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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A18-0698

A18-1732

Kent David Wentzel, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A18-0698),

and

State of Minnesota,
Respondent (A18-1732),

vs.

Kent David Wentzel,
Appellant.

Filed July 8, 2019
Reversed and remanded
Smith, Tracy M., Judge

Swift County District Court
File No. 76-CV-17-481, 76-CR-17-455

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Minnesota (for respondent Commissioner of Public Safety (A18-0698))

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Minnesota (A18-1732))

Considered and decided by Schellhas, Presiding Judge; Smith, Tracy M., Judge; and Cochran, Judge.

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

SMITH, TRACY M., Judge

In these consolidated appeals, appellant Kent David Wentzel challenges the district court's denial of his motion to suppress the result of his alcohol-concentration test in his driving-while-impaired (DWI) case and denial of his petition to rescind the revocation of his driver's license, arguing that the officer who administered the test violated Wentzel's right to counsel. We agree. We reverse both cases and remand the license-revocation case for further proceedings.

FACTS

In October 2017, Deputy Pat Hammerud responded to a report of a driver asleep on the road. Hammerud arrived on scene at around 12:57 a.m. and found Wentzel at the wheel of his car. Wentzel was arrested for driving while impaired and was brought into a room at the county jail where the breath alcohol-concentration tests are administered. Hammerud began reading the Minnesota implied-consent advisory at 1:28 a.m. When asked if he wanted to contact an attorney, Wentzel said, "Not at this time." Hammerud finished reading the advisory at 1:30 a.m. At that point, Hammerud turned on the DataMaster breath-test machine (DMT) and began the fifteen-minute observation period, during which the driver is observed to ensure nothing happens that could interfere with the test results. During the

observation period, Hammerud prepared paperwork on a computer and ran an automated diagnostic check¹ on the DMT.

At around 1:38 a.m., about nine minutes into the observation period, Wentzel asked if Hammerud knew of any attorneys in the area and if he could look at his phone. Hammerud denied the request. Several minutes later, appellant asked to speak with an attorney, and Hammerud denied the request. At 1:49 a.m., when Wentzel was about to blow into the DMT, he hiccupped. Hammerud restarted the observation period. During this observation period, Wentzel made two more requests to speak with an attorney, which Hammerud denied. At 2:08 a.m., Wentzel finally took the test. The test reported an alcohol concentration of 0.11.

Respondent State of Minnesota charged Wentzel with DWI in violation of Minn. Stat. § 169A.20, subd. 1(5) (2016), and respondent commissioner of public safety revoked his driver's license pursuant to Minn. Stat. §§ 169A.50-.53 (2018). After a consolidated hearing, the district court issued an order denying Wentzel's motion to suppress the test result in the DWI proceeding and his petition to rescind the license revocation, rejecting his assertion that the test was obtained in violation of his limited right to counsel. Wentzel and the state agreed that the right-to-counsel issue is dispositive of the DWI case and stipulated to the state's case, under Minn. R. Crim. P. 26.01, subd. 4, to obtain review of the denial of the motion to suppress. These consolidated appeals follow.

¹ The record suggests that the diagnostic check takes about "a couple minutes."

DECISION

Wentzel argues that the result of his alcohol-concentration test was obtained in violation of his right to counsel. Whether a driver's right to counsel has been vindicated is a mixed question of law and fact. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). As in this case, when the parties do not dispute the facts, appellate courts review the district court's legal determination de novo. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

A driver has a limited right to consult with counsel before deciding whether to submit to an alcohol-concentration test. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991); *see also State v. Hunn*, 911 N.W.2d 816, 817 (Minn. 2018) (stating that *Friedman* applies only to implied-consent cases). Although limited, a driver's right to counsel has a basis in the Minnesota Constitution; "[t]he driver must be informed of this right, and the police officers must assist in its vindication." *Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). Unless the driver waives his right, he must be "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).

Even if the right to counsel is waived, police officers must recognize a subsequent withdrawal of the waiver in certain circumstances. In *State v. Slette*, this court stated that "officers should recognize the withdrawal of a DWI arrestee's initial waiver of the right to consult with counsel when the change of mind is immediate and does not interfere with

police officers' processing of a case or their ability to administer [a breath] test." 585 N.W.2d 407, 409 (Minn. App. 1998).

Finding that Wentzel waived his right to counsel when he told the officers, "Not at this time," the district court focused on whether the officer had to recognize Wentzel's subsequent withdrawal. The court decided that the officer did not have to because "Wentzel's change of mind did not occur immediately or within a reasonable time."

We disagree. Both the district court and the respondents reason that Wentzel's right to counsel was vindicated in part because his change of mind was not "immediate" under *Slette*. But *Slette* did not hold that the withdrawal of waiver has to be immediate in the sense that it has to be made instantly. In *Slette*, the driver initially waived the right to counsel and changed his mind "[a] few minutes later." *Id.* at 408. *Slette* thus contemplates that an effective withdrawal will sometimes cause a certain amount of delay. *Id.* at 410. Wentzel changed his mind nine minutes after the waiver, when, as we discuss below, police still had ample time both to accommodate his consultation with counsel and to complete testing. We conclude that, in the circumstances of this case, Wentzel's change of mind was "immediate" under *Slette*.

Also, Wentzel's withdrawal of his waiver did not "interfere with police officers' processing of a case or their ability to administer [a breath] test." *Id.* at 409. The relevant factors for analyzing the reasonableness of any time delay are drawn from caselaw governing whether a driver was given adequate time to consult an attorney. *See id.* at 410 (citing *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992)). The factors include:

(1) the importance to the driver of the decision to submit to testing; (2) the purpose of the right to counsel, which is to protect lay persons who lack skill and knowledge to defend themselves; (3) the driver's rights, which should not unreasonably interfere with police ability to gather evanescent evidence; (4) the legislative intent to coerce drivers into taking the test; (5) the liberal interpretation of the implied consent law in favor of the public interest; and (6) the need to return police to the streets to serve the public.

Id. Because Wentzel was given no attorney time, we need to determine whether giving him any time would have unreasonably delayed the process based on the totality of the circumstances. *See Parsons*, 488 N.W.2d at 502.

The district court decided that “[a]llowing . . . Wentzel to contact an attorney . . . would have unreasonably delayed administration of the test by requiring . . . Hammerud to wait until an attorney was contacted before restarting the observation period and Datamaster diagnostic checks.” That decision is erroneous. Giving Wentzel some time to contact an attorney would not have required Hammerud to restart the whole 15-minute preparation. Some impropriety or irregularity during the observation period may require the breath-test operator to restart the observation period and, if the operator does not restart, render the test result invalid. *Kramer v. Comm’r of Pub. Safety*, 706 N.W.2d 231, 237 (Minn. App. 2005). But no authority holds that talking to someone qualifies as such impropriety or irregularity. *See id.* (“[A] slight interruption of the observation period or a less than perfect observation does not invalidate the test unless the driver has ingested or regurgitated a substance that affects the results” (quotation omitted)). In fact, Hammerud himself conversed with Wentzel several times during the observation periods, but Hammerud did not restart the periods based on those conversations. There was an

approximately 30-minute time period between when Wentzel asked for an attorney and when he took the test. During those 30 minutes, Wentzel was not prohibited from talking, he was only prohibited from talking to an attorney.

Also, the observation period does not have to be interrupted in order to ensure the privacy of an arrestee's conversation with an attorney. "[P]roper testing procedures generally require that the officer remain in the presence of [a DWI] 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." *Comm'r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 270 (Minn. 1992). The officer may remain in the room even when the arrestee is talking to an attorney on the telephone. *Id.* at 269-70 ("[P]olice do not have to provide a DWI arrestee with a private telephone because the arrestee's rights will be sufficiently protected by the subsequent exclusion of any overheard statements or any fruits of those statements.").

The district court and respondents do not explain why Hammerud could not let Wentzel try to contact an attorney while observing Wentzel at the same time. Instead, they discuss the facts that Hammerud needed to return to the streets and that Wentzel was familiar with the implied-consent process. But Hammerud would not have returned to the streets any later by letting Wentzel try to contact an attorney during the observation periods. And we are not persuaded that Wentzel's familiarity with the process, no matter how deep it is, entirely deprives him of attorney time he would otherwise be entitled to. Here, Wentzel was denied time to contact an attorney that would not have caused an unreasonable delay. Because Hammerud violated Wentzel's right to counsel, his breath test results should have

been suppressed and his petition to rescind the revocation of his license should have been granted. We reverse Wentzel's DWI conviction because the parties agreed that the suppression issue is dispositive of the case. We reverse and remand the license-revocation case for further proceedings consistent with this opinion.

Reversed and remanded.