STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1342

State of Minnesota,
Respondent,

vs.

Sun Yong Kish,
Appellant.

Filed August 11, 2009
Affirmed in part, reversed in part, and remanded
Minge, Judge

Ramsey County District Court
File No. 62-K5-06-601420

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-3421; and

Katrina E. Joseph, Martin J. Costello, Hughes & Costello, 1230 Landmark Towers, 345 St. Peter Street, St. Paul, MN 55102-1637 (for respondent)

Peter J. Timmons, 700 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431 (for appellant)

Considered and decided by Worke, Presiding Judge; Minge, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MINGE, Judge

Appellant challenges her conviction of driving while impaired (DWI), arguing that (1) the district court erred in denying her motion to suppress evidence on the grounds that she was not provided an interpreter and that her statutory right to counsel was violated; and (2) the district court erred in denying her discovery request for the Intoxilyzer source code. Because we conclude that the district court did not clearly err in determining that appellant is not a person disabled in communication and that appellant unequivocally waived her statutory right to counsel, we affirm those rulings. Because we conclude that the district court erred in denying appellant's discovery request, we reverse in part, and remand.

FACTS

On November 30, 2006, St. Anthony Police Officer Jeremy Sroga observed appellant Sun Yong Kish operating a motor vehicle without headlights or running lights. Officer Sroga stopped appellant and noted that she smelled of alcohol. After failing the field sobriety tests, appellant was arrested for DWI, taken to the police station, read the implied-consent advisory, and given the Intoxilyzer breath test. The results indicated that appellant had a .15 alcohol concentration, and she was charged with a DWI offense.

A hearing was held on appellant's motions to (1) suppress evidence on the grounds that appellant was not provided with an interpreter; and (2) compel the disclosure of the Intoxilyzer source code. The district court heard testimony and

reviewed the electronic recording of the implied-consent procedure, written arguments, and affidavits regarding the source code.

Because the district court found that appellant speaks and understands English, it concluded appellant is not a "person disabled in communication." The district court denied both the suppression motion and appellant's request for the Intoxilyzer source code and found appellant guilty. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred in denying appellant's motion to suppress statements and breath-test results because she was not provided an interpreter at the police station. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). But we accept the district court's findings of fact regarding a motion to suppress unless they are clearly erroneous. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

Appellant argues that the district court erred in concluding that she is not a person disabled in communication. To protect or facilitate the exercise of constitutional rights, it is the express policy in Minnesota to provide persons "disabled in communications" with a qualified interpreter. Minn. Stat. §§ 611.30-.34 (2006). A person is disabled in communications when

> (a) because of a hearing, speech or other communication disorder, or (b) because of difficulty in speaking or comprehending the English language, [the person] cannot fully understand the proceedings or any charges made against the person, or the seizure of the person's property, or is incapable of presenting or assisting in the presentation of a defense.

Minn. Stat. § 611.31. Under the controlling statutes, an interpreter must be appointed when persons disabled in communications are arrested. Minn. Stat. § 611.32.

Appellant argues that reversal is required because she was not provided with a Korean language interpreter at the police station at the time of the implied-consent advisory. Appellant cites *State v. Farrah*, 735 N.W.2d 336 (Minn. 2007) to support her argument that the lack of an interpreter compels reversal because, without an interpreter, appellant could not knowingly and intelligently waive her rights. However, the threshold question is whether appellant is a person disabled in communication under the statute.

In *Farrah*, the supreme court held that the defendant was a person disabled in communication and that the state failed to demonstrate that the defendant waived his *Miranda* rights when the defendant was not provided a qualified interpreter at his interrogation. *Id.* at 342-43. The court noted the record clearly demonstrated that the interrogating officer failed to notice that the defendant invoked his right to counsel because the officer could not understand the defendant's poor English language skills. *Id*. at 342. In *Farrah*, the district court failed to make any specific finding regarding the defendant's language skills. *Id.* The supreme court concluded that, although the officer felt he and the defendant understood each other, the officer

> admitted to repeating or explaining questions when Farrah had trouble understanding, the interrogation itself reflected the officer's and Farrah's problems in communication, there was other evidence that Farrah did not comprehend English all that well, and Farrah was provided language-interpreter services for the medical evaluations as well as for trial.

Id. at 343.

Here, the district court made specific findings and concluded, after hearing testimony from the arresting officer and reviewing the electronic recording of the implied-consent proceedings, that appellant was not a person disabled in communication. The findings included that (1) the arresting officer was able to communicate with appellant in English at the time of the arrest and field sobriety testing, in the squad car, and at the police station; (2) the testimony and the electronic recording showed that appellant understood English; (3) appellant never requested an interpreter; (4) appellant never indicated that she did not understand English; and (5) the electronic recording from the Intoxilyzer room indicated that any difficulty in communication was attributable to appellant's acute intoxication.

We accept the district court's findings of facts unless they are clearly erroneous. Appellant argues that the district court's findings are clearly erroneous in light of the evidence presented at trial. We recognize that there was testimony that appellant appeared confused at times, that appellant spoke with an accent, that it was clear that appellant's first language was not English, and that the recording of the efforts by the officer to give the implied-consent advisory—especially the right to counsel portion—indicate substantial confusion. However, these facts alone do not compel the legal

conclusion that appellant did not understand English or was a person disabled in communication. *See State v. Kail*, 760 N.W.2d 16, 20 (Minn. App. 2009) (holding no interpreter required for a deaf DWI arrestee when the record reflected no breakdown in communication or a misunderstanding occasioned by the arrestee's disability), *review dismissed* (May 7, 2009); *State v. Perez*, 404 N.W.2d 834, 839 (Minn. App. 1987) (holding that an arresting officer needs more than a defendant's nationality in order to determine that a defendant does not understand English to the degree that defendant is disabled in communication), *review denied* (Minn. May 20, 1987).

The record indicates that the officer had substantial experience dealing with people with language difficulties and with people who were intoxicated. He testified that he concluded that appellant's problems in following directions and communication were caused by her intoxication. This appellate court is not in a position to second-guess the district court's finding on this question. The fact that appellant was provided an interpreter for the remaining court proceedings is not dispositive. *See Perez*, 404 N.W.2d at 837. Further, we note that there was no testimony from appellant or anyone else about her English language skills. A claim of language difficulty without such evidence in the record provides little basis for us to reverse a district court's factual determination.

Based on the record, we conclude that the district court's findings, which have already been set forth in this opinion, are not clearly erroneous. Accordingly, we affirm the district court's legal conclusion that appellant was not a person disabled in communication.

II.

The second issue is whether the district court erred in denying appellant's motion to suppress her statements and breath test on the grounds that her statutory right to counsel was violated. When facts are undisputed, this court reviews de novo whether a defendant's right to counsel was violated. *State v. Christiansen*, 515 N.W.2d 110, 112 (Minn. App. 1994), *review denied* (Minn. June 15, 1994).

Under the Minnesota Constitution, DWI arrestees have the limited right to consult with counsel before deciding whether to comply with the statutory requirement of implied-consent testing. Minn. Const. art. I, § 6; *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 902 (Minn. 1994) (citing *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 837 (Minn. 1991)). If a DWI arrestee makes an equivocal or ambiguous request to consult with an attorney, the officer has a duty to clarify that request or provide the arrestee with an opportunity to contact an attorney. *State v. Slette*, 585 N.W.2d 407, 410 (Minn. App. 1998); *see State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988) (holding that "when a suspect indicates by an equivocal or ambiguous statement, which is subject to a construction that the accused is requesting counsel, all further questioning must stop except that narrow questions designed to 'clarify' the accused's true desires respecting counsel may continue").

According to the implied-consent-advisory form, in response to the question "Do you wish to consult with an attorney?" appellant responded "no" and "that's okay." Although the video recording of the implied-consent procedure discloses that appellant is initially confused, after repeating the question, appellant indicates that she did not wish to

consult an attorney but instead wanted to take the breath test. Appellant argues that her response was equivocal at best. However, it is difficult to understand how her response of "no" and "that's okay" could be perceived as anything other than that she did not wish to consult an attorney.

Finally, appellant argues that her request to contact her sister was the equivalent of the invocation of the right to consult an attorney and cites *Clogh v. Comm'r of Pub. Safety*, 360 N.W.2d 428, 429-30 (Minn. App. 1985) for the proposition that an arrestee may consult a non-attorney for the purpose of seeking assistance in obtaining an attorney. However, in *Clogh*, the DWI arrestee requested to call his parents specifically for the purpose of obtaining attorney-contact information. *Id.*; *see also State v. Karau*, 496 N.W.2d 416, 418 (Minn. App. 1993) (holding right to counsel violated when DWI arrestee denied an opportunity to call parents for the purpose of obtaining attorney-contact information). There is nothing in the record that indicates that appellant wished to call her sister to obtain attorney-contact information. Instead, the record reflects that appellant communicated that she did not wish to contact an attorney before submitting to the test.

We conclude that the district court did not err in denying appellant's motion to suppress statements due to an alleged violation of appellant's statutory right to counsel.

III.

The third issue is whether the district court erred in denying appellant's motion to compel discovery of the Intoxilyzer 5000EN source code. Under Minn. R. Crim. P. 9.01, subd. 2(3), a district court may require a prosecuting attorney to disclose the source code

for the Model 5000EN Intoxilyzer if defense counsel makes a showing that "the information may relate to the guilt or innocence of the defendant." *See State v. Underdahl*, __ N.W.2d __, 2009 WL 1150093, *6 (Minn. Apr. 30, 2009) *(Underdahl II)*. In *Underdahl II*, the supreme court indicated that, under rule 9, it is sufficient if the DWI defendant demonstrates that the source code *could be related* to his defense or that the source code is *reasonably likely* to contain information related to the case. *Id.* at *7. The material found sufficient included "source code definitions, written testimony of a computer science professor that explained issues surrounding the source codes and their disclosure, and an example of a breath-test machine analysis and its potential defects." *Id*. at *8.[1]

While appellant's submissions in support of his motion are not as extensive as those found sufficient in *Underdahl II*, appellant has submitted substantially similar material. Appellant submitted a partial implied-consent transcript concerning the examination of David Edin, a Bureau of Criminal Apprehension expert, and an affidavit by Thomas Burr, a recognized Intoxilyzer expert in Minnesota. These materials meet the limited showing necessary to demonstrate "that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to [his] guilt or innocence." *Id.* at *8.

[1] Because *Underwood II* was decided after the district court proceeding in this case, its application is first addressed in this appeal.

In light of the recent supreme court decision in *Underdahl II*, we reverse the district court's denial of appellant's request for discovery of the Intoxilyzer source code, reverse appellant's conviction, and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.

Dated: