

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT

Court File No. [REDACTED]

[REDACTED]  
Petitioner,

vs.

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
ORDER AND MEMORANDUM**

Commissioner of Public Safety,

Respondent.

The above-entitled matter came on for trial before the Honorable [REDACTED], Judge of District Court, on October 5, 2018, at the Carver County Courthouse, Chaska, Minnesota.

Petitioner [REDACTED] appeared and was represented by Charles Ramsay, Esq. [REDACTED], Assistant Attorney General, appeared for Respondent, the Commissioner of Public Safety. The sole issue identified by Petitioner is whether his right to counsel was vindicated.

The Court heard testimony from Petitioner and Carver County Sheriff's Deputy [REDACTED]; and received Exhibit 1, the Breath Test Advisory form; and Exhibit 2, an audio CD of the Advisory. The parties were invited to submit written arguments to the Court which were subsequently received, and the Court took the matter under advisement as of November 2, 2018.

Now, based on the files, records, and proceedings herein, the Court makes the following:

**FINDINGS OF FACT**

1. On June 2, 2018, Deputy [REDACTED] arrested Petitioner [REDACTED] (hereafter "Petitioner") for driving under the influence of alcohol.
2. Deputy [REDACTED] transported Petitioner to the Carver County Jail and read Petitioner the Breath Test Advisory, starting at approximately 3:15 a.m. Petitioner told Deputy [REDACTED] that he understood the Advisory and wished to speak with an attorney.
3. Deputy [REDACTED] provided Petitioner with a telephone and telephone books at approximately 3:18 a.m. The deputy also provided Petitioner with Petitioner's cellular telephone so that he could access the directory and call someone he believed might refer him to an attorney.

4. Petitioner made several calls and was able to speak with one attorney, however Petitioner testified that that attorney told him he would need to be paid before he answered Petitioner's questions.

5. Petitioner made further attempts to reach an attorney but did not leave any messages because he did not know the attorneys would be able to call him back.

6. Deputy [REDACTED] testified that Petitioner never asked him for a call-back number, and that he never offered it because it was printed on a sign on the wall to Petitioner's immediate left.

7. Petitioner is heard on the audio recording of the advisory leaving a message for an attorney and stating that he was at the Carver County Jail, but he didn't know how the attorney could contact him. Immediately after the call, Petitioner asks, "Is there a line that?...Obviously not."

8. Deputy [REDACTED] ended Petitioner's attorney time at approximately 3:52 a.m.

9. After Deputy [REDACTED] ended Petitioner's attorney time, Petitioner asked the deputy what the consequences of refusal would be. Deputy [REDACTED] re-read the section of the advisory stating that refusal to take a test is a crime. Petitioner thereafter agreed to take a breath test.

#### CONCLUSION OF LAW

1. Under the circumstances presented, Petitioner's right to counsel was not vindicated where Petitioner clearly misunderstood that he could leave a message for an attorney with call back number to reach him at the jail.

#### ORDER

1. Petitioner's Petition to rescind the revocation of his driving privileges based on his claim that his right to counsel was not vindicated is **GRANTED**.

2. The revocation of Petitioner's driving privileges is **RESCINDED**.

3. The attached Memorandum is incorporated herein by reference.

BY THE COURT:

Digitally signed by

[REDACTED]  
Date: 2018.11.07

22:02:43 -06'00'

Dated: November 7, 2018

[REDACTED]  
Judge of District Court

**MEMORANDUM**

The sole issue presented to the Court in this implied consent matter is whether Petitioner's right to counsel was vindicated.

**Analysis**

Under the Minnesota Constitution, a driver has a limited right to consult an attorney of his own choosing before deciding whether to submit to chemical testing, provided that the consultation does not unreasonably delay the administration of the test. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). A police officer must inform the driver of the right to counsel and must assist in its vindication. *Id.* The driver's right to counsel is vindicated if the driver is provided with a telephone and given a reasonable amount of time to contact and consult with an attorney before deciding whether to take a test. *Id.* If counsel cannot be contacted within a reasonable time, the driver may have to decide whether to take the test without the advice of counsel. *Id.*

When it is alleged that the Constitutional right to counsel was hampered or denied, the burden is on the State to show that the police assisted the driver to vindicate his right to counsel. *Butler v. Comm'r of Pub. Safety*, 348 N.W.2d 827, 829 (Minn.Ct.App.1984); *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn.Ct.App.1992). The initial burden can be met by proof that a peace officer provided a phone, phone directories, and a reasonable amount of time to contact an attorney. *Jones v. Comm'r of Pub. Safety*, 660 N.W.2d 472 (Minn.Ct.App.2003).

Whether the time period allotted to the driver was "reasonable" is typically judged based upon three factors: (1) the time of day; (2) the length of time the driver has been under arrest; and (3) whether the driver made a good faith and sincere effort to contact counsel. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 841-42 (Minn.Ct.App.1992). However, the State must also show that its agents did not hamper a person's attempt to consult with an attorney. *Jones*, 660 N.W.2d at 475-76.

In this case, Deputy [REDACTED] did provide Petitioner with a telephone and telephone books. While Petitioner was able to reach one attorney, it was clear from the audio recording of the advisory that he did not obtain the legal advice he sought. Furthermore, when he expressed clear confusion over whether there was a call back number he could leave with a message for other attorneys, Deputy [REDACTED] did nothing to clarify that there indeed was such a number. Vindicating a citizen's right to counsel is not a passive process, and the Court is dismayed that Deputy [REDACTED] failed to take the smallest additional effort to clear up Petitioner's confusion

regarding a call back number. Based upon the evidence presented, the Court must conclude Petitioner's right to counsel was not vindicated. As a result, Petitioner's motion to rescind the revocation of his driving privileges based on his claim that his right to counsel was not vindicated is GRANTED.