

Man appeals license revocation on privacy grounds

By: Jessica Shumaker ◉ January 22, 2018

A man who refused a breathalyzer test is appealing a judgment upholding the revocation of his license on grounds that the arresting officer failed to provide him a private space to confer with an attorney.

The case is that of Jereme Roesing, of Blue Springs, against the director of the Missouri Department of Revenue.

Roesing was arrested in Lee's Summit in May 2016 on suspicion of driving while intoxicated, according to court briefs. The Missouri director of revenue determined that he refused to submit to a chemical test and revoked his license for a year.

He filed a petition for review. At trial, he asserted his statutory right to counsel was violated because the arresting officer did not allow him to speak with his attorney in private.

The officer testified he stood three to four feet away from Roesing during the call and he could hear Roesing's conversation with his attorney.

The trial court sided with the director, and issued a judgment upholding the revocation of Roesing's license, finding the department met its burden of proving Roesing refused to submit to a chemical test.

The case was heard Monday by Judges James E. Welsh, Cynthia L. Martin and Gary D. Witt at William Jewell College in Liberty.

Bill Kenney of Kansas City represented Roesing. He told the judges the statute allowed his client 20 minutes to confer with an attorney prior to deciding whether or not to take the breath test.

"Implicit in the right to counsel is a right to privacy," he said.

Martin asked Kenney if he agreed the right to counsel in the case is not of constitutional origin, but rather statutory. He agreed.

She followed up noting that officers are required to consistently observe those in custody.

"What's the officer to do?" Martin asked.

Kenney said the officer could turn off video and audio.

"There has to be a better way than three feet away," he said.

Martin asked Kenney if he was asking the panel to read into the statute that the 20-minute conversation allowed must be private.

"I think there has to be some degree of privacy to have the effect it's intended to have," Kenney said.

In briefs and during arguments, Kenney pointed to a 6th Amendment violation in the case of Shayne Healea, the Moniteau County prosecuting attorney whose case will be before the Supreme Court in February.

In that case, a special master found a 6th Amendment violation occurred when the Columbia Police Department recorded a privileged attorney-client conversation between Healea and his attorney after he was taken into custody for second-degree assault.

Martin drew a distinction between Roesing and Healea's case, and noted that the Eastern District ruling in Healea's case wasn't on the violation, but rather the public release of a special master's report.

She said the context was not the same as his client's case.

"That's a little bit of a stretch," she said.

Kenney said it's the same underlying issue in a criminal context.

Morgan Brewington represented the department. During her portion, the panel questioned her on whether privacy entered into the elements the department must show in order to revoke a license.

She pointed to *Clardy v. Director of Revenue*, which found privacy was not required.

Witt pointed out that in that case, the officer had not overheard the call at issue. He also asked how a client could get advice with an officer standing right there.

"Really, I think the point is privacy is not an issue," Brewington said.

Witt asked how a client could confer without the officer hearing the conversation.

Brewington suggested leading yes or no questions, prompting Witt to list off a series of questions to ask that would require more, like what time did the client start drinking, or how many drinks had they had.

"All of these questions are relevant to what you advise to take a breathalyzer or not," Witt said.

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