STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1732

State of Minnesota,
Respondent,

vs.

Charles William Warren,
Appellant.

Filed August 10, 2010
Affirmed
Lansing, Judge

Wright County District Court
File No. 86-CR-08-582

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

Thomas N. Kelly, Wright County Attorney, Aaron D. Duis, Assistant County Attorney, Buffalo, Minnesota (for respondent)

Daniel L. Gerdts, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Lansing, Judge; and Stauber, Judge.

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

LANSING, Judge

In this appeal from conviction of third-degree test refusal, Charles Warren challenges the district court's decision that the arresting officer provided him a reasonable opportunity to consult with an attorney. Because the record demonstrates that Warren's right to counsel was vindicated, we affirm.

F A C T S

A Wright County deputy sheriff arrested Charles Warren for impaired driving shortly after 2:00 a.m. on January 21, 2008. The officer had observed Warren driving erratically on County Road 37 through Albertville and stopped him after Warren made a wide turn and repeatedly crossed the center line. A preliminary breath test indicated that Warren's alcohol concentration was .253, and the officer transported him to the Wright County Jail for further testing.

At the jail, the officer read Warren the implied-consent advisory. The advisory process and Warren's responses were recorded on audio tape. Warren was confrontational and uncooperative during the advisory and made irrelevant and sarcastic comments. When the officer asked if he understood the advisory, Warren said, "No." The officer twice repeated the advisory, and Warren twice more said he did not understand it, said the officer was a "good reader," and said that he would make the officer read the advisory "twenty times." He then said, "I just refuse to take the test."

Warren made similar responses to the officer's inquiry of whether Warren wanted to consult an attorney. He said "sure" and told the officer that he would sit there for two

days if it took that long to reach an attorney. The officer provided a phone and phone directories. Warren said that his lawyer's number was in his cell phone, which had been taken from him by the booking staff. The officer did not retrieve the cell phone from the booking staff but redirected Warren's attention to the phone and the directories that had been provided for him. Warren continued to make irrelevant comments on a series of unrelated subjects and did not pay any attention to the directories or the phone. The officer waited for several minutes, periodically reminding Warren that he was waiting for him to use the directories and the phone to contact an attorney. Warren finally replied that it was not an "opportune time" to call because his attorney "would be asleep right now." He then stated he did not want to use the phone.

The officer repeatedly asked Warren if he would submit to a chemical test. Warren did not respond to the question. Instead, Warren continued to talk about unrelated issues and tried to draw the officer into conversation on those issues. The fifth time that the officer asked Warren if he would submit to a chemical test, Warren refused. The officer asked whether there was a reason for Warren's refusal, but the response on the audiotape is unintelligible.

The state charged Warren with test refusal under Minn. Stat. § 169A.20, subd. 2 (2006). Warren moved for dismissal on the ground that his right to counsel under the implied-consent law had been violated. The district court denied his motion, finding that Warren had been given "the opportunity to exercise his constitutional right to consult with an attorney" but failed to make "the threshold good-faith and sincere effort to reach an attorney." The district court concluded that Warren had terminated any attempt to

contact an attorney "on his own initiative." Warren and the state submitted the test-refusal charge to the district court for determination on stipulated facts, and the district court found Warren guilty. Warren now appeals.

D E C I S I O N

Under the Minnesota Constitution, a person who has been arrested for driving while impaired has a limited right to consult with an attorney before deciding to submit to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). This right is vindicated when the officer requesting a chemical test "provid[es] a telephone and a reasonable amount of time to contact an attorney." *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

If the arrestee's good-faith efforts to reach an attorney have not succeeded after a reasonable time, an officer can require him to make the testing decision "in the absence of counsel." *Friedman*, 473 N.W.2d at 835. A good-faith effort by the arrestee is a threshold requirement for the exercise of the right to counsel. *Kohn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). An officer may also require an uncounseled decision on testing if the arrestee ends his attempt to contact counsel or acts in a manner that "frustrate[s] the testing process." *See Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008) (concluding right vindicated when arrestee ended effort of his own accord); *Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000) (concluding right vindicated when arrestee refused to acknowledge advisory or answer officer's questions).

Whether an officer has vindicated an arrestee's right to counsel is decided on the totality of the circumstances. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). Establishing the circumstances entails fact-finding and, absent clear error, the district court's findings will be sustained. *Id*. at 501; *see also Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001) (stating factual findings reviewed for clear error), *review denied* (Minn. Dec. 11, 2001). Whether an arrestee makes a good-faith effort to contact an attorney is a "fact-specific inquiry," that is also subject to clear-error review. *Gergen*, 548 N.W.2d at 309.

The district court found that Warren did not make a good-faith effort to contact an attorney. The record supports the district court's finding. The district court specifically relied on Warren's statement to the officer that "he could sit there for two days" and that he felt that two days was a reasonable period of time to get in touch with an attorney. The district court also stated that Warren did not use the phone books to see if he could obtain his attorney's phone number or the phone number of any other attorney and Warren did not dial 411 to try to get his attorney's phone number. The officer periodically attempted to focus Warren's attention on the phone, but Warren would not comply. When the officer finally asked whether Warren was going to call an attorney, Warren stated, "It's not an opportune time; he would be asleep right now. I don't want to use the phone."

This conduct was consistent with Warren's approach to all parts of the implied-consent process. In addition to requesting that the officer read him the advisory for a second and third time, Warren ignored the officer's direct questions on testing and

attempted to engage the officer in conversation on topics that were unrelated to the implied-consent process. These distracting comments and actions reinforce the district court's finding that Warren's conduct was neither sincere nor in good faith. *See Busch*, 614 N.W.2d at 259 (concluding right vindicated when driver refused to acknowledge or respond to advisory or officer's questions); *Gergen*, 548 N.W.2d at 310 (concluding right vindicated when arrestee was "more interested in washing his hands, finding a coat, and arranging for a ride home").

On appeal, Warren focuses his argument on the officer's failure to retrieve Warren's cell phone to allow him to call his attorney. The officer testified that he often retrieves cell phones for detained persons for the specific purpose of calling a lawyer. The officer said that he did not go to the booking area to retrieve Warren's cell phone because he believed the request was part of Warren's attempt to delay the process and to continue to play games. The record provides ample support for the officer's conclusion that Warren was "playing games" and attempting to delay a chemical test. Warren demonstrated his disrespect for the implied-consent procedure from the outset. He persistently mocked the officer as the officer read the advisory. Although Warren apparently understood the consequences of test refusal, he feigned incomprehension, saying that he would make the officer read the advisory twenty times and that he intended to sit there for two days if necessary. The record supports the reasonableness of the officer's inference of delay and "game playing." Warren did not persist in his request for the cell phone and did not attempt to locate his attorney's number through any other means, despite having a directory.

The district court further found that Warren terminated any attempt to contact an attorney "on his own initiative." The record fully supports this findng as well. Warren made no effort to use the phone or directories provided, he eventually said that it was not an opportune time to call because his attorney would be sleeping, and he told the officer that he did not want to use the phone. It was therefore Warren's own choice to discontinue his opportunity to contact counsel. *See Mell*, 757 N.W.2d at 713 (concluding that right was vindicated when, after three minutes, arrestee indicated he no longer wished to try reaching counsel).

Warren failed to make a good-faith or sincere effort to contact an attorney and, after making no attempt to use the phone and phone directories that were provided to him, he concluded the session by telling the officer that he did not want to use the phone. The district court did not err by finding that Warren's limited right to counsel was vindicated.

Affirmed.