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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0415**

State of Minnesota,
Respondent,

vs.

Antone Larron Owens,
Appellant.

**Filed July 2, 2018
Remanded
Stauber, Judge***

Hennepin County District Court
File No. 27-CR-15-30253

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Reilly, Judge; and Stauber, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

This is a direct appeal from a conviction of driving while impaired, which was stayed to allow appellant to initiate postconviction proceedings in district court. After the postconviction court denied relief, appellant argued on reinstated appeal that the postconviction court erred in denying him relief for ineffective assistance of trial counsel based on his counsel's failure to move to suppress urine-test results on due-process and Fourth Amendment grounds and that the postconviction court erred in denying appellant's petition for postconviction relief without holding an evidentiary hearing. We remand for an evidentiary hearing.

FACTS

At approximately 12:07 a.m. on September 20, 2015, a state trooper stopped appellant Antone Larron Owens for not having his taillights on. The trooper smelled an overwhelming odor of air freshener, but also detected the scent of alcohol. Owens failed a field sobriety test and took a preliminary breath test, registering a 0.124 alcohol concentration. The trooper arrested Owens and read him the implied-consent advisory before attempting to administer a breath test at the jail. Two breathalyzer machines failed to return a result, so the trooper asked Owens to take a blood or urine test. Owens agreed to take a urine test. The urine test occurred at 2:20 a.m., and it showed an alcohol concentration of 0.103.

Respondent State of Minnesota charged Owens with one count of driving under the influence of alcohol and one count of operating a motor vehicle with an alcohol

concentration of 0.08 or more as tested within two hours. Owens moved the district court to suppress the urine-test results on the basis that the sample was collected more than two hours after the driving conduct was observed.

The district court held an omnibus hearing on March 17, 2016. The parties stipulated that the driving conduct was observed at 12:07 a.m. and that the sample was collected at 2:20 a.m. The state called Dr. Kathryn Fuller, a forensic scientist at the Bureau of Criminal Apprehension, who testified that the alcohol concentration in a urine sample is not equivalent to the alcohol concentration in the blood when the sample is collected, which makes it impossible to do a retrograde analysis to estimate alcohol concentration at an earlier time. However, she opined that if the sample had been collected 13 minutes earlier, the sample would not have been significantly different than the one she tested. Dr. Fuller testified that her opinion was based on the assumption that Owens had not consumed alcohol between the time he was pulled over and the time the sample was collected and the assumption that, because alcohol is a diuretic and increases the rate of urination, the urine in the bladder when the sample was collected was relatively fresh. She testified that the preliminary breath test was consistent with her opinion.

Owens called Thomas Burr, who testified that Dr. Fuller's opinion was essentially a retrograde analysis, which cannot be performed on a urine sample. In his memorandum in support of his motion to suppress the urine-test results, Owens argued that the state failed to prove that his alcohol level was 0.08 or more within two hours of the time he drove. He argued that the delay in obtaining the sample made it necessary to estimate his alcohol concentration, and that because retrograde analysis was not possible with a urine test, the

test results must be suppressed. He did not argue that the sample was improperly obtained. The district court denied Owens's motion to suppress, concluding that the evidence of alcohol present in the urine was admissible for the purpose of proving Owens violated the law.

The matter proceeded to trial, and Owens was found guilty of driving under the influence of alcohol and driving with an alcohol concentration of 0.08 or more within two hours of driving. The district court sentenced Owens to serve 75 months in prison.

Owens appealed. This court stayed his appeal while he pursued postconviction relief. Owens petitioned the postconviction court to reverse his conviction on the basis of ineffective assistance of trial counsel. He argued that a reasonably competent attorney would have argued that the urine test was obtained in violation of the Fourth Amendment. Owens requested an evidentiary hearing to present support for his argument. The postconviction court denied the petition for postconviction relief without granting an evidentiary hearing.

The postconviction court reasoned that Owens had not shown material facts in dispute that needed to be resolved. The district court noted that there was no dispute that Owens's counsel did not challenge the taking of the urine sample on Fourth Amendment grounds. The district court also noted that Owens had not "presented any argument that raises a reasonable probability of prejudice from trial counsel's decision to not challenge the taking of [his] urine sample. In fact, [Owens] concedes in his own Petition that he consented to the test." The district court reasoned that evidence showed Owens agreed to

the urine sample, which justified his attorney's decision not to challenge the administration of the test. This court then reinstated Owens's appeal.

D E C I S I O N

Owens contends that he is entitled to “some form of postconviction relief” because he received ineffective assistance of counsel when his attorney did not move to suppress the results of the urine test on due-process or Fourth Amendment grounds. A defendant is entitled to have the assistance of counsel in all criminal prosecutions. U.S. Const. amend. VI; Minn. Const. art I, § 6. This right to counsel, more specifically, is the right to “*effective assistance of counsel*.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (emphasis added) (quotation omitted). When this court reviews a postconviction court's denial of relief on a claim of ineffective assistance of counsel, we consider the factual findings that are supported by the record, conduct a de novo review of their application, and determine whether the court abused its discretion. *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

Owens must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068. “[T]here 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). “Generally, [appellate courts] will not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014). A postconviction

court's statements regarding counsel's trial strategy are not owed deference and are reviewed de novo. *Nicks*, 831 N.W.2d at 503 n.1.

Due Process

Owens argues that his attorney should have moved to suppress the test results because the implied-consent advisory read to Owens violated his due-process rights by inaccurately informing him that refusing to submit to a urine test was a crime. This argument was not presented to the district court in Owens's request for postconviction relief. Owens's request for postconviction relief stated that "the basis for [his] ineffective assistance of counsel claim is that trial counsel failed to challenge the taking of [his] urine sample by arguing there was no exception, other than [his] consent, to justify taking the sample and testing it without a search warrant." The issue Owens raised to the postconviction court concerned his Fourth Amendment rights and not his current claim that his due-process rights were violated. "It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quotation omitted) (declining to consider constitutional issue). We therefore do not consider Owens's argument that his due-process rights were violated when he was read the implied-consent advisory.

Fourth Amendment

The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Generally, warrantless searches are per se unreasonable." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

Taking blood or urine samples from someone constitutes a “search” under the Fourth Amendment. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). But police do not need a warrant if the subject of the search consents. *Id.*

Owens argues that three cases, *Brooks*, this court’s decision in *State v. Thompson*, 873 N.W.2d 873, 878 (Minn. App. 2015), *aff’d* 886 N.W.2d 224 (Minn. 2016), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), were all decided before Owens’s jury trial; that a reasonably competent attorney would have known about all three cases; and that his attorney should have relied on them to argue that he did not voluntarily consent to his urine sample being taken without a warrant.

Owens acknowledges that in *Brooks*, the supreme court concluded that reading a defendant an implied-consent advisory does not render the defendant’s consent to a chemical test involuntary. 838 N.W.2d at 570. However, Owens argues that he was misinformed by the implied-consent advisory, relying on *Birchfield*, which states that “motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” 136 S. Ct. at 2186.

Owens’s factual scenario is most similar to that of Beylund in the *Birchfield* trio of cases. Beylund submitted to a blood test after police told him it was required by law, and the North Dakota Supreme Court held that his consent was voluntary on the erroneous assumption that the state could permissibly compel blood tests. *Id.* Because voluntariness of consent to a search must be determined from the totality of all the circumstances, the Supreme Court remanded the case for reevaluation of Beylund’s consent given the partial inaccuracy of North Dakota’s advisory. *Id.* And this court’s decision in *Thompson*

indicates that the test used in determining the constitutionality of a urine test is the same as that of a blood test. *See Thompson*, 873 N.W.2d at 878-79 (holding that a urine test is invasive in a similar way as a blood test). Thus, the conclusion that the supreme court reached in *Birchfield* is instructive.

In this case, the postconviction court denied Owens postconviction relief based on its conclusion that “[b]ecause evidence showed that [Owens] had agreed to take the urine sample, trial counsel’s choice to not challenge that taking is reasonable.” However, *Birchfield* calls into question whether Owens’s consent was valid based on the totality of the circumstances. *See* 136 S. Ct. at 2186 (“[M]otorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.”). The fact that Owens’s counsel failed to make an argument regarding Owens’s consent may have therefore resulted in prejudice.

To show prejudice, a defendant has the burden of proving that a reasonable probability exists that, had the alleged error not occurred, the result of the trial would have been different. *Swaney v. State*, 882 N.W.2d 207, 218 (Minn. 2016). Owens argues that he was prejudiced because, had trial counsel challenged the urine-test results on this basis, the district court would have suppressed the test results. Based on the clear language of *Birchfield* that motorists cannot be deemed to have consented to a blood test on pain of committing a criminal offense, and Minnesota’s similar treatment of blood and urine tests, there is a reasonable probability that the district court, in considering the totality of the circumstances, would have suppressed the evidence.

The Minnesota Supreme Court has stated that, even assuming an attorney's alleged errors were prejudicial, "a defendant arguing ineffective assistance of counsel must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Rhodes*, 657 N.W.2d at 844 (quotation omitted). "Generally, [appellate courts] will not review an ineffective-assistance-of-counsel claim that is based on trial strategy." *Vang*, 847 N.W.2d at 267. However, because there was no evidentiary hearing, there is no evidence on appeal regarding whether the attorney's decision was one of trial strategy or whether the attorney simply did not know of the relevant caselaw.

Owens argues that the postconviction court committed reversible error by denying his motion without holding an evidentiary hearing. "A postconviction court's denial of a petition for relief is reviewed for an abuse of discretion; and a postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Nicks*, 831 N.W.2d at 495. A defendant seeking an evidentiary hearing on a petition for postconviction relief based on a claim of ineffective assistance of counsel "must allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland v. Washington*." *Id.* Under Minn. Stat. § 590.04, subd. 1 (2016), a postconviction court must grant an evidentiary hearing unless the court concludes that the "petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief."

Owens argues that he alleged appropriate facts by raising an ineffective-assistance-of-counsel claim in his postconviction petition. He argues that an evidentiary hearing would assist the postconviction court in resolving questions regarding whether his trial counsel was aware of the relevant caselaw, why counsel did not raise a Fourth Amendment challenge, and what the implied-consent advisory said when it was read to Owens. We agree.¹

The postconviction court denied Owens's request for an evidentiary hearing because Owens consented to the test. *Birchfield*'s language draws that very consent into question. *Birchfield* indicates that an implied-consent advisory's misstatement of law should be considered by the district court as part of the totality of the circumstances surrounding whether a person's consent was valid. 136 S. Ct. at 2186. The district court did not have the opportunity to consider whether Owens's consent was valid because that argument was not presented by Owens's attorney.

Because the postconviction court denied Owens an evidentiary hearing, it received no evidence regarding whether his trial attorney's decision not to challenge the test was sound trial strategy. We therefore remand for an evidentiary hearing for the parties to submit evidence related to Owens's ineffective-assistance-of-counsel claim.

Remanded.

¹ In lieu of submitting a brief on the substantive arguments in this case, the state agreed that the case should be remanded to the district court for an evidentiary hearing.