STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY MICHAEL THELEN,

Defendant-Appellant.

UNPUBLISHED
April 17, 2001

No. 220561
Leelanau Circuit Court
LC No. 99-001033-FH

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Jeremy Thelen of one count of second-degree home invasion[1] and one count of receiving and concealing stolen property over $100.[2] The trial court sentenced him to concurrent prison terms of seven to thirty years for home invasion and five to ten years for receiving and concealing stolen property, reflecting his status as third habitual offender.[3] Thelen now appeals as of right the trial court's order denying his motion for new trial based on ineffective assistance of counsel, in which he claimed that his trial counsel was ineffective for failing to move to suppress evidence seized from his home. We affirm.

I. Basic Facts And Procedural History

The parties essentially agree on the factual description of the crime. In late October 1998, Michelle Collins and her three children returned to their home in Bingham Township, Leelanau County, from an overnight trip to southern Michigan, during which Collins had left her house unlocked. On her return, Collins went into her bedroom and saw that her belongings were in disarray, furniture had been moved, and drawers and storage boxes had been opened. In

[1] MCL 750.110; MSA 28.305.

[2] MCL 750.535; MSA 28.803.

[3] MCL 769.11; MSA 28.1083.

particular, Collins noted that a nightstand that usually sat at the head of the bed had been moved to the closet. Collins immediately called 911 to report that someone had broken into her home.

Officer Michael Lamb, of the Leelanau County Sheriff's Department, arrived in response to Collins' call. He noticed a footprint embedded in dust on the nightstand. The footprint was clearly from a Nike shoe because it revealed a logo on it. Because Collins indicated that no one in her family owned Nike shoes, the officer concluded that the intruder had stepped on the nightstand to access the top shelf of the closet storage area, from which items had been removed. The officer removed the stand for testing, turning it over to another officer for safekeeping. Among the items missing from the Collins home were a video camera, a still camera and accessories, a cordless telephone, cash, jewelry and, two one-hundred pound pumpkins that had been in front of the house.[4]

Following the break-in at the Collins home, someone broke into another home in the Traverse City area, stealing two televisions, a VCR, a spotting scope, binoculars, two tackle boxes, and a flashlight. Officer Lamb, who also investigated this second crime, began to suspect that Thelen had committed these crimes. Subsequently, in mid-October 1998, Detective Robert Mead joined the investigation after receiving the footprint and list of stolen items from Officer Lamb.

Acting on information that Thelen had the stolen goods at his home, Detective Mead went to Thelen's home with Officer Edward Eckerle. Thelen invited the officers into his home. Immediately on entering the living room, the officers noticed, *mirabile dictu*, a large pumpkin, weighing approximately one hundred pounds, lying on the floor. The officers also noticed a television, a white telephone, and a tackle box, all matching the description of those stolen in the two robberies. On questioning, Thelen said that his girlfriend had given him the television and that if the other items were stolen, someone else must have brought them there. Thelen then signed a search consent form that the officers provided, excusing them from obtaining a warrant.

As the officers searched the rest of the home, including bedrooms and the bathroom, they found Nike shoes on the floor in a hallway, which Thelen said belonged to him. The officers immediately checked the shoes against the print from the Collins home. They informed Thelen they matched and would be confiscated. There are conflicting versions of what happen next but, according to the officers, Thelen became upset and tried to take the shoes from Officer Mead. Officer Eckerle responded that Thelen could retrieve his shoes if he came to the police station and explained how their print appeared on the nightstand. Thelen stated that because the officers had the shoes, the print, and the nightstand, they could "put two and two together." The officers also found and took custody of a flashlight, another telephone, and a pair of binoculars. They returned the great pumpkin to the Collins house. There is no indication from the record as to what happened to the other pumpkin and it may still be at large . . . in one form or another.

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[4] Thelen's girlfriend testified that she was at Thelen's house when Thelen and his roommate brought in, *deus ex machina*, a large pumpkin that they rolled down the hallway.

After Thelen's arrest and in preparation for his May 1999 trial, his trial counsel discussed the constitutionality of the search and seizure with him. Defense counsel determined that the shoes were admissible because Thelen had voluntarily signed a consent form for the warrantless search and seizure.

At trial, the prosecutor produced the tackle box, television and remote, one telephone, and tennis shoes as evidence. At the close of the prosecutor's case-in-chief, on the second day of trial, the defense did not call any witnesses and Thelen declined to testify. The jury took about fifty minutes to deliberate before returning a guilty verdict on both charges.

After Thelen requested appellate counsel at sentencing, his appellate attorney filed a motion for new trial and an evidentiary hearing, claiming that Thelen had been denied effective assistance of counsel by his trial attorney, who had not moved to suppress the Nike shoes as evidence. In early December 1999, the trial court conducted a *Ginther*[5] hearing. Thelen testified that after he let the officers in, they said that if he did not sign the consent form, they would get a warrant or call his probation officer. Thelen stated that he did not want his probation officer involved, so he signed the form. According to Thelen, after he thought about it and called an attorney, he changed his mind and asked them to leave but the officers told him it was too late because they had already seen the alleged stolen items. Thelen asserted that the officers then continued the search and, ten minutes later, located the Nike shoes.

On cross-examination, Thelen admitted to the prosecutor that he had signed a probation order indicating that he agreed that his residence could be entered at any time. On redirect, Thelen confirmed that he knew his probation officer had the right to enter his home at any time to ensure he continued living there. Further, Thelen acknowledged that the probation order also specifically allowed an official to enter his home without a warrant on probable cause to search for controlled substances, firearms, or stolen property, and that his Nike shoes did not fit into any of those categories. Officer Eckerle denied on cross-examination that Thelen had protested the seizure of his Nike shoes by struggling with one of the officers. Addressing these facts as a whole, Thelen's appellate counsel argued that the Nike shoes were inadmissible as evidence because Thelen had revoked his consent when he objected to seizure of his tennis shoes, resulting in a illegal warrantless search and seizure that mandated suppression. Thus, Thelen's trial counsel was ineffective for failing to move to suppress the shoes.

Subsequently, in a written opinion, the trial court denied the motion for a new trial, agreeing with the prosecutor that the evidence at trial had established beyond a reasonable doubt that Thelen committed the crimes, Thelen gave written consent to intrude on his already-reduced expectation of privacy, the shoes were in plain view, and they were seized while the consent remained in effect. Accordingly, the trial court concluded that Thelen's trial counsel's decision not to move for suppression for constitutionally sound.

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[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The sole issue on appeal is whether Thelen is entitled to a new trial because his trial attorney was ineffective for failing to move to suppress the shoes as evidence.

II. Legal Standard

"Effective assistance of counsel is presumed" and "[t]he defendant bears a heavy burden of proving otherwise."[6] To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, i.e., he must "show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial."[7] This necessarily entails proving prejudice to the defendant, which means that there is "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different."[8]

III. The Warrant Requirement and Consent Exception

Both the Fourth Amendment[9] to the United States Constitution and Const 1963, art 1, § 11,[10] protect against unreasonable government intrusions by requiring the police to obtain a warrant before conducting a search or seizure. "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions."[11] However, neither a warrant nor probable cause is necessary before the police may conduct a search if the individual consents.[12] To be valid, consent must be "unequivocal, specific, and freely and intelligently given."[13] Whether the consent was valid depends on the totality of the circumstances.[14] Despite giving valid consent to a search, a suspect nevertheless

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[6] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[7] *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

[8] *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

[9] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV.

[10] "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." Const 1963, art 1, § 11.

[11] *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999).

[12] *Id*. at 294, citing *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

[13] *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998).

[14] *People v Goforth*, 222 Mich App 306, 209; 564 NW2d 526 (1997).

retains the right to revoke that consent and stop the search at any time.[15] However, the "suspect cannot retroactively revoke the consent and complain of the conduct by the police pursuant to that consent before it is revoked . . . ."[16]

Thelen's consent clearly made the search that led to the police seizure of the Nike shoes constitutional. From the very outset of the officers' interaction with Thelen at his home, Thelen indicated that he would consent to a search. Thelen allowed the officers to enter his home. We assume he did so, in part, because the terms of his probation required him to submit to searches for and seizure of certain contraband. Nevertheless, regardless of his initial reasons for allowing them to enter his home, Thelen gave full, unequivocal, and voluntary consent to the search for evidence of a crime when he signed the consent form, in which he acknowledged waiving his rights. Needless to say, the great pumpkin caught the officers' attention. The officers then commenced their search for evidence concerning the two breaking and entering offenses without any objection, indicating Thelen's continuing consent to the search for evidence of a crime. The search ended when the officers seized the shoes when they found them in the hallway. Not until after the officers had taken possession of the shoes did Thelen object to the officers' actions. This objection was, however, too late because the search and seizure were complete at that time.[17] While Thelen claims that he had already revoked his consent to the search when the police seized his shoes, he has not identified any evidence in the record, including the transcript of the *Ginther* hearing, that indicates that he informed the officers that he was withdrawing his consent before they had seized his shoes. At best, the *Ginther* hearing transcript reveals that Thelen cannot recall whether he revoked his consent before or after the officers found the shoes.

If defense counsel had moved to suppress the shoes based on this evidence, the trial court would have acted properly by denying the motion because the totality of these circumstances demonstrates that the officers acted lawfully in accordance with Thelen's valid consent when they seized the shoes. Defense counsel's conduct was, therefore, not deficient when he failed to move to suppress the shoes and, as a result, Thelen has not demonstrated that he is entitled to a new trial on this basis.[18]

In light of our conclusion that the officers were acting according to valid consent at the time they seized the shoes, we need not determine whether any other exceptions to the warrant requirement would have justified the seizure in this case, thereby validating defense counsel's decision not to move to have the shoes suppressed.

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[15] *People v Powell*, 199 Mich App 492, 496; 502 NW2d 353 (1993).

[16] *Id*.

[17] "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

[18] See *People v Carbin*, ___ Mich ___; ___ NW2d ___ (Docket No. 114799, decided April 3, 2001), slip op at 18.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper