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Minn. Stat. § 480A.08, subd. 3 (2008).*

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0289

State of Minnesota,
Respondent,

vs.

Muriel Elizabeth Talbor Matuzak,
Appellant.

Filed January 6, 2009
Affirmed
Stoneburner, Judge

St. Louis County District Court
File No. 69DUCR064977

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul,
MN 55101-2134; and

Melanie Ford, St. Louis County Attorney, Paul Thomas Shaffer, Assistant County
Attorney, Suite 501, 100 North Fifth Avenue West, Duluth, MN 55802-1298 (for
respondent)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and
Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges her conviction of gross misdemeanor driving while impaired, arguing that because she was denied her right to a second blood-alcohol test, the district court erred by failing to suppress the Intoxilyzer test results. Because the district court did not err by admitting the Intoxilyzer test results, we affirm.

FACTS

Appellant Muriel Matuzak was arrested for driving while impaired after she failed several field sobriety tests including a preliminary breath test (PBT) that showed an alcohol concentration of .174. When Matuzak saw the PBT results, she asked the arresting officer if she could take a blood test. The officer did not respond to the request. The officer read the implied-consent advisory to Matuzak, and she was transported to the jail. She had access to her cellular telephone during the trip to the jail and used it to send a text message to a friend stating that she would not be at work. Matuzak declined to speak with an attorney and consented to a breath test. Matuzak did not make any further inquiry about a blood test or any other additional alcohol-concentration test, and she did not ask to make any telephone calls.

Matuzak was charged with DWI. She moved to suppress the results of the Intoxilyzer test, arguing that she had been prevented from obtaining a second test by the officer's silence in response to her scene-of-the-stop inquiry about a blood test. After a hearing on the motion, the district court concluded that because there were no "active attempts by law enforcement to prevent or deny a separate test," the Intoxilyzer test

results were admissible. Matuzak submitted the case to the district court on stipulated facts as authorized by *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980) (superseded by Minn. R. Crim. P. 26.01 subd. 4, effective April 1, 2007). The district court found Matuzak guilty of DWI in the second degree. Matuzak was sentenced, but the sentence was stayed pending this appeal.

D E C I S I O N

“When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.” *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When, as here, the dispositive facts are undisputed, the question of whether an officer prevented or denied an additional test is one of law. *Haveri v. Comm’r of Pub. Safety*, 552 N.W.2d 762, 765 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

Minnesota law provides that after a person submits to the state’s alcohol-concentration test, the person has a right to have an additional test at the person’s own expense. Minn. Stat. § 169A.51, subd. 7(b) (2006). “The failure or inability to obtain an additional test . . . does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer.” *Id.*

It is the obligation of the person arrested to make clear the intent to have a second test administered. *See Davis v. Comm’r of Pub. Safety*, 509 N.W.2d 380, 387 (Minn. App. 1993), *aff’d*, 517 N.W.2d 901 (Minn. 1994). It is the clear duty of attorneys, not

police officers, “to explain the extent and scope of the right to an additional test while the driver is in custody.” *Id.* “The only advisory that the police must give a person under the implied consent law is that mandated by statute.” *Hager v. Comm’r of Pub. Safety*, 382 N.W.2d 907, 911 (Minn. App. 1986).

In determining whether an additional test has been prevented or denied, this court has drawn a distinction between an officer’s failing to assist and an officer’s hampering an attempt to obtain such a test. *Theel v. Comm’r of Public Safety*, 447 N.W.2d 472, 474 (Minn. App. 1989), *review denied* (Minn. Jan. 8, 1990). In *Theel*, this court held that although an officer has no duty to assist a second test by providing supplies or transportation to a testing facility or arranging for a test at the jail, Theel’s right to obtain an additional test was hindered by an officer. *Id.*

In that case, after an Intoxilyzer test revealed an alcohol concentration of .10, Theel said that he wanted to make arrangements for a second test by a person of his choosing. *Id.* at 473. Theel reached two hospitals by telephone, but neither had the facilities to come to the jail for testing. *Id.* An officer correctly told Theel that the officer was under no obligation to take him to the hospital and that it was up to Theel to make arrangements for the test at the jail. *Id.* Theel then asked to be allowed to contact an attorney and an officer said, “Forget it. They’re all sleeping.” *Id.*

Matuzak argues that her situation is analogous to Theel’s. We disagree. Theel made an active attempt to obtain a second test after he took the Intoxilyzer test, and he was denied the right to call an attorney to assist in arranging the test. In contrast, Matuzak declined to speak with an attorney before the Intoxilzyer test, did not request a

second test after the Intoxilyzer test, and did not ask to speak to anyone about a second test. Matuzak failed to make clear her intent to have a second test administered, and law enforcement did nothing to prevent or deny additional testing.

Affirmed.