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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0948**

Steven Michael Wenzel, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed January 22, 2018
Reversed
Schellhas, Judge**

Stearns County District Court
File No. 73-CV-16-10391

John L. Lucas, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Jamie Reinschmidt, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's order sustaining the revocation of his driving privileges. Because the state did not vindicate appellant's right to counsel prior to administering a breath test, we reverse the district court's order sustaining the revocation of appellant's driving privileges.

FACTS

Responding to a dispatch call, Officer Walters found appellant Steven Wenzel's unattended car in a ditch. Wenzel's wife soon arrived and led Officer Walters to the Wenzels' home, where they located Wenzel. Officers administered, and Wenzel failed, various field sobriety tests. Officers then arrested Wenzel for driving while impaired (DWI). Officer Walters transported Wenzel to jail and read him the implied-consent advisory.¹ Beginning at 1:48 a.m., Officer Walters offered Wenzel an opportunity to contact an attorney. Wenzel made two calls, leaving a message during one and speaking with his wife during the second. After speaking with his wife, Wenzel did not make or request to make any additional calls. Six minutes later, at 1:54 a.m., Officer Walters asked Wenzel if he would consent to a breath test, and Wenzel refused.

Officer Walters testified that Wenzel terminated the attorney-consultation time because he had "ceased making reasonable effort" to contact an attorney. At that time, Wenzel had not received a call back from the attorney for whom he had left a message, from his wife, or from any attorney sought by his wife. The record does not reflect whether Officer Walters told Wenzel that his attorney-consultation time had ended when he asked Wenzel if he would submit to a test.

¹ Effective July 1, 2017, the legislature changed the language of Minn. Stat. § 169A.51, subd. 2 (2016), and the implied-consent advisory is now called a "breath test advisory." 2017 Minn. Laws ch. 83, art. 2, 53, at 355 (codified as amended at Minn. Stat. § 169A.51, subd. 2 (Supp. 2017)). We cite the most recent version of Minn. Stat. § 169A.51 because its amendments do not affect the resolution of this case.

Respondent Minnesota Commissioner of Public Safety revoked Wenzel's driving privileges for refusing to submit to a breath test, and Wenzel timely petitioned for rescission of the revocation. After an implied-consent hearing, the district court denied Wenzel's petition.

This appeal follows.

DECISION

“At the time a breath test is requested, the person must be informed . . . [of his or her] right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the [breath] test.” Minn. Stat. § 169A.51, subd. 2(3) (Supp. 2017). “Under 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). The right to counsel is considered vindicated if a person is given a reasonable time to contact and talk with counsel. *Id.* at 835. “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.” *Id.* (quotation omitted). “The right to counsel is limited in DWI cases to ensure that consultation does not unreasonably delay the administration of the test.” *Jones v. Comm’r of Pub. Safety*, 660 N.W.2d 472, 475 (Minn. App. 2003).

“The determination of whether an officer has vindicated a driver's right to counsel is a mixed question of law and fact.” *Mell v. Comm’r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). We will not set aside a district court's findings of fact unless they are

clearly erroneous. *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). Appellate courts “hold findings of fact as clearly erroneous only when [they] are left with a definite and firm conviction that a mistake has been committed.” *Id.* (quotation omitted). “Once [the] facts are established, their significance constitutes a question of law.” *Parsons v. Comm’r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992).

Wenzel argues that Officer Walters failed to vindicate his right to counsel by not affording him a reasonable amount of time to contact an attorney. To determine if an officer has provided a reasonable amount of attorney time, this court “balances the efforts made by the driver against the efforts made by the officer,” focusing “both on the police officer’s duties in vindicating the right to counsel and the defendant’s diligent exercise of the right.” *Mell*, 757 N.W.2d at 713 (quotation omitted). Regarding whether a driver has been afforded a reasonable length of time to contact an attorney, this court has said that a “reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone.” *Id.*; see also *Kuhn v. Comm’r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992) (concluding that “basing the ‘reasonable’ time criteria on a specific number of elapsed minutes alone is improper”), review denied (Minn. Oct. 20, 1992). “This court will consider other factors, including the time of day and length of delay since the driver was arrested, but these are not exclusive factors. . . .” *Mell*, 757 N.W.2d at 713.

In *Mell*, this court rejected the driver’s argument that less than three minutes was not a reasonable length of time, when Mell “attempted to contact his wife but not an attorney,” walked away from the telephone to the attending deputy, told the deputy that he could not reach his attorney and did not have the attorney’s telephone number, “did not

request another telephone directory or more time to attempt to contact an attorney,” “made no further attempts to contact an attorney,” and nodded his head “when asked if he was done trying to reach his attorney.” *Id.* “After three minutes, [the driver] ended his diligent exercise of his right.” *Id.* He “changed the subject by denying that he was driving and disputing whether [the deputy] could force him to take the test.” *Id.*

In *Mulvaney v. Comm’r of Pub. Safety*, the driver told the arresting officer that he would be willing to submit to a chemical test “if his lawyer so advised” and said that he wanted to speak to a particular attorney. 509 N.W.2d 179, 180 (Minn. App. 1993). The officer would not allow the driver to use the phone himself, but gave the driver a telephone directory at approximately 12:22 a.m. *Id.* The driver gave the telephone number to the officer, who dialed the number, let the phone ring approximately 12 times, and hung up. *Id.* The officer suggested that the driver try another attorney, but the driver said that he did not want another attorney. *Id.* When the officer asked him if he would take the test, he responded, “noper.” *Id.* at 180–81. The officer completed the implied-consent advisory at 12:28 a.m. and indicated that the driver refused to submit to a test. *Id.* at 181.

Citing *Friedman*, the *Mulvaney* court stated that “[a] driver must[] be given a reasonable time to contact an attorney,” and that “[r]easonable time is not based on elapsed minutes alone.” *Id.* The court stated that “[t]he first question is whether appellant made a good faith and sincere effort to reach an attorney,” and “[t]he next question is whether the officer complied with his duty to vindicate the right to counsel.” *Id.* at 181–82. The court reversed the driver’s license revocation, concluding that, under the facts, the officer did not vindicate the driver’s right to counsel. *Id.* at 182.

In *Kuhn*, this court concluded that the driver “made a sincere effort to call and consult with an attorney” when the driver attempted to contact an attorney three times over 24 minutes, after which the arresting officer said “you got to take the test now.” 488 N.W.2d at 839, 842. Because the driver “made a sincere effort to call and consult with an attorney,” the record contained nothing to indicate that the driver “was using delaying tactics or decided on his own to stop trying to reach an attorney,” and the time of day was 2:03 a.m., this court concluded that the driver’s right to consult with counsel was not vindicated. *Id.* at 842; *see also Jones*, 660 N.W.2d at 476 (concluding that, absent proof that driver’s reasonable attorney-consultation time had expired, driver’s right to consult with counsel was not vindicated when police dispatcher refused to allow driver to speak with attorney who responded to call); *Duff v. Comm’r of Pub. Safety*, 560 N.W.2d 735, 738 (Minn. App. 1997) (concluding that driver’s limited right to consult with attorney was not vindicated because he was not given reasonable time).

In this case, the district court found that Wenzel “declined to attempt to contact another [attorney]” and “had no intention of contacting any other attorney.” But these findings of fact lack evidentiary support, and we therefore are left with a firm and definite conviction that the findings are clearly erroneous. Officer Walters testified that he could not recall if Wenzel “made any statements that stated I’m done talking with an attorney.” And Wenzel did not testify at the implied-consent hearing. The record reflects that, before asking Wenzel if he would submit to a breath test, Officer Walters did not ask Wenzel if he was done trying to contact an attorney, and Wenzel made no affirmative action, such as a nod or statement, to indicate he was done trying to contact an attorney. And the record

contains no evidence that, during the six minutes of attorney-consultation time, Wenzel employed delaying tactics or had decided to stop trying to contact an attorney.

The district court found that, “at a minimum [Officer Walters] was coming up against the end of the two-hour window to obtain a breath test and perhaps even past it,” and the state argues that Officer Walters requested that Wenzel consent to a breath test after a reasonable amount of attorney-consultation time for that reason. But, as Wenzel points out, Officer Walters did not testify that he was concerned about the two-hour window of time following Wenzel’s driving or that the issue ever entered his mind.

Based on the facts in this case, we conclude that the state did not vindicate Wenzel’s limited right to consult with an attorney. We therefore reverse the district court’s order sustaining the revocation of Wenzel’s driving privileges.

Reversed.