STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF DAKOTA **FIRST JUDICIAL DISTRICT**

File No. 19WS-CV-13-1170

[redacted]

Petitioner,

v.

Commissioner of Public Safety,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The above-entitled matter came on for hearing before the Honorable Erica H. MacDonald, Judge of District Court, at the Dakota County Northern Service Center, West St. Paul, Minnesota, on October 1, 2013, for an implied consent hearing. Jeffrey S. Sheridan, Esq., appeared on behalf of Petitioner who was present. Kristi Nielsen, Assistant Attorney General, appeared on behalf of Respondent.

At the outset of the hearing, Petitioner specified the four issues for consideration, one of which is whether Petitioner's limited right to counsel was vindicated. Three witnesses testified. Five exhibits were received into evidence.

At the conclusion of the hearing, a briefing schedule was set. On October 22, 2013, Petitioner filed Petitioner's Trial Brief. On November 5, 2013, Respondent filed Respondent's Memorandum of Law. On November 15, 2013, Petitioner filed Petitioner's Reply Brief. As of November 15, 2013, the record was complete and the matter taken under advisement.

FINDINGS OF FACT

1. On Friday, July 12, 2013 at approximately 6:50 p.m., Marietta Janecky called 911 to report a "car that was driving in front of [her] erratically." (Un. Tr.[1] at 5.)
2. She provided a description of the car and its license plate number.
3. Officer David Letourneau of the Eagan Police Department responded to the call of a suspected impaired driver.
4. Upon arriving on the scene, he saw that another officer was speaking with the suspect, later identified as Petitioner.
5. Officer Letourneau assisted on scene as the backup.
6. The other officer spoke with Petitioner and then conducted field sobriety tests.
7. Petitioner was arrested for driving while impaired ("DWI").
8. Officer Letourneau took custody of Petitioner because the other officer "was getting close to the end of his shift." (Un. Tr. at 12.)
9. Officer Letourneau took Petitioner to the Eagan PD "to go through paperwork for a DWI." (Un. Tr. at 13.)
10. Officer Letourneau began reading the Implied Consent Advisory to Petitioner at 7:28 p.m.
11. Petitioner stated she understood what had been read to her and wished to consult with an attorney.
12. Officer Letourneau testified that Petitioner "said multiple times during the reading, she said she wanted to speak with an attorney."

[1] "Un. Tr." is used to refer to the real time transcript of the implied consent hearing.

13. Officer Letourneau then provided Petitioner with a telephone, her cell phone, and paper directories.

14. Her attorney time began at 7:29 p.m.

15. Petitioner then made multiple telephone calls to friends and family, the first of which was to her father.

16. Each of those conversations included conversation about her desire to talk to a lawyer.

17. She also sent text messages.

18. During those communications, "[s]he mentioned multiple times that she needed an attorney or wanted an attorney." (Un. Tr. at 17.)

19. Throughout her attorney time, Petitioner remained steadfast in her determination to speak to an attorney. (Un. Tr. at 24-26.)

20. Officer Letourneau testified that in the phone calls she made, "[s]he was asking people to get her a lawyer" and "said she needed a lawyer." (Un. Tr. at 26.)

21. At one point, she briefly looked through a couple pages of one of the directories provided.

22. As to what occurred during her attorney time, Officer Letourneau testified as follows:

> During the approximately 30 minutes or a little over that the attorney time is made available, I reminded her multiple times this was her time to consult with an attorney and to get advice on how she should proceed. And after it appeared she wasn't making an attempt to contact an attorney or counsel, provide with a friend of family to contact her back, it was my decision to make, to have the time stopped, so she could make the decision on her own.

(Un. Tr. at 18.)

23. He ended her attorney time at 8:00 p.m., explaining that he ended it at this time

"[b]ecause it had been half an hour and from my experience with her sitting there, um, not doing anything or sending text messages or calling friends or family, it didn't appear that a good-faith effort was being made to try to contact an attorney to seek advice." (Un. Tr. at 18.)

24. At the time Officer Letourneau was ending the attorney time, Petitioner was on the telephone with someone and said something to the effect that her time was up and the officer was making her get off the telephone.

25. Officer Letourneau then asked Petitioner if she would submit to a breath, blood, or urine test.

26. She declined.

27. Officer Letourneau placed Petitioner in a holding cell while he went to complete the paperwork online.

28. It took him approximately fifteen to twenty minutes to complete the paperwork.

29. While he was completing the paperwork, Attorney Sheridan called Eagan dispatch in an effort to contact Petitioner.

30. The dispatcher obtained the pertinent information including Petitioner's name and Attorney Sheridan's name and callback number and advised she would advise the officer on the case. (Ex. 2.)

31. Prior to him completing the paperwork, at 8:14 p.m., Officer Letourneau learned through radio dispatch that an attorney had contacted dispatch about trying to contact Petitioner.

32. Officer Letourneau confirmed with dispatch that he had received the radio transmission. (Ex. 2.)

33. Officer Letourneau took no steps to put Petitioner in contact with the attorney.

34. Officer Letourneau could have stopped the paperwork process and allowed Petitioner to call the attorney.

35. Officer Letourneau made the decision not to do that, agreeing on cross-examination that "even though . . . it was clear that family member had essentially gotten ahold of a lawyer, the lawyer had tried to make contact with her, [his] decision was to allow everything to stand as it was." (Un. Tr. at 30.)

36. Officer Letourneau testified that he made this decision because "the implied consent advisory was complete" and her "was trying to finish up the paperwork before transport." (Un. Tr. at 35.)

37. If he had made the decision to suspend the paperwork process and to permit Petitioner to speak with the attorney, it would have been a minimal amount of more work for him to complete.

38. Officer Letourneau signed the implied consent advisory form at 8:30 p.m., which was sixteen minutes after he learned that an attorney had been trying to contact Petitioner.

39. At approximately 9:00 p.m., Officer Letourneau began to transport Petitioner to the jail.

40. Officer Letourneau removed Petitioner from the holding cell and placed Petitioner in his squad car.

41. At that time and for the first time, he informed Petitioner that an attorney had called and he wrote down the attorney's name and number and put it with her property which was in the front seat.

42. Petitioner was handcuffed in the rear of the squad car away from her property, including

her cell phone.

43. Officer Letourneau then transported her to the Dakota County Jail.

44. Petitioner never consulted with an attorney prior to being transported to jail.

45. Petitioner made a good-faith and sincere effort to contact an attorney.

46. There is no evidence that Petitioner was using delay tactics or acting in an obstructionist manner.

CONCLUSIONS OF LAW

The issue before the Court is whether Petitioner's right to counsel was vindicated. Based on the totality of the particular circumstances in this case, the Court finds that Petitioner's right to counsel was not vindicated and, therefore, rescinds the revocation of her driving privileges.

The Minnesota Constitution provides drivers with a limited right to counsel before deciding whether to submit to chemical testing. Minn. Const. art. I, § 6; Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 835 (Minn. 1991). The right is limited to the extent that it cannot "unreasonably delay the administration of the test." Id. Police officers must inform the driver of this right and assist in its vindication. Friedman, 473 N.W.2d at 835.

To determine whether a driver's right to counsel was vindicated, one must examine the totality of the circumstances. Mell v. Comm'r of Pub. Safety, 757 N.W.2d 702, 712 (Minn. App. 2008). Important considerations in this determination include such factors as whether Petitioner received reasonable time; whether Petitioner made a good-faith effort to reach an attorney; whether the officer aided Petitioner; and whether Petitioner exercised the right. Kuhn v. Comm'r of Pub. Safety, 488 N.W.2d 838, 840 (Minn. App. 1992); Parsons v. Comm'r of Pub. Safety, 488 N.W.2d 500, 502 (Minn. App. 1992). As has been explained:

> [A]ny person who is required to decide whether he will submit to a chemical test shall have the right to consult with a lawyer of his own choosing before making that decision, provided that such a consultation does not unreasonably delay the administration of the test. The person must be informed of this right, and the police officers must assist in its vindication. The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel.

Delmore v. Comm'r of Pub. Safety, 499 N.W.2d 839, 841-42 (Minn. App. 1993) (quoting Friedman, 473 N.W.2d at 835 (quotation omitted)).

In a case such as this, the "threshold matter" is whether Petitioner made a "good faith and sincere effort to reach an attorney." Kuhn, 488 N.W.2d at 842. Whether a driver made a good-faith effort to contact an attorney is a question of fact. Gergen v. Comm'r of Pub. Safety, 548 N.W.2d 307, 309 (Minn. App. 1996).

In this case, Petitioner made a good-faith sincere effort to contact an attorney prior to deciding whether to submit to testing. She made multiple telephone calls seeking help in contacting an attorney. Officer Letourneau could not have been clearer in his testimony that Petitioner remained steadfast in her resolve to contact an attorney. She never wavered on that point. Even at the time Officer Letourneau was about to end her attorney time, Petitioner was on the telephone attempting to contact an attorney. It is true that she was contacting family members to help her find an attorney; however, that was a reasonable way to go about finding a qualified attorney to give her advice. There is no evidence from which one could infer that she was using delay or stall tactics.

Once past the threshold issue, the issue is whether Petitioner was given a reasonable amount of time to contact an attorney. As to what constitutes a "reasonable time" within which

to contact an attorney, there is no bright-line rule and "basing the 'reasonable' time criteria on a specific number of elapsed minutes alone is improper." Kuhn, 488 N.W.2d at 842. The "relevant factors" to consider "focus both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of that right." Id. The time of day is also a relevant consideration, with a driver given more time in the early morning when it may be more difficult to obtain an attorney. Id.

Petitioner was given thirty-one minutes within which to contact an attorney. Without more facts, one might find that she was given a reasonable amount of time. On these facts, however, the opposite conclusion must be reached.

As discussed, Petitioner remained steadfast that she wished to contact an attorney before deciding whether to submit to chemical testing. She acted diligently on this issue, making telephone calls and sending text messages. She was even on the telephone trying to find an attorney when Officer Letourneau ended her attorney time. At that point, she declined testing and Officer Letourneau deemed the case a refusal. Fourteen minutes later, however, Officer Letourneau received word from dispatch that an attorney had called trying to contact Petitioner. At this point, Officer Letourneau knew that Petitioner was in the holding cell and did not have her cell phone or a way for an attorney to reach her other than through him. He made the unilateral decision to continue with the paperwork process instead of suspending that process and letting Petitioner contact the attorney. He candidly admitted on the witness stand that it would have been a minimal amount of more work to have let her contact the attorney. Officer Letourneau did not complete the paperwork until sixteen minutes after he had full knowledge that an attorney was trying to contact Petitioner. Moreover, it was after regular business hours

on a Friday night in the summer. It is not unreasonable that it would have taken a bit longer than usual to find an attorney with whom to consult. Officer Letourneau should have taken the minimal additional time to permit Petitioner to speak with the attorney. His failure to do so was inexcusable on these facts. As stated, officers must assist in the vindication of a driver's right to counsel. McNaughton v. Comm'r of Pub. Safety, 536 N.W.2d 912, 914 (Minn. App. 1995). The obligation to assist includes permitting the driver the opportunity to speak with an attorney of his choosing. Id. There was no reasonable or rational explanation given for Officer Letourneau's unilateral decision to deny Petitioner telephone contact with the attorney. See Jones v. Comm'r of Pub. Safety, 550 N.W.2d 472 (Minn. App. 2003) (finding right to counsel not vindicated where there was no rational reason for the denial of telephone contact). On the particular facts of this case, Petitioner's limited right to consult with an attorney prior to testing was not vindicated.

ORDER

Based on the foregoing, Petitioner's request to rescind the revocation based on the denial of the right to counsel is **GRANTED** and the revocation of Petitioner's driving privileges is hereby **RESCINDED.**

BY THE COURT:

Dated: 11/26/2013

Erica H. MacDonald
Judge of District Court