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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0225**

State of Minnesota,
Respondent,

vs.

Wayne Alan Menter,
Appellant.

**Filed April 9, 2018
Affirmed
Johnson, Judge**

Redwood County District Court
File No. 64-CR-16-155

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Jenna M. Peterson, Redwood County Attorney, Joel C. Brakken, Assistant County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and Kirk, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Redwood County jury found Wayne Alan Menter guilty of driving while impaired. The jury's verdict is based on evidence that Menter drove his truck into a ditch,

that law-enforcement officers at the scene perceived that he was intoxicated, that a relative who was present told the officers that Menter was intoxicated, and that Menter admitted that he had been drinking before he was driving. Menter petitioned for post-conviction relief on the ground that his trial attorney was ineffective because the attorney did not attempt to suppress the state's evidence that Menter admitted to drinking and because the attorney did not object to that evidence at trial. The post-conviction court denied the petition on the ground that Menter's trial attorney's performance was not deficient because there was no legal basis for an argument that Menter's admission was inadmissible. We affirm.

FACTS

Menter was arrested on February 28, 2016, after he drove his truck into a ditch on county highway 15 and failed a series of field-sobriety tests. The state charged him with three counts: (1) first-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2014), based on an allegation that Menter was under the influence of alcohol; (2) first-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(5), based on an allegation that Menter's alcohol concentration was 0.08 or more; and (3) driving after cancellation, in violation of Minn. Stat. § 171.24, subd. 5 (2014).

The case was tried on one day in October 2016. The state called three witnesses: Menter's nephew, W.M., and two deputy sheriffs who responded to the report that Menter's truck was in the ditch, Mike Campbell and Mitch Zimmermann. Menter did not testify and did not offer any other evidence.

W.M. testified that he received a telephone call from Menter, who said that he had driven his truck into a ditch and needed W.M. to pull out the truck. W.M. drove to the place that Menter described and pulled Menter's truck out of the ditch. As W.M. began to drive away, Menter drove his truck into the opposite ditch. W.M. turned around and attempted to pull Menter's truck out of the ditch a second time, but W.M.'s tow strap broke. W.M. testified that Menter appeared to be intoxicated.

Deputy Campbell testified that he responded to a report from a dispatcher that a vehicle was stuck in a ditch. When he arrived at the scene, he saw Menter and W.M. Deputy Campbell noticed that Menter's speech was slow and slurred, that he smelled of alcohol, and that he was leaning on the truck to support himself, which led Deputy Campbell to believe that Menter was intoxicated. Deputy Campbell spoke to W.M., who said that Menter was intoxicated. Deputy Campbell also testified that he found the truck's keys in one of Menter's pockets while performing a search.

Deputy Zimmermann testified that he arrived at the scene a couple minutes after Deputy Campbell. He testified that he detected a strong odor of alcohol and slurred speech when he talked to Menter and suspected that he was under the influence of alcohol. He testified that Menter admitted to drinking beer at a bar before driving the truck. The state played for the jury a video-recording of Deputy Zimmermann's conversation with Menter, which was captured by Deputy Zimmermann's dashboard camera. The audio portion of the video-recording reveals that Deputy Zimmermann asked Menter questions such as, "What's going on here tonight?," "How did you end up in the ditch here?," "How much did you have to drink tonight, Wayne?," and "Were you drinking at the bar tonight [or] just

kinda drinking on the road?” Menter responded by saying that he could not tell the deputy how much he had drunk but that he had “a few beers” at a bar in the city of Sanborn. Deputy Zimmermann testified that he administered field sobriety tests, which confirmed his suspicion that Menter was under the influence of alcohol. Deputy Zimmermann arrested Menter. Menter later submitted to a breath test, which revealed an alcohol concentration of 0.17.

The jury found Menter guilty on count 1 and count 2. The district court found Menter guilty on count 3, for which Menter had waived his right to a jury trial. The district court imposed a sentence of 57 months of imprisonment on count 1.

Menter filed a timely notice of appeal and later asked this court to stay the direct appeal to allow him to seek post-conviction relief. *See* Minn. R. Crim. P. 28.02, subd. 4(4). We granted the stay. In July 2017, Menter filed a post-conviction petition in which he argued that his trial attorney was ineffective because he did not move to suppress the evidence of his statements to the officers and did not object to that evidence at trial. In August 2017, the post-conviction court denied the petition, without an evidentiary hearing, on the ground that Menter failed to allege facts that are capable of proving that his trial attorney’s performance was deficient. In September 2017, we dissolved the stay and reinstated the appeal.

DECISION

Menter argues that his trial attorney was ineffective because he did not move to suppress the state’s evidence that Menter admitted to drinking before he drove into the ditch and because he did not object to the evidence at trial. Menter contends that his trial

attorney should have challenged the state's evidence on the grounds that his admission arose from a custodial interrogation and that he was not given a *Miranda* warning.

A criminal defendant is entitled to the assistance of counsel in a criminal prosecution. U.S. Const. amend. VI; Minn. Const. art I, § 6. The right to counsel is the right to the “effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)) (emphasis added). A defendant claiming a violation of the constitutional right to the effective assistance of counsel must prove two things:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. In general, “there is a strong presumption that counsel's performance fell within a wide range of reasonable assistance.” *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (quotation omitted).

A suspect who is asked questions in a custodial interrogation has a right to be informed of certain constitutional rights, including the Fifth Amendment right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444, 467-79, 86 S. Ct. 1602, 1612, 1624-30 (1966). A “custodial interrogation” exists if “questioning [was] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444, 86 S. Ct. at 1612; *see also State*

v. Heden, 719 N.W.2d 689, 694-95 (Minn. 2006). A person is in custody if there has been a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 1144 (1984) (quotation omitted); *see also State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). If a person makes a statement in a custodial interrogation without having received a *Miranda* warning, the person’s statement is inadmissible. *See Miranda*, 384 U.S. at 471-72, 86 S. Ct. at 1626; *see also State v. Tibiatowski*, 590 N.W.2d 305, 308 (Minn. 1999).

Menter’s ineffectiveness claim rests on the premise that he was subjected to a custodial interrogation when Deputy Zimmerman asked him questions on the side of the road, near where his truck was in the ditch. But that premise is contrary to an opinion of the United States Supreme Court. In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984), the Court stated that the concerns underlying the *Miranda* doctrine are not present in an “ordinary” or “typical” traffic stop. *Id.* at 435-47, 104 S. Ct. at 3147-52. The Court reasoned that, in such a stop, an officer who lacks probable cause but has a reasonable suspicion of criminal activity “may detain [the driver] briefly in order to investigate the circumstances that provoke suspicion.” *Id.* at 439, 104 S. Ct. at 3150 (quotation omitted). In doing so, “the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 29, 88 S. Ct. 1868, 1884 (1968)). The Court further reasoned that the “noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not ‘in custody’ for the purposes of *Miranda*.” *Id.* at 440, 104 S. Ct. at 3150. The Court concluded that the facts

of that case did not present any reason to depart from the general rule that routine traffic stops do not give rise to a custodial interrogation. *See id.* at 441-42, 104 S. Ct. at 3151-52.

The Minnesota Supreme Court has issued similar opinions, both before and after *Berkemer*. In *In re Welfare of M.A.*, 310 N.W.2d 699 (Minn. 1981), which was decided before *Berkemer*, the supreme court concluded that a juvenile was not subjected to a custodial interrogation when state troopers “questioned him on the highway near the stopped car” and, thus, “a *Miranda* warning was not then required.” *Id.* at 700. In *State v. Herem*, 384 N.W.2d 880 (Minn. 1986), which was decided after *Berkemer*, a deputy sheriff stopped a motorcyclist and asked him several questions, such as whether he knew that he was speeding, whether he had seen the patrol car, and whether he had been drinking. *Id.* at 881. The supreme court reasoned that the stop was not “the functional equivalent of a formal arrest” because it “involved only a short period of time, and it was not until defendant failed the preliminary breath test that he was informed that his detention would not be temporary.” *Id.* at 883. Similarly, in *State v. Kline*, 351 N.W.2d 388 (Minn. App. 1984), a deputy sheriff found a vehicle “stuck in the ditch” and engaged in “general on-site questioning” of the vehicle’s driver, asking questions such as, “‘Are you the driver?’, ‘Have you been drinking?’, ‘How much?’” *Id.* at 389-90. This court concluded, “The deputy violated no rights of the defendant by not giving him a *Miranda* warning.” *Id.* at 390.

In this case, the deputies detained Menter for investigatory purposes after observing that his truck was in a ditch and that he appeared to be intoxicated. There is no dispute that Deputy Zimmerman had a reasonable suspicion of criminal activity, and his questions of

Menter were appropriate for a brief investigatory detention. The questions that Deputy Zimmerman asked were similar to the questions asked in *Herem* and *Kline*. See *Herem*, 384 N.W.2d at 881, 883; *Kline*, 351 N.W.2d at 390. At the time, the circumstances did not indicate a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” See *Murphy*, 465 U.S. at 430, 104 S. Ct. at 1144. Accordingly, Menter was not subjected to a custodial interrogation, and a *Miranda* warning was not required.

In general, an attorney’s performance is not deficient if the attorney does not object to evidence that is not inadmissible. See *State v. Asfeld*, 662 N.W.2d 534, 546 (Minn. 2003). The well-established caselaw described above provided Menter’s trial attorney with ample reasons for not moving to suppress the state’s evidence that Menter admitted to drinking before he drove into the ditch and not objecting to the evidence when it was introduced at trial. Thus, Menter cannot establish that his trial attorney’s performance was deficient.

In sum, the post-conviction court did not err by denying Menter’s post-conviction petition.

Affirmed.