STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0094

State of Minnesota,
Respondent,

vs.

Kyle Duwayne Harms,
Appellant.

Filed October 9, 2023
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CR-21-17427

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Tory R. Sailer, Justine K. Wagner, Gregerson, Rosow, Johnson & Nilan, Ltd., Eden Prairie City Attorneys, Minneapolis, Minnesota (for respondent)

Lucas J.M. Dawson, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues on appeal from his conviction of driving while impaired (DWI) that the district court erred by denying his motion to suppress the breath-test results because

the officer violated his constitutional right to consult with counsel before appellant submitted to chemical testing. We affirm.

FACTS

At approximately 12:56 a.m. on September 17, 2021, an officer from the Eden Prairie Police Department observed and stopped appellant Kyle Duwayne Harms based on his driving conduct. When the officer approached appellant's vehicle, the officer smelled an odor of alcohol emanating from the vehicle. Appellant admitted to drinking alcohol that night. The officer then asked appellant to "step out [to] perform standardized field sobriety tests" and appellant complied. Appellant also agreed to submit to a preliminary breath test (PBT) which the officer administered 1:05 a.m. The PBT revealed appellant's alcohol concentration to be 0.164. As a result, the officer arrested appellant and transported him to the Eden Prairie Police Department.

The officer and appellant arrived at the police department at approximately 1:11 a.m. At 1:17 a.m., the officer read the implied-consent advisory to appellant. The officer then asked appellant whether he wanted to speak with an attorney, and appellant confirmed that he did. At 1:19 a.m., the officer gave appellant his personal cellphone and provided him with a stack of DWI attorney directories to contact an attorney.

Appellant placed one phone call to a law firm and left a voicemail. He then placed the cell phone on the desk, sat there quietly, and did not use the attorney directories.[1] This prompted the officer to ask appellant whether he was done trying to contact an attorney.

[1] The parties stipulated that appellant only used three minutes of his attorney time.

Appellant shook his head, to which the officer stated, "you are? Okay." Appellant responded, "well, its . . .," to which the officer asserted, "I'm asking, it's got to be a yes or no." Appellant replied, "I mean yeah, it's 1:30 in the morning, ya know." Following his response, the officer took both appellant's phone and the DWI attorney directories away and asked appellant if he would submit to a chemical breath test. Appellant responded "yes." At 1:26 a.m., the officer gave appellant his phone back to make calls to his family and friends. Then from 1:39 to 1:43 a.m., the officer administered the chemical breath test. The test revealed an alcohol concentration of 0.13.

Respondent State of Minnesota charged appellant by citation with four misdemeanors: operating a motor vehicle while under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) (2020); operating a motor vehicle with an alcohol concentration of 0.08 within two hours in violation of Minn. Stat. § 169A.20, subd. 1(5) (Supp. 2021); careless driving in violation of Minn. Stat. § 169.13, subd. 2(a) (2020); and carrying a firearm while driving under the influence with alcohol concentration of 0.10 or more in violation of Minn. Stat. § 624.7142, subd. 1(5) (2020).

Appellant moved to suppress the results of the chemical-breath test, alleging that the officer violated his constitutional right to consult with counsel prior to the testing. The district court held an evidentiary hearing on appellant's motion at which the officer testified on behalf of the state and the parties stipulated to admitting the video from the officer's body-worn camera. After the hearing, the district court denied appellant's motion to suppress and stated that "[the officer] vindicated [appellant's] right to counsel before

administering the breath test because he provided [appellant] with his cell phone, attorney directories, and time to contact an attorney."

On December 28, 2022, the district court held a stipulated-evidence trial under Minn. R. Crim. P. 26.01, subd. 4,[2] on count two of operating a motor vehicle with an alcohol concentration of 0.08 within two hours. The district court found appellant guilty of count two and dismissed the remaining charges. It sentenced appellant to 30 days in jail, stayed for two years. This appeal follows.

DECISION

I. The parties' joint motion to reverse the district court's conviction and remand for further proceedings is denied.

As an initial matter, the parties filed a joint motion, after briefing had been completed, requesting that this court reverse and remand for further proceedings because appellant failed to waive his right to testify under Minn. R. Crim. P. 26.01, subd. 4. However, this court does not consider substantive issues raised for the first time in a motion after briefing is complete. *See* Minn. R. Crim. P. 28.02, subd. 10 (providing Minn. R. Civ. App. P. 128.02 governs form and filing of briefs); Minn. R. Civ. App. P. 128.02, subd. 4 (providing that no further briefs may be filed without leave of appellate court); *see also State v. Tracy*, 667 N.W.2d 141, 145 (Minn. App. 2003) (stating party may not raise a new argument at oral argument) (citing *State v. Bucher*, 563 N.W.2d 776, 780 (Minn. App.

[2] Under Minn. R. Crim. P. 26.01, subd. 4., a party may seek review of a pretrial issue involving the suppression of evidence by stipulating to the state's case.

1997) (stating issues not briefed are forfeited), *rev. denied* (Minn. Aug. 5, 1997)). We therefore deny the parties' joint motion and address the case on its merits.

II. The district court properly denied appellant's motion to suppress the chemical breath test after determining that the officer vindicated appellant's constitutional right to counsel.

Appellant argues that, because his "right to counsel was not vindicated, the breath test results should have been suppressed." We are not persuaded.

"The determination of whether an officer vindicates a driver's right to counsel is a mixed question of law and fact, requiring the appellate court to apply the controlling legal standard to historical facts as determined by the trial court." *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001) (quotation omitted), *rev. denied* (Minn. Dec. 11, 2001). "An appellate court reviews the district court's factual findings under the clearly erroneous standard, but independently reviews the district court's legal determination." *Id*.

A driver has a limited right to consult with an attorney before deciding whether to submit to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 829 (Minn. 1991). But "[t]his right is limited to the extent that it cannot unreasonably delay administration of the test." *McNaughton v. Comm'r of Pub. Safety*, 536 N.W.2d 912, 914 (Minn. App. 1995). "Police officers must assist in the vindication of this right to counsel" which includes "allowing a driver, upon request, the opportunity to consult with an attorney of his own choosing." *Id.* at 914-15. "Vindication of the right will occur if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id*. "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). Moreover, "[a] reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008). "[T]his court must balance the efforts made by the driver against the efforts made by the officer." *Id*.

Furthermore, "as a threshold matter the driver must make a good faith and sincere effort to reach an attorney." *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992). Whether a driver "made a good faith effort to contact an attorney is a fact-specific inquiry, and this court need only determine whether the district court's finding is clearly erroneous." *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *rev. denied* (Minn. Aug. 6, 1996). "A finding of fact is clearly erroneous only if, upon review of the entire evidence, a reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (quotation omitted). We will also "consider other factors, including the time of day and length of delay since the driver was arrested, but these are not the exclusive factors that this court may consider." *Mell*, 757 N.W.2d at 713.

Appellant argues that (1) he made a sincere, good-faith effort to contact an attorney; (2) he should have been given more time to contact an attorney given the time of day; (3) the officer prematurely ended his attorney time; and (4) he did not knowingly, voluntarily, and intelligently waive his right to an attorney. We address each issue in turn.

A. Appellant did not continue to make a good-faith and sincere effort to reach an attorney.

Appellant first argues that he made a sincere, good-faith effort to contact an attorney before the officer prematurely ended his attorney time. We are not convinced.

Mell is particularly instructive for our case. There, the officer provided the defendant with a telephone and telephone directories to contact an attorney. *Id.* at 707. Rather than contacting an attorney, the defendant tried to contact his wife, and after failing to reach her, hung up, and approached the officer. *Id.* The defendant told the officer that he could not get in contact with his attorney because he did not have his phone number. *Id.* The officer replied, "you've been made aware that there's a phone book and a phone." *Id.* The defendant agreed, and the officer asked "[a]nd you don't want to call him at this time?" *Id.* The defendant nodded in the affirmative and did not try to request another telephone directory or request more time to contact an attorney. *Id.* at 707-08. This court determined that the record supported the district court's finding that the defendant "ended any good-faith effort to contact an attorney by the time he was asked whether he would take the test," and held that the officer vindicated the defendant's right to counsel by providing the defendant with "a telephone, directory, and time to make contact with an attorney." *Id.*

The reasoning in *Mell* applies here. Like the defendant in *Mell*, appellant used the cellphone for a short period of time, did not use the stack of attorney directories provided, and did not request more time to speak to an attorney. Moreover, by answering in the

affirmative that he was done contacting an attorney, appellant ended any good-faith effort to contact an attorney.

B. The time of day is not dispositive of the officer vindicating appellant's right to counsel.

Appellant argues that, because of the time of day, he should have been provided a longer period to hear back from the attorney he contacted or given more time to contact additional attorneys. We are not persuaded.

There are "no definite or exclusive set of factors." *Kuhn*, 488 N.W.2d at 842. However, the "time of day" is a relevant factor and a "driver should be given more time in the early morning hours when contacting an attorney may be more difficult." *Id.*

Here, the record shows that, after appellant left a voicemail with an attorney, he could have asked for more time for a return call or asked for more time to contact additional attorneys but failed to do either. Instead, appellant placed his cell phone on the desk and sat there quietly until the officer reasonably inquired if he was done with his time. *See Eveslage v. Comm'r of Pub. Safety*, 353 N.W.2d 623, 627 (Minn. App. 1984) (holding that officer vindicated defendant's right to consult an attorney when defendant tried to contact his attorney but did not succeed, and officer did not have to advise defendant to try to consult any other attorneys); *see also Mell*, 757 N.W.2d at 713 (recognizing that appellant made implied-consent decision at 2:54 a.m. and holding that officer vindicated appellant's right to counsel by providing telephone, directories, and reasonable time to contact an attorney). While the time of day is one factor, it is not determinative.

C. The length of time is not dispositive of the officer vindicating appellant's right to counsel.

Appellant also argues that the officer "interrupted" appellant's attorney time when more than one hour and a half remained to administer the chemical breath test. We disagree.

Generally, "because of the evanescent nature of the evidence in DWI cases, the accused is accorded a limited amount of time to contact an attorney." *Kuhn*, 488 N.W.2d at 840. As stated above, the officer, based on his observation of appellant placing his cellphone on the table and sitting there quietly after making the first call, asked whether appellant was done with his attorney time but did not interrupt appellant's time. We stated in *Mell* that an officer vindicated defendant's right to counsel after defendant only used the telephone for less than three minutes. 757 N.W.2d at 713. Moreover, "an officer need not ensure that a driver actually contacts an attorney, particularly when the driver chooses to stop calling." *McNaughton*, 536 N.W.2d at 915. The officer here did not have a duty to ensure that appellant contacted an attorney when appellant chose not to make any additional calls or ask for more time.

We conclude that, when viewing the totality of the circumstances, the officer vindicated appellant's right to counsel when he provided appellant with his cellphone, a stack of attorney directories, and time to make the call.

D. The standard of providing a "knowingly, voluntary, and intelligent waiver" does not apply to the limited right to counsel expressed in *Friedman*.

Finally, appellant argues that he did not knowingly, voluntarily, and intelligently waive his right to an attorney. Appellant's argument is misguided.

"A defendant may waive his right to counsel if the defendant's waiver is knowing, voluntary and intelligent." *State v. Maddox*, 825 N.W.2d 140, 147 (Minn. App. 2013) (quotation omitted). The limited right to counsel under *Friedman*, however, does not require that appellant make a waiver of this kind. 473 N.W.2d at 829. Appellant even concedes in his brief that "Minnesota courts have not directly addressed the standard for a waiver of the *Friedman* right to counsel" and "[w]ithout further guidance, this Court must assume that the general rule for a waiver applies." Moreover, an issue based on mere assertion and not supported by argument or authority is waived "unless prejudicial error is obvious on mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). Here, appellant has provided no supporting caselaw and we discern no prejudicial error.

Affirmed.