

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0853**

State of Minnesota,
Respondent,

vs.

Erik James Enno,
Appellant.

**Filed March 3, 2025
Affirmed
Bentley, Judge**

Polk County District Court
File No. 60-CR-22-1376

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

Ronald I. Galstad, East Grand Forks City Attorney, Galstad, Jensen & McCann, PA, East
Grand Forks, Minnesota (for respondent)

Alexander F. Reichert, Reichert Law Office, Grand Forks, North Dakota (for appellant)

Considered and decided by Bentley, Presiding Judge; Slieter, Judge; and Florey,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

In this direct appeal from a final judgment of conviction for driving while impaired (DWI), appellant challenges the district court's denial of his motion to suppress the results of his chemical breath test. He argues that he was denied the opportunity to consult privately with his attorney because their call took place within earshot of police officers and was recorded pursuant to standard police department protocols. We affirm.

FACTS

The relevant facts and procedural history relating to appellant Erik James Enno's DWI arrest are undisputed. One evening, a police officer in East Grand Forks initiated a traffic stop upon seeing a vehicle fail to stop at a stop sign. Enno was driving. While speaking with Enno, the officer noticed signs of intoxication and a smell of alcohol emanating from Enno's car. Enno admitted he had "a beer." The officer then conducted field sobriety tests, during which the officer observed various "clues" that Enno was intoxicated. Meanwhile, another officer arrived to assist. A preliminary breath test yielded an alcohol concentration of 0.099. Enno was arrested for DWI and transported to the East Grand Forks Police Department.

The booking room was connected to another small room with a phone. One of the officers read Enno the Minnesota Implied Consent Advisory, which requires that officers allow an arrestee to consult an attorney by phone upon request, so long as it does not cause unreasonable delay. Minn. Stat. § 169A.51, subd. 2(3) (2024). Enno asked to call his attorney, whose phone number was saved on his cellphone. Enno was permitted to retrieve

his attorney's phone number, was informed that the telephone lines were recorded, and was allowed to call his attorney using the police department's phone. Both officers remained in the booking room while Enno spoke with his attorney in the connected room. One officer testified that, for most of that time, he was setting up a chemical breath test machine "approximately 12 to 15 feet from where [Enno] was sitting" and could not hear what Enno's attorney was saying.

According to that officer, there was "no other place" to allow Enno to call his attorney. The department does not give DWI arrestees private rooms to make calls, and officers therefore can monitor arrestees for safety, prevent access to unauthorized items and areas, and ensure that equipment is not damaged. The officer also explained that the East Grand Forks Police Department's phone lines are recorded as a general practice but are not actively monitored. The officer had not listened to Enno's call as it happened or afterward and was not aware of anyone else who had.

Enno ultimately submitted to the chemical breath test, which revealed an alcohol concentration of 0.09. Respondent State of Minnesota charged him with two counts of third-degree driving while impaired, Minn. Stat. §§ 169A.20, subd. 1(1), (5), .26, subd. 1 (2022). After an initial appearance, Enno filed a motion to suppress the results of the test and dismiss the charges against him because he had been "denied his right to private telephone access to consult with an attorney." The motion was heard at two contested omnibus hearings, and upon determining that Enno's right to counsel was not violated the district court denied Enno's motion in full.

Before trial, the state amended the charges to one count of fourth-degree misdemeanor driving while impaired, Minn. Stat. §§ 169A.20, subd. 1(5), .27 (2022). The parties agreed to proceed to trial on stipulated evidence with the understanding that the pretrial issue raised in Enno’s motion to suppress “is dispositive or that trial will be unnecessary if [Enno] prevails on appeal.” *See* Minn. R. Crim. P. 26.01, subd. 4. The district court found Enno guilty of fourth-degree DWI, sentenced him to 30 days’ incarceration, and stayed the sentence for one year.

Enno appeals.

DECISION

Enno challenges the district court’s denial of his motion to suppress the results of his chemical breath test and to dismiss the DWI charge, arguing that he was “denied his right to consult with . . . counsel before testing, as he was on a recorded phone, in a supervised room, and was not granted [the] alternative option [of a private phone call] that he and [his attorney] proposed.”

“When reviewing a pretrial order denying a motion to suppress, we review the district court’s factual findings for clear error and its legal determinations *de novo*.” *State v. Ezeka*, 946 N.W.2d 393, 403 (Minn. 2020). “Questions of constitutional law are reviewed *de novo*.” *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009).

The Minnesota Constitution guarantees an accused “the right . . . to have the assistance of counsel in his defense.” Minn. Const. art. I, § 6. In the DWI context, the supreme court has explained that this includes a “limited right to counsel within a reasonable time before submitting to testing.” *Friedman v. Comm’r of Pub. Safety*, 473

N.W.2d 828, 837 (Minn. 1991). Minnesota statutes further provide that “[r]easonable telephone access . . . shall be provided following the request of the person restrained and before other proceedings shall be had regarding the alleged offense causing custody.” Minn. Stat. § 481.10, subd. 2 (2024).

“[G]iven the limited nature of the right to counsel in [the DWI] context,” the supreme court has clarified that the presence of a police officer in the room where an attorney call takes place does not violate the right to speak to counsel before submitting to chemical testing for blood alcohol. *Comm’r of Pub. Safety v. Campbell*, 494 N.W.2d 268, 269-70 (Minn. 1992). In *Campbell*, the supreme court noted that, although “the presence of a police officer in the room when the arrestee talks with the attorney may inhibit the arrestee,” “police do not have to provide a DWI arrestee with a private telephone” to vindicate their limited right to counsel because “proper testing procedures generally require that the officer remain in the presence of an arrestee.” *Id.* Short of an outright denial of that right—for example, by refusing to allow the arrestee to call their attorney, *State v. Stradcutter*, 568 N.W.2d 545, 546 (Minn. App. 1997)—a DWI arrestee’s rights are “sufficiently protected by the subsequent exclusion of any overheard statements or any fruits of those statements.” *Campbell*, 494 N.W.2d at 269-70.

Campbell forecloses Enno’s argument that the state violated his limited right to consult an attorney by denying him a private telephone to make the call. Although Enno and his attorney may have been inhibited from speaking freely because an officer was present in the room, Enno nonetheless had an opportunity to consult with his attorney before deciding whether to submit to testing. That is all *Campbell* requires. *Id.* at 270.

Enno attempts to distinguish *Campbell* because “[the officers] were not only listening to one end of the phone call, like the officer in *Campbell*, the call was also being recorded.” But *Campbell*’s scope is not so limited. *Campbell* explains that the remedy for any improperly “overheard statements or any fruits of those statements” stemming from the lack of a private telephone conversation is to exclude the statements—not to exclude the results of any subsequent chemical test. *Id.* at 269-70. That reasoning applies the same regardless of whether an officer is in the room or the call is being recorded pursuant to standard department protocols. Because the state did not attempt to introduce any statements from the recording of Enno’s call to his attorney or statements that an officer may have overheard while sitting in the room, *Campbell* controls.

Moreover, the supreme court has also held that, “[e]ven if the act of recording, but not listening to, attorney-client phone conversations is an intrusion into the attorney-client relationship, such an intrusion does not automatically translate into a violation of a defendant’s right to counsel.” *State v. Andersen*, 784 N.W.2d 320, 333-34 (Minn. 2010). For the recording to rise to a violation of a defendant’s right to counsel, the defendant must show prejudice arising from the intrusion. *Id.* at 333. Here, the undisputed facts are that no police department personnel involved in this case listened to the recording. Therefore, Enno cannot show prejudice resulting from the recording that would amount to a violation of his right to counsel.

Affirmed.