STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0619

Luke Joseph Freeman, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed January 6, 2014
Affirmed
Rodenberg, Judge
Dissenting, Chutich, Judge

Cass County District Court
File No. 11-CV-13-22

Richard C. Kenly, Backus, Minnesota (for appellant)

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Chutich, Judge.

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

RODENBERG, Judge

Appellant Luke Joseph Freeman challenges the district court's decision to sustain the revocation of his driver's license pursuant to Minn. Stat. § 169A.53, subd. 3 (2012). Appellant argues that his limited right to counsel was violated because both sides of his

phone conversation with counsel were recorded. Because we determine that reinstatement of a driver's license is not an available remedy for violation of the limited right to counsel, we affirm.

FACTS

On December 7, 2012, appellant was arrested for driving while impaired (DWI). Lt. David Zumberge of the state patrol advised appellant of his implied consent rights, and appellant requested to speak with an attorney. Lt. Zumberge recorded both sides of appellant's conversation with his attorney. Appellant agreed to submit to a breath test, which revealed an alcohol concentration in excess of the legal limit, and his Minnesota driver's license was revoked.

This is the second appeal regarding Lt. Zumberge's recording of appellant's attorney-client conversation. In the first appeal, appellant sought appellate review of his conviction for DWI. *State v. Freeman*, No. A13-0593, 2013 WL 4779097, at *1 (Minn. App. Sept. 9, 2013) (2-1 decision), *review denied* (Minn. Dec. 17, 2013). We reversed the district court's suppression of the test results "[b]ecause the proper remedy for violation of the right to a private attorney-client consultation is suppression of any overheard statements and not suppression of the test results." *Id.*

In this second appeal, appellant petitioned for reinstatement of his driver's license and requested a hearing pursuant to Minn. Stat. § 169A.53 (2012). The district court denied his petition. The district court determined that recording both sides of the attorney-client conversation did not violate appellant's right to counsel. The district court explained that an individual has a right to request legal advice before deciding to submit

to chemical testing but does not have the right to obtain such advice in private. The district court also stated that "[t]he attorney's advice as well as the arrestee's statements to counsel cannot be used in subsequent hearings and this makes the extent of the recording irrelevant." This appeal followed.

D E C I S I O N

On appeal, appellant argues that the district court misapplied the law in determining that appellant is not entitled to reinstatement of his Minnesota driver's license. "We apply a de novo standard of review to the district court's conclusions of law" on the issue of whether law enforcement violated a driver's limited right to counsel. *Nelson v. Comm'r of Pub. Safety*, 779 N.W.2d 571, 573 (Minn. App. 2010). When the facts are undisputed, "it is a legal determination whether [the driver] was accorded a reasonable opportunity to consult with counsel based on the given facts." *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

As a preliminary matter, our decision in appellant's first appeal does not collaterally estop appellant from relitigating the issue of whether his right to counsel was violated. Collateral estoppel prevents relitigation of matters when "(1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party in the prior case; and (4) there was a full and fair opportunity to be heard on the issue." *In re Trust Created by Hill*, 499 N.W.2d 475, 484 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). Here, the issues appear identical but implied consent proceedings, which are civil in nature, differ from criminal

DWI proceedings. The two proceedings "are related only to the extent that they both generally grow out of the same set of facts." *State, Dep't of Pub. Safety v. House*, 291 Minn. 424, 425, 192 N.W.2d 93, 94-95 (1971). "[T]he parties to the proceedings are not the same." *Id.* at 425, 192 N.W.2d at 95. Therefore, collateral estoppel does not apply to prevent appellant from raising the right-to-counsel issue in this subsequent implied consent proceeding.

The Minnesota Constitution guarantees an accused the right "to have the assistance of counsel in his defense." Minn. Const. art. I, § 6. "[U]nder the right-to-counsel clause in article I, section 6 of the Minnesota Constitution, an individual has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). "Because of the evanescent nature of the evidence in DWI cases, the accused is accorded a limited amount of time to contact an attorney." *Kuhn*, 488 N.W.2d at 840 (quotation omitted).

> [A]ny person who is required to decide whether he will submit to a chemical test shall have the right to consult with a lawyer of his own choosing before making that decision, provided that such a consultation does not unreasonably delay the administration of the test. The person must be informed of this right, and the police officers must assist in its vindication. The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel. If counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel.

Friedman, 473 N.W.2d at 835. Importantly, the limited right to consult with counsel in the implied consent context is a constitutional right. *Id.*

A driver has the right to consult with an attorney before deciding whether to submit to chemical testing but has no right to consult that attorney in private. *State, Dep't of Pub. Safety v. Held*, 311 Minn. 74, 76, 246 N.W.2d 863, 864 (1976). Because the right to consult an attorney is limited, "police do not have to provide a DWI arrestee with a private telephone." *Comm'r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 269 (Minn. 1992). In *Campbell*, a police officer remained in the room while the driver spoke with his attorney on the phone. *Id.* The *Campbell* court explained that "proper testing procedures generally require that the officer remain in the presence of an arrestee in order to impeach any later testimony by an arrestee who submits to testing that ingestion of something at the station might have affected the test results." *Id.* at 270.

Under existing Minnesota law, the only remedy available to a driver for violation of his limited right to counsel when a police officer records the driver's conversation with counsel is the exclusion of the recorded statements from future court proceedings. *See id.* at 269-70 (concluding that suppression is an adequate remedy). In cases where the driver is not provided privacy to talk to his lawyer, "the arrestee's rights will be sufficiently protected by the subsequent exclusion of any overheard statements or any fruits of those statements." *Id.* "[T]he driver's rights are sufficiently safeguarded by a rule which forbids the use in evidence of any statements made by defendant to his counsel over the telephone which are overheard by police." *Held*, 311 Minn. at 76, 246 N.W.2d at 864. In contrast, when a driver is denied any consultation with an attorney, a district court may

order the suppression of the test results. *State v. Stradcutter*, 568 N.W.2d 545, 548 (Minn. App. 1997). No appellate cases allow the additional remedy of reinstatement of a driver's license except in cases of complete deprivation of the driver's limited right to counsel. *See Friedman*, 473 N.W.2d at 837 (reversing a driver's license revocation when the driver was denied an opportunity to consult with an attorney).

We are troubled by Lt. Zumberge's apparently intentional recording of both sides of the attorney-client conversation. In previous cases challenging a violation of a driver's right to counsel, the recordings were unintentional. *See, e.g.*, *Koester v. Comm'r of Pub. Safety*, 438 N.W.2d 725, 726 (Minn. App. 1989) (the police officer attempted to turn off his recording device but the attorney-client conversation was inadvertently recorded). Nevertheless, the only remedy available to appellant in these circumstances is the exclusion of the recorded conversation from future court proceedings. *Id.* at 727. We decline to create an additional remedy for violation of this right under the state constitution. "[I]t is not the role of *this* court to make a dramatic change in the interpretation of the Minnesota Constitution when the supreme court has not done so." *State v. Rodriguez*, 738 N.W.2d 422, 431 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008). We have previously declined to add additional defenses to the implied consent statute. *See Axelberg v. Comm'r of Pub. Safety*, 831 N.W.2d 682, 686-87 (Minn. App. 2013) (declining to add the additional defense of necessity to Minn. Stat. § 169A.53, subd. 3 (2010)), *review granted* (Minn. Aug. 20, 2013). Because the only remedy available for a violation of appellant's limited right to counsel is suppression of

the recording from court proceedings, appellant is not entitled to reinstatement of his driver's license.[1]

Affirmed.

[1] We also observe that appellant has not argued that the recording of his telephone conversation with his attorney changed or denied any advice his lawyer gave or might have given him. There is no record evidence that the attorney was aware of the recording or that he altered his legal advice in response to it. The record does not support a conclusion that appellant was completely denied his right to confer with counsel. *Cf. Stradcutter*, 568 N.W.2d at 548.

CHUTICH, Judge (dissenting)

Because no Minnesota case has specifically addressed the disturbing facts of this case—where a law enforcement officer not only listens to but tape records both sides of an attorney-client communication that occurred over a speaker phone—and because I believe that this encroachment on a privileged conversation amounts to a constructive denial of the right to counsel, I respectfully dissent. Although the companion criminal case, *State v. Freeman*, No. A13-0593, 2013 WL 4779097 (Minn. App. 2013), *review denied* (Minn. Dec. 17, 2013), is unpublished and not precedential, Minn. Stat. § 480A.08, subd. 3 (c) (2012), I respectfully incorporate the rationale stated in the *Freeman* dissent, along with the discussion below.

Drivers in Minnesota have "a limited right to consult an attorney before deciding whether or not to submit to chemical testing for blood alcohol" under article 1, section 6 of the Minnesota Constitution. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 829 (Minn. 1991). In addition to this limited constitutional right, persons in law-enforcement custody have a general statutory right to a "private interview" with an attorney or "private telephone access" to an attorney. Minn. Stat. § 481.10 (2012).

When a person is arrested for driving while under the influence, these rights are satisfied when a driver is given a telephone and a reasonable time to contact and to speak with counsel before testing. *Comm'r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 269 (Minn. 1992). Recognizing that "proper testing procedures generally require that the officer remain in the presence of an arrestee," the *Campbell* court reaffirmed previous

decisions holding that a DWI arrestee need not be provided with a private telephone or private room from which to call. *Id*. at 269.

Campbell recognizes that, given these circumstances, a *defendant's* statements to his lawyer may be overheard by police officers. *Id.* If police do overhear the defendant's side of the conversation, the supreme court reasoned that "the driver's rights are sufficiently safeguarded by [the] rule which forbids the use in evidence of any [of these] statements." *Id*. (quoting *State, Dep't of Public Safety v. Held*, 311 Minn. 74, 76, 246 N.W.2d 863, 864 (1976)).

Campbell acknowledged that while the police presence may "inhibit the arrestee," the right to consult counsel was nevertheless meaningful because "experienced attorneys will understand the situation and ask 'yes or no' questions that allow the attorneys to get the information they need to advise the arrestees properly." *Id.* at 270. This comment suggests that the supreme court did not contemplate that police eavesdropping would include the *actual advice* that an *attorney* provides in a privileged conversation.

Another line of precedent in cases of driving while impaired specifies that a different remedy—test suppression—is appropriate where an arrestee is prevented from consulting an attorney altogether before taking or refusing chemical testing. *State, City of Belle Plaine v. Stradcutter*, 568 N.W.2d 545, 548 (Minn. App. 1997) (concluding that because a driver "was not allowed to consult with counsel before testing, the district court properly suppressed the test results"); *see also Friedman*, 473 N.W.2d at 829, 837 (reversing a driver's license revocation when the driver was denied an opportunity to consult with an attorney).

State, Dep't of Pub. Safety v. Kneisl, is instructive here. 312 Minn. 281, 285, 251 N.W.2d 645, 648 (1977). In *Kneisl*, a driver was allowed a telephone call to his attorney, but when the attorney promptly arrived at the jail, the police refused to let him speak with the driver privately. *Id*. at 282-84, 251 N.W.2d at 647-48. The supreme court held that if an "attorney arrives at the jail within a reasonable time so as to not affect the validity of the implied-consent testing, a private consultation between attorney and client must be allowed." *Id.* at 286, 251 N.W.2d at 649.

Notably, when discussing what these private interviews involved, the supreme court did not contemplate that police officers could listen to both sides of the attorney-client consultation. The supreme court instead stated that, even if a private room "is unavailable or impermissible under the circumstances, counsel should be allowed to confer with his client out of the earshot of others in the room." *Id*. at 286–87.

Applying these principles to the factual situation of first impression presented here—the apparently intentional tape-recording by a state patrol officer of an attorney-client consultation conducted over a speaker phone—suppression of the test results is warranted.[2] Minnesota caselaw simply does not give police the right to intentionally listen to the entire conversation between client and attorney. *C.f. Kneisl*, 312 Minn. at

[2] The majority suggests that this court's role is not to change an interpretation of the Minnesota Constitution when the supreme court has not done so, but here, in response to an issue of first impression, we are determining which of two lines of precedent and remedies established by the supreme court is applicable to this unique situation. *See, e.g.*, *State v. Barajas*, 817 N.W.2d 204, 215 (Minn. App. 2012) (stating that the facts and circumstances of the case required the court to address a matter of first impression). And when precedent allows and circumstances so require, this court has recognized an additional affirmative defense not specified in the implied consent statute. *See Dutcher v. Comm'r of Pub. Safety*, 406 N.W.2d 333, 336 (Minn. App. 1987).

286–87, 251 N.W.2d at 649 ("[C]ounsel should be allowed to confer with his client out of the earshot of others in the room."). Similarly, under the Fourth Amendment, police are not entitled to use electronic devices to listen to conversations that they could not have otherwise lawfully heard. *Lopez v. United States*, 373 U.S. 427, 439, 83 S. Ct. 1381, 1388 (1963); *State v. Bellfield*, 275 N.W.2d 577, 578 (Minn. 1978).

This total intrusion on a privileged attorney-client communication effectively denied Freeman his right to counsel. Suppression of the overheard statements is an inadequate remedy because the eavesdropping may not only result in less robust legal advice, but may also reveal information or strategy that can be used to the state's advantage in ensuing proceedings. For these reasons, I would reverse the district court's ruling.