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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0784**

Michael John Smude, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed March 11, 2019
Affirmed
Smith, Tracy M., Judge**

Morrison County District Court
File No. 49-CV-18-268

Steven K. Budke, Levenson Budke, P.A., Eagan, Minnesota (for appellant)

Keith Ellison, Attorney General, William Young, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Michael John Smude challenges the district court's decision sustaining the revocation of his driver's license for refusal to submit to alcohol-concentration testing under Minnesota's implied-consent law, Minn. Stat. §§ 169A.50-.53 (2018). Smude argues

that the district court (1) erred by concluding that his limited right to counsel was vindicated and (2) clearly erred by finding that he refused testing. We affirm.

FACTS

Following a traffic stop shortly before midnight on February 12, 2018, Trooper Samuel Catlin arrested Smude on suspicion of driving while impaired and transported him to the Morrison County Jail. There, Catlin read Smude an implied consent advisory, informing him that he was required by law to take an alcohol-concentration test; that refusal was a crime; that he had a right to contact an attorney before deciding whether to take the test, but would be required to make a decision within a reasonable period of time, even if he was unable to contact an attorney; and that unreasonable delay or refusal to decide would be considered refusal to take the test. Smude asked to contact an attorney. Using jail-supplied phone books and his personal cell phone, Smude made two phone calls. He left a message during one of the calls but did not speak with an attorney during either call. Catlin testified that, during the time that Smude was given to contact the attorney, Smude was not “playing games” or trying to avoid contacting an attorney.

Ten to 15 minutes after the second call, and 44 minutes after Smude’s time to call an attorney began, Catlin told Smude that it was time to decide and asked whether he would take the test. Smude responded that he wanted to talk to an attorney. Catlin interpreted his response as refusal to submit to the test. Smude’s refusal was submitted to respondent commissioner of public safety, who—as required by statute—revoked Smude’s license to drive. See Minn. Stat. § 169A.52.

Smude petitioned the district court to rescind the revocation of his license. The district court concluded that the process vindicated Smude's limited right to an attorney and that Smude's conduct amounted to a refusal to submit to an alcohol-concentration test. The district court sustained the revocation, and Smude appeals.

D E C I S I O N

I. Smude's limited right to counsel was vindicated.

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). 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). When the parties do not dispute the facts, we 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).

The right to counsel established in *Friedman* is the right to "a reasonable amount of time in which to attempt to consult with counsel" before deciding whether to submit to testing. *State v. Melde*, 725 N.W.2d 99, 104 (Minn. 2006). Drivers do not have unlimited time to attempt to contact an attorney, an absolute right to actually talk to an attorney, or the right to an attorney at the state's expense. *State v. White*, 504 N.W.2d 211, 213-14 (Minn. 1993).

The right to counsel is vindicated if a driver is given a reasonable amount of time to contact an attorney of the driver's choosing. See *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 809 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999) (explaining that

the exact method by which a driver is allowed to choose and contact an attorney is not important, so long as it does not unduly constrain the driver's choice of attorney). This court has declined to define a reasonable time in terms of a specific number of minutes. *Kuhn*, 488 N.W.2d at 842. Rather, as we explained in *Kuhn*, we analyze several factors that are relevant but neither definite nor exclusive. *Id.* First is a threshold requirement that the driver "make a good faith and sincere effort to reach an attorney." *Id.* The next factor is the time of day—attorneys are less likely to be quickly available outside of normal working hours, particularly in the early morning on a weekday. *Id.* Finally, the length of time since the arrest is a factor, because the value of the test decreases as time goes on. *Id.*; *Friedman*, 473 N.W.2d at 835 (citing the "evanescent nature" of alcohol concentration as a reason to limit the amount of time available to contact an attorney). In addition, as we explained in *Parsons v. Comm'r of Pub. Safety*—released the same day as *Kuhn*—we consider other relevant factors, such as access to a telephone, freedom to use the telephone as the driver wishes, length of access to telephone, use of the telephone during that period, and the driver's understanding that the time to contact an attorney is limited. 488 N.W.2d 500, 502 (Minn. App. 1992).

Smude makes two main arguments for why the process failed to vindicate his right to an attorney. First, he argues that he was making a good-faith attempt to contact an attorney, so his opportunity should not have been cut off. Second, he argues that 44 minutes was not a reasonable amount of time in his case.

As to Smude's first argument, a driver's reasonable time to contact an attorney does not continue indefinitely simply because the driver is acting in good faith. *See Kuhn*, 488

N.W.2d at 842 (stating that good faith is a “threshold matter”). Rather, even assuming that Smude was acting in good faith, we must consider the remaining factors from *Kuhn* and *Parsons* to address Smude’s second argument—whether he was given reasonable time to contact an attorney.

The first *Kuhn* factor—after the threshold matter of good faith—is the time of day that a driver is attempting to contact counsel. *Kuhn*, 488 N.W.2d at 842. Because it was early in the morning, contacting an attorney would take longer, so Smude was entitled to more time than if he had been arrested during normal working hours. *See id.* (stating that more time must be given when the driver is trying to contact an attorney at 2 a.m. because most attorneys would not be available at that time). But, in *Umphlett v. Comm’r of Pub. Safety*, a driver was given 37 minutes to contact an attorney, starting at 8:50 p.m., and that time was held to be sufficient, even though it was also outside many attorneys’ working hours. 533 N.W.2d 636, 639 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). Similarly, in *Parsons*, it was reasonable to allow a driver 40 minutes, starting at 1:39 a.m. 488 N.W.2d at 502. Thus, the early hour here does not make the 44-minute time period unreasonably short.

The next *Kuhn* factor is the amount of time the driver has been under arrest when the officer ends attorney-contact time and requests testing. 488 N.W.2d at 842. In *Kuhn*, where we concluded the driver’s right to counsel was not vindicated, the length of time was one hour; here, the officer ended Smude’s attorney-contact time an hour and a half after Smude was stopped. *See id.* Though that is only 30 minutes longer, it meant that only 30 minutes remained to conduct testing within two hours of the time of driving. *See Minn.*

Stat. § 169A.20, subd. 1 (2018) (criminalizing driving a motor vehicle if the driver's "alcohol concentration . . . as measured within two hours of . . . driving" is at least 0.08). Preserving 30 minutes to perform the test is not unreasonable, given that Smude had already had 44 minutes to contact an attorney.

Application of the *Parsons* factors likewise supports the conclusion that Smude was given a reasonable opportunity to contact an attorney. Smude had access to the phone for 44 minutes, and he could use it as he wished. *See Parsons*, 488 N.W.2d at 502 (considering access to telephone, length of access to phone, and freedom to use telephone as driver wishes). He only called two people and did not continue calling when he failed to reach anyone. *See id.* (considering driver's use of phone). And Smude was also told that he had to make the decision within a reasonable period of time. *See id.* (considering driver's understanding that attorney-contact time is limited).

Smude argues that the 44 minutes was too short because he used the restroom and spent some of his time chatting with Trooper Catlin. Though using the restroom occupied some of his time, the record shows that he spent a significant portion of his 44 minutes waiting for a return call. Smude does not argue that he would have made additional calls in an attempt to contact an attorney if he had not used the restroom. Similarly, Smude's decision to talk with Trooper Catlin during his time to contact an attorney does not entitle him to more time. The record contains no hint that Smude tried to place additional calls but was prevented from doing so by his conversation with Catlin, and Smude again does not make such an argument. Thus, neither Smude's restroom use nor his conversation with Catlin entitled him to more time to contact an attorney.

In sum, even if Smude was acting in good faith, in light of the other relevant factors, Smude was given a reasonable opportunity to contact an attorney and his limited right to counsel was vindicated. See *Umphlett*, 533 N.W.2d at 639 (holding that driver’s limited right to counsel is vindicated when driver has a fair amount of time to contact attorney but makes only two phone calls); *Eveslage v. Comm’r of Pub. Safety*, 353 N.W.2d 623, 627 (Minn. App. 1984) (holding that the right to counsel was vindicated when the driver was unable to contact the attorney that he wanted to and declined to try to contact any other attorney).

But Smude raises two additional objections to the district court’s conclusion. First, he points out that the district court asked only one question of Catlin—namely, how much time Smude had to contact an attorney. Smude argues that the district court therefore must have based its decision solely on the time allowed, apparently contending that this was error because *Kuhn* rejected a bright-line time-based rule. See *Kuhn*, 488 N.W.2d at 842 (“[B]asing the ‘reasonable’ time criteria on a specific number of elapsed minutes alone is improper.”). But the district court was not responsible for questioning witnesses; relevant testimony was primarily elicited by counsel. And the district court, in its findings of fact, pointed out that Smude had made only two phone calls in 44 minutes and apparently had one lawyer in mind that he wanted to contact. The court’s findings indicate that it considered more than just the length of time that Smude had access to a phone.

Second, Smude claims that his right was not vindicated because he was not given a warning before his opportunity to contact an attorney ended. Smude neither explains why such a warning would have improved his access to counsel nor cites any relevant caselaw

requiring such a warning. A claim made without analysis or citation to legal authority is waived. *Fannie Mae v. Heather Apartments Ltd.*, 811 N.W.2d 596, 600 n.2 (Minn. 2012).

Because Smude was given a reasonable amount of time in which to consult with counsel before deciding whether to submit to testing, the district court did not err in concluding that his limited right to counsel was vindicated.

II. The district court did not plainly err in finding that Smude refused to submit to an alcohol-concentration test.

Whether a driver has refused to submit to testing is a question of fact that this court reviews for clear error. *See Linde*, 586 N.W.2d at 810 (treating refusal as a question of fact). For a factual finding to be clearly erroneous, the reviewing court must be “left with the definite and firm conviction that a mistake has been made.” *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016) (quotation omitted).

Express verbal refusal to submit to an alcohol-concentration test is not necessary to support a finding that the test was refused. *State, Dep’t of Highways v. Lauseng*, 183 N.W.2d 926, 926-27 (Minn. 1971) (failure to produce urine sample constitutes test refusal); *State v. Ferrier*, 792 N.W.2d 98, 102-03 (Minn. App. 2010) (same), *review denied* (Minn. Mar. 15, 2011); *State v. Hagen*, 529 N.W.2d 712, 714 (Minn. App. 1995) (silence in response to officer’s question as to whether the driver would take a blood test or a urine test constituted refusal). In *Linde*, a driver was told that it was time to make an uncounseled decision, and he replied, “Not until I talk to my lawyer.” 586 N.W.2d at 808. This court held that, simply by asking the driver whether he would take the test, the officer effectively

informed the driver that his attorney-contact time had expired and he would be charged with test refusal if he did not submit to testing. *Id.* at 810.

The same is true here: when Catlin asked Smude, after 44 minutes of time to contact an attorney, whether he would now submit to testing, Catlin adequately notified Smude that his opportunity to talk to an attorney was over and that not submitting to a test would constitute test refusal. *See id.* Nonetheless, Smude responded that he wanted to talk to an attorney. The district court did not clearly err in finding that Smude's response was a refusal to submit to testing.

Affirmed.