STATE OF MINNESOTA
COUNTY OF WASHINGTON
DISTRICT COURT
TENTH JUDICIAL DISTRICT

File Number: [redacted]

Case Type: Implied Consent

[redacted],

PETITIONER,

Vs.

Commissioner of Public Safety,

RESPONDENT.

ORDER

The above-captioned matter came before the Court on the [redacted] day of [redacted], upon the Petitioner's request for a hearing under Minnesota Statutes § 169A.53, Subd. 2.

Petitioner was represented by Mr. Ryan Garry.

Respondent was represented by Ms. Maria Zaloker.

Petitioner raises two arguments:

1. Whether or not he was allowed an adequate amount of time to reach and consult with an attorney.
2. Whether or not the Implied Consent Advisory as read to the Petitioner was misleading in violation of his Constitutional rights.

Facts:

1. Petitioner was arrested for DWI in the City of [redacted], Washington County, Minnesota on [redacted].
2. The Petitioner's car was stopped at approximately 11:42 p.m.

3. Following his arrest, the Petitioner was taken to the Woodbury Police Department where he was read the standard Minnesota Implied Consent Advisory.

4. The arresting officer read, verbatim, the portions of the form that are checked. See Exhibit 1. The officer did not read the portions of the form that were not checked.

5. The Petitioner requested to consult with an attorney. Beginning at 12:10 a.m. the Petitioner was allowed 20 minutes to contact and speak with an attorney.

6. During the 20 minute period the Petitioner made 4 phone calls. The police report (part of Exhibit 1) indicates that after each of the Petitioner's attempts to reach an attorney that he left a voice mail for the attorney to call him back.[1]

7. The Petitioner was not wasting time or playing games to delay the processing of his case. He was making sincere, active, and good faith efforts to call an attorney and obtain legal advice.

8. The Petitioner left messages with the attorney of his choice asking that he (the Petitioner) be called back. This demonstrates that the Petitioner was, in fact, desirous of obtaining legal advice.

9. The officer offered the Petitioner (in turn) the ability to take a breath, urine, or blood test. The Petitioner turned down each of the requests in turn. Each time the Petitioner told police that he would not take a test because he had not been allowed a reasonable period of time to reach an attorney and obtain legal advice

10. The officer ended the Petitioner's ability to obtain legal advice at 12:30 a.m.

11. The court finds that the officer did not have a very good recollection of the events that transpired. When asked at the hearing if the Petitioner was actively trying to reach an attorney when he (the officer) stopped his phone usage, the officer originally answered, "No." When asked to check what he had written in his report, the officer then changed his answer to, "Yes."

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[1] Each case is incredibly fact specific. Respondent relies on the unpublished case of Buermann v. Commissioner (A11-1121). The court notes that, among other dissimilarities, Mr. Buermann did not leave any messages with the attorney that he was calling. The act of requesting a call back and leaving a message is different from calling the same attorney four times and not receiving any answer of any kind. The fact that an attorney has a messaging service set up demonstrates to those calling that the attorney is available for

Analysis of Law & Facts:

Limited Right to Counsel.

There are a number factors that have a bearing on what amounts to a reasonable time to allow a DWI suspect to reach and consult with an attorney.

There is no definite or exclusive set of factors. Courts recognize, however, that the relevant factors focus both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of the right. There are also public policy considerations including considering the ability of police officers to get back out on the road and perform other functions. Courts look to the totality of the circumstances in each case.

Within this context, courts have found, as a threshold matter, that the driver must make a good faith and sincere effort to reach an attorney. The court specifically finds that the Petitioner in this case made a sincere effort to call and consult with an attorney. The court does not believe that the Petitioner was using delaying tactics or playing games, or that he decided on his own to stop trying to reach an attorney. The Petitioner was actively working to obtain advice. He was waiting for a call back from the attorney of his choice when his time was ended by the officer. The Petitioner did not stop trying to obtain legal advice. The officer stopped the Petitioner from being able to obtain legal advice.

Another factor involves the time of day when the driver tries to contact an attorney. A driver should be given more time in the early morning hours when contacting an attorney may be more difficult. Here Petitioner was trying to contact an attorney at shortly after midnight when presumably attorneys are not as readily available to reach as they would be during normal business hours.

Third, the length of time the driver has been under arrest is important because the longer a driver is under arrest the less probative value the chemical test may ultimately have. Here Petitioner was stopped at approximately 11:42 pm. The officer began reading the Advisry at 12:09 p.m. By 12:30 a.m., less than an

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consultation even after hours. Conversely, a phone that is not picked up in any way seems to show that that particular attorney is not accepting calls and is not available for consultation.

hour after the stop of the Petitioner's motor vehicle, he was told by the officer that his time was up. A test need only be taken within two (2) hours of the time that a vehicle is operated. The officer could easily have allowed the Petitioner significantly more time without running into the two-hour deadline.

Bernard and Due Process.

The Petitioner was read the standard Minnesota Implied Consent Advisory. The Advisory would be perfectly acceptable if the Petitioner had only been offered a breath test. However, in this case, the officer offered a breath test, a urine test, and a blood test. The Court believes that the officer did this in a good faith attempt to allow the Petitioner every possible chance to avoid facing the prospect of a test refusal charge.

However, following State v. Bernard (as consolidated with Birchfield v. North Dakota), the Minnesota Advisory has now been found to be misleading and incorrect as it relates to blood and urine tests.

The language in the Advisory regarding the penalty of test refusal is accurate only as it relates to the offering of a breath test. The United States Supreme Court has disallowed such language as it relates to blood tests holding that a driver can't be threatened with prosecution for refusing a blood test. (There is also good reason to believe that such language is improper as it relates to urine tests.[2])

Nonetheless, as well-intentioned as it likely was, once the officer offered the Petitioner a urine test and a blood test, he misled and confused the Petitioner as to what the status of the law was as it related to his ability to refuse a test and whether or not he might be subjected to criminal prosecution for doing so. The Advisory as read was not fully accurate, and was in fact inaccurate (and therefore misleading), as it related to the consequences of refusing the urine and blood tests that were offered.

Normally, one might count on a driver to get clearer advice from the attorney of his or her own choosing. However here the misleading nature of the Advisory was exacerbated by the fact that the officer did not allow the Petitioner adequate time to reach and consult with a lawyer.

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[2] See, State v. Thompson, 873 N.W. 2d 873 (Minn. Ct. App. 2015).

The Advisory which was read to the Petitioner, as a whole and as applied to [redacted] was unconstitutionally misleading.

Conclusions:

1. The Petitioner's limited right to counsel was not vindicated.
2. The Petitioner was misled by the Implied Consent Advisory as it relates to the three tests that he was offered.

NOW THEREFORE, based upon all of the files, records, and proceedings herein, the Court makes the following:

ORDER

1. That the revocation of the Petitioner's driving privileges under the authority of Minnesota Statutes § 169A.53, Subd.2 be and hereby is REVOKED. The Commissioner is hereby ordered and directed to take all appropriate actions, forthwith, such as are necessary to carrying out the court's order herein.
2. The Washington County Court Administrator shall serve/mail/e-serve a copy of this order upon each of the parties (or their attorneys) to this case.

Dated: [redacted]

[redacted]
Judge of District Court