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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-824

Jordan Walsh, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 19, 2011
Affirmed
Johnson, Chief Judge

Roseau County District Court
File No. 68-CV-10-953

F. Clayton Tyler, Karen Mohrlant, F. Clayton Tyler, P.A., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Melissa Eberhart, Paul R. Kempainen, Eric P. Schieferdecker, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Stoneburner, Judge; and Harten, Judge.*

*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

JOHNSON, Chief Judge

The commissioner of public safety revoked Jordan Walsh's driver's license after he was arrested on suspicion of driving while impaired and refused to submit to chemical testing. Walsh challenged the revocation on the ground that his limited right to counsel had not been vindicated. The district court rejected Walsh's challenge and sustained the revocation. We affirm.

FACTS

In August 2010, Walsh was arrested in Roseau County on suspicion of driving while impaired (DWI). Deputy Matt Restad transported Walsh to the Roseau County Detention Center. The interactions there between Deputy Restad and Walsh were video-recorded. A compact disk containing the video-recording later was introduced into evidence at the implied-consent hearing.

The video-recording shows that Deputy Restad escorted Walsh into a booking room and read him the Minnesota Implied Consent Advisory. As required by law, Deputy Restad informed Walsh that Minnesota law requires him to submit to a chemical test to determine his alcohol concentration, that refusal to submit to a chemical test is a crime, that he had a right to speak with an attorney, and that if he was unable to contact an attorney within a reasonable period of time, he would be required to make the testing decision himself. *See* Minn. Stat. § 169A.51, subd. 2 (2010). Walsh indicated that he understood the advisory.

After receiving the advisory, Walsh asked to speak with an attorney. Deputy Restad provided Walsh with a telephone and two telephone books. Walsh, however, wanted to contact a specific attorney who practices in the Twin Cities. Deputy Restad did not have a telephone book for the Twin Cities. Thus, Walsh called his mother and asked her to retrieve the attorney's telephone number from his home, which is approximately one mile from Walsh's mother's home.

Walsh sat down and waited for his mother to call back. After approximately 30 minutes, the following dialogue took place between Walsh and Deputy Restad:

> DEPUTY RESTAD: Well Jordan, it's been about a half hour here, so, um, I guess with that, will you take a urine test?
>
> WALSH: No, I want to hear from [my mother] first.
>
> DEPUTY RESTAD: Okay, will you take a blood test?
>
> WALSH: Not until I talk to [my attorney].
>
> DEPUTY RESTAD: Okay.
>
> WALSH: She'll be calling back—I'm not denying it, I'm just, waiting.
>
> DEPUTY RESTAD: Right, but, you know, within a reasonable period of time. You know, you have to make the decision if you can't get hold of an attorney. So, that's what—that's why I was asking, I guess. You don't have a driver's license with you at all?

After this exchange, Deputy Restad led Walsh out of the room. Deputy Restad determined that Walsh refused to submit to a chemical test. *See* Minn. Stat. §§ 169A.20,

subd. 2, .52, subd. 1 (2010). As a consequence, the commissioner revoked Walsh's driver's license. *See* Minn. Stat. § 169A.52, subd. 3 (2010).

Walsh petitioned the district court to rescind the revocation. *See* Minn. Stat. § 169A.53, subd. 2(a) (2010). After a hearing, the district court issued a two-page order which states, in part, "The only issue raised by the Petitioner was whether he was granted reasonable time to make contact with an attorney prior to deciding whether to submit to alcohol testing." The district court concluded that Walsh did not make a good-faith and sincere effort to contact an attorney because he made only one telephone call to his mother in a half-hour time period. Accordingly, the district court denied the petition and sustained the revocation. Walsh appeals.

D E C I S I O N

Walsh argues that the district court erred by denying his petition to rescind the revocation of his driver's license. Specifically, Walsh argues that his limited right to counsel was not vindicated because Deputy Restad did not clearly indicate to him that his time to contact an attorney had expired and did not give him a final opportunity to make an uncounseled decision regarding whether to submit to chemical testing.

A driver subject to the implied consent law has a limited right to consult with an attorney before deciding whether to submit to chemical testing. *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (citing Minn. Const. art. I, § 6). The driver's limited right to consult with an attorney prior to testing is "vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id.* (quotation omitted). If the driver is

unable to contact an attorney within a reasonable time, "the person may be required to make a decision regarding testing in the absence of counsel." *Id.* (quotation omitted). A court should consider the "totality of the facts" in determining whether a driver's limited right to counsel has been vindicated. *Parsons v. Commissioner of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). If the relevant facts are undisputed, we apply a *de novo* standard of review to a district court's conclusion as to whether a driver "was accorded a reasonable opportunity to consult with counsel based on the given facts." *Kuhn v. Commissioner of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

In analyzing whether a driver's right to counsel has been vindicated, a "threshold matter" is whether the driver made "a good faith and sincere effort to reach an attorney." *Id.* at 842. If not, a court need not engage in further analysis. *See id.* A driver who "decide[s] on his own to stop trying to reach an attorney" does not make a good-faith and sincere effort to reach an attorney. *See id.* In this case, the district court found that Walsh did not make a good-faith and sincere effort to contact an attorney. We apply a clear-error standard of review to this finding of fact. *See Gergen v. Commissioner of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

It is undisputed that Deputy Restad informed Walsh of his limited right to consult with an attorney, provided him with a telephone, and gave him approximately 30 minutes to contact an attorney. Walsh made only one telephone call to his mother and then waited for a return phone call. Walsh had been informed that he was required to contact

an attorney within a reasonable period of time, yet he did not make any other telephone calls during this period. These facts are sufficient to support the district court's findings.

The facts of this case are similar to the facts of other cases in which this court concluded that a driver did not make a good-faith and sincere effort to contact an attorney. For example, in *Linde v. Commissioner of Public Safety*, 586 N.W.2d 807 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999), the driver tried unsuccessfully to contact a nephew who was an out-of-state attorney but did not attempt to contact any local attorneys. *Id.* at 810. In *Palme v. Commissioner of Public Safety*, 541 N.W.2d 340 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996), the driver called an attorney who told him to wait for another attorney to call him back, and the driver did nothing further except wait for a return call. *Id.* at 342. And in *Gergen*, the driver tried to call only one attorney, could not make contact, and gave up without trying to contact any other attorneys. 548 N.W.2d at 309-10. In each of these cases, this court affirmed a district court's finding that the appellant did not make a good-faith and sincere effort to contact counsel. *Linde*, 586 N.W.2d at 810; *Gergen*, 548 N.W.2d at 310; *Palme*, 541 N.W.2d at 345. Likewise, we conclude that the district court in this case did not clearly err by finding that Walsh did not make a good-faith and sincere effort to contact an attorney. This conclusion is sufficient to affirm the district court's order sustaining the revocation of Walsh's driver's license. *See Linde*, 586 N.W.2d at 810; *Palme*, 541 N.W.2d at 345.

Even if Walsh could get past the threshold issue, we would reject his contention that Deputy Restad did not clearly indicate to him that his time to contact an attorney had

expired and did not give him a final opportunity to make an uncounseled decision regarding whether to submit to chemical testing. Walsh relies on *Linde* for the proposition that a driver's limited right to counsel is not vindicated unless a law enforcement officer clearly indicates that the time to contact an attorney has expired and gives the driver one final opportunity to submit to testing. *See Linde*, 586 N.W.2d at 810. But the portion of *Linde* on which Walsh relies is not concerned with the vindication of a driver's limited right to counsel; rather, that part of *Linde* is concerned with whether a driver refused to submit to chemical testing. *Id.* Walsh's counsel conceded at oral argument that she is not arguing in this proceeding that Walsh did not refuse to submit to chemical testing. Thus, the *Linde* opinion does not support Walsh's argument that a final warning is necessary to the vindication of a driver's limited right to counsel.

Furthermore, Walsh's contention is without merit because Deputy Restad *did* clearly indicate that Walsh's time to contact an attorney had expired. The video-recording reveals that when Deputy Restad brought an end to Walsh's time for consultation with an attorney and led Walsh out of the room, Walsh followed him without asking for additional time or for clarification. And nothing in the record indicates that Deputy Restad thereafter interfered with Walsh's opportunity to make an uncounseled decision regarding whether to submit to chemical testing. As it happened, Walsh had 30 minutes to contact an attorney, and that is an adequate amount of time for the vindication of the limited right to counsel. *See Palme*, 541 N.W.2d at 342, 345 (holding that 29 minutes was reasonable); *Ruffenach v. Commissioner of Pub. Safety*, 528 N.W.2d 254, 255, 257 (Minn. App. 1995) (holding that 36 minutes was reasonable). "A

driver cannot be permitted to wait indefinitely . . . , and an officer must be allowed to reasonably determine that the driver has had enough time." *Palme*, 541 N.W.2d at 345.

In sum, because Walsh's limited right to counsel was vindicated, the district court did not err by sustaining the revocation of his driver's license.

Affirmed.