STATE OF MINNESOTA
IN COURT OF APPEALS
A09-943

State of Minnesota,
Respondent,

vs.

David Fredrick Wagner,
Appellant.

Filed July 20, 2010
Affirmed
Wright, Judge
Dissenting
Ross, Judge

Hennepin County District Court
File No. 27-CR-08-54910

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of first-degree test refusal and fleeing a police officer in a motor vehicle, arguing that (1) he was denied adequate time to consult an attorney before deciding whether to submit to chemical testing and (2) the prosecutor exercised a peremptory challenge to remove the only African American prospective juror in violation of the constitutional right to equal protection. We affirm.

FACTS

Plymouth Police Officer Amy Therkelsen was on a late-night patrol in October 2008 when she observed a vehicle driven by appellant David Wagner cross the fog line two times and swerve between lanes without signaling. After Officer Therkelsen activated the emergency lights on the squad car, Wagner accelerated, entered a cloverleaf interchange, stopped the vehicle, and fled on foot. Wagner evaded police until another officer later captured him.

Wagner was arrested and brought to the police station where he failed field sobriety tests and produced a preliminary breath test result of .092 alcohol concentration. Officer Therkelsen then took Wagner to an interview room for a 15-minute observation period. Officer Therkelsen read Wagner the implied-consent advisory, and he requested to consult with an attorney. After providing Wagner a telephone and several telephone books, Officer Therkelsen left the area. Wagner had access to the telephone from 2:16 a.m. to 2:32 a.m. When she returned, Officer Therkelsen asked Wagner if he would submit to a breath test. Wagner informed her that he was trying to dial a friend's long-

distance telephone number to obtain the telephone number for his attorney. Long-distance telephone calls from the police station can be made only after entering a four-digit code. With Officer Therkelsen's assistance, Wagner attempted four or five times to place the call using the long-distance code. Each attempt resulted in a message that the call could not be completed as dialed. Officer Therkelsen concluded that Wagner had received ample time to contact an attorney and that additional time should not be given. Officer Therkelsen again asked Wagner if he would submit to a breath test. But "all he would tell [her]" is that he would like to speak to an attorney. Officer Therkelsen considered Wagner's nonresponsive answer a refusal.

The state charged Wagner with first-degree driving while impaired, a violation of Minn. Stat. § 169A.24, subd. 1 (2008); first-degree test refusal, a violation of Minn. Stat. § 169A.20, subd. 2 (2008); and fleeing a police officer in a motor vehicle, a violation of Minn. Stat. § 609.487, subd. 3 (2008). Wagner moved the district court to dismiss the test-refusal charge, arguing that the right to counsel had not been vindicated because he was denied an adequate opportunity to contact an attorney. Following a hearing on the motion to dismiss, the district court denied the motion.

The case proceeded to trial. During jury selection, the prosecutor exercised a peremptory challenge to remove the only African-American prospective juror. Wagner objected pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), arguing that the prosecutor's peremptory challenge was racially discriminatory. The district court overruled the objection. A jury returned a not-guilty verdict on the charge of first-degree

driving while impaired and guilty verdicts on the charges of first-degree test refusal and fleeing a police officer in a motor vehicle. This appeal followed.

D E C I S I O N

I.

Whether a driver's limited right to counsel has been vindicated presents a mixed question of law and fact. *State v. Collins*, 655 N.W.2d 652, 656 (Minn. App. 2003). When, as here, the facts are not in dispute, we make an independent legal determination of whether the defendant was given a reasonable opportunity to consult an attorney. *Id.*

The Minnesota Constitution provides drivers with a reasonable opportunity to consult an attorney before deciding whether to submit to chemical testing. Minn. Const. art. I, § 6; *State v. Melde*, 725 N.W.2d 99, 104 (Minn. 2006) (citing *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 837 (Minn. 1991)). Because of the evanescent nature of the evidence, "this right is limited to the extent that it cannot unreasonably delay administration of the test." Minn. Stat. § 169A.51, subd. 2(4) (2008); *Friedman*, 473 N.W.2d at 835. A driver's right to counsel is vindicated if police provide a telephone and a reasonable amount of time to contact and speak with counsel prior to testing. *Friedman*, 473 N.W.2d at 835. "A reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). If a driver cannot reach counsel within a reasonable amount of time, the driver may be required to decide whether to submit to chemical testing without the advice of counsel. *Friedman*, 473 N.W.2d at 835.

Wagner argues that Officer Therkelsen did not provide a reasonable amount of time to contact an attorney. Whether a driver had a reasonable opportunity to consult an attorney is determined from the totality of the circumstances. *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). Both an officer's duties in vindicating a driver's right to counsel and the driver's diligence in exercising that right are relevant considerations. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). "[A]s a threshold matter the driver must make a good faith and sincere effort to reach an attorney." *Id.* The time of day that the driver attempts to contact an attorney also is a relevant factor. *Id.* And because of the evanescent nature of the evidence, the length of time the defendant has been under arrest is a relevant consideration. *Id.*

Wagner argues that each of these factors weighs in favor of concluding that his right to counsel was not vindicated. There is no dispute that Wagner's attempt to contact an attorney occurred in the early morning hours, and this fact weighs in favor of Wagner's argument. But Wagner's other claims, that he made a good-faith effort and that a further delay in testing would not have rendered the chemical test less probative, are not supported by the record.

Wagner asserts that nothing in the record indicates that he failed to make a good-faith effort to contact an attorney. But he does not claim that he attempted to place any calls other than the long-distance calls to a friend from whom he hoped to secure an attorney's telephone number. Officer Therkelsen was not in the room for the entire time that Wagner had access to the telephone and telephone books. But the record establishes

that, during the time that Officer Therkelsen was with Wagner, he did not attempt to call other attorneys. Rather, he repeatedly dialed a wrong number for his friend. Nothing about Wagner's conduct or his assertions indicates that he was willing to take any action other than dialing this wrong number. "[R]efusing to try to contact more than one attorney or giving up trying to contact an attorney is fundamentally different than making a continued good-faith effort to reach an attorney." *Id.* at 841. It is not the officer's duty to ask a driver to try another number when the driver's initial effort fails. *See Saxton v. Comm'r of Pub. Safety*, 355 N.W.2d 769, 771 (Minn. App. 1984) (stating that officer was not obligated to suggest calling a specific attorney when driver was unable to reach an attorney and sought officer's advice).

Indeed, Officer Therkelsen ended Wagner's telephone access after only 15 minutes; but this length of time is not material when the driver fails to make a good-faith effort to contact an attorney. *See Mell*, 757 N.W.2d at 713. In *Mell*, we rejected the driver's argument that *three* minutes was not a reasonable length of time to vindicate the right to counsel when, after that short period, the driver ended his diligent effort to contact an attorney. *Id.* The *Mell* court concluded that the officer "vindicated appellant's right to counsel by providing a telephone, directory, and time to make contact with an attorney." *Id.* Wagner's failure to pursue an alternative course of conduct when the futility of his efforts to reach his friend was apparent leads us to conclude that Wagner did not make a good-faith and sincere effort to reach an attorney.

We do not know whether Officer Therkelsen was concerned that further delay would allow Wagner's blood-alcohol concentration to fall below the legal limit because

the issue was not addressed at the hearing. But such a concern would have been reasonable under the circumstances. Wagner fled police after Officer Therkelsen initiated the traffic stop and before the preliminary breath test was administered. Approximately 30 minutes elapsed between the preliminary breath test and the final request to submit to chemical testing. Although this was not a lengthy period of time, Wagner's preliminary breath test indicated an alcohol concentration of only .092. *See Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992) ("[A]lcohol in the blood stream dissipates at an average of .015 percent per hour."). The short length of time that Wagner was under arrest does not weigh in favor of Wagner's position as he argues. Rather, permitting Wagner to continue his futile conduct would constitute an unreasonable delay.

Wagner next asserts that his test-refusal conviction must be reversed because Officer Therkelsen did not testify that she told Wagner his time to contact an attorney was over. Before charging a driver with test refusal, an officer must give the driver notice that the search for an attorney is over and "clearly offer the driver one final opportunity to make an uncounselled decision regarding testing." *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 810 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). But neither the prosecutor nor defense counsel asked Officer Therkelsen whether she advised Wagner that his time had expired. And this argument was not raised and addressed in the district court.

The prosecutor asked Officer Therkelsen the following line of questions about her final request:

> Q: And do you remember about how long you gave the defendant before you asked him again to take the test for the second or third time?
> A: It was a total of about 15 minutes.
> Q: Okay. And so do you feel that you gave the defendant ample time to contact an attorney?
> A: Yes.
> Q: And, after that, did you ask the defendant would he submit to a breath sample?
> A: Yes.
> Q: And what did he say?
> A: He said he would like to speak to an attorney.
> Q: So did he refuse?
> A: That's all he would tell me.

In *Linde*, we held that the officer's final question—asking whether the appellant would submit to testing—gave the appellant notice that his time had expired and that he had a final opportunity to make a testing decision, even if such notice was "rather indirect." *Id.* Likewise, albeit indirectly, Officer Therkelsen's final request for a breath sample notified Wagner that he was out of time and gave him a final opportunity to make an uncounselled decision.

Wagner did not exercise any alternatives after learning that his friend could not be reached using the phone number he repeatedly dialed, he did not use the telephone books provided him to contact an attorney, and he did not request the opportunity to try a different course of action after the officer made her final request for a breath sample. On these facts, we conclude that Wagner's limited right to counsel was vindicated.

II.

Wagner next argues that, because the prosecutor's exercise of a peremptory challenge against the only African-American prospective juror was racially motivated,

the district court erred by overruling his objection. We review a *Batson* challenge for clear error, and the district court's ruling will not be disturbed unless it is not supported by the record or the applicable law. *State v. Reiners*, 664 N.W.2d 826, 830-31, 834 n.3 (Minn. 2003). The Equal Protection Clauses of the United States and Minnesota constitutions bar any party from exercising a peremptory strike on the basis of a prospective juror's race. *Batson*, 476 U.S. at 86, 106 S. Ct. at 1717; *State v. Taylor*, 650 N.W.2d 190, 201 & n.7 (Minn. 2002). *Batson* established a three-step process to determine whether a peremptory strike has been used to discriminate on the basis of race. 476 U.S. at 96-98, 106 S. Ct. at 1723. The opponent of the strike must make a prima facie showing that a peremptory strike was used for a discriminatory purpose. *Reiners*, 664 N.W.2d at 831. The burden then shifts to the proponent of the strike to offer a race-neutral explanation for the strike. *Id.* If a race-neutral explanation is given, the district court considers the parties' arguments and decides whether the opponent of the strike has proved that purposeful racial discrimination occurred. *Id.*

Unless discrimination is inherent in the proponent's explanation for the strike, we presume an absence of discriminatory intent. *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001). Thus, to prevail after a race-neutral explanation has been advanced in the second step of the process, the proponent of the *Batson* challenge must meet its burden of proving purposeful discrimination. *Id.*

That the prosecutor excluded a member of a racial minority group from the jury is undisputed. But Wagner, who is not a member of a racial minority group, failed to establish any circumstances that demonstrate prima facie evidence of discrimination.

"The state's use of a peremptory challenge to remove a member of a racial minority, alone, does not establish a prima facie case." *State v. Pendleton*, 725 N.W.2d 717, 726 (Minn. 2007); *see also State v. White*, 684 N.W.2d 500, 508 (Minn. 2004) ("Merely because a member of a racial group has been peremptorily excluded from the jury does not necessarily establish a prima facie showing of discrimination . . . .").

In rejecting Wagner's *Batson* challenge, the district court found that there were no "racial overtones to the case," and the prosecutor's questioning of the prospective juror did not deviate from that of the other jurors. Wagner does not challenge these findings on appeal. Rather, Wagner's argument is founded on his view that "there was nothing about [the prospective juror's] responses that indicated he would not be a favorable juror." In light of our legal standard, this argument is unavailing.

Based on our careful review of the record, the district court correctly determined that Wagner failed to make a prima facie showing that the prosecutor's use of the peremptory strike was discriminatory. The district court, therefore, did not err by overruling his *Batson* challenge.

Affirmed.

ROSS, Judge (dissenting)

I respectfully dissent from section I of the majority's opinion because I do not believe that the officer gave the detained driver a reasonable opportunity to reach an attorney.

The record establishes the following. Officer Therkelsen left the detained David Wagner alone with a telephone and several telephone directories but failed to inform him how to use the telephone to make a long-distance call. Wagner therefore could not call his out-of-town friend to obtain the number of his attorney, and he had to wait for the officer to return and enter a long-distance code. After the officer returned and entered the code allowing Wagner to telephone his friend, Wagner discovered that he had the wrong telephone number. After that point, the officer effectively withdrew her permission for Wagner to reach an attorney. The officer asked Wagner to submit to an alcohol concentration test and deemed his reasonable, responsive request to speak with an attorney as his refusal to be tested.

The constitution allows a detained driver a reasonable opportunity to consult with an attorney before the driver must decide whether to submit to chemical testing. Minn. Const. art. I, § 6; *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). I think that under the unusual circumstances here, the officer did not give Wagner a reasonable opportunity to consult with an attorney. In most circumstances, particularly those in which the detainee intends to call a local attorney, an officer's leaving the detainee for 15 minutes with a telephone and directory easily constitutes a reasonable opportunity to confer with an attorney.

But what constitutes a reasonable opportunity in most circumstances was not sufficient here. Because Wagner's access to his preferred attorney was through a long-distance friend and because Wagner could not dial long-distance numbers without the officer's assistance, the officer's leaving Wagner with the telephone for several minutes could not vindicate Wagner's right to a reasonable opportunity to consult with an attorney. And because Wagner was given no opportunity to consider making a call to a local attorney after he discovered that his long-distance contact information was incorrect, the presence of the telephone directory also did nothing to vindicate his right to consult with an attorney.

I recognize that the telephone was apparently operational to reach local numbers all along and that the directory would have given Wagner the contact information for a local attorney. And there is no reason to believe that Officer Therkelsen intentionally prevented Wagner from calling a local attorney. But I am sure that a reasonable detainee would first exhaust his means to contact his preferred attorney before resorting alternatively to a random name in a phone book. And I am also sure that he would expect to have been informed beforehand if the officer intended to deem him as having forfeited his opportunity to reach *any* attorney by trying unsuccessfully to reach his preferred attorney. It is unclear from the record what prevented the officer from offering Wagner the chance to call a random attorney after it became clear that he had the wrong number to reach his preferred attorney. Under these circumstances, I would hold that Wagner was denied a reasonable opportunity to reach an attorney.

Several cases inform my opinion. The first is *Kuhn v. Commissioner of Public Safety*. In *Kuhn*, even though police had given the detained driver a telephone, a telephone directory, and 24 minutes to attempt to reach an attorney, we held that police did not vindicate the detainee's right to consult with an attorney before having to decide whether to submit to alcohol testing. 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). And in *Kuhn*, "[t]he record contain[ed] no evidence as to why [the detained driver] was unable to contact an attorney" during the 24 minutes. *Id*. at 843 (Kalitowski, J., dissenting). This case presents an even stronger argument for a similar holding because we *do* know why Wagner was unable to contact an attorney during the 15 minutes before he was deemed to have refused the test, and the reasons do not suggest that Wagner was stalling or otherwise being less than diligent in his efforts: The telephone security system simply prevented Wagner from dialing out, and when that problem was resolved, it also became apparent that Wagner had the wrong telephone number to reach his preferred attorney.

The second case is *Friedman*, in which the supreme court reversed a license revocation upon deciding that "an individual has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." 473 N.W.2d at 835. *Friedman* is remarkably similar to this case in that after the driver had "request[ed] a consultation with her attorney, her confused response was deemed a refusal to take the test." *Id*. at 833.

And the third case that shapes my dissent is the earlier case of *Prideaux v. State, Department of Public Safety*. In *Prideaux*, although the supreme court addressed a

statutory right rather than a constitutional right, it followed constitutional-like principles and specifically declared that a detained driver has the right to consult with legal counsel "of his own choosing" and that police must assist in the vindication of that right. 310 Minn. 405, 421, 247 N.W.2d 385, 394 (1976). *Prideaux* establishes not only the reasonableness of Wagner's request but also his right to first attempt to reach the attorney "of his own choosing." And it highlights the gravity of the officer's unexplained interpretation of Wagner's second reply that "he would like to speak to *an* attorney" as a test refusal rather than what it appears to have actually been—a request for permission or assistance "to speak to *an* attorney."