**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0087**

Antone Larron Owens, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

**Filed August 12, 2019**
**Affirmed**
**Schellhas, Judge**

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

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

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Jesson, Judge.

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

**SCHELLHAS**, Judge

Appellant argues that a postconviction court abused its discretion by rejecting his postconviction claim that his trial counsel provided ineffective assistance by not challenging the warrantless taking of his urine for chemical testing. We affirm.

## FACTS

Very early in the morning on September 20, 2015, Minnesota State Patrol Trooper Andrew Gibbs stopped appellant Antone Owens's vehicle for failing to illuminate his tail-lights. After detecting a scent of alcohol, Trooper Gibbs asked Owens to submit to a field sobriety test; Owens submitted and failed. Trooper Gibbs arrested Owens, transported him to the Hennepin County Jail, and read him the implied-consent advisory. Owens spoke with an attorney, consented to a breath test, and submitted multiple breath samples. Each test "came up error" due to a machine malfunction. Owens then provided a urine sample, the Minnesota Bureau of Criminal Apprehension analyzed it, and the sample revealed an alcohol concentration of 0.103.

Respondent State of Minnesota charged Owens with two counts of felony driving while impaired: operating a motor vehicle under the influence of alcohol and operating a motor vehicle with a 0.08 or more alcohol concentration within two hours of the time of driving. Owens moved to suppress the test results on the basis that the urine sample was collected more than two hours after the observed driving conduct. Following a contested omnibus hearing, the district court found that Owens provided a urine sample "approximately two hours and thirteen minutes" after Trooper Gibbs stopped him, a finding

not challenged by the state; concluded that expert opinion about Owens's alcohol concentration within two hours of the time of driving presented a question of fact best resolved by a jury; and denied the suppression motion. A jury found Owens guilty of both counts. The court entered a conviction on each count and sentenced Owens to 75 months' imprisonment on count one, operating a motor vehicle under the influence of alcohol.

Owens filed a direct appeal, and this court stayed his appeal to allow him to seek postconviction relief. Owens petitioned for postconviction relief, claiming that his trial counsel provided him ineffective assistance by not moving to suppress the urine-test results on Fourth Amendment grounds. The postconviction court summarily denied Owens's petition. This court reinstated his appeal and rejected his due-process ineffective-assistance-of-counsel argument because he failed to raise the issue in district court. *State v. Owens*, No. A17-0415, 2018 WL 3213016, at *3 (Minn. App. July 2, 2018) (*Edwards I*). But we remanded for an evidentiary hearing regarding the validity of Owens's consent to chemical testing of his urine. *Id*. at *4.

On remand, Owens amended his postconviction petition, adding a due-process argument regarding his trial counsel's failure to challenge the urine-test results. The postconviction court conducted an evidentiary hearing at which Owens and his trial counsel testified, and the parties stipulated to the admission of: the audio recording and transcript of Trooper Gibbs's administration of the implied-consent advisory to Owens, the squad-car video of the traffic stop, and a copy of the implied-consent advisory. The court denied Owens's petition, concluding that even if his trial counsel had moved to suppress his urine-test results on Fourth Amendment or due-process grounds, both motions would have failed,

and Owens therefore "failed to show there is a reasonable probability the result of the proceeding would have been different."

This appeal follows.

## D E C I S I O N

Appellate courts "review the denial of a petition for postconviction relief . . . for an abuse of discretion." *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). A postconviction court "abuses its discretion if it 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." *Id*. (quotation omitted). "The postconviction court's legal conclusions are reviewed de novo. *Fox v. State*, 913 N.W.2d 429, 433 (Minn. 2018).

"The Sixth Amendment provides to criminal defendants the right to the assistance of counsel at trial," including "the guarantee that counsel's assistance be effective." *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019) (quotation omitted). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. (quotation omitted). "To prevail on an ineffective assistance of counsel claim, [an] appellant must show both that (1) his trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019); *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). Appellate courts review a postconviction court's application of the *Strickland* test "de novo because it involves a

mixed question of law and fact." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). We need not consider both parts of the *Strickland* test if one of the parts fails. *Id.*

**I.**

Under the second part of *Strickland*, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Mouelle*, 922 N.W.2d at 715 (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case." *Mosley*, 895 N.W.2d at 591 (quotations omitted). A reviewing court "considers the totality of the evidence before the judge or jury in making a determination of prejudice." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

**A. Fourth Amendment claim**

Owens argues that but for his trial counsel's failure to move to suppress his urine-test results on the basis that his consent was invalid because it was not free and voluntary, the test results would have been suppressed and the outcome of the proceeding would have differed. The postconviction court rejected this argument, concluding that the outcome of the proceeding would not have differed because a "strong likelihood" existed that a suppression motion would have been denied because Owens's consent was valid.

The United States and Minnesota Constitutions prohibit the unreasonable search and seizure of persons, houses, papers, and effects. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Taking a urine sample constitutes a search under the Fourth Amendment. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). A warrantless search is per se unreasonable unless an exception to the warrant requirement applies. *State v. Stavish*, 868 N.W.2d 670,

675 (Minn. 2015). "But police do not need a warrant if the subject of the search consents." *Brooks*, 838 N.W.2d at 568. "For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented." *Id*. "Whether consent is voluntary is determined by examining the totality of the circumstances." *Id*. (quotation omitted). "Consent is not involuntary merely because the circumstances of the encounter are uncomfortable for the person being questioned." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) (quotation omitted). "But when an encounter becomes coercive, when the right to say no to a search is compromised by a show of official authority the Fourth Amendment intervenes." *Id*. (quotation omitted). Whether consent was voluntary is a question of fact, reviewed for clear error. *Id*. "Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred." *Id*. at 846–47.

Quoting *Brooks*, 838 N.W.2d at 571, Owens argues that under the totality of the circumstances, his "'will had been overborne and his capacity for self-determination critically impaired,'" rendering his consent invalid. The postconviction court found that Trooper Gibbs read Owens the implied-consent advisory, advising him that he had a choice to submit or not, *see id*. at 572 ("While an individual does not necessarily need to know he or she has a right to refuse a search for consent to be voluntary, the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness."); that Owens did not experience coercive pressures; that Trooper Gibbs gave Owens "ample time to speak and consult with counsel before agreeing to submit to any kind of chemical test," *see id*. (recognizing that "the ability to consult with

counsel about an issue supports the conclusion that a defendant made a voluntary decision"); and that when Trooper Gibbs asked Owens if he wanted to submit to a urine test, Owens did not ask any questions or ask again to speak to an attorney, *see id*. at 570 ("[A] driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test."). The court therefore found that Owens's consent was voluntary. The record shows that Trooper Gibbs gave Owens approximately 40 minutes of attorney time; provided him a cellphone, a landline, and a phone book; and helped him out of the police car after he said that he did not have enough light to read the telephone book. The record supports the court's findings.

Owens argues that the implied-consent advisory read to him inaccurately threatened him with a crime for refusing a warrantless blood or urine test and that the inaccurate threat rendered his consent invalid. The accuracy or inaccuracy of an implied consent read to a driver is a relevant factor in determining the voluntariness of the driver's consent. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (remanding for district court to "reevaluate [driver]'s consent given the partial inaccuracy of the officer's advisory" (footnote omitted)). But Owens cites to no case, and we could find none, that holds that an inaccurate advisory alone renders a driver's consent involuntary. And while Owens argues that "he agreed to a urine test *only* because Trooper Gibbs inaccurately told him refusing the urine test was a crime and he did not want to be automatically charged," the record does not support this contention. (Emphasis added.) Owens had the opportunity to consult with an attorney, he did not face repeated police questioning, or spend multiple days in custody, *see Brooks*, 838 N.W.2d at 571 (concluding that driver did not face coercion when he was

"neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody"), and the advisory read by Trooper Gibbs made clear to Owens that he had a choice of whether to submit or not, *cf. id*. at 571–72 (concluding consent was voluntary where driver was told he had a choice whether to submit or not to testing, had the opportunity to consult with an attorney, was under arrest, and did not face repeated police questioning). Examining the totality of the circumstances, we conclude that Owens validly consented to providing a urine sample because his consent was voluntarily and freely given. *See State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994) (stating that consent must be "received, not extracted").

Because Owens provided a valid consent to the collection of a urine sample, his Fourth Amendment rights were not violated by the warrantless urine testing. *Cf. id*. at 880–81 (concluding that consent to give wallet to officer was not voluntary where defendant was repeatedly questioned while sitting in a police car, the officer physically leaned toward the defendant, and the defendant's answers seemed "to fend off a search"). A motion to suppress on Fourth Amendment grounds therefore would have failed, and, accordingly, we conclude that the postconviction court did not err by denying Owens's ineffectiveness-of-counsel claim based on Fourth Amendment grounds. *See Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) ("A claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made.").

**B. Due-process claim**

Owens also argues that his urine-test results would have been suppressed if his trial counsel had moved to suppress them on due-process grounds. This court reviews a due-process challenge de novo. *State v. Rey*, 905 N.W.2d 490, 494 (Minn. 2018). An implied-consent advisory that threatens a criminal consequence that the state is not authorized to impose violates due-process. *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991). To the extent that it is applicable to criminal proceedings, the supreme court clarified in *Johnson v. Comm'r of Pub. Safety*, that a *McDonnell* violation occurs when a driver proves that he or she (1) "submitted to a breath, blood, or urine test"; (2) "prejudicially relied on the implied consent advisory in deciding to undergo testing"; and (3) "the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to testing." 911 N.W.2d 506, 508–09 (Minn. 2018).

Here, Owens satisfied the first *McDonnell* factor because he submitted to a urine test. But the postconviction court implicitly found that Owens failed to satisfy the second factor because his testimony at the postconviction evidentiary hearing established that he did not prejudicially rely on an inaccurate advisory. Owens claims that he "testified at the evidentiary hearing [that] he submitted to the [urine] test . . . based on the implied consent advisory . . . telling him that refusing to test was a crime." The record does not support his claim. When asked what his understanding was about test refusal after exercising his right to speak to an attorney, Owens testified that he "would have been charged with a crime automatically for refusing to take – to take the breathalyzer test." He also testified that he did not recall asking Trooper Gibbs about what would happen if he refused to submit to a

urine test, and he agreed adamantly that Trooper Gibbs "only told [him] that it would be a crime if he refused a breath test."

On redirect examination, the following colloquy occurred:

> DEFENSE COUNSEL: Mr. Owens, after the Breathalyzer test failed and Trooper Gibbs asked you to take the urine test, did he, uh, again tell you that, uh, go through the advisory at all, that you would have a right to consult with counsel before you took the urine test?
> THE DEFENDANT: Ma'am, no, ma'am.
> DEFNSE COUNSEL: Okay. And is it possible that when Trooper Gibbs gave you the advisory that he just talked to you generally that refusing to test was a crime *as opposed to specifically saying a Breathalyzer, refusing the Breathalyzer is a crime?*
> THE DEFENDANT: *He specifically instructed that if I didn't take that Breathalyzer test, that it's a crime.*
> DEFNSE COUNSEL: That's what you recall.
> THE DEFENDANT: *He said nothing about no urinalysis.*
> DEFNSE COUNSEL: Okay. But if the squad car video reflects something different, would you disagree with that? For example, if the squad car video reflects that he just told you taking a test – refusing to take a test is a crime, would you have reason to dispute that?
> THE DEFENDANT: *Taking the Breathalyzer test.*
> DEFNSE COUNSEL: *Okay. So you recall him specifically saying a Breathalyzer and not just a test in general?*
> THE DEFENDANT: *Yes, that's correct.*

(Emphasis added.)

Although Owens also testified that he "had no choice but to say, yes, because it's an automatic refusal," the bulk of his testimony belies that claim. Despite his postconviction attorney's earnest efforts to rehabilitate Owens on redirect examination, the above colloquy reveals that Owens understood that the implied-consent advisory threatened a crime *only if he refused a breath test.* Owens therefore did not satisfy the

second *McDonnell* factor—that he prejudicially relied on the threat of a refusal crime in the implied-consent advisory when deciding to provide a urine sample. Because Owens failed to satisfy the second *McDonnell* factor, we need not analyze whether the implied-consent advisory incorrectly stated the law. *Cf. Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503, 505 (Minn. 2018) (declining to address third *McDonnell* factor when driver failed to establish that he prejudicially relied on implied-consent advisory).

Because Owens failed to satisfy the second *McDonnell* factor, even if his trial counsel had moved to suppress his urine-test results on the basis of a due-process violation, his motion would have been denied. The postconviction court therefore did not err by concluding that Owens suffered no prejudice based on his trial counsel's failure to raise a due-process violation because the outcome of the proceeding would not have differed.

**II.**

"In evaluating claims of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable." *Crow*, 923 N.W.2d at 14 (quotation omitted). Because Owens failed to satisfy the second part of the *Strickland* test, we need not consider the first part of the test—whether his trial counsel's performance was reasonable. *See Mosley*, 895 N.W.2d at 591 ("If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement.").

**Affirmed.**