STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0513

State of Minnesota,
Respondent,

vs.

Galen Dale Littlewind,
Appellant.

Filed February 12, 2018
Affirmed in part and reversed in part
Ross, Judge

Clay County District Court
File No. 14-CR-15-767

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

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

ROSS, Judge

Police arrested Galen Littlewind for drunk driving and read him the implied-consent advisory, but they refused to allow him to speak with an attorney after he repeatedly asked for one. Littlewind refused to submit to a chemical test. Representing Littlewind in his trial

for both driving while impaired and chemical-test refusal, Littlewind's attorney never moved the district court to suppress the evidence of his refusal, and he did not argue to the jury that Littlewind was not intoxicated. After the jury convicted Littlewind on both charges, he petitioned unsuccessfully for postconviction relief, arguing that he received ineffective assistance of trial counsel. Failing to move to suppress evidence related to Littlewind's test refusal fell below an objective standard of reasonableness, so we reverse in part, invalidating his conviction for test refusal. But defense counsel's decision to concede the element of intoxication and instead challenge the state's theory that Littlewind was the driver was a reasonable defense strategy under the circumstances and done with Littlewind's consent, so we affirm in part, validating his conviction for impaired driving.

FACTS

A green van sideswiped a car sitting at a red light on a March 2015 evening in Moorhead. The van sped away and the car chased it across the border into Fargo and then back again into Moorhead, where the van ran a red light and collided with another car and flipped to its side. After Moorhead police officers arrived, six or seven people piled out of the van followed by the billowing odor of an alcoholic beverage that one officer described as "overwhelming."

Police identified Galen Littlewind as the van's driver after hearing from witnesses that the driver was wearing a Vikings jersey. Littlewind protested, yelled, and refused to perform field-sobriety tests. Police arrested him and he resisted, pulling away and kicking at the officers. Officers had to drag him to the squad car and force him inside.

Officer Brandon Desautel took Littlewind to the hospital to tend to a cut on his forehead. Accompanied by Officer Toby Krone, Officer Desautel read Littlewind the implied-consent advisory and Littlewind repeatedly demanded to speak with an attorney. The officers refused the demand, however, telling Littlewind he was not allowed to contact an attorney because of his disruptive behavior. One of the officers asked Littlewind to submit to a breath test, and he refused.

Littlewind pleaded guilty to two charges of obstructing legal process based on his behavior during the arrest, and he faced trial for two impaired-driving offenses—driving under the influence of alcohol and refusing to take a breath test. His attorney took the case to trial without moving the district court to suppress evidence of his test refusal despite the officers having failed to allow him to contact an attorney. The attorney built Littlewind's defense exclusively on the theory that the state could not prove that he was the van's driver, implicitly conceding to the jury that Littlewind was intoxicated.

The jury found Littlewind guilty on both charges. The district court sentenced him to a 72-month prison term for driving under the influence but stayed the sentencing on the test-refusal conviction pending this appeal. We stayed the appeal to allow Littlewind to litigate his contemporaneous petition for postconviction relief on the claim that his trial attorney provided him ineffective assistance of counsel. Littlewind rested that claim on the attorney's failure to move to suppress the test-refusal evidence and his alleged concession that Littlewind was intoxicated. The postconviction court denied his petition for relief. This appeal follows.

D E C I S I O N

Littlewind argues that he received ineffective assistance of counsel when his attorney failed to move to suppress evidence obtained after police ignored his request to speak with an attorney. We review a postconviction court's denial of an ineffective-assistance claim de novo. *Opsahl v. State*, 677 N.W. 2d 414, 420 (Minn. 2004). To receive a new trial, Littlewind must show that his attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 420–21; *see also Strickland v. Washington*, 466 U.S. 668, 689, 104. S. Ct. 2052, 2065 (1984)). Because the failure to litigate a suppression motion is Littlewind's principal allegation of ineffectiveness, he must prove that his 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).

We begin with the merit of the hypothetical suppression motion. Applying the state constitution, "an individual has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). It is not enough that police officers inform the person of this right, "the police officers must assist in its vindication." *Id*. (quotation omitted). The officers meet this duty by providing a telephone and allowing a reasonable period for the person to reach and speak with an attorney. *Id*. The district court

must suppress evidence obtained in violation of the right to counsel in the implied-consent context. *See State v. Slette*, 585 N.W.2d 407, 410 (Minn. App. 1998).

The officers here undisputedly did not provide Littlewind a telephone or give him time to contact an attorney, but the state maintains that in this case providing a telephone was unnecessary. This is because the right to consult with counsel before submitting to chemical testing is not absolute. The implied-consent law requires a driver not to frustrate the implied-consent process. *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003). The postconviction court agreed with this position, concluding that "[t]he facts of the instant case undoubtedly indicate that Petitioner forfeited his limited right to an attorney through his unreasonable and uncooperative behavior." Our caselaw does not support the conclusion.

We have previously concluded that a defendant frustrated the implied-consent process so as to forfeit the right to contact an attorney, but the circumstances here do not resemble the circumstances in those cases. In *Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 259–60 (Minn. App. 2000), we held that a defendant who requested to talk to a lawyer before hearing the implied-consent advisory but remained silent after an officer read the advisory frustrated the implied-consent process and implicitly retracted his previous request for an attorney. And in *Collins*, we held that a defendant who asserted the right to an attorney at the scene of the accident but who screamed, swore, made accusations of rape, and insisted that she would not listen during the reading of the advisory at the jail—preventing police from reading the advisory in full—similarly frustrated the testing process and essentially retracted her previous request to contact an attorney. 655 N.W.2d at 658.

The defendants in *Collins* and *Busch*, unlike Littlewind, prevented the implied-consent process from being completed. That process includes an officer's reading of the complete advisory accompanied by the officer's request for a chemical test, the defendant's opportunity to contact an attorney before deciding whether to submit to a chemical test, and the defendant's response to the officer's request for a chemical test. Here, police were able to present the implied-consent advisory completely and Littlewind plainly and repeatedly requested to speak with an attorney. As the district court put it, Littlewind "unequivocally requested an attorney after the implied consent advisory was read." That police read the complete implied-consent advisory and Littlewind then requested an attorney undermines the notion that Littlewind frustrated the implied-consent process.

We do not question the district court's understanding that Littlewind was belligerent, but the record and caselaw inform us that the court overstated the importance of Littlewind's being in handcuffs. It found that removing the handcuffs "would most definitely have created a significant safety risk." But both officers who participated in the implied-consent process testified that they had previously assisted defendants who were unable to use their hands but who had asserted their right to an attorney. According to the officers, they have read through phone books and dialed numbers to reach attorneys on the defendants' behalf. The officers' practice fits our precedent, as we have already held that a defendant's limited right to counsel may be vindicated even if police do not allow him to dial the telephone himself. *See Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 808, 810–11 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). That safety concerns may have required officers to keep Littlewind in handcuffs does not excuse the officers

from vindicating his right to counsel. Because the officers did not vindicate Littlewind's limited right to contact an attorney, a motion to suppress evidence of Littlewind's test refusal would have had merit.

To demonstrate that he received ineffective assistance of counsel, Littlewind must also show that his attorney performed below an objective standard of reasonableness. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To do so, he must overcome the strong presumption that his attorney's action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104. S. Ct. at 2065. We see no strategic benefit to foregoing a meritorious motion to suppress the most critical evidence in a test-refusal trial, and the state does not offer any benefit. Because his trial counsel's performance fell below an objective standard of reasonableness, Littlewind was denied his Sixth Amendment right to the effective assistance of counsel. We therefore reverse his test-refusal conviction.

Littlewind also challenges his conviction for driving under the influence of alcohol, arguing that his attorney was ineffective because he allegedly conceded the element of intoxication during closing argument. "When counsel . . . admits a defendant's guilt without the defendant's consent, the counsel's performance is deficient and prejudice is presumed." *State v. Prtine*, 784 N.W.2d 303, 317–18 (Minn. 2010). Counsel's concession of guilt need not be explicit to be objectively unreasonable, but we exercise caution when defining an implied concession so as to avoid using semantics to find automatic grounds for a new trial. *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004). And our scrutiny of close statements must be highly deferential in light of the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Dukes v. State*,

660 N.W.2d 804, 811 (Minn. 2003). If the defendant acquiesced in a concession, we will not grant a new trial. *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991). Although this is a close question in this case, we conclude that the attorney implicitly conceded that Littlewind was intoxicated but that Littlewind acquiesced in this approach.

We infer that the attorney essentially conceded the element when he made the following comments about the state's evidence that Littlewind was intoxicated:

> [The prosecutor] asked you to look at the elements of each of these charges. For driving under the influence of alcohol, the first element is that Mr. Littlewind had to have driven or operated or been in physical control of the motor vehicle. And the government has to prove that beyond a reasonable doubt.
>
> The government has to provide enough evidence that you are so confident that that is true that you couldn't possibly have a reasonable doubt about that fact. That that's something that in your most important affairs -- making a decision about one of your children, about what to do with your retirement plan -- that you have that much confidence in pulling the trigger on believing that there's that proof.
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> The second element is whether Mr. Littlewind was under the influence of alcohol at the time the vehicle was being driven. Well, there's plenty of evidence that Mr. Littlewind was under the influence of alcohol, and the government really hammered on that. And I don't think we challenge that at all. That's really not the issue at all.
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> It's not a crime to be intoxicated in a motor vehicle. That's not the problem. And as the judge read you the instructions, Mr. Littlewind is facing two charges. He's not being charged with being an extraordinarily unruly problem for law enforcement; which he very clearly was in that audio. That's not what this case is about. It's not about whether he was intoxicated at any given time.
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> State's got to prove that he was under physical control of that motor vehicle. And they can't even clearly, conclusively identify what kind of clothing the person operating the motor vehicle was wearing.

In context of the argument as a whole, the statements, "there's plenty of evidence that Mr. Littlewind was under the influence of alcohol" and "I don't think we challenge that at all" appear together as a concession.

We are persuaded, however, that Littlewind acquiesced in his attorney's decision to challenge the driving element but not the intoxication element. Littlewind's brief on appeal acknowledges that his attorney's "opening statement regarding this offense focused primarily on the state's inability to prove the identity of the van's driver" and "did not mention the issue of intoxication or indicate that it would be an issue" in the trial. And Littlewind acknowledged in his testimony during the postconviction hearing that he was "okay" with this strategy:

> A. . . . [Counsel said] if he could prove that I wasn't the driver, we don't have to worry about the alcohol or the refusal. That was his whole strategy, so I left it at that.
>
> Q. All right. And did you know about that strategy beforehand?
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> A. Before we went [to trial], yeah.
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> Q. . . . And that seemed okay to you.
>
> A. That I wasn't the driver, yeah.

The testimony of acquiescence is not expansive, but it is sufficient.

We have no difficulty concluding that this strategy of defending only the driving element was objectively reasonable. Littlewind insists that the strategy "had no appreciable benefit to his defense" because conceding the intoxication element does not promote any affirmative defense or lay the groundwork for receiving a favorable sentence. To the contrary, these are not the only reasonable grounds for a concession. We can see the

strategic benefit to the defense: persuasion by credibility. If a reasonable defense attorney faces nearly unquestionable evidence establishing that his allegedly drunk-driving client was indeed drunk but only questionable evidence establishing that he was actually driving, he may with the defendant's consent or acquiescence attempt to demonstrate his objectivity and credibility to the jury by admitting the essentially indefensible element and defending only the defensible one. The state's evidence that Littlewind was intoxicated was exceedingly strong, leaving his attorney with few credible arguments. His rhetorical comparison between the state's evidence on the different elements might arguably help the jury to notice a dearth of support for the driving element.

Littlewind raises additional arguments in a supplemental brief on his own behalf. Among other things, he argues that the five-year conditional-release mandate for his first-degree drunk-driving conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment because it punishes him for having the disease of alcoholism. He also says that it violates his Sixth Amendment right to trial by jury because it increases his maximum sentence without the benefit of a jury. To the extent that alcoholism is a disease, driving is not a symptom. It is not cruel and unusual to punish an alcoholic for a crime that is related only causally—if at all—to his condition. *See State v. DeFoe*, 308 Minn. 436, 437, 241 N.W.2d 635, 636 (Minn. 1976). And because Littlewind is being punished for operating a motor vehicle while impaired—not being addicted to alcohol—his sentence does not violate the Eighth Amendment. *See Robinson v. California*, 370 U.S. 660, 665–66, 82 S. Ct. 1417 (1962). Because the sentencing factor that subjected Littlewind to a mandatory conditional release of five years was based on Littlewind's prior criminal

convictions, his additional punishment does not run afoul of the Sixth Amendment. *See Apprendi v. New Jersey*, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361–62 (2000); Minn. Stat. § 169A.24 (2016); Minn. Stat. § 169A.276, subd. 1 (2016). None of Littlewind's other arguments requires further discussion.

Affirmed in part and reversed in part.