STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2001
v	No. 223716 Kent Circuit Court
THOMAS WILLIAM KLOOSTERMAN, Defendant-Appellant.	LC No. 98-002362-FH

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manufacturing marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and maintaining a drug house, MCL 333.7405(1)(d); MSA 14.15(7405)(1)(d). Following these convictions, the court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, and second drug offender, MCL 333.7413(2); MSA 14.15(7413)(2), to a term of five years' probation, with the first six months to be served in jail. Defendant appeals as of right. We affirm.

Defendant's convictions resulted from evidence discovered at his home following a consent search conducted by members of the Kent Narcotics Unit on February 12, 1998. That search, however, was prompted by the discovery of marijuana within the defendant's car earlier that same evening, for which defendant was charged with one count of possession of marijuana with intent to deliver. MCL 333.7401(2)(d); MSA 14.15(7401)(2)(d).[1]

Sometime before February 12, 1998, Detective Scott Malkewitz of the Walker Police Department received information from a confidential informant that an individual driving a gray four-door Volvo had been selling marijuana from his car at the Deltaplex stadium where he worked. After locating a gray four-door Volvo in the parking lot of the Deltaplex, Malkewitz traced the vehicle's license plate to defendant. Malkewitz then began a surveillance of

[1] This charge was brought separately from defendant's other convictions and is not before this Court in this appeal.

defendant. On February 12, 1998, Malkewitz' surveillance of defendant began at defendant's home and continued to the Deltaplex lot. Malkewitz contacted a canine handler from the narcotics unit so that the dog could smell for drugs from the exterior of the car. The dog handler arrived with the dog at the Deltaplex and ran the dog around the exterior of defendant's unoccupied car. During this run, the dog "alerted" on both the trunk and passenger compartment of the car.[2]

Malkewitz sent two patrol officers into the Deltaplex to locate defendant and bring him to the car. When the officers returned with defendant, defendant was advised that the police had information that marijuana was being sold from a gray four door Volvo and that the dog had alerted on both the trunk and the passenger compartment of his vehicle. Defendant was asked for consent to access the vehicle's interior.

Without hesitation, defendant opened the trunk and permitted a search of the trunk. No contraband was found. Malkewitz then reminded defendant that the dog had also alerted on the passenger compartment and asked defendant to unlock the vehicle to permit a search of that area. Defendant refused, and Malkewitz told him that the dog alert gave him probable cause to enter the vehicle. Malkewitz advised defendant that he would break a window to gain access if defendant did not open the vehicle for them. Defendant then stated that there was a "quarter on the front seat" and reluctantly unlocked the vehicle. The dog alerted to a brown paper bag on the front seat, which when opened, was discovered to contain approximately one quarter pound of marijuana.

Defendant argues that his convictions must be reversed as a result of trial counsel's failure to raise, or timely raise, the following two challenges to the search of his automobile: first, that the drug-sniffing dog had not been shown to be sufficiently reliable to support a finding of probable cause to search the vehicle; and second, that even assuming such probable cause existed with respect to the vehicle's trunk, the officers lacked sufficient cause to extend the search to the passenger compartment after finding no contraband within the trunk. Defendant further argues that because a timely challenge to the dog's reliability would have resulted in a finding that the search of defendant's vehicle was unlawful, the instant convictions, which rest upon the evidence subsequently discovered in his home, must be reversed because the officers' suspicion that there might be additional contraband at the home was derived from the unlawful search of defendant's vehicle. After review of the record in this matter, we find each of these contentions to be without merit.

In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine, first, whether counsel's performance was objectively unreasonable; and second, whether the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Regarding the second requirement, defendant must show a reasonable probability that, but for counsel's errors,

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[2] "Alerted" is a term of art used by narcotics officers to indicate that a dog detected the possible presence of narcotics in a particular area of a car.

the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). Here, as discussed below, because the search of defendant's vehicle was properly supported by probable cause defense counsel's failure to raise, or otherwise timely argue these alternate grounds for suppression, did not constitute ineffective assistance of counsel. See *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997) (counsel is not required to argue a frivolous or meritless position); See also *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

With respect to the police dog's qualifications to support a finding of probable cause to search the vehicle, defendant argues that the dog had not been shown to be reliable and that trial counsel was ineffective in allowing its handler to testify concerning the animal's positive reactions to the trunk and passenger compartment without timely objection. We disagree.

In *People v Clark*, 220 Mich App 240, 243-244; 559 NW2d 78 (1996), this Court observed that, as a general rule, the reliability of a police dog's positive reaction will be established upon proof of the animal's training and certification:

> While we agree that in certain cases it will be important to examine the dog's training, health, or other such circumstances, we conclude that *in the usual case, . . . all that is necessary to find the dog's alert to be reliable is evidence of the dog's training and certification*. [*Id*. at 244. (Emphasis added.)]

Here, the dog's handler testified that she had been working with the dog since December 1997, during which time the two had "put in about 150 hours" of training at a facility in northern Ohio, where they had been certified in the detection of illegal drugs. Because defendant has identified no authority or rationale that would remove this matter from the "usual case," and thus require further examination of the dog's qualifications, we conclude that the evidence of record was sufficient to support the dog's reliability to support a finding of probable cause. *Id*. Thus, inasmuch as a more timely objection to the animal's qualifications would not have resulted in an outcome different than that actually achieved, we do not believe that defendant is entitled to relief as a result of counsel's failure to raise such a challenge in a more timely manner. *Toma*, *supra*; *Hoag*, *supra*.

Similarly, we reject defendant's contention that counsel was ineffective in failing to argue that, even assuming that there was probable cause to search the vehicle's trunk, the officers lacked sufficient cause to extend the search to the passenger compartment after finding no contraband within the trunk. Defendant's argument in this regard is premised upon this Court's opinion in *People v Martinez*, 192 Mich App 57; 480 NW2d 302 (1991), wherein police officers acting on information that the defendant was selling drugs in the parking lot of his workplace approached the defendant's vehicle after observing three men enter the car shortly after a shift change. *Id*. at 58-59. Although the officers later testified at a suppression hearing that at the time they approached the vehicle, they had no indication of illegal activity taking place, one officer testified that upon reaching the vehicle he observed what he believed to be a marijuana cigarette on the front passenger's lap. *Id*. at 59. At that point, the officer identified himself and convinced the passenger to open the vehicle's door. *Id*. at 60. When the door opened, the officer could no longer see the marijuana cigarette and thus requested that the passenger empty his pockets; however, no marijuana cigarette was found. *Id*. The officer then searched the passenger

side of the car but was unable to find the cigarette. *Id*. At that point, the second officer requested that the defendant, who was seated behind the steering wheel, get out of the car. *Id*. As the defendant left the vehicle, the officer observed a shopping bag located inside the car and asked for permission to search the bag. *Id*. Despite the defendant's denial of such permission, the officer searched the bag and found marijuana. *Id*.

On appeal, this Court found that although the officers possessed probable cause to search the vehicle for the cigarette, the officers' search of the shopping bag was improper because "the failure to find the cigarette in the vehicle or on any of its occupants rendered any further search unreasonable." *Id*. at 62-64. In the instant matter, defendant argues that like the search of the bag in *Martinez*, *supra*, the officers' failure to find drugs in the trunk of his car rendered any further search of the vehicle unreasonable. However, unlike the officers in *Martinez*, *supra*, as a result of the dog's separate positive reaction to the passenger compartment the officers in the instant matter had probable cause to extend their search of the vehicle past the "empty" trunk and into the car's interior. Accordingly, we reject defendant's claim that he was denied the effective assistance of counsel as a result of his trial counsel's failure to raise the proffered challenge to the officers' search of the interior of defendant's vehicle. See *Flowers*, *supra* at 737-738.

Because we conclude that defendant has not established that the evidence found within the vehicle would have been suppressed had counsel raised the foregoing challenges, defendant's additional claim, that the instant convictions must be reversed because the officers' search for contraband at his home was derived from an unlawful search of defendant's vehicle must also logically fail.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder