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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2021**

Jeffrey Paul Nieland, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 29, 2018
Affirmed
Kirk, Judge**

Douglas County District Court
File No. 21-CV-17-697

Robert D. Stoneburner, Stoneburner Law Office, Paynesville, Minnesota (for appellant)

Lori Swanson, Attorney General, Stephen D. Melchionne, Assistant Attorney General, St.
Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Kirk, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the 90-day revocation of his driver's license following his
arrest for driving while impaired, arguing that the district court erred in sustaining the
revocation because the arresting deputy failed to vindicate appellant's limited right to

counsel. Because we conclude that appellant's limited right to counsel was vindicated, we affirm.

FACTS

On March 25, 2017, a Douglas County sheriff's deputy arrested appellant Jeffrey Paul Nieland for driving while impaired (DWI). The deputy transported appellant to jail and placed him in a holding room. A surveillance camera in the holding room recorded the following sequence of events.

The deputy read an implied-consent advisory to appellant, but appellant expressed confusion over contacting an attorney, so the deputy read the advisory a second time. After the second reading, appellant indicated that he understood it. The deputy then informed appellant that he could contact an attorney or decide on his own whether to take the breath test. A stack of phone books and a telephone were located in the holding room within appellant's reach. Appellant picked up a phone book and began paging through it, but stated, "I don't know who I could call." The deputy told appellant that the phone books listed attorneys with 24-hour availability. Appellant referenced being inexperienced and asked for the deputy's recommendation. The deputy explained that he did not recommend attorneys, but that appellant could choose to call any attorney and could later switch attorneys. The district court transcribed the following exchange between appellant and the deputy:

[Appellant]: Okay so let's say I call this guy (*points to the page*) and then what happens?

[Deputy]: Ah, he's just going to get some basic information and you can just speak with him. Kinda like let him know where you're at and what's going on.

[Appellant]: ([Appellant] *faces the phone, moves his hands closer to the phone, and makes gestures with his hands*) Well, I guess I don't have a choice, I guess.

[Deputy]: Well, you have a choice, whether you want to contact an attorney or not. So.

[Appellant]: ([Deputy] *gets up and touches the phone*). Well, I'd like to, not this one (*points to the page again*). I mean my own guy eventually, but . . .

[Deputy]: Okay.

[Appellant]: You know what I mean?

[Deputy]: You don't have your own though right now, correct?

[Appellant]: No. *Indecipherable*.

[Deputy]: Yeah, you can. . . . No. I know. (*Lifting the receiver*).

[Appellant]: Know what I mean?

[Deputy]: Let me see if I can get this here, it's been awhile. What's the number?

[Appellant]: 612-[xxx-xxxx] ([Appellant] *recites the number from the page he's been pointing at*).

[Deputy]: (*Begins dialing*) . . . Oh, hold on . . . (*Continues dialing*). I think I gotta dial a code. (*Looks at something on the desk*). Alright. ([Deputy] *makes sure the call connects and hands the receiver to [appellant]*). It should work. Yep.

The deputy then handed the phone to appellant, left the holding room, and observed appellant through an open doorway while appellant spoke to a person on the phone. The deputy reentered the room and used a computer, but did not speak to appellant during the

phone call. After approximately 13 to 14 minutes, appellant concluded the phone call by hanging up the receiver. The deputy asked appellant, “Alright, you had a chance to speak with an attorney. Will you take a breath test?” Appellant responded, “Yes.” Appellant then submitted to a breath test, which registered an alcohol concentration of 0.11, in excess of the legal limit.

Respondent Minnesota Commissioner of Public Safety subsequently revoked appellant’s driving privileges for 90 days. Appellant petitioned the district court for rescission of the revocation, arguing, in part, that his right to counsel was not vindicated, which the district court denied following a contested implied-consent hearing. Appellant filed a motion for amended findings or a new trial, which the district court construed as a motion for reconsideration, and denied.

This appeal follows.

D E C I S I O N

Appellant argues that his limited right to counsel was not vindicated because (1) he was not allowed to consult an attorney of his own choosing and (2) the deputy did not afford appellant reasonable time and means to contact an attorney. We disagree.

“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).¹ “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). Police officers must assist in the vindication of this right. *Id.*

“The right to counsel is considered vindicated when the driver is provided with a telephone prior to testing and given a reasonable amount of time to contact and consult with an attorney.” *Mell v. Comm’r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). “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 (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*, 757 N.W.2d at 712. “[We] defer to the district court’s credibility determinations and ability to weigh the evidence.” *Constans v. Comm’r of Pub. Safety*, 835 N.W.2d 518, 523 (Minn. App. 2013). We will not set aside a district court’s findings of fact unless they are clearly erroneous. *Jasper v. Comm’r of Pub. Safety*,

¹ Effective July 1, 2017, the legislature amended 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)).

642 N.W.2d 435, 440 (Minn. 2002). “To the extent the facts are uncontested, whether a driver was given a reasonable opportunity to consult with counsel is a question of law that is reviewed de novo.” *Linde v. Comm’r of Pub. Safety*, 586 N.W.2d 807, 809 (Minn. App. 1998).

I. Appellant consulted with an attorney of his own choosing.

Appellant argues that the deputy selected his attorney, and he disputes the district court’s findings that he was not actively attempting to contact an attorney and that the deputy only provided assistance. We disagree.

A driver has “the right to consult with a lawyer of his own choosing” before deciding whether he will submit to a chemical test. *Friedman*, 473 N.W.2d at 835 (quotation omitted). This right may be vindicated even if law enforcement does not allow the driver to personally dial a telephone number. *Linde*, 586 N.W.2d at 809-10.

In *Delmore*, we concluded that the officer selected the driver’s attorney when in response to the driver’s request to speak to an attorney, “[t]he officer immediately picked up a telephone, dialed a number and handed the phone to [the driver] indicating that here was the attorney to talk to.” *Delmore v. Comm’r of Pub. Safety*, 499 N.W.2d 839, 842 (Minn. App. 1993). In *McNaughton*, we concluded that the driver was not allowed to consult with an attorney of his own choosing when the driver was given only a list of five pre-selected attorneys and did not have access to a phone book or directory assistance. *McNaughton v. Comm’r of Pub. Safety*, 536 N.W.2d 912, 915 (Minn. App. 1995). Finally, in *Haveri*, we concluded that the driver was allowed to consult with an attorney of his own

choosing when in response to the driver stating that he did not know any attorneys, the officer suggested an attorney and wrote down the attorney's phone number, but the driver had access to a telephone and a phone book. *Haveri v. Comm'r of Pub. Safety*, 552 N.W.2d 762, 766-67 (Minn. App. 1996).

In this case, the district court found that (1) appellant's gesture toward the phone indicated his selection of an attorney and a request for assistance in placing the phone call; (2) the deputy acted to assist appellant in contacting, rather than selecting, an attorney; (3) appellant voiced no objection once the deputy began dialing the attorney's number and did not request additional attorney time after ending the phone call; and (4) in light of appellant's previous questions about changing attorneys at a later date, appellant's statement, "[N]ot this one. I mean my own guy eventually," referred to his desire to select a different long-term attorney, rather than his desire to contact a different attorney that night.

The evidence supports the district court's findings that appellant indicated his selection of an attorney and the deputy acted to assist appellant to contact rather than to select an attorney. Appellant had access to a phone and to phone books. As captured by the video recording, appellant pointed to an attorney's advertisement while browsing a phone book. He then looked at the phone and moved his hands towards it, and told the deputy that he'd like to contact an attorney. When the deputy stood up and reached for the phone, appellant stated, "[N]ot this one. I mean my own guy eventually, but" The deputy stopped and asked appellant whether he presently had his own counsel. Appellant

said, “No,” and then made a statement that is indecipherable on the audio recording, to which the deputy responded, “Yeah, you can. . . . No. I know.” The deputy then asked appellant for the phone number, which appellant recited.

Despite appellant’s apparent indecisiveness over whether to contact an attorney, the evidence shows that the deputy reasonably interpreted appellant’s actions as selecting an attorney and seeking the deputy’s assistance to place a phone call. Had appellant wished to select a different attorney, or select no attorney at all, he had ample opportunities to tell the deputy of that decision, but he did not do so. On this record, we conclude that the deputy vindicated appellant’s right to counsel to the extent that appellant was allowed to consult with an attorney of his own choosing.

II. Appellant received a reasonable amount of time and means to contact an attorney.

Appellant argues that he was not afforded a reasonable amount of time and means to contact an attorney because only two minutes elapsed from the deputy’s second reading of the implied-consent advisory until the deputy dialed the phone number that appellant recited and then handed the receiver to appellant. We are not persuaded.

We determine whether a driver received a reasonable amount of time to contact and consult with an attorney based on the totality of the circumstances. *Parsons v. Comm’r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). “A reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone.” *Mell*, 757 N.W.2d at 713. In our determination, we “balance the efforts made by the driver against the efforts made by the officer,” focusing on the officer’s duty to vindicate the driver’s limited right

to counsel and the driver's "diligent exercise of that right." *Id.* (quotation omitted). We may also consider other factors such as "the time of day and length of delay" from the time at which the driver was arrested. *Id.*

Here, appellant, on his own, engaged the deputy with questions about which attorney to contact and how the process worked. As discussed, appellant had access to a phone and to phone books, and the record shows that appellant selected his attorney and that the deputy acted to assist appellant in placing a phone call. Appellant provides no authority to support his contention that two minutes is an inadequate amount of time for a driver to select an attorney of his own choosing, and, in fact, approximately six minutes had elapsed from the deputy's first reading of the advisory. Moreover, after speaking to an attorney for 13 to 14 minutes, appellant did not ask for more time to consult with another attorney or indicate his dissatisfaction with the attorney he spoke with. We conclude that, under the totality of the circumstances, the deputy vindicated appellant's limited right to counsel to the extent that appellant received a reasonable amount of time and means to contact an attorney.

III. Appellant forfeited his argument that the district court erred in denying his motion for amended findings, conclusions of law, and order.

Appellant asserts that the district court erred in denying his motion for amended findings, conclusions of law, and order because it construed his motion as a motion to reconsider and declined to address the merits. "Assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Ouellette*, 740 N.W.2d 355, 361 (Minn. App. 2007)

(quotation omitted), *review denied* (Minn. Dec. 19, 2007). As respondent correctly points out, appellant failed to provide any authority or argument in support of his assertion of error in his principal brief to this court. In his reply brief, appellant attempted to support his assertion, but he failed to address whether he had already forfeited the initial argument. A party's "reply brief must be confined to new matter raised in the brief of the respondent." Minn. R. Civ. App. P. 128.02, subd. 3. The new matter raised in respondent's brief is whether appellant forfeited his initial argument; it is not an opening for appellant to resurrect a previously forfeited argument.

Moreover, the district court found that appellant acknowledged at the motion hearing that his motion was essentially a motion to reconsider. Appellant did not contest this finding or enter a transcript of the hearing into the appellate record. Based on the available record, prejudicial error is not obvious on mere inspection. Therefore, because appellant did not adequately support his argument in his principal brief and prejudicial error is not obvious on mere inspection, we conclude that appellant has forfeited the argument.

Affirmed.