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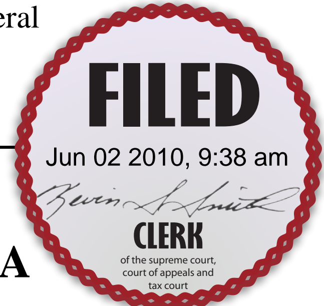

IN THE COURT OF APPEALS OF INDIANA

M.K.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0912-JV-1176
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Geoffrey A. Gaither, Magistrate
Cause No. 49D09-0907-JD-2109

June 2, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent M.K. appeals the trial court's order adjudicating him a juvenile delinquent for an act that would have constituted Carrying a Handgun Without a License,[1] a class A misdemeanor, had it been committed by an adult. M.K. raises two arguments on appeal: (1) the trial court's admission of the handgun into evidence violated M.K.'s rights under the United States and Indiana Constitutions; and (2) the evidence is insufficient to sustain the delinquency finding. Finding that M.K. has waived the argument regarding the admission of the handgun into evidence, but that it was the ineffective assistance of his trial counsel that led to the waiver, we reverse and remand for further proceedings.

FACTS

On July 10, 2009, Indianapolis Metropolitan Police Officer Anthony Patterson received a dispatch regarding a fight that had occurred among a large group of people in front of a residence in Marion County. Officer Patterson arrived in uniform and in a fully marked police vehicle. He observed approximately fifteen individuals at the scene and four individuals walking away.

Officer Patterson exited his vehicle and ordered the four individuals, including M.K., to stop and return. M.K. entered his vehicle and started the engine. Officer Patterson ordered M.K. to get out of the vehicle, and M.K. complied. M.K. told Officer

[1] Ind. Code § 35-47-2-1.

Patterson that the vehicle was registered to his mother but belonged to him and that he used the vehicle on a "regular basis . . . to get around." Tr. p. 65-66.

Officer Patterson arrested M.K. at the scene and issued a citation because M.K.'s vehicle was parked more than twelve inches from the curb. After deciding to impound the vehicle, another officer on the scene performed an inventory search of the vehicle at the scene, which revealed a .25 semi-automatic handgun sitting underneath the front passenger's seat. The officers did not attempt to contact M.K.'s mother to see if she would retrieve the vehicle. The vehicle was then towed away and impounded.

On July 13, 2009, the State filed a petition alleging M.K. to be a juvenile delinquent for acts that would have been class A misdemeanor battery, class A misdemeanor carrying a handgun without a license, and class A misdemeanor dangerous possession of a firearm, had they been committed by an adult.

On September 8, 2009, the juvenile court held a hearing on the delinquency petition. During the State's case-in-chief, it offered into evidence the handgun that had been recovered from M.K.'s vehicle. M.K.'s attorney stated that "[w]e have no objection" to the admission of the weapon into evidence. Id. at 48. M.K. also failed to object to the police officers' testimony regarding the handgun.

After the State rested, M.K.'s attorney moved for a directed verdict, arguing, among other things, that the impoundment and inventory search of the vehicle was "improper" and "bogus" because the police officers knew that the vehicle was owned by M.K.'s mother but did not contact her before impounding and searching the vehicle. Id.

at 60. The juvenile court granted the motion as to the battery count but denied as to the remaining two counts. At the close of the hearing, the juvenile court found the remaining allegations true, merging the dangerous possession of a firearm count into the carrying a handgun without a license count. The same day, the juvenile court ordered that M.K. be placed on probation.

On September 29, 2009, M.K. filed a motion to correct error, alleging that the inventory search was "inappropriate" and that the evidence did not support the true finding of delinquency. Appellant's App. p. 38. On October 6, 2009, the juvenile court denied the motion to correct error. M.K. now appeals.

DISCUSSION AND DECISION

I. Admission of the Handgun into Evidence

M.K. first argues that the juvenile court erred by admitting the handgun into evidence, contending that the inventory search of the vehicle violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

Initially, we observe that M.K. did not object to the admission of this evidence—indeed, his attorney specifically told the juvenile court that M.K. had no objection. Only after the State rested did M.K. argue—in requesting a directed verdict—that the search was "improper," tr. p. 60, and, in the motion to correct error, that the search was "inappropriate," appellant's app. p. 38. Thus, even if we were to find that M.K. could have preserved this argument by raising it for the first time after the State had rested—a

dubious proposition—at no point did M.K. explicitly contest the constitutionality of the search. Instead, M.K. made an argument that sounded in public policy rather than the federal or state constitutions—that it was improper to impound and search the vehicle without first contacting M.K.'s mother to see if she would retrieve it. Under these circumstances, we can only find that M.K. has failed to preserve this argument on appeal.

In most situations, waiver notwithstanding, we could still undertake an analysis to determine whether the alleged error was fundamental.[2] Our Supreme Court, however, has clearly held that the admission of evidence "obtained in violation of the defendant's constitutional rights to be protected against unlawful searches and seizures does not elevate the issue to the status of fundamental error that may be raised for the first time on appeal." Swinehart v. State, 268 Ind. 460, 466-67, 376 N.E.2d 486, 491 (1978); see also Covelli v. State, 579 N.E.2d 466, 471 (Ind. Ct. App. 1991) (applying Swinehart and declining to apply fundamental error doctrine to defendant's allegations of admission of evidence obtained in violation of right to be protected from unlawful searches), trans. denied; Jackson v. State, 469 N.E.2d 753, 755-56 (Ind. Ct. App. 1984) (declining to apply fundamental error doctrine to defendant's allegations of admission of allegedly illegally gained evidence). Pursuant to this authority, M.K. has failed to establish that the

[2] Fundamental error is "an extremely narrow exception 'and applies only when the error constitutes a blatant violation of basic principles, the harm of potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'" Baer v. State, 866 N.E.2d 752, 764 (Ind. 2007) (quoting Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006)). Furthermore, "it is not enough, in order to invoke this doctrine, to urge that a constitutional right is implicated." Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007).

admission of the handgun into evidence is reviewable under the doctrine of fundamental error.

II. Assistance of Trial Counsel

In response to the State's waiver argument, M.K. argues that, in the event we find that he has waived this issue, his trial counsel was ineffective for the failure to object to the search and the admission of the evidence at the time of the delinquency hearing.

It is well established that "[l]ike defendants in criminal proceedings, respondents in juvenile delinquency proceedings have a Sixth Amendment right to the effective assistance of counsel." Perkins v. State, 718 N.E.2d 790, 793 (Ind. Ct. App. 1999). A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant so much that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Davidson v. State, 763 N.E.2d 441, 444 (Ind. 2002) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

As for the first prong, we cannot conceive of any reasonable tactic that would have led M.K.'s attorney to refrain from objecting to the admission of the handgun into evidence based upon the questionable impoundment and search. Therefore, we can only conclude that counsel's failure to raise this objection fell below that objective standard of reasonableness to which we expect attorneys to rise.

We must next consider whether counsel's performance prejudiced M.K. to such an extent that but for the failure to object to the admission of the handgun, the result of the proceeding would have been different. M.K. argues that the impoundment and inventory search of the vehicle were improper under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

Turning first to the federal constitution, we note that in general, the Fourth Amendment prohibits warrantless searches and seizures. Ratliff v. State, 770 N.E.2d 807, 809 (Ind. 2002). One exception to the warrant requirement is an inventory search of an impounded vehicle. Id.

In determining the propriety of an inventory search, the threshold question is whether the impoundment itself was proper. Taylor v. State, 842 N.E.2d 327, 331 (Ind. 2006). An impoundment is warranted when it is "part of 'routine administrative caretaking functions' of the police or when it is authorized by statute." Id. (quoting Woodford v. State, 752 N.E.2d 1278, 1281 (Ind. 2001)).

The State makes no claim that impoundment of M.K.'s vehicle was authorized by statute. Instead, it argued that the impoundment and search were proper pursuant to the community caretaking function. To prove a valid inventory search under the community caretaking function, the State must demonstrate the following: "(1) 'the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing,' and (2) 'the decision to combat

that threat by impoundment was in keeping with established departmental routine or regulation.'" Id. (quoting Fair v. State, 627 N.E.2d 427, 433 (Ind. 1993)).

Essentially, the State argued at M.K.'s hearing[3] that the impoundment and search were proper because the vehicle was parked illegally and the officers had to impound and remove it "for safety reasons[.]" Tr. p. 62. Three officers testified at the hearing, however, and except for one brief exchange, none of them testified regarding safety concerns. The only exchange addressing safety was the following colloquy between the prosecutor and one of the three officers:

> Q. . . . And you said that the citation was issued because [the vehicle] was parked illegally?
>
> A. That's correct ma'am.
>
> Q. Okay. And it was being towed for safety reasons at that point?
>
> A. That's correct.

Id. at 59. There is no evidence in the record whatsoever about what those "safety reasons" might have been. We cannot discern whether the neighborhood was a high-crime area, in which case the vehicle itself might have been imperiled, or whether the vehicle was parked in such a way as to obstruct traffic or in some way create a public nuisance or safety hazard for pedestrians or other vehicles. There is simply no evidence in the record on this issue. Our Supreme Court has commented that "it is not true that every vehicle parked illegally must be impounded." Taylor, 842 N.E.2d at 331-32

[3] On appeal, the State only contends that M.K. has waived this argument and does not address the substance of the impoundment and inventory whatsoever.

(noting that, in that case, "[t]he record simply does not establish that Taylor's vehicle constituted a potential hazard to public safety simply because it may have been parked illegally"). Here, the State failed to meet its burden of establishing the propriety of this impoundment—we cannot find that the conclusory statement of one officer that the vehicle was towed for safety reasons or the prosecutor's argument to that effect suffice.

Furthermore, there is no evidence in the record regarding department policy and procedure. Thus, the State has also failed to establish the second prong of the impoundment test—that the impoundment was in keeping with established departmental routine or regulation.

Moreover, even if we had found the impoundment proper, the State offered no evidence at the hearing that the inventory search was in keeping with departmental policies and procedures. To meet this burden, "the State must do more than offer the bald allegation of law enforcement that the search was conducted as a routine inventory." Edwards v. State, 762 N.E.2d 128, 133 (Ind. Ct. App. 2002), aff'd on reh'g, 768 N.E.2d 506 (Ind. Ct. App. 2002), trans. denied. Where, as here, "the record does not include the substance of any police department policy regarding inventory searches, or even indicate there is such a policy," the State fails to carry its burden. Id. Thus, the juvenile court here had no evidentiary basis to evaluate whether the inventory search performed on M.K.'s vehicle was in conformity with established local law enforcement policy. Accordingly, based on this record, had M.K.'s attorney objected to the admission of this evidence based upon the improper impoundment and inventory search, the juvenile court

would have had to sustain the objection based on the Fourth Amendment[4]—thereby eliminating the only evidence supporting the delinquency finding. Under these circumstances, therefore, we find that M.K. has established that he was prejudiced as a result of his attorney's failure to object to the evidence regarding the handgun that was found as a result of the inventory search of his vehicle.

The judgment of the juvenile court is reversed and remanded for further proceedings.

DARDEN, J., and CRONE, J., concur.

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[4] Inasmuch as we find that on this record, the impoundment and search were improper under the Fourth Amendment to the United States Constitution, we need not also consider its propriety under the Indiana Constitution.