

## Court finds no right to privacy when calling attorney about DWI testing

By: Jessica Shumaker ◉ March 13, 2018

Drivers suspected of driving while intoxicated in Missouri do not have the right to confer privately with an attorney about the merits of taking a chemical test, the Western District Court of Appeals ruled Tuesday.

The split 2-1 ruling came in a case in which a Blue Springs man challenged a civil proceeding in which the director of the Missouri Department of Revenue revoked his license for refusing to submit to a Breathalyzer test.

The man, Jereme Roesing, was arrested in Lee's Summit in May 2016 on suspicion of DWI. The director determined that he refused to submit to a chemical test and revoked his license for a year.

He petitioned for a review of the revocation, taking the case to trial. He argued at trial that his statutory right to counsel was violated because the arresting officer did not allow him to speak with his attorney in private, but rather stood within three or four feet of him during the call and could hear the conversation.

The trial court sided with the director and issued a judgment upholding the revocation, finding the department met its burden to show he refused to submit to a chemical test.

Roesing appealed that decision in the Western District.

Judge Cynthia L. Martin wrote the majority opinion, with Judge James E. Welsh concurring. Judge Gary D. Witt dissented.

The case centered on Section 577.041.1 of the Missouri Revised Statutes, which provides a statutory right to speak to an attorney when a person suspected of driving while intoxicated is asked to submit to a chemical test.

The law allows 20 minutes for a person to attempt to contact an attorney. It also says if the person continues to refuse to submit to any test upon the completion of the 20 minutes, it will be deemed a refusal.

Martin said the purpose of the law, to provide a person with a reasonable opportunity to contact a lawyer to make an informed decision about a chemical test, was met in Roesing's case, just as it would have been met even if a person suspected of DWI tried but failed to reach an attorney.

"If it is sufficient to satisfy the purpose of the section 577.041.1 to afford a person twenty minutes to unsuccessfully attempt to contact an attorney, then it is certainly sufficient to satisfy the purpose of the statute to afford a person twenty minutes to successfully attempt to contact an attorney, regardless whether the ensuing conversation is private," she said.

Martin said Roesing argued the appeals court should broaden the definition of prior case law of "reasonable opportunity to contact an attorney" to also provide the right to confer privately with an attorney. She said the plain language of the statute does not afford that right.

In the dissenting opinion, Witt said he would find Roesing was denied his statutory right to counsel.

He said there was no way to know why Roesing was contacting an attorney – whether he was exercising his statutory right to counsel tied to the chemical test or his constitutional right to counsel for potential criminal charges.



Missouri Court of Appeals Western District, located in Kansas City. Photo by Scott Lauck.

"It is safe to say that Roesing probably had no idea there was a difference," Witt said. "In fact, in every driving while intoxicated arrest the legal issues that the arrested person may wish to discuss with their attorney and the advice the attorney gives to that person are hopelessly intertwined and cannot be separated."

Witt disagreed with the majority framing Roesing's argument as "broadening" rights. He said instead, "it is merely refusing to create some lesser attorney client relationship that does not yet exist."

"The legislature did not 'exclude' the word 'privately' because it did not intend to grant a private consultation," he said. "The term was not included because consultation with an attorney implicitly and necessarily includes privacy."

Bill Kenney, a Kansas City attorney, represented Roesing. He said he and his client agree with Witt's interpretation, that the right to counsel has historically been found to include the right to confer in private.

"That's the only meaning that makes sense," he said.

He said his client intends to seek transfer to the Supreme Court.

Morgan Brewington, an attorney for the Department of Revenue in Jefferson City, represented the director. In a statement, Brewington said the department "is pleased to see that the Court of Appeals gave effect to the plain language of section 577.041.1."

The case is *Roesing v. Director of Revenue*, WD80585.