

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1565**

Lawrence Silas Kostohryz, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 6, 2021
Affirmed
Frisch, Judge**

Polk County District Court
File No. 60-CR-18-1830

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, First Assistant County Attorney, Crookston, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that his trial counsel was ineffective for failing to move to suppress blood test results obtained from a warrant lacking in probable cause. We affirm.

FACTS

On September 28, 2018, at approximately 12:18 a.m., Officer Tyler Carrier stopped appellant Lawrence Silas Kostohryz for driving with expired vehicle registration and subsequently arrested Kostohryz for driving after cancellation. Officer Carrier suspected that Kostohryz was under the influence of illegal substances and applied for a warrant to obtain a urine or blood sample.

The application for a search warrant detailed the following observations. Kostohryz was stopped outside a residence “associated with drug investigations in the recent past.” During the initial stop, Officer Carrier observed Kostohryz had “dilated pupils, fidgety fingers, and had a clenched jaw,” and in the booking room, Officer Carrier “noticed that Kostohryz was restless (pacing back and forth, could not sit still, and kept standing up and sitting down), that his hands were fidgety (could not keep his fingers still), and observed scabs on his arms.” Officer Carrier knew these to be indicators of narcotic use from his training and experience. “Based on the behaviors Kostohryz displayed, [Officer Carrier] believed Kostohryz was under the influence of a controlled substance and called Officer Alex Schilke (who is a certified Drug Recognition Expert) to come conduct a drug recognition evaluation (DRE) on Kostohryz.” Officer Schilke arrived “a short time later to conduct a DRE evaluation.” The warrant application further specified:

Officer Schilke conducted a full DRE evaluation and came to the conclusion that Kostohryz was under the influence of a controlled substance, specifically a Central Nervous System Stimulant. During the evaluation Kostohryz had a pulse that was above the average normal range on one of the three readings, had an elevated blood pressure (158/138 mmHG), and had an accelerated internal clock (Kostohryz estimated the

passage of 30 seconds in only 16 seconds). Kostohryz performed poorly on the Walk and Turn test (during the test Kostohryz used his arms to balance, failed to touch heel to toe, and took the incorrect number of steps) and the One Legged Stand test (Kostohryz swayed while balancing and put his foot down . . . while balancing on the left leg, and swayed while balancing and used his arms to balance while balancing on the right leg). During the finger to nose test Kostohryz failed to touch the tip of his finger to the tip of his nose on 4 of the 6 attempts. Kostohryz had pupils that were dilated above the average normal range in room light (6mm), and had pupils that were slow to react to light. All of these are indicators of somebody who is under the influence of a Central Nervous System Stimulant.

A search warrant was issued, and Kostohryz submitted to a blood draw. Analysis of the blood sample revealed the presence of methamphetamine and amphetamine in Kostohryz's blood. Kostohryz was subsequently charged with first-degree driving while impaired (DWI) – body contains any amount of schedule I or II drugs, pursuant to Minn. Stat. § 169A.20, subd. 1(7) (2018) (count I), and gross misdemeanor driving after cancellation – inimical to public safety, pursuant to Minn. Stat. § 171.24, subd. 5 (2018) (count II).

Kostohryz waived his right to a contested omnibus hearing and demanded a speedy trial. Prior to trial, Kostohryz pleaded guilty to count II. A jury trial was held, which resulted in a guilty verdict on count I. Kostohryz was sentenced to 65 months in prison on count I and a concurrent 12 month sentence on count II.

Kostohryz filed a petition for postconviction relief wherein he requested his conviction for DWI “be reversed, the evidence be suppressed and the charges be dismissed” and argued his trial counsel was ineffective when he failed to challenge the

search warrant as lacking in probable cause.¹ The postconviction court determined that Kostohryz was not entitled to an evidentiary hearing and denied the petition, finding “there were multiple objective indicators of impairment exhibited by [Kostohryz] which Officer Corrier observed and set forth in the Application for Search Warrant” and that “[b]ased on the totality of the circumstances, the Application for Search Warrant made by Officer Corrier was sufficiently supported by probable cause.” Based on these findings, the postconviction court concluded that Kostohryz did not receive ineffective assistance of trial counsel because a probable-cause challenge to the warrant “would have been unsuccessful.” This appeal follows.

DECISION

Kostohryz argues the postconviction court erred in finding the blood-draw warrant was supported by probable cause and that it relied on four erroneous factual findings in dismissing his petition. The state argues that the denial of postconviction relief was proper “because appellant failed to meet his affirmative burden to prove that he received constitutionally ineffective assistance of counsel.”

“A petitioner seeking postconviction relief has the burden of establishing by a fair preponderance of the evidence that the facts warrant relief.” *Erickson v. State*, 725 N.W.2d 532, 534 (Minn. 2007) (quotation omitted). “If the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, a petitioner is not entitled to an evidentiary hearing.” *Id.* (quotation omitted). “We review the denial of a

¹ Kostohryz filed an appeal (No. A19-1512) prior to filing a petition for postconviction relief but later voluntarily dismissed the appeal.

petition for postconviction relief, including denial without a hearing, for an abuse of discretion.” *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). “A postconviction court does not abuse its discretion unless it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018) (quotation omitted).

[W]hen we review a postconviction court’s denial of relief on a claim of ineffective assistance of counsel, we will consider the court’s factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court’s decision or conclude that the court abused its discretion because postconviction relief is warranted.

State v. Nicks, 831 N.W.2d 493, 503-04 (Minn. 2013).

A claim for ineffective assistance of counsel requires the claimant to show (1) counsel’s performance fell below an objective standard of reasonableness, and (2) absent counsel’s unreasonable performance, the result of the proceeding likely would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 696-97, 104 S. Ct. 2052, 2064, 2069 (1984). “We review a district court’s application of the *Strickland* test de novo because it involves a mixed question of law and fact. If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement.” *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (citation omitted).

To succeed in a claim of ineffective assistance of counsel for failure to challenge a warrant, Kostohryz “must show that the search warrant so patently lacked probable cause that the failure to challenge it could only have been ineffectiveness of counsel and not trial tactics.” *State v. McLane*, 346 N.W.2d 688, 690 (Minn. App. 1984). “Counsel does not

act unreasonably by not asserting claims that counsel could have legitimately concluded would not prevail.” *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009).

A warrant is supported by probable cause if, on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. On review, we must determine whether there was a substantial basis to conclude that probable cause existed. . . . Our inquiry is limited to the information presented in the affidavit supporting the warrant.

State v. Holland, 865 N.W.2d 666, 673 (Minn. 2015) (quotations and citations omitted).

Probable cause to believe a driver is under the influence requires only one objective indication of impairment. *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004), *review denied* (Minn. June 15, 2004). Objective indicators of impairment include dilated pupils, anxious and fidgety behaviors, an elevated pulse, and swaying during a sobriety test. *State v. Prax*, 686 N.W.2d 45, 49 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

Here, the four corners of the search-warrant application contained attestations of multiple indications of impairment based on the observations of two police officers, one of whom is a certified drug recognition expert. Kostohryz argues these observations were insufficient to constitute probable cause that he was under the influence because it was just as likely that there were innocent reasons, such as stress and fatigue, for these symptoms. The standard for probable cause does not require officers to rule out all possible innocent explanations prior to applying for a search warrant. *See State v. Hawkins*, 622 N.W.2d 576, 580 (Minn. App. 2001) (noting “[t]he fact that there might have been an innocent explanation for [defendant’s] conduct does not demonstrate that the officers could not reasonably believe that [defendant] had committed a crime”).

Kostohryz also argues that because certain indicators of narcotic use were missing, such as erratic driving and possession of narcotics, Officer Carrier lacked probable cause to obtain a search warrant. Kostohryz cites no legal authority in support of the proposition that the absence of certain indicia of narcotic use negates an officer's observation of other objective indicators of such use. *See Kier*, 678 N.W.2d at 678 (stating an officer needs to observe "only one objective indication of intoxication" to have probable cause to believe a person is under the influence).

Kostohryz failed to meet the two-prong test set forth in *Strickland* because the application for a search warrant did not "so patently lack[] probable cause that the failure to challenge it could only have been ineffectiveness of counsel and not trial tactics."² *McLane*, 346 N.W.2d at 690. The search-warrant application contained *numerous* statements of objective indicators that Kostohryz was under the influence of narcotics, such as pupils that were dilated and slow to react to light, fidgety fingers, a clenched jaw, restlessness, scabs on his arms, a high pulse rate, an accelerated internal clock, and poor coordination and balance. We see no error in the conclusion by the postconviction court that a challenge to the search warrant for want of probable cause would have failed and counsel was not ineffective for failing to assert that challenge. *See Wright*, 765 N.W.2d at 91 (holding failure to bring a meritless claim is not ineffective assistance of counsel).

² Kostohryz fails to identify which of his two counsel provided ineffective assistance, but because the warrant was supported by adequate probable cause, we need not address this issue.

Kostohryz also argues the postconviction court made four clearly erroneous findings in denying his petition because such findings fell outside the scope of the application for search warrant. But even assuming that observations by the postconviction court in the narrative of the case constitute findings, the substantive analysis by the postconviction court in denying the petition for relief strictly relied only on the assertions set forth in the warrant application itself. Because the postconviction court did not rely upon allegations or facts outside of the warrant application, any claimed error is harmless. *See Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 539-40 (Minn. App. 1997), *review denied* (Minn. June 11, 1997) (holding that clearly erroneous findings that are not substantially prejudicial are merely harmless error and need not be disturbed).

Affirmed.