be waiting to see if he received a call back within a reasonable amount of time before making other calls. And Beattie's failure to inform the officer that he wanted to wait for a return call is unreliable as an indicator because—when only one minute had passed since he stopped leaving messages and only six minutes had passed

since he received the telephone directories—it is reasonable to assume that the officer would know that Beattie was waiting to see if he would receive phone calls in response to the messages he left. Beattie's exercise of his right was sufficiently diligent to trigger the officer's duty to help vindicate it. *Kuhn*, 488 N.W.2d at 842.

For these reasons we conclude that Beattie's right to counsel was not vindicated, and we reverse. We, therefore, decline to reach the second issue raised by Beattie—that the arresting officer lacked probable cause to believe Beattie had driven while impaired.

Reversed.