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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0817**

State of Minnesota,
Respondent,

vs.

Robby Lee Vaughn,
Appellant.

**Filed April 3, 2017
Affirmed
Smith, Tracy M., Judge**

Houston County District Court
File No. 28-CR-14-623

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Samuel Jandt, Houston County Attorney, Caledonia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy. G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

On appeal from his conviction of first-degree driving while impaired (DWI), appellant Robby Lee Vaughn argues that the use of his 2011 implied-consent license

revocation to enhance the DWI charge to a felony violates his right to due process. Because the law permits the enhancement of a DWI charge to a felony based on an uncounseled implied-consent license revocation and Vaughn was not deprived of his rights to counsel or due process, we affirm.

FACTS

The prior implied-consent license revocation that Vaughn challenges as an improper basis for enhancement stems from a 2011 driving incident. In August of that year, Vaughn was charged with criminal refusal to take a breath test for alcohol concentration. Based on the test refusal, the Commissioner of Public Safety revoked Vaughn's driver's license pursuant to the civil implied-consent law. Vaughn did not seek judicial review of the civil license revocation. In the criminal case on the test-refusal charge, Vaughn prevailed. The district court granted Vaughn's motion for a directed verdict of acquittal after finding that the officer did not give Vaughn enough time to provide a sample and Vaughn's act of striking the testing machine did not amount to refusal.

The current case arose in 2014, when Vaughn was charged with two felony DWI offenses, among other charges. The two charges were enhanced to felonies using three prior impaired-driving incidents, one of which was the 2011 implied-consent license revocation.

At the request of Vaughn's attorney, the district court ordered an examination to assess Vaughn's competency. Minn. R. Crim. P. 20.01. The examination report discussed the effects of a 1996 snowmobile accident that put Vaughn in a coma for 98 days and resulted in a "serious traumatic brain injury." The examination report noted that, as a result

of the traumatic brain injury, Vaughn has “cognitive limitations” that “are not going to improve over time.” Specifically, the examination found that Vaughn has difficulties with memory, word recognition, vocabulary, anger, and mood control, and may “experience some difficulty with being cognitively overwhelmed if he is faced with an extensive amount of new information.” Ultimately, though, the examination report concluded that Vaughn “generally functions without significant difficulty” and “has sufficient ability to consult with a reasonable degree of rational understanding with his defense counsel.” The district court concluded that Vaughn was competent to stand trial.

Vaughn moved to preclude the use of his 2011 license revocation as a prior qualified impaired-driving incident to enhance the charges to felonies, arguing that, “under the specific circumstances of this case,” it would violate his right to due process. Vaughn asserted that the combination of his traumatic brain injury, his indigence, and the lack of a right to appointed counsel in the license-revocation proceeding “foreclose[d] the opportunity for judicial review” of the revocation of his driver’s license. The district court denied Vaughn’s motion, ruling that the 2011 driver’s license revocation could be used for enhancement.

Vaughn waived his right to a jury trial and stipulated to the prosecution’s case under Minn. R. Crim. P. 26.01, subd. 4, in order to obtain review of the order denying his pretrial motion. The district court adjudicated Vaughn guilty of DWI with an alcohol concentration of 0.08 or higher. The offense was enhanced to a felony first-degree DWI because it was committed “within ten years of the first of three or more qualified prior impaired driving

incidents,” including the 2011 license revocation. Minn. Stat. § 169A.24, subd. 1(1) (2014).

Vaughn appeals.

DECISION

Vaughn asserts that under his “unique” circumstances, the state should not have been permitted to use his 2011 license revocation to enhance his DWI charge. We review de novo the district court’s legal conclusion regarding the use of a prior license revocation to enhance current DWI charges. *State v. Goharbawang*, 705 N.W.2d 198, 201 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006). We defer to the district court’s factual findings absent a showing of clear error. *Erickson v. State*, 842 N.W.2d 314, 318 (Minn. 2014).

A driver may raise a constitutional challenge to the use of a prior implied-consent license revocation as an enhancement factor in a DWI case in which the revocation is used for enhancement. *Davis v. Comm’r of Pub. Safety*, 509 N.W.2d 380, 391-92 (Minn. App. 1993), *aff’d* 509 N.W.2d 380 (Minn. 1994). When a defendant challenges the final outcome of a prior proceeding in order to prevent the state from using it to satisfy an element of a charged offense, the challenge is called a collateral challenge. *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988). Collateral challenges are allowed only in “unique cases,” such as where a defendant’s “pivotal constitutional right” to counsel was violated. *Id.* Due process also requires that a collateral challenge to the use of an administrative or civil proceeding as an element of a criminal offense be permitted where the prior proceeding “effectively eliminates the right of the [defendant] to obtain judicial review.”

United States v. Mendoza-Lopez, 481 U.S. 828, 839, 107 S. Ct. 2148, 2156 (1987). The “unavailability of effective judicial review” of the prior determination warrants a collateral challenge to its use as an enhancement factor in a criminal case. *Id.* at 841, 107 S. Ct. at 2157.

Vaughn asserts that his “unique” circumstances resulted in both the unavailability of judicial review and violation of his right to counsel.

Availability of Judicial Review

Vaughn asserts that his failure to timely seek review of the license revocation “is excused by his circumstances—lack of appointed counsel, lack of resources to retain counsel, and effects of his brain injury.” Under these circumstances, Vaughn argues, an opportunity for review was not available to him.

Vaughn could have challenged the license revocation by filing a timely petition for judicial review under Minn. Stat. § 169A.53, subd. 2 (2014). “When a driver does not seek judicial review of a revocation of driving privileges, subsequent use of the revocation as an aggravating factor . . . does not violate the driver’s due-process rights.” *State v. Coleman*, 661 N.W.2d 296, 297 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003); *see Goharbawang*, 705 N.W.2d at 202 (stating that “[t]he availability of [judicial] review, although unexercised, satisfies the due-process requirement of meaningful review” where the revocation came within ten days before the criminal charges in which the revocation was used for enhancement).

Vaughn’s lack of appointed counsel and lack of resources to obtain counsel in the implied-consent matter are not unique. Minnesota law establishes that an indigent person

is not entitled to appointed counsel in an implied-consent license-revocation proceeding. *Thole v. Comm’r of Pub. Safety*, 831 N.W.2d 17, 22 (Minn. App. 2013), *review denied* (Minn. July 16, 2013). Thus, the only factor that might make Vaughn’s situation unique is the fact that his traumatic brain injury may have made it more difficult for him to litigate his own case than it would have been for the average person.

Vaughn cites *Anderson v. Comm’r of Pub. Safety*, in which the court of appeals concluded that it lacked jurisdiction to hear an untimely petition to rescind a driver’s license revocation but “note[d] that the state’s enhancement of criminal charges based on revocations that occurred when a petitioner was mentally incompetent to seek judicial review may constitute a violation of due process.” 878 N.W.2d 926, 930 (Minn. App. 2016). *Anderson* did not decide whether such a case necessarily would preclude the use of a license revocation as enhancement. *Id.* But, even if it would, the record here contains no evidence that Vaughn was incompetent at the time of the revocation and, although he suffers some cognitive difficulties from a traumatic brain injury, Vaughn was found competent to stand trial on the instant charge in 2014. We are not aware of any legal authority that would “excuse” a person from the statutory requirements for challenging an implied-consent license revocation due to cognitive limitations like Vaughn’s. Thus, we conclude that Vaughn is not entitled to collaterally challenge his 2011 license revocation due to a lack of opportunity for meaningful review. *See Mendoza-Lopez*, 481 U.S. at 839, 107 S. Ct. at 2156; *Coleman*, 661 N.W.2d at 297.

Right to Counsel

Vaughn also argues that his unique circumstances resulted in a violation of his due process right to counsel. A defendant may collaterally challenge a prior conviction used to enhance a current charge if the prior conviction was obtained in violation of his right to counsel. *State v. Nordstrom*, 331 N.W.2d 901, 904 (Minn. 1983). Under the Minnesota Constitution, a defendant has a right to counsel in any criminal matter in which the defendant stands a substantial chance of facing incarceration. *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967). But, again, there is no due-process right to court-appointed legal counsel in an implied-consent license revocation proceeding. *Thole*, 831 N.W.2d at 22. Because there is no right to counsel in implied-consent license revocation cases, the use of an uncounseled license revocation to enhance DWI charges does not violate a defendant's right to counsel. *State v. Dumas*, 587 N.W.2d 299, 302 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999).

Vaughn essentially asks us to recognize a right to appointed counsel for a person affected by a traumatic brain injury to challenge an implied-consent license revocation before it may be used to enhance a DWI to a felony. No existing federal or Minnesota law recognizes such a right, and this court cannot create one. “[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to [the court of appeals].” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). We therefore conclude that Vaughn was not deprived of a right to counsel in connection with his 2011 implied-consent license revocation. *See Dumas*, 587 N.W.2d

at 302. The district court thus did not err in permitting the state to use Vaughn's 2011 license revocation to enhance the DWI charge to a felony.

Vaughn asserts, based on his acquittal in his 2012 criminal test-refusal case, that "the lack of counsel really matters because had an attorney challenged the civil revocation, Appellant would have prevailed on the same legal theory as he did in the criminal case." We decline to speculate as to the likely outcome of a hypothetical challenge to the 2011 license revocation, but we note that an acquittal on a DWI charge "does not render the prior implied-consent revocation based on the same incident invalid." *See State v. Hanson*, 356 N.W.2d 689, 692 (Minn. 1984). Furthermore, the proposition that Vaughn could have prevailed had he challenged the license revocation has no bearing on the fact that he had no right to counsel in that case and has no right to preclude its use for enhancement now.

Affirmed.