STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1508

State of Minnesota,
Appellant,

vs.

Travis Dewayne Lewis, Sr.,
Respondent

Filed February 10, 2014
Affirmed
Worke, Judge

Steele County District Court
File No. 74-CR-13-1097

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

Daniel A. McIntosh, Steele County Attorney, Christy M. Hormann, Assistant County Attorney, Owatonna, Minnesota (for appellant)

Matthew J. Mankey, Special Assistant State Public Defender, Golden Valley, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

WORKE, Judge

In this pretrial appeal, the state argues that the district court erred in dismissing respondent's driving-while-impaired (DWI) charge because his pretest right to counsel was not vindicated. We affirm because, while the officer reasonably accommodated respondent's hearing loss, seven minutes was not a reasonable amount of time to contact an attorney.

D E C I S I O N

The district court granted respondent Travis Dewayne Lewis, Sr.'s motion to dismiss a DWI charge after concluding that his right to pretest counsel was not vindicated. When the state challenges a district court's pretrial order, we must first determine whether the state has proven critical impact on its ability to prosecute the case. *In re Welfare of L.E.P*, 594 N.W.2d 163, 168 (Minn. 1999). "In the absence of critical impact [this court] will not review a pretrial order." *Id.* Critical impact is met when the ruling significantly reduces the likelihood of a successful prosecution. *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). Dismissal of the DWI charge will significantly reduce the likelihood of a successful prosecution. *See State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (holding that suppression ruling resulting in dismissal meets the critical-impact requirement). Therefore, the state has shown critical impact.

We must next determine whether the district court erred in concluding that Lewis's right to counsel was not vindicated. Whether an officer vindicated a driver's right to counsel is a mixed question of fact and law. *Groe v. Comm'r of Pub. Safety*, 615

N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). This court reviews the district court's factual findings for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). A factual finding is clearly erroneous when it is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008) (quotation omitted). "Once the facts are established, their significance becomes a question of law for de novo review." *Groe*, 615 N.W.2d at 841.

A driver has a limited right to counsel before deciding whether to submit to chemical testing under the Minnesota Constitution. Minn. Const. art. I, § 6; *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). This right is vindicated when the driver is "provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Friedman*, 473 N.W.2d at 835 (quotation omitted). A "reasonable time" is not a fixed amount of time, and it cannot be based on elapsed minutes alone. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). While there is no exclusive set of factors to consider in determining what amounts to a reasonable time to contact an attorney, relevant factors focus on the officer's duties in vindicating the right to counsel and the driver's diligence in exercising that right. *Id.* In this context, courts consider: (1) "the time of day when the driver tries to contact an attorney[,]" (2) "the length of time the driver has been under arrest . . . because the longer he is under arrest the less probative value the chemical test may ultimately have[,]" and (3) whether "the driver . . . make[s] a good faith and sincere effort to reach an attorney." *Id.*

The district court concluded that Officer Christian Berg failed to vindicate Lewis's pretest right to counsel because (1) he did not accommodate Lewis's hearing impairment and (2) he gave him only seven minutes, at nearly 2:00 a.m., in which to contact an attorney. We will first consider whether Lewis's hearing impairment was reasonably accommodated. Following the initial traffic stop, Lewis indicated to Officer Berg that he was hard of hearing. Officer Berg then communicated with Lewis in a raised voice. Lewis did not indicate that he needed a hearing device, nor was he using a hearing aid. Lewis was able to follow Officer Berg's verbal instructions on field sobriety tests.

In determining whether Lewis's hearing impairment was reasonably accommodated we next review the video from the detention center. The video shows that Officer Berg read Lewis the implied-consent advisory two and one-half times. Throughout this time, Lewis sat in a chair and looked away from the officer. The officer raised his voice through the second reading because of Lewis's hearing impairment. After the first two readings, Officer Berg asked Lewis if he understood what the officer read, and Lewis replied: "No, I do not." For the third reading, Officer Berg stood in front of Lewis, held up the advisory for Lewis to see, indicated that they would go through it together, and began reading. Lewis looked down and away from the officer. The officer asked: "Do you want to follow along or do you just want me to read it to you?" Lewis told the officer to get the sheet of paper out of his face and to get him a copy to read. Officer Berg gave Lewis a copy of the advisory and continued to read, but Lewis folded the copy and told the officer to stop reading.

Officer Berg then asked Lewis 13 times if he wanted to call an attorney. Lewis either ignored the question or replied in various manners, such as: "I can't get an attorney—do you see what time it is," "I don't have a phone number," "I want to get out of here," "why would I talk to somebody I do not know," "you're not answering my question," and "what are they supposed to do—represent me in court?" When Lewis agreed to call an attorney, he looked through a directory and increased the volume on the phone. Lewis dialed, but hung up. He dialed again, but stated that it went to an operator. He dialed a third time, but hung up and asked for a different phone. The officer told Lewis that he failed to dial a "1" before the number. Lewis dialed again and left a message with a call-back number. Officer Berg then asked Lewis if he was done trying to contact an attorney. Lewis shrugged and said "whatever" before refusing testing.

The record indicates that while Lewis was born with a genetic hearing issue, he does not use a hearing aid or communicate with sign language, but communicates by reading lips. He admitted that he did not disclose that he reads lips to Officer Berg, and agreed that it would have been helpful if he had. Additionally, Lewis was familiar with the DWI process; his driver's license was revoked in 2005, 2007, and 2008 for alcohol-related offenses. And he testified that he had gone through the same process in past DWI cases and that he is familiar with his right to contact an attorney.

We disagree with the district court in its determination that Officer Berg failed to meet his duty in accommodating Lewis's hearing deficit. In this regard, several of the district court's findings are not supported by the record and are, therefore, clearly erroneous. First, the district court found that Officer Berg read the advisory and gave

Lewis a copy of the advisory, but that it was "not at all clear that . . . Lewis understood he was being given a copy of the document the officer was reading, nor was it clear from the video that [he] understood he should follow along." But the record shows that Lewis asked the officer for a copy and the officer showed Lewis that he was reading from an identical document. Further, Lewis was aware that he was to follow along with the officer because the officer asked: "Do you want to follow along or do you want me to read it to you?" And Lewis testified that he asked the officer for a copy of the advisory so that he could follow along.

Second, the district court found that while Officer Berg provided Lewis with a phone and three directories, he declined to give Lewis a different phone when Lewis told the officer that he could not hear. While the officer did not give Lewis a different phone, the record shows that Lewis was able to hear on the phone. The video shows that Lewis dialed incorrectly and stated that he heard an "operator." Lewis testified that he heard a dial tone, dialed a number, heard a message and a beep, and left a message. Thus, the officer refusing to give Lewis a different phone does not indicate that the officer failed to vindicate Lewis's right to counsel.

Third, the district court found that Officer Berg failed to assist Lewis to overcome his hearing impairment because he "simply spoke louder without determining if another form of communication would be better suited," made little effort to look directly at Lewis when speaking to him, which would have enabled Lewis to read the officer's lips, and "never wrote anything out on paper in an effort to communicate effectively." But Officer Berg told Lewis that he was using a raised voice because Lewis told him that he

was "hard of hearing." Lewis never told the officer that he needed a hearing device, never requested an interpreter, and never asked the officer to communicate with him in any manner other than verbally. Additionally, Office Berg could not physically ensure that he was looking directly at Lewis because Lewis stared at the floor or the wall to his left. If Lewis communicated most effectively by reading lips, he intentionally avoided communicating with the officer. Finally, when the officer instructed Lewis: "Look at me so you can hear me," Lewis responded: "Yeah, I can hear you." Based on the record before us, we conclude that the officer did adequately accommodate Lewis's hearing loss in reaching an attorney.

We next consider whether Lewis was given adequate time to contact an attorney. Lewis attempted to contact an attorney at nearly 2:00 a.m., which is a difficult time of day in which to reach an attorney. In considering the length of time under arrest, Officer Berg stopped the vehicle Lewis was driving at 12:01 a.m. The video recording from the detention center, which was admitted into evidence, began recording at approximately 1:44 a.m. This passage of time lessens the probative value of the chemical test. Officer Berg gave Lewis "only seven minutes . . . in which to contact an attorney," and that "less than a minute after leaving a message with an attorney," Officer Berg asked Lewis to submit to testing.

While we are not assigning a reasonable amount of time in which to contact an attorney, we conclude, that under the circumstances, seven minutes was not reasonable. While Officer Berg accommodated Lewis's hearing impairment, he did not fully comply with his duties in vindicating Lewis's right to pretest counsel by providing Lewis with

only seven minutes at nearly 2:00 a.m. in which to contact an attorney. And the officer failed to wait a reasonable amount of time to await a return call from the attorney with whom Lewis left a voice message. On this basis we affirm the district court's determination that Officer Berg failed to vindicate Lewis's right to pretest counsel.

Affirmed.