STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF DAKOTA | FIRST JUDICIAL DISTRICT

[redacted]

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RESCIND REVOCATION OF PETITIONER'S LICENSE

Court File No.: C3-07-12048

TO: THE ABOVE-NAMED COURT; THE HONORABLE ; AND , ASSISTANT ATTORNEY GENERAL.

INTRODUCTION

Petitioner, [redacted] was arrested on December 16, 2006 and charged with Fourth Degree Driving While Impaired in violation of Minnesota Statute § 169A.20 and §169A.27. After arresting Petitioner, Deputy transported him to the Apple Valley Police Department and read him the Motor Vehicle Implied Consent Advisory.[1] Petitioner requested to speak with an attorney. Deputy provided Petitioner with a telephone and four phone books at 2:39 a.m. Petitioner then made a good faith and sincere effort to contact four attorneys until 2:57 a.m., when Deputy ended his telephone time after 18 minutes. Because 18 minutes is not sufficient time to contact an attorney given the early morning hour, and because Deputy terminated one of Petitioner's phone calls mid-dial, Petitioner's right to counsel prior to testing was not vindicated.

[1] The recording of the implied consent advisory and subsequent conversation between Petitioner and Deputy W[redacted] was audio recorded. The audio recording and transcript were stipulated to by Petitioner's counsel and the Commissioner of Public Safety, and submitted as evidence to the Court at the implied consent hearing.

STATEMENT OF THE CASE

On December 16, 2006, Dakota County Sherriff's Deputy was traveling northbound on Garrett Avenue approaching the intersection at 140th Street in Apple Valley, Minnesota. Deputy testified that she saw a vehicle exit a parking lot and thereafter make an immediate left turn without signaling. Deputy initiated a traffic stop and identified the driver as H[redacted], Petitioner in this matter. After conducting field sobriety tests, Deputy placed Petitioner under arrest and transported him to the Apple Valley Police Department.

At 2:37 a.m. Deputy read the Motor Vehicle Implied Consent Advisory to Petitioner. Petitioner indicated that he wanted to consult with counsel before submitting to the test. At 2:39 a.m. Deputy gave Petitioner four phone books and a telephone. Petitioner then made good faith, sincere, and valiant efforts to reach four attorneys until 2:55 a.m., when Deputy reentered the room and told Petitioner to hang up the phone. She then told Petitioner "[i]t is now that reasonable time" and that he would have to make a decision about testing, even though Petitioner had only been given only sixteen minutes to reach an attorney. Petitioner stated that he wanted to make another call, and Deputy agreed to allow it. The fourth call, too, was unsuccessful. At 2:57 a.m. Deputy required Petitioner to make a decision on his own, without the benefit of counsel. Petitioner eventually agreed to the test. Petitioner was given only 18 minutes to contact counsel at approximately 3:00 a.m. in the morning. During those 18 minutes, Petitioner attempted to contact four different attorneys, each call being unsuccessful. Petitioner testified that he would have made a fifth call had Deputy not ended his phone time.

CREDIBILITY OF WITNESSES

Deputy first testified that she made an accurate, complete, and specific report in this case. She further testified that she relied on this report because she could not recall exactly what happened during this offense. Despite not independently being able to recall this case, she testified to facts that were not included in her report. She also testified that Petitioner used stall techniques at the police station, however later on cross examination admitted that he was not using any stall techniques. Deputy further testified that she made mistakes in Petitioner's case, such as calling him by the wrong name and asking Petitioner to take a drug test when he was not under suspicion of driving while under the influence of a controlled substance. Deputy testimony indicated that, as demonstrated through the transcript of the implied consent hearing provided to the court by the undersigned, her memory and further testimony of what happened on December 16, 2007 is questionable at best.

Petitioner, on the other hand, testified that he wanted to tell the truth in this matter, that he had never been arrested before, that he was aware that testifying falsely on the witness stand was a felony, that he had worked for the Federal Bureau of Investigation as a special agent for over 10 years, that he had formerly passed an intensive FBI background check regarding character and honesty, and was determined to be by character an honest individual by the OS Argument. He testified as to specific details throughout the night, recalled specific facts, such as the bad weather, the fact he had been given four phone books rather than three as testified to by Deputy , the

specific description of the print on the call back phone at the police station[2], lights, and conversations with the police officers that only could be recalled by an individual with an accurate memory.

ISSUE

1. **Was Petitioner's pretest right to counsel vindicated?**

ARGUMENT

I. GIVEN THE TOTALITY OF THE CIRCUMSTANCES TEST, DEPUTY W[redacted] DID NOT GIVE PETITIONER A REASONABLE AMOUNT OF TIME TO CONTACT AN ATTORNEY.

A driver who is subjected to the implied consent law has the right to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W. 2d 828, 835 (Minn. 1991). The determination of what is a reasonable amount of time to contact counsel before submitting to chemical testing depends on the *totality of the circumstances*. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. Ct. App. 1992)(*emphasis added*). Factors to consider include the time of day, the length of time the driver has been under arrest, and whether the driver has made a good faith effort to contact counsel. *Id.* at 502.

A. The first prong of the totality of the circumstances test requires that the court consider the time of day.

A driver should be given more time to reach an attorney in the early morning hours, when attorneys may not be readily available. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. Ct. App. 1992). The driver is entitled to more time in the early morning hours when attorneys are hard to reach. *Id.* If the driver is diligently trying to

[2] As an example, Petitioner testified about the phone at the police station, "it was neat so it was – didn't' look handwritten. There wasn't an area code on it. It was just a seven digit number from what I can recall and it was the push button type."

contact an attorney, he should be permitted to keep trying until the officer has to commence testing to obtain a valid (within two hours of driving) test. *See Id.*

In *Kuhn*, the officer terminated the driver's good faith efforts to locate an attorney at 2:26 a.m., after only twenty-four minutes of calling. *Id.* at 839. The court held that police did not afford the driver a reasonable opportunity to contact and consult with an attorney considering the early morning hour, when attorneys are difficult to reach. *Id.* at 842. *See also Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 385 (twenty-three minutes not enough at 3:00 a.m. where driver was making a diligent effort to contact counsel); *cf. Parsons v. Comm'r of Pub. Safety,* 488 N.W.2d 500, 502 (Minn.App.1992) (officer vindicated driver's right by explaining that time to consult with counsel was limited and providing telephone and directories for forty minutes around 2:00 a.m.); *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 345 (Minn. App. 1995) (right vindicated where telephone and directories were provided for twenty-nine minutes around 9:00 p.m.).

Like *Kuhn* and *Davis*, in this case Petitioner attempted to contact legal counsel at 2:55 a.m., a time when presumably very few if any attorneys are available. Most criminal attorneys use answering services at that time of night, which makes timely contact even more difficult. As Petitioner testified, the first two phone calls to law firms were answered by "answering services," who indicated that they first had to page an attorney and give that attorney the call back information before Petitioner could actually receive legal advise. The answering services further told Petitioner to keep the line clear and to wait for a call back from the on-call attorney, further preventing him from getting an attorney on the line promptly. Taking all these facts into consideration, the decision in

Kuhn and Minnesota case law make it clear that driver in Petitioner's situation, trying to reach an attorney in the early morning hours, should be afforded more time than 18 minutes to reach an attorney.

B. The second prong of the totality of the circumstances test requires that the court consider the length of time the driver has been under arrest.

Deputy [redacted] testified that Petitioner was given only 18 minutes at approximately 3:00 a.m. in the morning to contact an attorney, and that she had no idea how many phone calls Petitioner made:

Mr. Garry: You gave Mr. [redacted] 18 minutes to contact an attorney at 3 o'clock in the morning, is that correct?

Deputy [redacted]: Yes, sir.

Mr. Garry: And you have no idea how many phone calls he made during that 18 minutes, is that correct?

Deputy [redacted]: That is correct.

(Implied Consent Hearing T. 43 L.18-24)

An individual has a limited right, upon request, to obtain legal advice before deciding whether to submit to chemical testing, provided the consultation does not unreasonably delay administration of the test. Minn. Stat. Ann. § 169A.51 Subd. 2(4) (Westlaw 2007); *Friedman v. Comm'r of Pub. Safety,* 473 N.W.2d 828, 835 (Minn. 1991). A driver must be informed of this right, and a police officer must assist in its vindication. *Friedman,* 473 N.W.2d at 835. Whether a person's right to counsel has been vindicated is determined by the totality of the circumstances, including the evanescent nature of alcohol. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. Ct. App.1992). Because of the evanescent nature of alcohol, an officer has two

hours from the time of the stop to conduct a valid test. *See* Minn. Stat. Ann. § 169A.20 Subd. 1(5) (Westlaw 2007). The length of time the driver has been under arrest is important because the longer he is under arrest, the less probative value the chemical test may ultimately have. *Kuhn* at 843.

In this case, Petitioner was pulled over at 1:45 a.m., giving Deputy until 3:45 a.m. to obtain a BAC intoxilyzer reading. Deputy cut short Petitioner's phone time at 2:57 a.m., after giving Petitioner only 18 minutes of phone time to contact counsel. Allowing Petitioner more time would not have unreasonably delayed the administration of the test. Deputy had until 3:45 a.m., another 48 minutes, to obtain a valid test sample pursuant to the DWI statute. Deputy testified to this fact on cross-examination:

Mr. Garry: Ok. Well, taking you back to the stop, it was about 1:45, right?

Deputy : Yes, sir.

Mr. Garry: And you're trying to get an implied consent test within two hours of driving, right?

Deputy Yes, sir.

Mr. Garry: You knew that you had until about 3:45 to get an implied consent test in this case?

Deputy Yes, sir.

(Implied Consent Hearing T. 26 L.21-25, T. 27 L. 1-4)

At the time Deputy terminated Petitioner's attempts to reach counsel, Petitioner had not yet spoken with an attorney, and there were still 48 minutes left in which to get a valid Intoxilyzer result.

C. The third prong of the totality of the circumstances test requires that the court consider whether the driver has made a good faith effort to contact counsel.

The driver's good-faith effort to contact an attorney is a threshold issue in making this determination. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992). In *Kuhn*, the driver tried to contact an attorney three times over the course of twenty-four minutes. *Id.* at 839. The officer testified that the driver "wasn't faking or stalling." *Id.* The *Kuhn* court concluded that the driver was making a sincere effort to contact counsel: "there is nothing in the record, in other words, to indicate Kuhn was using delaying tactics or decided on his own to stop trying to reach an attorney." *Id.* at 842.

1. Petitioner attempted to contact at least four different law firms, and was not using delay tactics.

In this case, when asked whether he wanted to contact counsel, Petitioner stated to Deputy ., "I would like to consult with an attorney, yes." At 2:39 a.m., Petitioner was given four phone books to contact counsel. He searched through the phone books until he found the criminal attorney's advertisement, placed a phone call, spoke with an answering service, gave the answering service the call back number to the jail, and waited for a return phone call as instructed by the answering service. After waiting approximately five minutes, Petitioner had not yet received a return phone call, and so he looked through the phone books again to contact a second law firm. Once he found the next advertisement, he called the second law firm, spoke with an answering service, gave

the answering service the call back number, and waited for a return phone call as instructed by the answering service.[3]

In this case, Petitioner made a good faith and sincere effort to reach counsel. From 2:39 a.m. until 2:57 a.m., Mr. H[redacted] attempted to contact four attorneys in the phone book. Petitioner was not faking, stalling, or using "delaying tactics." The answering services for the law firms he had reached told him to keep the line open for the attorney to return his call.

> *Petitioner*: Well, the first phone call... I had to yell out to see how to get an outside line because they didn't tell me how to use the phone. I tried to dial it direct. And I yelled out, how do you get an outside line? And they said, you have to dial 9. So then I dialed 9 and I dialed the number. I got the answering service. The answering service... said, do not make any calls, we'll give you a call back. So I waited after that first phone call probably for about at least three minutes, hoping to get a call back.

(Implied Consent Hearing T. 64 L.2-14)

2. **Deputy testified that Petitioner was not stalling or using delay tactics.**

In response to a clarification question from the Honorable about whether Petitioner was stalling at the Apple Valley Law Enforcement Center, Deputy testified on cross-examination that Petitioner was not stalling at the police station:

> *The Court*: But the question is directed to that time, the implied consent advisory at the Apple Valley Law Enforcement Center, so that's where your testimony should be focused in response to this question.
>
> *Deputy* : So I guess the answer to your question now would be, no, at that point in time there were no things that led me to believe that he was stalling at that time.

[3] Petitioner credibly testified at the implied consent hearing that he eventually attempted to reach four different law firms, and would have placed a fifth phone call had Deputy W[redacted]not ended his phone time.

(Implied Consent Hearing T.46 L.25, T. 47 L. 1-3)

When Petitioner finally did stop trying to contact an attorney, it was not because he decided to stop on his own. Petitioner stopped because he was forced to do so by Deputy . At approximately 2:55 a.m., after not receiving a return phone call from the law firm he had most recently called, Petitioner again searched through the yellow pages, found the next advertisement, picked up the phone to make his third phone call, and started dialing the phone number on the advertisement. While he was doing this, Deputy entered the room and the following conversation occurred:

Deputy	The time is now 02:55 hours. I'm back in the room with Mr. G[redacted] who is attempting to call attorneys. Mr. G[redacted], as I explained to you earlier, before making a decision not to test, you have the right to consult with an attorney.
Petitioner:	Uh-Huh.
Deputy	And continuing on if you wish to do so a telephone directly will be made available to you, which they were, correct?
Petitioner:	Correct.
Deputy	And then I also stated that if you are unable to contact an attorney you must make the decision on your own, correct?
Petitioner:	Correct.
Deputy	Okay. And you've got to make the decision within a reasonable time. Okay. It is now that reasonable time.
Petitioner:	Okay.
Deputy	So, if you could **hang that receiver** up, please. Do you understand everything still at this point?

(Implied Consent Advisory T. 3 L. 25, T. 4 L. 1-20) (emphasis added)

Petitioner verified the fact that while he was making his third phone call to an attorney, Deputy entered the room and forced him to hang up the phone:

Mr. Garry: At that point did you eventually decide to call a third attorney?

Petitioner: Yes, I did.

Mr. Garry: And what happened then?

Petitioner: I had the receiver in hand; I was already in the process to dial the number; and that's when the deputy entered the room again and that's when she told me to hang up the receiver.

After Petitioner was told to hang up the receiver, 16 minutes into trying to contact legal counsel, Deputy decided that a reasonable time expired. Petitioner however, told Deputy that he had not yet reached a lawyer, and that he wanted to make another call. The following conversation occurred:

Petitioner: Yes. Yes, I do.

Deputy Okay. Will you take a drug test for me?

Petitioner: I'm going to try one more attorney because the other one did not call me back.

Deputy Sir, I've given you a reasonable time. I will allow you to try one call right now, but it is at a reasonable time. Okay.

Petitioner: Okay.

Deputy So I need you to make a decision. I need you to do that. I'll give you a minute to call right now.

Petitioner: Okay. I'm going to call right now. I'm sorry, to get an outside line though, is 612 the area code here?

Deputy You need to dial 612.

Petitioner: Okay.

(Recording Stopped)

(Implied Consent Advisory T. 4 L. 22-25, T. 5 L. 1-13)

Petitioner attempted to contact the fourth law firm, however no one answered the phone call. Despite not being able to contact counsel, Deputy entered the room one minute later, and told Petitioner that his time was up, and requested he take a breath test.

Petitioner was given a phone at 2:39 a.m. and his telephone time ended at 2:57 am. Petitioner was given only *eighteen minutes* to search through the yellow pages, decide which law firm to call, and contact an attorney at approximately 3:00 a.m. This is less time than in any of the cases cited above. At that hour in the morning, Minnesota courts have consistently held that *less than* thirty minutes is insufficient time to contact counsel. Deputy had more than forty-five minutes remaining to obtain a valid sample. Therefore, taking into account the totality of the circumstances, Deputy did not give Petitioner a reasonable opportunity to contact or consult with counsel.

D. Moreover, Deputy unreasonably hindered Petitioner's exercise of his attempt to contact legal counsel.

If an officer takes actions that unreasonably hinder the driver's exercise of his or her right to counsel, then that officer has failed to vindicate the right. *See, e.g., Jones v. Comm'r of Pub. Safety*, 660 N.W.2d 472, 476 (Minn. Ct. App. 2003) (right not vindicated when dispatcher falsely advised attorney that time had expired); *Duff v. Comm'r of Pub. Safety*, 560 N.W.2d 735, 737–38 (Minn. Ct. App.1997) (right not vindicated when officer instructed driver to end call with attorney before the driver was able to obtain sufficient advice); *Kuhn*, 488 N.W.2d at 842 (right not vindicated when officer required driver to test while driver was making efforts to contact attorney).

In *Duff*, 560 N.W. 735, the driver was in mid-call when the officer entered the room and forced him to hang up the phone. *Id.* at 737. The officer terminated the call without knowing whom the driver was speaking to or how long the conversation had lasted. *Id.* The officer acknowledged an immediate test was not required to obtain a valid sample, so it was unnecessary for the officer to stop the call at that very moment. *Id.* at 737–38. The *Duff* court held that, because of the prematurely terminated phone call, the driver was not given a reasonable opportunity to consult with an attorney. *Id.* at 738. His right to counsel was therefore not vindicated. *Id.*

Like *Duff*, in this case, Deputy cut short Petitioner's third phone call. Though Deputy provided Petitioner with a telephone and telephone books, she *twice* terminated Petitioner's call in mid-dial.[4] Petitioner made a valiant effort to exercise his constitutional and statutory right to consult with counsel. Deputy had no way of knowing whether or not this particular call would result in the connection that Petitioner had been hoping for. Further, like in *Duff*, it was not necessary for Deputy to end Petitioner's call and test him at that very moment; in fact, she testified that she still had more than 45 minutes to obtain a valid intoxilzyer test.

1. **Deputy : admitted that she could have given Petitioner more time to use the phone**:

At the implied consent hearing, the following cross-examination occurred:

Mr. Garry: And he had until 3:45 to take the test within two hours, is that correct?

Deputy Yes, sir.

Mr. Garry: So he had another 48 minutes to take the intoxilyzer machine at that point, did he not?

[4] The phone termination occurred on page 4, line 18-19 of the stipulated transcript provided to the Court.

Deputy That could have – yeah, I guess so, yes.

Mr. Garry: And you could have given him some additional, more time to contact an attorney, could you not have?

Deputy Yeah, he could have had a little more time.

(Implied Consent Hearing T. 44, L. 5-13)

2. **Deputy made an incorrect legal conclusion that Petitioner had been given a reasonable amount of time to contact an attorney.**

Deputy arbitrarily decided that it had been a 'reasonable' amount of time. She even testified that she was not qualified to make this legal determination.

Mr. Garry: Petitioner then stated, after you told him to hang up the receiver, "I'm going to try one more attorney because the other one did not call me back," is that correct?

Deputy : That is correct.

Mr. Garry: And you responded, "Sir, I've given you a reasonable time. I will allow you to try one call right now, but it is at a reasonable time," is that correct?

Deputy Yes, sir.

Mr. Garry: Now, you don't have a law degree, do you, Deputy?

Deputy No, sir, I do not.

Mr. Garry: You made the legal conclusion that you had given Mr. H[redacted] a reasonable amount of time to contact an attorney, is that right?

Deputy Yes, sir.

(Implied Consent Hearing T. 41, L.19-25, T. 42, L. 1-10)

Deputy unreasonably hindered Petitioner's attempts to speak with counsel by forcing him to hang up in mid-dial. Besides her admission that she had another 48

minutes to obtain a valid Intoxilyzer reading from Petitioner when she terminated his phone calls, she was not qualified to arbitrarily decide that a 'reasonable' amount of time had passed. That decision is a judicial determination. There was no reason for Deputy W[redacted] to stop Petitioner from contacting an attorney, *especially in mid-dial*, considering she still had 48 minutes to get a valid test result. Moreover, she testified that Petitioner was not stalling for time during the implied consent advisory.

A reasonable amount of time, therefore, had not yet elapsed, despite Deputy conclusions. Petitioner spent only 18 minutes on the phone at roughly 3 a.m. trying to contact four separate law firms, and Deputy admitted she had 48 more minutes to spare in which she could obtain a valid Intoxilyzer result. Because of Deputy actions, Petitioner never spoke with an attorney that night. No circumstances at the time Petitioner was making his calls warranted Deputy order to cease further attempts. Petitioner made it very clear he wanted to speak to an attorney; at no point did he indicate he was done trying and was ready to decide whether or not to take the Intoxilyzer test. To the contrary, he told Deputy he was still trying to reach an attorney when she prevented him from making any more calls. Deputy failed to vindicate Petitioner's right to counsel.

CONCLUSION

An individual has a limited to right to consult counsel before submitting to chemical testing. The right to counsel is vindicated when the Petitioner is given access to a telephone and telephone books, and granted a *reasonable time* to contact an attorney. Case law indicates that (1) more time should be given to a driver trying to contact an attorney in the early hours of the morning, as was the case here, (2) that the police have 2

hours to get a valid Intoxilyzer test result, and in this case, Deputy had 48 more minutes, nearly an hour, from the time she terminated Petitioner's attempts to reach an attorney in which to get a valid test, and (3) that a driver must make a good-faith and valiant effort to contact an attorney, as was the case here. Petitioner was, at all times during the implied consent advisory, either calling an attorney or waiting for one to return his call. In this case, Petitioner, at 3 a.m., was given only 18 minutes to reach an attorney. Deputy W unreasonably and prematurely forced him to hang up in mid-dial. Consequently, Petitioner's right to counsel was not vindicated.

Petitioner's limited right to contact and consult with counsel under the Minnesota Constitution, Minn. Const. Art. 1, § 6, was not vindicated and therefore rescission of Petitioner's driver's license revocation is merited.

Respectfully submitted,

CAPLAN LAW FIRM, P.A.

Dated: June 18, 2007

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