STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0219
A08-1796

State of Minnesota,
Respondent,

vs.

Joseph George Therrien,
Appellant,

and

Joseph George Therrien, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 28, 2009
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. K9-07-3406

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

John J. Choi, St. Paul City Attorney, Clifford R. Berg, Assistant City Attorney, 500 City Hall and Courthouse, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Jennifer M. Macaulay, 649 Grand Avenue, Suite 2, St. Paul, MN 55105 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of second-degree refusal to submit to a chemical test. He argues that, to comply with due-process requirements, a law-enforcement officer must offer an alternative testing method when a test subject indicates an inability to comply with the testing method selected by the officer and that his trial attorney's failure to raise a due-process challenge based on this court's opinion in *State v. Netland*, 742 N.W.2d 207 (Minn. App. 2007), *aff'd in part and rev'd in part*, 762 N.W.2d 202 (Minn. 2009), constituted ineffective assistance of counsel. We affirm.

FACTS

On an early morning in September 2007, State Trooper Carrie Rindal saw a vehicle weaving in the lane and crossing the fog line. Trooper Rindal stopped the vehicle and, after approaching, observed that the driver, appellant Joseph Therrien, had bloodshot eyes and "a very strong odor of alcohol" on his breath. Appellant admitted to having consumed four beers over the course of the evening. Trooper Rindal asked appellant to get out of his vehicle and to advise her if he had any medical issues; appellant informed her that he had asthma. The trooper had appellant perform two field sobriety tests, the results of which led her to believe that he was intoxicated. She asked appellant to take a preliminary breath test, and appellant registered an alcohol concentration of .161. Trooper Rindal placed appellant under arrest, called for his vehicle to be towed, and

searched the vehicle incident to the tow. She specifically searched for an inhaler but did not find one.

Trooper Rindal took appellant to the Ramsey County Law Enforcement Center, where she read him an implied-consent advisory and asked him to perform a breath test. Appellant told her that he would try to take the test. Trooper Rindal did not observe any indication that appellant's asthma was affecting him. She testified that she has arrested others with asthma and that she too has asthma, so she is familiar with its effects. Appellant's efforts resulted in the machine registering a "deficient sample," which Trooper Rindal said was likely caused by appellant's use of short, quick puffs rather than the long, hard breathing that she had instructed him to do. Appellant said, "I have asthma. So you might as well call it a refusal." After Trooper Rindal reminded him that refusal is a crime, appellant said, "DUI is a crime too. I'll let my attorney deal with it."

Appellant was charged with second-degree test refusal, in violation of Minn. Stat. § 169A.20, subd. 2 (2006), and second-degree driving while impaired (DWI), in violation of Minn. Stat. § 169A.20, subd. 1(1) (2006). The only witnesses at trial were Trooper Rindal and appellant. Appellant testified that he felt a tightness in his chest a few minutes before he was pulled over and that he had thrown his inhaler away because it was empty. He also testified that he didn't think that he was swerving prior to the stop, but that he had been on his cell phone to his wife to ask if he had another inhaler at home. Appellant stated that although he told Trooper Rindal about his asthma, he did not tell her about the chest tightness he felt or that he had any concerns related to the asthma. He said he tried to take the test, blowing "as hard as I could" and giving it his "best." But he

said that once he was told that he was providing a deficient sample, his attitude was, "[I]f it's deficient, it's deficient."

The jury found appellant guilty of test refusal but was unable to reach a verdict on the DWI charge. Appellant challenged the conviction before this court but obtained a stay of the appeal in order to seek postconviction relief on the grounds that the due-process argument under *Netland* was not ripe because the supreme court had taken review of the case or, alternatively, that his trial counsel's assistance was ineffective for failing to raise it.

The postconviction court denied appellant relief, concluding that his trial attorney's failure to raise a due-process argument was a matter of trial strategy and that appellant's case was distinguishable from *Netland*. Appellant filed a notice of appeal from the postconviction decision; the stay of the direct appeal was lifted, and the two appeals were consolidated.

D E C I S I O N

I.

Appellant's principal argument is that his right to due process was violated because Trooper Rindal did not offer him an alternative testing method after he told her that he had asthma.[1] We review whether a defendant's right to due process was violated de novo. *Netland*, 762 N.W.2d at 207.

[1] We note that appellant did not properly preserve this constitutional issue for appeal. But the parties have had adequate briefing time, and the issue was implied in the district court. We therefore address the due-process issue in the interests of justice. *See State v. Bradley*, 629 N.W.2d 462, 464 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001).

Under Minnesota law, a peace officer who requires a subject to submit to a chemical test is given the option to choose the testing method: breath, blood, or urine. Minn. Stat. § 169A.51, subd. 3 (2006). Appellant argues that in order to comply with due-process requirements of fundamental fairness, when a test subject indicates, by word or act, a physical incapacity to take the breath test, the peace officer must provide an alternative testing method. He contends that a person cannot refuse to submit to a chemical test under Minn. Stat. § 169A.20, subd. 2, if the person is physically incapable of taking the test.

In *Netland*, the supreme court held that failure to provide an alternative testing method when one is requested is not bad faith when the subject is (1) "starting and stopping" rather than providing the consistent, long, hard breath required for the test and (2) on notice that failure to provide an adequate sample amounts to refusal. 762 N.W.2d at 209. But the supreme court acknowledged that Netland did not "tell the officer she was having difficulty breathing or suffering from a medical condition that would hinder her ability to take the breath test." *Id.* Appellant argues that his informing the officer that he has asthma distinguishes his case from *Netland*. We disagree.

This record does not support an inference that Trooper Rindal was acting in bad faith when she did not offer appellant an alternative testing method. Trooper Rindal concluded that appellant's alleged asthma was not interfering with his ability to take the breath test based on her observation that appellant was refusing to take the breath test by providing only short, quick puffs. *Accord People v. Reynolds*, 478 N.E.2d 33, 35-36 (Ill. App. Ct. 1985) (concluding that failure to arrange alternative testing did not violate due

process when accused had an asthma attack but his breathing had returned to normal before the breath test). In addition, Trooper Rindal clearly advised appellant that failure to provide an adequate sample amounted to a refusal. Although appellant testified at his trial that he was experiencing tightness in his chest, he did not tell Trooper Rindal about this, and she did not observe that he was having any difficulty breathing.

Further, appellant's argument—that if a subject merely claims to have asthma or another medical condition that *might* render a person incapable, the officer may not choose the breath test—amounts to a complete reversal of the procedure set forth in Minn. Stat. § 169A.51, subd. 3. We decline to construe the statute in this way. The legislature has given the choice to the law-enforcement officer, and appellant's standard is a rejection of that choice that would prove unworkable for officers.

Finally, we note that a defendant may argue that he did not refuse to take the breath test, wanted to continue trying the breath test, or wanted to use an alternative method, but these theories and the evidence offered to support them present fact questions. *Netland II*, 762 N.W.2d at 210. Appellant argued to the jury the fact question of whether or not he refused to take the test, and the jury convicted him. There is no due-process violation here.

II.

Appellant argues that the postconviction court abused its discretion by denying his petition for postconviction relief without an evidentiary hearing. We review the summary denial of postconviction relief for an abuse of discretion, noting that "[a]n evidentiary hearing is not required unless there are material facts in dispute that must be

resolved to determine the postconviction claim on its merits." *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). We conclude that there are no disputed material facts in this record.

In order to obtain a new trial based on a claim of ineffective assistance, a criminal defendant "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." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted).

Appellant claims that his trial attorney's failure to raise a due-process issue to the district court constituted ineffective assistance. But a claim of ineffective assistance cannot be based on a matter of trial strategy. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Whether to raise a defense or theory at trial is a matter of trial strategy "within the proper discretion of trial counsel [that] will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999), *as amended on denial of reh'g* (Minn. July 23, 1999).

Appellant argues that his attorney's failure to make a due-process argument cannot be construed as trial strategy because there is no evidence that a strategic decision was made. But that is true for many strategic decisions that result in not taking an action, such as not objecting, not investigating an alternative theory of the crime, or not offering potential evidence. The absence of a record of decision-making does not necessarily mean that a decision was not made.

Further, the representation provided by appellant's trial counsel did not, by failing to raise a due-process challenge, fall below an objective standard of reasonableness. But even if we were to conclude that appellant's trial counsel provided ineffective assistance by not raising a due-process argument, appellant has not shown that the outcome of his case would have been any different. As already discussed, appellant's due-process rights were not violated under the standard articulated in *Netland*.

The postconviction court did not abuse its discretion by summarily denying appellant's postconviction petition.

Affirmed.