

STATE OF MINNESOTA
COUNTY OF OLMSTED

DISTRICT COURT
CRIMINAL DIVISION
THIRD JUDICIAL DISTRICT

State of Minnesota,

Court File No. [REDACTED]

Plaintiff,

vs

**ORDER GRANTING MOTION
TO SUPPRESS AND DISMISS
AND MEMORANDUM**

Defendant.

On December 7, 2016, the above-captioned matter came on for a contested omnibus hearing before the Honorable [REDACTED] in Olmsted County District Court. Kelly M. Wagner, Esq., appeared on behalf of the State of Minnesota. Jay S. Adkins, Esq., appeared on behalf of Defendant [REDACTED] personally present.

Based upon all of the files, records, and proceedings herein, the Court hereby makes the following:

ORDER

1. Defendant's Motion to Suppress is **GRANTED**.
2. Defendant's Motion to Dismiss Count One of the Complaint is **GRANTED**.
3. Defendant shall appear for a plea hearing before the Honorable [REDACTED] in Olmsted County District Court on [REDACTED] [REDACTED].
4. The attached Memorandum constitutes the Court's findings and is hereby incorporated and made a part of this Order.

BY THE COURT:

[REDACTED]

[REDACTED] 2017.01.30 16:34:02
-06'00'

The Honorable [REDACTED]
Judge of District Court

[REDACTED]

MEMORANDUM

PROCEDURAL HISTORY

On July 20, 2016, Defendant [REDACTED] was charged by complaint with Refusal to Submit to Chemical Test, in violation of Minnesota Statute § 169A.20, subdivision 2, and Driving While Impaired, in violation of Minnesota Statute § 169A.20, subdivision 1 (1). On September 21, 2016, [REDACTED] filed a motion to suppress and dismiss. Parties appeared for a contested omnibus hearing on December 7, 2016. The State called Officer P. See, of the Rochester Police Department, to testify. The Defendant offered as Exhibit 1 a copy of the video recording of the officer's initial encounter with [REDACTED] the officer's reading of Implied Consent Advisory, [REDACTED] attorney time, and the officer's reading of the Miranda warning. Parties later submitted written arguments to the Court.

FACTUAL BACKGROUND

On June 9, 2016, at approximately 6:11 P.M., Defendant [REDACTED] was stopped and placed under arrest by Officer See for suspicion of driving while under the influence of alcohol. Officer See then transported [REDACTED] to the Olmsted County Adult Detention Center. At approximately 7:04 P.M., Officer See read the Implied Consent Advisory to the Defendant, informing [REDACTED] that Minnesota law requires her to take a chemical test to determine if she is under the influence of alcohol and that refusal to take the test is a crime. [REDACTED] indicated to the officer that she understood. The officer also advised her that she had a right to contact an attorney before she made a decision about whether or not to submit to the test. In addition, he advised her that if she was unable to consult an attorney within a reasonable amount of time she must make the decision on her own. [REDACTED] again indicated that she understood.

When Officer See initially asked [REDACTED] if she wished to consult with an attorney, [REDACTED] did not respond. Officer See repeated the question two more times, reminding [REDACTED] that she would need to make a decision regarding chemical testing and that if she did not speak to an attorney she would need to make the decision independently. [REDACTED] indicated that she would like to consult an attorney.

At approximately 7:08 P.M., Officer See provided [REDACTED] with several telephone directories and instructed her to let him know when she was ready to use the telephone. [REDACTED]

[REDACTED]

began looking through the directories, and within one minute, asked for Officer See's assistance in finding the number for Ohly Law Firm. Officer See found the phone number online, dialed the number for her, and then handed the phone to [REDACTED]. When [REDACTED] picked up the phone, she informed the officer that there was a busy signal. Officer See then attempted to contact Ohly Law himself, but he also received a busy signal.

Officer See encouraged [REDACTED] to continue looking for another attorney to contact while he made additional attempts to reach Ohly Law. [REDACTED] began shaking her head, and Officer See asked if Ohly Law was the only attorney she wanted to call. [REDACTED] replied, "I have—yeah, I guess so, that's where I live. I don't know what to do. I don't have an attorney." Officer See tried to call Ohly Law twice, but he received only a busy signal. The officer directed [REDACTED] to attempt to find another attorney to call while he continued to try Ohly Law.

At this point, [REDACTED] became visibly frustrated and asked Officer See to help her find legal aid. The officer again encouraged her to look through the telephone directories. [REDACTED] spent the next minute or so flipping through the directories and asking Officer See for assistance: "If you can't find it for me, I have no idea—legal aid, where is that at?" Officer See directed her to look through the directories and pointed to a legal advertisement offering legal aid to individuals twenty-four hours a day. Officer See attempted to contact Ohly Law again, but he received only a busy signal.

Approximately five minutes into her attorney time, [REDACTED] began asking questions of the officer, as to what she should do, why she should contact an attorney, and what the consequences were of refusing. Officer See reminded [REDACTED] that this was her time to contact an attorney to seek legal advice, and if she wasn't going to attempt to do so, then "we're going to be done here." [REDACTED] continued to ask the officer questions about what the consequences were of refusing, and Officer See continued to encourage her to contact an attorney.

Officer See attempted to contact Ohly Law, but he received only a busy signal. He then provided [REDACTED] with the telephone, and she attempted to call the law office herself. She informed Officer See that she got the number wrong, and he instructed her to hang up and dial again. Before [REDACTED] hung up the phone, she placed the receiver to her ear and said, "It's busy, busy, busy." [REDACTED] asked for the phone number for Ohly Law again, dialed the number, and

indicated that the line was busy.

Eventually, [REDACTED] informed Officer See that she didn't have her reading glasses and asked for his assistance in finding legal aid. [REDACTED] continued to ask the officer questions about what the consequences were of refusing and whether she could go home. Officer See explained to her that she could not go home and reminded her that if she wanted to speak to an attorney, she needed to attempt to contact an attorney.

Approximately fifteen minutes into [REDACTED] attorney time, Officer See began pressuring [REDACTED] to "do something," telling her: "We have to do something. You have to look for someone to call. We can't just be sitting here." Officer See attempted to call Ohly Law one more time and, again, found the line was busy. He cautioned [REDACTED] that if she was not going to attempt to contact an attorney, then they were "going to move on." One minute later, Officer See asked [REDACTED] if she would take a breath test. [REDACTED] agreed. Officer See then proceeded to request the presence of a DataMaster DMT-G operator to administer the test.

While waiting for the DMT operator to arrive, [REDACTED] became upset and began crying and slamming the telephone directories against the table. When she regained her composure, she asked Officer See if she could contact an attorney. He replied, "I think our time has passed already." Even so, when she asked him to dial another phone number for her, he agreed to place the call. When Officer See handed her the phone, she informed him that "it's busy [unintelligible] like the other."

At this point, it appears that Officer See suspects something is wrong. He attempts to dial his own phone number and receives only a busy signal. The officer walks away from [REDACTED] and goes to ask a fellow officer if there is any reason why every number dialed out would result in a busy signal. The other officer follows Officer See to determine if there are any issues with the phone that was provided to [REDACTED]. The other officer tells Officer See that he needs to dial a "9" and then a "1" in order to dial out.

Officer See dials Ohly Law again and gives the phone to [REDACTED] but it is unclear whether she hears ringing, a busy signal, or an automated message. [REDACTED] ends the call and attempts to dial a different phone number but appears to have some difficulty. Officer See dials the phone number for her and then gives the phone back to her. [REDACTED] picks up the phone and tells the

[REDACTED]

officer that “the call did not go through.” Officer See auto-redials the number, hears the same message, and then asks [REDACTED] to show him the phone number. Officer See dials the number and states, “Yeah, that number isn’t working.” Officer See attempts to contact Ohly Law again and informs [REDACTED] that the firm is closed.

Shortly thereafter, Officer See asks [REDACTED] if there is anyone else she wishes to call. [REDACTED] asks what was going to happen to her next, and the officer explains that she has agreed to take the breath test, so they are waiting for the DMT officer to arrive. Eventually, the DMT officer arrives and administers a breath test. When [REDACTED] failed to provide two separate, adequate breath samples, the DMT officer advised her that if she refused to follow directions the test would result in a refusal. [REDACTED] attempted two more breaths but did not provide an adequate breath sample. She was later charged with refusal to submit to a chemical test for refusing to cooperate in providing a breath sample for alcohol concentration testing.

ANALYSIS

1. Standard

Criminal defendants are entitled to counsel under both the Federal and Minnesota Constitutions. U.S. Const. amend. VI, Minn. Const. art. I, § 6. In Minnesota, this right extends to all “critical stages” in a criminal prosecution, including the stage where law enforcement asks an individual to submit to a chemical test pursuant to the Implied Consent laws. *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991) (“[W]hen asked to submit to a chemical test, a driver finds him- or herself at a ‘critical stage’ in the DWI process.”). “[U]nder the right-to-counsel clause in article I, section 6 of the Minnesota Constitution, an individual has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing.” *Id.* at 835 (emphasis added). This right is limited to the extent that it does not unreasonably delay administration of the test.” *Id.*

When determining whether a driver’s right to counsel has been vindicated, the court examines the totality of the circumstances. *Groe v. Comm’r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. Ct. App. 2000) (citation omitted). A law enforcement officer must assist a driver in vindicating this right by providing the driver with a telephone and giving the driver a reasonable amount of time to contact and consult with an attorney. *Gergen v. Comm’r of Pub.*

[REDACTED]

Safety, 548 N.W.2d 307, 309 (Minn. Ct. App. 1996) (citation omitted). Although the officer need not ensure that the driver has received the best or even proper counsel, the officer must allow the driver, upon request, “the opportunity to consult with an attorney of his own choosing.” *McNaughton v. Comm’r of Pub. Safety*, 536 N.W.2d 912, 915 (Minn. Ct. App. 1995) (citations omitted). Where a defendant’s right to counsel is not vindicated, the court must suppress evidence obtained in violation of that right. *See State v. Nordin*, 571 N.W.2d 242, 244 (Minn. Ct. App. 1997) (suppressing driver’s Intoxilyzer test results where the driver’s right to counsel was not vindicated).

2. Limited Right to Counsel

The State claims that [REDACTED] did not make a good faith and sincere effort to contact an attorney. Consequently, the State argues, [REDACTED] cannot now claim that her right to counsel was not vindicated when she did not indicate to Officer See that she was receiving only busy signals and she did not make a good faith and sincere effort to contact an attorney. The State cites *Kuhn v. Comm’r of Pub. Safety*, to support its position: “For a defendant’s right to counsel to be vindicated, ‘as a threshold matter the driver must make a good faith and sincere effort to call and consult with an attorney.’” 488 N.W.2d 838, 842 (Minn. Ct. App. 1992).

When determining whether a driver’s limited right to consult an attorney is vindicated, the question of whether the driver diligently exercised that right is an important factor to consider. However, that specific factor relates to the issue of whether a driver was afforded a reasonable amount of time to contact and consult with counsel. The entire passage from *Kuhn* reads as follows:

[W]e conclude that basing the “reasonable” time criteria on a specific number of elapsed minutes alone is improper.

Then what factors have a bearing on what amounts to a reasonable time? We propose no definite or exclusive set of factors. We recognize, however, 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. Within this context, we believe as a threshold matter the driver must make a good faith and sincere effort to reach an attorney.

Id.

[REDACTED]

Unlike the right to counsel issue in *Kuhn*, the issue before this Court is not whether [REDACTED] was given a reasonable amount of time to contact and consult with an attorney. Rather, it is whether [REDACTED] was given an opportunity to consult with an attorney of her own choosing *before* deciding whether to submit to chemical testing.¹ “[T]he choice of whether to submit to the chemical testing procedures is a very important one to the individual driver. A driver must make a critical and binding decision regarding chemical testing, a decision that will affect him or her in subsequent proceedings.” *Friedman*, 473 N.W.2d at 832 (citation omitted). Thus, it is important that a driver has “the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing.” *Id.* at 835.

The record indicates that [REDACTED] was unsure of what to do and confused about the legal ramifications of her decision. The State maintains that by allowing [REDACTED] sixteen minutes to attempt to contact an attorney and providing her with a telephone and telephone directories, Officer See did everything required of him to vindicate her right to counsel. This Court disagrees.

Vindication of a driver’s limited right to counsel occurs when the driver is “given a reasonable opportunity to consult with an attorney of his own choosing.” *McNaughton v. Comm’r of Pub. Safety*, 536 N.W.2d 912, 915 (Minn. Ct. App. 1995) (citing *Friedman*, 473 N.W.2d at 835). “Police officers ‘must assist’ in the vindication of this right to counsel.” *Id.* at 914 (quoting *Friedman*, 473 N.W.2d at 835). In *McNaughton*, the driver had no access to telephone books, either local or out-of-town, and he had no direct access to the telephone or directory assistance. *Id.* *McNaughton*’s choice of attorney was limited to a list of five pre-selected attorneys, and the one attorney *McNaughton* spoke to refused to give him legal advice. *Id.* at 915. Given these limitations, the court of appeals found *McNaughton*’s limited right to counsel was not vindicated, because he was not afforded a reasonable opportunity to contact and consult with an attorney of his own choosing. *Id.*

[REDACTED] similarly, was limited in her ability to contact and consult with an attorney. Although [REDACTED] was provided with a telephone and multiple telephone directories, she was

¹ Consequently, the Court expresses no opinion as to whether [REDACTED] made a good faith and sincere effort to reach an attorney.

[REDACTED]

not provided with a working telephone. It was impossible for [REDACTED] to contact an attorney using the telephone provided to her during her attorney time. Consequently, she had no opportunity to obtain a meaningful consultation before making a critical and binding decision that would affect her in subsequent proceedings. The additional calls placed after the phone issue was resolved do not remedy the violation of [REDACTED] right to counsel, as the calls were made after [REDACTED] had already agreed to provide a breath test.

CONCLUSION

Based on the facts presented in this case, this Court cannot find that Defendant [REDACTED] [REDACTED] was afforded a reasonable opportunity to contact and consult with an attorney of her own choosing before deciding whether to submit to chemical testing. [REDACTED] limited right to counsel was not vindicated because she did not have access to a working telephone prior to being presented with the choice of whether to submit to the chemical testing. Consequently, evidence of her refusal to submit to a chemical test should be suppressed.

[REDACTED]