

## Court weighs right to private attorney calls

By: Jessica Shumaker ◉ January 17, 2019

The Missouri Supreme Court on Jan. 15 probed whether a state law allowing drivers suspected of driving while under the influence to consult with an attorney prior to chemical testing also extends the right of confidentiality to those calls.

The court heard the appeal of Jereme Roesing, a man who was arrested in Lee's Summit in May 2016 on suspicion of DWI. The state's Director of Revenue 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. At trial, Roesing argued that his statutory right to counsel in the civil revocation proceeding was violated because the arresting officer did not allow him to speak with his attorney in private, but rather stood within 3 to 4 feet of him during his phone call and could hear the conversation.

The officer also recorded the conversation, and the police department later submitted the recording to the prosecutor in Roesing's criminal case, according to his attorney, Bill Kenney of the Kenney Law Firm in Kansas City.

In March 2018, a split three-judge panel from the Western District Court of Appeals ruled that drivers suspected of DWI do not have the right to confer privately with an attorney. Roesing sought and was granted transfer of the case to the Supreme Court.

Roesing is arguing on appeal that the process of revoking his license was flawed. He contends his refusal to undergo chemical testing was not valid because he was unable to have a confidential conversation with his attorney.

He said the statute at issue in the case gives a person suspected of DWI up to 20 minutes to attempt to contact an attorney for advice about whether to undergo chemical testing.

"It's silent as to the actual scope of attorney-client consultation," he said.

Chief Judge Zel M. Fischer asked Kenney if he agreed that the only reason Roesing had a right to speak with an attorney was through the statute and whether that meant the constitutional right to counsel doesn't necessarily apply in the case.

"We're not hearing the criminal case," he said. ". . . What happened in the criminal case certainly isn't dispositive, but other than the interpretation of this statute and what it means, what else should guide us?"

Kenney agreed that his client is not entitled to an attorney in a civil proceeding. He pointed to Section 600.048.3 as a guiding statute, which requires police officers to provide a private space for suspects in cases to meet with counsel.

Judge Mary R. Russell asked if Kenney preserved that argument. He said he generally argued before the trial court that he did not believe the legislature intended for a client-attorney conversation to be overheard and recorded by an officer.

Judge Laura Denvir Stith summed up his arguments.

"You're saying there's no purpose to granting the right to contact if you can't talk to them confidentially and if



The Missouri Supreme Court building in Jefferson City. File photo

anything you say can be used against you in a criminal case then in fact you have no right to consult?" she said.

Kenney agreed, saying it's nearly impossible for an attorney to get the information needed from the client to advise the client if an officer is nearby listening and the conversation is being recorded.

Zack Bluestone, deputy solicitor general, represented the Director of Revenue.

He said Roesing's proceeding is strictly confined to three issues: "whether the suspect was actually arrested, whether the officer had reasonable grounds to believe that the suspect was driving while impaired and whether the suspect refused to submit to a breath test."

He also argued that the plain language of the statute doesn't give suspects the right to a confidential conversation with their attorney.

Stith extended his arguments about reading the statute literally.

"If you literally read the statute, it doesn't say you can talk, that can't be obviously what the legislature meant," she said, noting that the statute gives the right only to attempt to contact an attorney.

She also asked why the court can't assume a normal protection to attorney-client conversations wouldn't apply in Roesing's case.

Bluestone said the purpose of the statute is to provide suspects an opportunity to have a meaningful conversation with an attorney.

"How can it be meaningful if it's not confidential?" Stith asked. "Why isn't that also implicit in what the statute says?"

Bluestone said the purpose of the phone call is "to advise the suspect of the consequences of refusal to submit to the test."

"An attorney can do that without having to even engage in questions about the specific questions of the case, which is what opposing counsel relies on," he said.

The case is *Roesing v. Director of Revenue*, SC97165.