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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0809**

State of Minnesota,
Respondent,

vs.
Buk Gaak Gany,
Appellant.

**Filed January 22, 2019
Affirmed
Johnson, Judge**

Blue Earth County District Court
File No. 07-CR-15-5060

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Tracy M. Smith, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

A Blue Earth County jury found Buk Gaak Gany guilty of refusal to submit to a chemical test after he was arrested for driving while impaired. Gany petitioned for post-conviction relief, arguing that he received ineffective assistance of counsel because his trial

attorney did not move to suppress evidence of his test refusal on the ground that he has limited proficiency in the English language and was not provided with an interpreter in connection with the implied-consent advisory. The post-conviction court denied Gany's petition. We conclude that the post-conviction court did not err by finding that Gany is not "disabled in communication" and, thus, was not entitled to an interpreter. Consequently, Gany's trial attorney was not ineffective in not moving to suppress the evidence of Gany's test refusal. Therefore, we affirm.

FACTS

On the evening of December 12, 2015, two off-duty officers of the Blue Earth County Sheriff's Department saw a car travel the wrong way on a one-way street near a liquor store in the city of Mankato. Deputy Ruch and Lieutenant Wersal then saw the car back into a parking spot, but they lost sight of the car as they parked their own vehicle. The officers entered the liquor store, where they saw a man who Deputy Ruch believed was the driver of the car that had traveled the wrong way on the one-way street. The officers observed that the man appeared to be intoxicated and that the liquor store refused to sell him any alcoholic beverages. The officers followed the man out of the store and saw him walk to the same car and open the driver's door. The officers prevented the man from entering the car, took his car keys, and called for back-up assistance.

Several on-duty officers responded to the call and arrested the man, who later was identified as Gany, on suspicion of driving while impaired. Officer Hoppe transported Gany to the county jail, where he read Gany the implied-consent advisory. During the reading of the advisory, Gany frequently interrupted Officer Hoppe, often for the purpose

of saying that he was not driving a car when he was apprehended. Officer Hoppe asked Gany several times whether he understood the advisory, and Gany eventually said that he did. Officer Hoppe did not ask Gany whether he wanted an interpreter, and Gany did not request one. Officer Hoppe asked Gany whether he wanted to consult with an attorney. Gany initially indicated that he wanted to do so. But after Officer Hoppe provided him with a telephone and telephone books, Gany made no effort to use them, stating that he did not have an attorney's telephone number and did not know whom to call. Officer Hoppe then asked Gany several times to submit to a breath test. Gany responded that he would not do so. Officer Hoppe reiterated that his failure to take the breath test would be a refusal, to which Gany responded, "That's fine."

The state charged Gany with (1) refusal to submit to a chemical test, in violation of Minn. Stat. § 169A.20, subd. 2 (2014); (2) driving while impaired (DWI), in violation of Minn. Stat. § 169A.20, subd. 1(1) (2014); and (3) driving after cancellation of a driver's license as inimical to public safety, in violation of Minn. Stat. § 171.24, subd. 5 (2014).

In January 2017, the district court presided over a one-day jury trial. The state presented the testimony of four law-enforcement officers. Gany presented the testimony of two witnesses: a friend who testified that he, not Gany, was the person who had been driving the car, and Gany's daughter, who testified that Gany had walked, not driven, to the liquor store. In closing arguments, Gany's trial attorney pointed to a language barrier between Gany and the arresting officers to explain Gany's statements to officers that he was not driving the car when he was apprehended and to argue that Gany's refusal to submit to testing was reasonable.

The jury found Gany guilty of test refusal but not guilty of the other two charges. The district court imposed a sentence of 54 months of imprisonment. Gany filed a timely notice of appeal. He later moved to stay the appeal so that he could file a post-conviction petition. We granted the motion. Gany petitioned for post-conviction relief, arguing that he received ineffective assistance of counsel “because his trial counsel failed to move to suppress the refusal, which resulted from the violation of Gany’s right to counsel, because Gany did not understand the English-language implied consent advisory and was not provided with an English-language interpreter.” The post-conviction court held an evidentiary hearing, at which Gany testified about his ability to understand and express himself in English. In April 2018, the post-conviction court denied the petition. We reinstated the appeal.

D E C I S I O N

Gany argues that the post-conviction court erred by denying his post-conviction petition. He contends that his trial attorney provided him with constitutionally ineffective assistance of counsel by not moving to suppress the evidence of his test refusal based on the fact that he was not provided an interpreter in connection with the implied-consent advisory.

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. This right is the “right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quotation omitted). To

prevail on an ineffective-assistance-of-counsel claim, a defendant must satisfy two requirements:

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. If a criminal defendant argues on appeal that his trial attorney was ineffective in not moving to suppress evidence, the appellant must show, to satisfy the second requirement, that the suppression claim "is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986). If one of the *Strickland* requirements is not satisfied, a court need not consider the other requirement. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

In reviewing a post-conviction court's denial of a claim of ineffective assistance of counsel, this court applies a clear-error standard of review to the post-conviction court's factual findings, a *de novo* standard of review to the post-conviction court's legal conclusions, and an abuse-of-discretion standard of review to the post-conviction court's ultimate decision whether to grant relief. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013); *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012); *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010).

Gany contends that his trial attorney's performance was deficient because he did not move to suppress the evidence of Gany's test refusal. Specifically, Gany contends that his trial attorney should have argued to the district court that his English-language skills are limited because he is a Sudanese immigrant whose primary language is Nuer, that he consequently is disabled in communication, that he was entitled by statute to an interpreter, that the officers' failure to provide an interpreter led to a violation of his limited constitutional right to counsel in connection with the implied-consent advisory, and that suppression of the evidence of his test refusal is the appropriate remedy for that constitutional violation.

The legislature has expressly stated that it is "the policy of this state that the constitutional rights of persons disabled in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings." Minn. Stat. § 611.30 (2018). If a person who is disabled in communication is arrested for a criminal offense, "the arresting officer . . . shall immediately make necessary contacts to obtain a qualified interpreter and shall obtain an interpreter at the earliest possible time at the place of detention." Minn. Stat. § 611.32, subd. 2 (2018). The officer "shall, with the assistance of the interpreter, explain to the person disabled in communication, all charges filed against the person, and all procedures relating to the person's detainment and release." *Id.* A person is "disabled in communication" if he or she, "because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person, or the seizure of the person's property, or is incapable of presenting or assisting in the presentation of a defense." Minn. Stat. § 611.31(2) (2018).

“The term disabled in communication . . . includes persons disabled in expression or comprehension of the English language.” *State v. Farrah*, 735 N.W.2d 336, 342 (Minn. 2007). The determination that a person is disabled in communication is a fact-specific inquiry. See *State v. Kail*, 760 N.W.2d 16, 19-21 (Minn. App. 2009); *State v. Perez*, 404 N.W.2d 834, 838-39 (Minn. App. 1987), *review denied* (Minn. May 20, 1987).

In considering Gany’s argument, we are mindful that his theory of post-conviction relief is based on the premise that suppression is justified by the alleged denial of his limited *constitutional* right to counsel. The limited right to counsel arising under the state constitution applies when “an individual is asked by law enforcement officials to undergo a blood alcohol test” and ensures that the individual “has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing.” *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 835, 837 (Minn. 1991) (citing Minn. Const. art. I, § 6). We assume that Gany invokes his limited constitutional right to counsel because a violation of the statutory right to an interpreter, by itself, is not a ground for suppression. See *State v. Sanchez-Diaz*, 683 N.W.2d 824, 835 (Minn. 2004) (stating that violation of statutory right to interpreter “does not require the application of the exclusionary rule”); see also *State v. Mitjans*, 408 N.W.2d 824, 830 (Minn. 1987); *State v. Marin*, 541 N.W.2d 370, 373-75 (Minn. App. 1996), *review denied* (Minn. Feb. 27, 1996). As it happened, Gany did not take advantage of his limited right to counsel because he chose not to call an attorney before deciding whether or not to submit to chemical testing. To prevail on his post-conviction claim, he ultimately would need to prove that the absence of an interpreter resulted in a denial of his limited constitutional

right to counsel between the time of the reading of the implied-consent advisory and the time of his decision to refuse chemical testing.

As stated above, whether a person is disabled in communication is a fact-specific inquiry. See *Kail*, 760 N.W.2d at 19-21; *Perez*, 404 N.W.2d at 838-39. In addition, the ability to communicate is inherently a matter of degree. If a person's present ability to communicate is in question during courtroom proceedings, a district court has "broad discretion based on its first-hand view of indicators that a person is handicapped in communication, including: mispronunciations, pauses, facial expressions, and gestures." *Jama v. State*, 756 N.W.2d 107, 115 (Minn. App. 2008) (quotation omitted). But if a person's ability to communicate with law-enforcement officers on a prior occasion is in question, a district court or post-conviction court must make findings of fact concerning the prior event. See, e.g., *Kail*, 760 N.W.2d at 19-21. In making those findings of fact, a post-conviction court still is permitted to rely on its first-hand knowledge of the person's ability to communicate based on its observation of the person during prior court proceedings. See, e.g., *Arredondo v. State*, 754 N.W.2d 566, 577 (Minn. 2008). A post-conviction court's findings of fact are subject to a clear-error standard of review. *Nicks*, 831 N.W.2d at 503; *Riley*, 819 N.W.2d at 167. A finding of fact is clearly erroneous if there is no reasonable evidence to support it or if this court is left with the definite and firm conviction that a mistake was made. *State v. Gomez*, 721 N.W.2d 871, 883 (Minn. 2006).

In this case, the post-conviction court made extensive findings of fact based on the evidence presented at the evidentiary hearing, including the 22-minute audio-recording of

the implied-consent advisory, and its own first-hand observations of Gany in pre-trial proceedings and trial. The post-conviction court summarized the issue as follows:

Gany spoke in English to all of the officers on the night of his arrest, initiated conversation in English and did not request an interpreter. Gany expressed his understanding of the Implied Consent Advisory and indicated that he understood his right to have an attorney both at the time of the Implied Consent Advisory and during his testimony at his post-conviction relief hearing. Although clearly not his first language, Gany has demonstrated that he has a firm grasp of the English language. Gany has lived in the United States for over twenty years, speaks both Nuer and English at home with his children, has held down many jobs, attended school where the teachers only spoke English, and obtained a driver's license.

On the night of December 12, 2015, it is clear that Gany was heavily intoxicated based upon the testimony of the officers. The difficulty the officers encountered with Gany during the reading of the Implied Consent advisory was attributable to Gany's intoxication levels, not due to an inability to understand or communicate in the English language. Additionally, Gany had been previously convicted of four prior DWIs, indicating that he had been through the process previously and was aware of the information and processes being relayed to him. Gany expressed that he understood his right to an attorney, that he was done looking for an attorney's number, and that he wanted to go before the judge. Gany declined to take the breath test because he believed he should not have been arrested for walking on the street.

Gany did not request an interpreter on the night in question or for any pre-trial hearings. At trial Gany only requested that the interpreter clarify certain words if he raised his hand. Of particular note, Gany did not request an interpreter nor was an interpreter present for his hearing or his testimony during the post-conviction relief hearing in which he was arguing that he is disabled in communication.

The Court finds that Gany is not disabled in communication because he does not have difficulty in speaking

or comprehending the English language, was able to fully understand the proceedings and charges made against him, and was capable of presenting or assisting in the presentation of a defense.

Based on its finding that Gany is not disabled in communication, the post-conviction court found that he did not have a right to an interpreter on the evening of December 12, 2015, that a suppression motion likely would have been denied, and that Gany's trial attorney did not provide him with ineffective assistance.

Gany contends that the post-conviction court erred by finding that he is not disabled in communication "because he has difficulty speaking, and particularly comprehending, the English language." Gany further contends that his disability is "demonstrated by the direct evidence in the record of his speech: the squad video, implied consent audio recording, and transcript of the postconviction hearing." He points to numerous specific examples of imperfect communication between him and others.

We acknowledge that the factual record is somewhat in conflict. But the post-conviction court's finding that Gany is not disabled in communication is well supported by evidence that was presented at the post-conviction hearing as well as the record of pre-trial proceedings and trial. Before trial, Gany stipulated to four prior DWI convictions within the past 11 years. Gany testified at the post-conviction hearing that he knew that he had a right to consult with an attorney after he was arrested and brought to jail. At trial, one of the arresting officers, Officer Waterstreet, testified that "there was some language barrier, but I wouldn't say enough that we couldn't have a conversation." Likewise, Officer Hoppe testified, "I don't think [Gany's] English was perfect by any means, but I believe he

understood the process of what was going on.” This testimony is corroborated by the audio-recording of the conversation between Gany and Officer Hoppe in which Gany said that he understood the implied-consent advisory. Although there is evidence that Gany did not understand how he could be arrested for DWI when he was not actually driving, that lack of understanding may have arisen from a misunderstanding of the law rather than a language barrier. In addition, the post-conviction court found that Gany’s intoxication interfered with his communication with the officers during the implied-consent advisory. Gany’s ability to communicate in English is evidenced by the fact that he did not rely on interpreters in pre-trial proceedings, relied on an interpreter only occasionally at trial, and did not rely on an interpreter during the post-conviction hearing. In addition, we defer to the post-conviction court’s first-hand observations of Gany throughout courtroom proceedings, which are well explained in its written order. *See Jama*, 756 N.W.2d at 115. Thus, the post-conviction court’s finding that Gany is not disabled in communication is not clearly erroneous.

In light of our conclusion that the post-conviction court did not clearly err by finding that Gany is not disabled in communication, the post-conviction court also did not err by determining that a suppression motion likely would have been denied and that Gany’s trial attorney did not provide him with ineffective assistance of counsel.

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

Affirmed.