

STATE OF MINNESOTA

COUNTY OF DAKOTA

H. [REDACTED],

Petitioner,

v.

Commissioner of Public Safety,

Respondent.

DISTRICT COURT

FIRST JUDICIAL DISTRICT

File No. C3-07-12048

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

The above-referenced matter came on for an implied consent hearing before the undersigned Judge of District Court on May 18, 2007, at the Western Service Center, Apple Valley, Minnesota.

Ryan P. Garry, Attorney at Law, Minneapolis, MN appeared with and on behalf of Petitioner. [REDACTED], Assistant Minnesota Attorney General, St. Paul, MN appeared on behalf of the Commissioner of Public Safety.

The issues as narrowed by agreement of counsel are: a) whether the stop of Petitioner's vehicle was lawful; and b) whether Petitioner was given a reasonable time in which to contact an attorney following his arrest.

Based upon the file, the record and proceedings herein, including post-hearing submissions from both parties, being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

I

That on December 6, 2006, at approximately 1:45 a.m., Deputy

FILED [REDACTED] DAKOTA COUNTY
Court Administrator

JUL 18 2007

BY [Signature]

W of the Dakota County Sheriff's Office ("the deputy") was on duty in the City of Apple Valley, County of Dakota, Minnesota.

II

That the deputy was in her squad car at a stop sign on Garrett Avenue, directly across the street from the parking lot of Bogart's Place ("the parking lot") to the north. The deputy testified that she observed Petitioner's vehicle ("the vehicle") in the parking lot, preparing to leave. The deputy also testified that her attention was drawn to the vehicle because it was slow to leave the parking lot and spent more than 30 seconds hesitating and/or pumping its brakes prior to exiting the parking lot, despite the fact that there was no traffic.

III

That the deputy further testified that the vehicle "peeled out" of the parking lot (without squealing its tires), and failed to signal its turn as it turned to the right out of the parking lot onto 140th Street and again as it turned left onto Garrett Avenue. Neither the hesitation/pumping of the brakes nor the vehicle peeling out of the parking lot were referenced in the deputy's report.

IV

That the deputy effectuated a traffic stop of the vehicle a short distance away, on 150th Street (County Road 42) and Cedar Avenue, Dakota County, MN.

V

That Petitioner had moved from Texas to Minnesota approximately three (3) months prior to the stop. At the time of the stop, the air temperature was bitterly cold and the roads were snow packed and slippery. Petitioner testified

that he was slow to leave the parking lot because he was warming up his car, defrosting its windows and testing the road surface for traction with his brakes. He denied "peeling out" of the parking lot. He acknowledged not signaling as he exited the parking lot, but was certain that he signaled his left turn onto Garrett Avenue, which was only about 10 yards from where the deputy was sitting in her marked squad car. Furthermore, exiting the parking lot onto 140th Street could be, and was, accomplished while driving in nearly a straight line.

VI

That the events which took place between the stop of Petitioner's car and the opportunity Petitioner was given to contact an attorney once at the police station are not at issue, except insofar as they are the product of an allegedly unlawful stop. Petitioner was placed under arrest for DWI and was taken to the Apple Valley Police Department ("the police station").

VII

That at 2:37 a.m., Petitioner was in custody at the police station. The deputy read Petitioner the Implied Consent Advisory. Petitioner stated he wished to consult with an attorney. (See Exhibit 1).

VIII

That at 2:39 a.m., immediately following the reading of the Implied Consent Advisory, Petitioner was given access to one telephone with a seven-digit number listed on it, and four telephone books for purposes of contacting an attorney.

IX

That the Findings of Fact paragraphs X through XV below, are based upon Petitioner's testimony in conjunction with the recording made at and around the time of the reading of the Implied Consent Advisory. (Exhibit 2A.) The Court finds these portions of Petitioner's testimony to be highly credible and important in determining the outcome of the contested issues.

X

That from approximately 2:39 a.m. to 2:43 a.m., Petitioner decided which attorney to call and ascertained how to access an outside line.

XI

That at approximately 2:43 a.m., Petitioner made his first call to an attorney. He reached an answering service. Petitioner was instructed to not make any more calls, but to wait for a call back. Petitioner waited 3-4 minutes, but the call was not returned. Petitioner believed that any return calls would ring to the phone he was using, as this was the only phone number he was able to provide to the answering service.

XII

That at approximately 2:47 a.m., Petitioner made his second call to an attorney, this time to a different law firm. Petitioner was instructed to keep the line clear and that he would receive a call back. Petitioner again waited 3-4 minutes for a call back, to no avail. The first two phone calls each lasted approximately one minute.

XIII

That at approximately 2:55 a.m., Petitioner's began a third attempt to call an attorney. The deputy entered the room and mistakenly (twice) identified Petitioner as Mr. G█████. She instructed Petitioner to hang up the telephone, stating that he had already been given a reasonable amount of time to contact an attorney. Petitioner had not yet dialed the number of a third attorney. The deputy then asked Petitioner if he would take a *drug* test. (emphasis added)

XIV

That following another request from Petitioner, the deputy gave Petitioner one more opportunity to call an attorney. Petitioner testified that this time, the phone rang for at least a minute, but there was no answer.

XV

That at approximately 2:57 a.m., the deputy re-entered the room and discontinued Petitioner's access to the telephone. Petitioner testified that he would have made a fifth attempt to call an attorney if the deputy had not stopped him. The period of time during which Petitioner could have conceivably contacted an attorney was 18 minutes.

XVI

That the deputy testified that Petitioner made one phone call and told her he was waiting for a call back. She also testified that she only observed him dialing the phone on one occasion and that he was not actively trying to reach an attorney, despite prompting from her. However, on cross examination the deputy did concede that she observed Petitioner only intermittently during the time he had the telephone, checking on him every 3 to 5 minutes, and in fact did not

know how many calls he made or attempted to make.

XVII

That the deputy had until 3:45 a.m. to obtain alcohol testing from Petitioner.

Based upon the above findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. A stop by law enforcement is justified if the officer has a specific and articulable suspicion of a violation. Marben v. State, Dept. of Pub. Safety, 294 N.W.2d 697, 699 (Minn. 1980).
2. A limited investigatory stop for a moving-traffic violation is constitutionally valid whether or not the violation endangered any person or property. See State v. Bissonette, 445 N.W.2d 843, 846 (Minn. Ct. App. 1989).
3. This court concludes that Petitioner's driving conduct did not provide the grounds necessary for the stop of his vehicle. Petitioner's version of events is entirely plausible, fitting not only the physical facts presented, but common sense. Petitioner did not turn or change the course of his vehicle as he left the parking lot such that he was in violation of either subdivision 4 or 5 of Minn. Stat. § 169.19. The stop of Petitioner's vehicle was based solely on the fact that it was parked at a bar at closing time. The stop was not based on a reasonable, articulable suspicion of a violation of law, traffic or otherwise.
4. Law enforcement must provide a driver access to a telephone and a "reasonable time" in which to contact an attorney. Friedman v. Comm'r. of Pub. Safety, 473 N.W.2d 828, 835 (Minn. 1991).

5. There is no definitive amount of time that constitutes a reasonable amount of time. Kuhn v. Comm'r. of Pub. Safety, 488 N.W.2d 838, 842 (Minn. Ct. App. 1992, *review denied* (Minn. Oct. 20, 1992)).

6. In determining whether a driver has been given a reasonable amount of time, this court considers three factors: the time of day, the length of time the driver has been under arrest, and whether the driver made a good faith and sincere effort to contact counsel. Id.

7. All three factors in this case favor Petitioner. Petitioner's arrest occurred in the middle of the night, making his attempts to contact an attorney difficult.

8. The deputy acknowledged that the alcohol testing of Petitioner was due at 3:45 a.m. at the latest. Petitioner's opportunity to contact an attorney was halted at 2:57 a.m., after only 18 minutes. Under the circumstances, this was an unreasonably short period of time. Petitioner had been under arrest for approximately one hour when his right to contact legal counsel was discontinued. Petitioner's alcohol test, while important, could have waited for up to another 45 minutes. Petitioner made it clear by his words and conduct that he wished to continue his efforts to reach an attorney. At no time did he indicate that he had reached the end of his efforts.

9. Petitioner made sincere and good faith efforts to contact an attorney. Petitioner was not afforded a reasonable time in which to contact an attorney following his arrest and prior to alcohol testing.

Based upon the above findings of fact and conclusions of law, IT IS
HEREBY ORDERED that the revocation of Petitioner's driving privileges is
hereby RESCINDED.

DATED: July 13, 2007

BY THE COURT:

Judge of District Court

Dakota County Court File No. C3-07-12048