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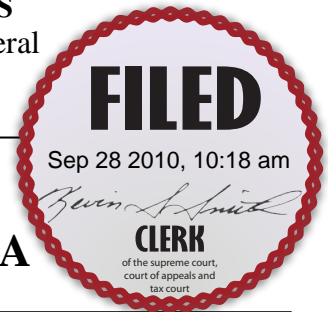
ATTORNEY FOR APPELLANT:

RUTH JOHNSON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

JOHN PEARSON,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1002-CR-127

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David M. Seiter, Judge Pro Tempore
Cause No. 49F07-0906-CM-59430

September 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

John Pearson appeals his conviction for carrying a handgun without a license as a class A misdemeanor.¹ Pearson raises one issue, which we restate as whether he received ineffective assistance of trial counsel. We affirm.

The relevant facts follow. On June 26, 2009, Indianapolis Metropolitan Police Officers Sara Woodson and Chris Wuensch, who were on duty in the same police vehicle, received a call from dispatch regarding a recent robbery involving a black male wearing a white t-shirt. At some point, the officers noticed that Pearson was driving a pick-up truck at approximately 3800 North College Avenue and that Pearson appeared to match the description of the person involved in the robbery. The officers followed the truck that Pearson was driving. After Pearson failed to stop at two stop signs and turned left into a parking lot without signaling, the officers initiated a traffic stop. The officers observed that Pearson appeared fidgety and nervous and made furtive movements.

Officer Wuensch approached the truck and asked Pearson for his driver's license and registration. Pearson produced an "Indiana State I.D." and stated that he did not have a driver's license. Transcript at 7. The officers were able to confirm that Pearson had never received a driver's license. Officer Woodson "ran a report on the B.M.V." which indicated that the truck was in the name of a person named Darnell Beverly. Id. at 10. Officer Wuensch asked Pearson if there were any weapons in the truck, and Pearson "said no." Id. at 8. Pearson initially told the officers that the truck was his, but when Officer Woodson informed him that the BMV report indicated the truck was owned by Darnell Beverly, Pearson stated that he had bought the truck from Beverly and had not

¹ Ind. Code § 35-47-2-1 (Supp. 2007).

transferred ownership of the vehicle to his name. Pearson also stated to the officers that his friend by the name of “B” had borrowed the truck from him. Id. at 15.

Officer Wuensch contacted a towing service to retrieve the truck that Pearson had been driving, and the officers placed Pearson in handcuffs. The officers performed a search of the truck and discovered a small caliber revolver wedged between the driver’s seat and the passenger’s seat and a clip and bullets on the passenger’s side door. After Pearson was given his Miranda rights, Officer Wuensch asked Pearson if the gun was his and if he had a gun permit, and Pearson responded that the gun was his and that he did not have a permit.

On June 26, 2009, the State charged Pearson with carrying a handgun without a license as a class A misdemeanor and operating a vehicle never having received a license as a class C misdemeanor.² After a bench trial on January 14, 2010,³ Pearson was found guilty as charged. The court sentenced Pearson to 365 days with 361 days suspended to probation for his conviction for carrying a handgun without a license and to sixty days with fifty-six days suspended for his conviction for operating a vehicle never having

² Ind. Code § 9-24-18-1 (2004) (subsequently amended by Pub. L. No. 100-2010, § 3 (eff. July 1, 2010)).

³ At the trial, Officer Wuensch testified that after the officers learned that Pearson “did not have a driving status,” Pearson was handcuffed and placed “under arrest for operating a vehicle without a license.” Transcript at 18. Officer Wuensch testified that he then “called [] for towing and did a search incident to the towing of the vehicle.” Id. Also, Officer Woodson testified that the officers had asked Pearson if “he would mind if [they] checked his vehicle and [Pearson] said no.” Id. at 8. Officer Woodson also testified that she did “tell [Pearson] that [she] was handcuffing him for [the officers’] safety and he had no objection to that” Id. at 9. Pearson testified that the officers handcuffed him but stated that he was not under arrest, and that the officers asked Pearson if he would mind if they searched the truck and Pearson said no.

received a license, and the court ordered the sentences to be served concurrent with each other.

The sole issue is whether Pearson was denied the effective assistance of trial counsel. “[A] postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.” Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998), reh’g denied, cert. denied, 528 U.S. 861, 120 S. Ct. 150 (1999). When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. Id. at 1216 (citing United States v. Taglia, 922 F.2d 413, 417-418 (7th Cr. 1991), cert. denied, 500 U.S. 927, 111 S. Ct. 2040 (1991)).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel’s performance was deficient and that he was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Id.

When considering a claim of ineffective assistance of counsel, a “strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Morgan v. State, 755 N.E.2d 1070, 1072 (Ind. 2001). “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” Williams v. State, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. Clark v. State, 668 N.E.2d 1206, 1211 (Ind. 1996), reh’g denied, cert. denied, 520 U.S. 1171, 117 S. Ct. 1438 (1997). Moreover, “[w]hen an ineffective assistance of counsel claim is based on trial counsel’s failure to make an objection, the appellant must show that, had a proper objection been made, it would have been sustained.” Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998).

Pearson argues that his trial counsel should have filed a motion to suppress because the officers’ search of the pick-up truck he had been driving violated the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Pearson argues that the search was unconstitutional because he did not waive his right to counsel before consenting to the search, the search incident to his arrest was improper, and the impoundment of the truck and accompanying search were improper. Pearson specifically argues that the “impoundment was unauthorized and unreasonable under the community caretaking function,” that the impoundment was not statutorily authorized, that “the scope of the inventory search was excessive,” and that

“because the car was properly parked in a parking space in a parking lot, the search appears pretextual.” Appellant’s Brief at 15.

The State argues that the search of the truck performed by the officers was incident to the towing of the truck and that the impoundment of the truck was proper under Ind. Code § 9-22-1-5. The State also argues that “[s]ince the search was based on the tow, not [Pearson’s] consent, *Pirtle* was not implicated.” Appellee’s Brief at 5. In his reply brief, Pearson argues that “the record before this court contains no evidence, from either Officer, indicating under which statute the vehicle was towed or what the police department policies are regarding inventory searches.” Appellant’s Reply Brief at 4.

A trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse the ruling only when it was an abuse of discretion. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). A trial court has abused its discretion if its ruling is clearly against the logic and effect of the facts and circumstances before the court. Id.

For a search to be reasonable under the Fourth Amendment, a warrant is required unless an exception to the warrant requirement applies. Taylor v. State, 842 N.E.2d 327, 330 (Ind. 2006). The State bears the burden of proving that a warrantless search falls within an exception to the warrant requirement. Id. A valid inventory search is a well-recognized exception to the warrant requirement. Id. In determining the propriety of an inventory search, the threshold question is whether the impoundment itself was proper. Id. at 331. An impoundment is warranted when it is part of routine administrative caretaking functions of the police or when it is authorized by statute. Id. If there is a

lawful custodial impoundment of the vehicle, the constitutional requirement of reasonableness requires that the inventory search itself must be conducted pursuant to standard police procedures. Jackson v. State, 890 N.E.2d 11, 18 (Ind. Ct. App. 2008) (citing Combs v. State, 878 N.E.2d 1285, 1290 (Ind. Ct. App. 2008)). This ensures that the inventory is not a pretext for a general rummaging in order to discover incriminating evidence. Id.

Ind. Code § 9-22-1-5 provides that “[w]hen an officer discovers a vehicle in the possession of a person other than the person who owns the vehicle and the person cannot establish the right to possession of the vehicle, the vehicle shall be taken to and stored in a suitable place.”

Here, the record shows that Pearson initially told the two officers that the truck was his. However, when the officers informed Pearson that the BMV report indicated the truck was owned by Darnell Beverly, Pearson stated that he had purchased the truck from Beverly and had not transferred ownership of the vehicle to his name. In addition, Pearson stated to the officers that “[h]is friend by the name of B” had borrowed the truck from him and, when asked “who B was,” stated that “he didn’t know” and that “[h]e was just someone and that’s all he knew his name by was B.” Transcript at 15. The record shows that Pearson was unable to establish ownership or the right to possession of the truck. The record does not reflect that the inventory search was pretextual. Under the circumstances, including the statements made by Pearson regarding ownership of the truck and the results of the BMV search conducted by the officers, we do not find Pearson’s arguments that the officers were not authorized to impound the truck to be

persuasive. See Howard v. State, 818 N.E.2d 469, 478 (Ind. Ct. App. 2004) (citing to Ind. Code § 9-22-1-5 and Ind. Code § 9-18-2-43, noting that the registration the defendant gave the officer belonged to another vehicle and another person, and finding that the officer was permitted to impound the vehicle), trans. denied.

Further, Officer Wuensch testified that he performed “a search incident to the towing of the vehicle” prior to having the vehicle towed and discovered the handgun wedged between the driver’s and passenger’s seats of the vehicle and pointing towards the engine block of the vehicle. Mindful that to prevail Pearson must demonstrate that there is a reasonable probability that the result of his trial would have been different had his counsel challenged the evidence of the handgun, see Ben-Yisrayl, 729 N.E.2d at 106, we note that Pearson has failed to show that the search performed by the officers did not comply with applicable police departmental procedures. Accordingly, we conclude that Pearson has failed to demonstrate by a reasonable probability that, but for his trial counsel’s failure to make an objection or file a motion to suppress the evidence of the handgun under the Fourth Amendment, the result of his trial would have been different. See Glotzbach v. State, 783 N.E.2d 1221, 1225 (Ind. Ct. App. 2003) (finding that the appellant failed to establish that, but for trial counsel’s failure to file a motion to suppress, the result of the proceedings would have been different and thus holding that the defendant failed to establish that his trial counsel’s performance was ineffective).

Pearson also argues that the search was improper under Article 1, Section 11 of the Indiana Constitution. The search and seizure analysis under Article 1, Section 11 of the Indiana Constitution is slightly different than under the Fourth Amendment of the

United States Constitution. The purpose of Article 1, Section 11 is “to protect from unreasonable police activity those areas of life that Hoosiers regard as private.” Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995). In deciding whether a warrantless search and seizure violates Article 1, § 11, we must determine whether, under the totality of the circumstances, the search was reasonable. Id. The determination of the reasonableness of a search or seizure often “turn[s] on a balance of: (1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and (3) the extent of law enforcement needs.” Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005). As previously mentioned, the record shows that Pearson had been driving the vehicle, never having received a license, that Pearson stated that the vehicle was his, that he had purchased it from another person identified as the owner by the BMV report obtained by the officers, and that he had let another person borrow the vehicle. Based upon the totality of the circumstances as set forth in the record, we conclude that Pearson has failed to demonstrate by a reasonable probability that an objection to or a motion to suppress the evidence of the handgun would have been sustained or granted under Article 1, Section 11 of the Indiana Constitution. See Peete v. State, 678 N.E.2d 415, 421 (Ind. Ct. App. 1997) (holding that the appellant failed to show that his trial counsel’s objection to the admissibility of evidence would have been sustained under the Fourth Amendment or Article 1, Section 11 of the Indiana Constitution and thus that his trial counsel was not

ineffective), trans. denied.⁴ Accordingly, we conclude that Pearson has failed to demonstrate that he was denied the effective assistance of trial counsel.

For the foregoing reasons, we affirm Pearson's conviction for carrying a handgun without a license as a class A misdemeanor.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.

⁴ Because we conclude that Pearson has not shown that he was denied the effective assistance of trial counsel based upon his argument that the search was an invalid inventory search, we do not address the arguments presented by Pearson or the State related to whether other exceptions to the warrant requirement would have permitted the search.