STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2004
v	No. 243126 Kent Circuit Court
TARVIS ANTHONY CUTTS, Defendant-Appellant.	LC No. 01-008381-FH

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv), and carrying a concealed weapon, MCL 750.227. We remand for a *Ginther*[1] hearing, and otherwise affirm.

On August 1, 2001, Officers Stormer and Lilly were on bike patrol near the Landmark Motel on 28th Street in Grand Rapids. They noticed two women sitting in front of the motel. The officers knew these women to be prostitutes and crack cocaine addicts. The officers asked the women what they were doing, and were told that they were waiting for a ride. The officers checked to see if there were any outstanding warrants for the women, and found that one was wanted on a probation violation. At this point, defendant came up to the front of the lobby. According to Officer Stormer, both women stated, and defendant acknowledged, that he was going to give the women a ride. However, defendant told Officer Stormer that he had locked the car keys in the trunk.

Officer Stormer checked defendant's background and found that defendant was on parole. While Officer Stormer was waiting for a check on the conditions of defendant's parole, he received some information from a Landmark employee that "kind of heightened" his senses. Officer Stormer was asked, "Without going into what it was, what did you do in response to that information?" He replied, "The first thing I did was to see what car he was associated with. I went there, and he was standing at the open trunk with the tow truck driver. I went back and contacted Officer Lilly and Officer Duke, and asked them to return to the motel because they just

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

left a minute before." Officer Stormer testified that he asked defendant if he could look in his car, and defendant declined permission. According to Officer Stormer, defendant walked to the lobby of the motel, apparently to call his parole officer.

Officer Stormer testified that he was given permission to arrest defendant by the parole officer on the basis that defendant was with a known prostitute. Officer Duke went to the motel lobby to arrest defendant, but he was not there. Defendant was arrested approximately a quarter of a mile away from the motel. A search of defendant yielded car keys in the front of his pants, the car's door key that had been removed from the key chain, $3,300 in cash, and a cell phone. After searching defendant, the officers took him back to the Landmark Motel, where defendant had left his vehicle, and his vehicle was then searched. Officer Lilly found a loaded pistol under the front seat, and Officer Stormer found three large rocks of crack cocaine in the pocket of a black leather jacket in the trunk.

Defendant contends that his trial counsel was ineffective for failing to move to suppress the evidence seized from his vehicle. Where, as here, a defendant fails to move for a new trial or for a *Ginther* hearing, appellate review is ordinarily precluded "unless the appellate record contains sufficient detail to support defendant's claim." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), the Court stated:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of establishing both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In *Kimmelman v Morris*, 477 US 365, 375; 106 S Ct 2574; 91 L Ed 2d 305 (1986), the Court noted:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a

reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Defendant maintains that the police officers' testimony was clear that their alleged purpose for searching defendant's vehicle was a ruse--thus, not sustainable under the inventory search exception, see *Colorado v Bertine*, 479 US 367, 381; 107 S Ct 738; 93 L Ed 2d 739 (1987), to the warrant requirement. The prosecutor contends the search was a valid inventory search attendant to the car being impounded, and that "[s]ince the defendant was going to be arrested, it is probable that his car was going to be impounded." However, the prosecutor provides no authority for these statements. "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

The prosecutor correctly asserts that when a vehicle is impounded, an inventory search of the vehicle and its content may be conducted, *South Dakota v Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976). However, the legality of an inventory search following a defendant's arrest depends in part on whether the car was lawfully impounded. *People v Poole*, 199 Mich App 261, 265; 501 NW2d 265 (1993).

This Court concluded in *Poole*, *supra*, that impoundment of a vehicle is proper when the defendant, who is driving the vehicle, is arrested and there is no one else there that can take care of the car. In *Poole*, police stopped the defendant for speeding on the freeway. After a LEIN check revealed that defendant was driving with a suspended license, the defendant was arrested and his vehicle impounded. An inventory search of the vehicle yielded cocaine, found in a paper bag in the pocket of pants, in the trunk. *Id.*, 263. On appeal, the defendant argued that the evidence of the drugs should have been suppressed because the inventory search was illegal. This Court disagreed. Noting that the legality of the inventory search depended in part on whether the car was legally impounded, this Court stated that the police officer testified that it was department policy to impound a vehicle "when a person is arrested and there is no one that can take care of the car," and that because the defendant's passenger had no valid driver's license, the officer properly impounded the vehicle pursuant to department policy. *Id.* Turning to the issue of the validity of the inventory search, this Court noted that such "depends on whether there were standardized criteria, policies, or routines regulating how inventory searches were to be conducted." *Id.* at 265. Noting that the police neither produced the department's policy on inventory searches nor testified regarding the department's policy regarding closed containers, this Court remanded for further proceedings solely on the issue whether the police department had a standard practice that allowed the procedure followed in this case.

In *People v Toohey*, 438 Mich 265, 268; 475 NW2d 16 (1991), the police observed defendant cross the yellow centerline of the street and driving erratically. The defendant was arrested after failing a sobriety test. *Id.* Before having the vehicle towed to the impound lot (because the defendant's passenger also appeared intoxicated and thus unable to drive), the police conducted an inventory search pursuant to departmental policy, which revealed a plastic baggie containing a white powdery substance under the driver's seat. *Id.* The officer then searched the trunk, and found a brown paper bag containing another plastic baggie in which a large quantity of white powdery substance was found, in the defendant's golf bag. *Id.*, 268-269. This Court concluded that the impoundment and inventory search were conducted in accordance with departmental procedures, and were therefore constitutional. *Id.*, 291. The Court stated that

the police officer's decisions that the vehicle was unattended after the driver was arrested, and that impoundment was the appropriate avenue to protect the vehicle from potential theft or vandalism were in accord with departmental procedures. *Id.*, 290-291. The Court further stated that there was no showing that the impoundment of the defendant's vehicle was a pretext for a criminal investigation -- rather, it was merely the performance of the police officer's caretaking function. *Id.*, 291. See also *People v Sinistaj,* 184 Mich App 191, 199; 457 NW2d 36 (1990) (concluding that police search of trunk after defendant's arrest constituted an invalid inventory search because officers' purpose was to unearth contraband rather than inventory vehicle's contents, officers failed to follow established departmental procedures for an inventory search, officers' removal of panel in trunk [behind which they found cocaine] went far beyond scope of those procedures, and search of trunk was not properly within scope of search incident to defendant's or his passenger's lawful arrest, which permitted search of passenger compartment of defendant's car and any containers found therein[2]).

The instant case is distinguishable from *Poole* and *Toohey.* Unlike the defendants in *Poole* and *Toohey,* defendant was not driving the vehicle at the time of his arrest. Rather, defendant's vehicle was parked in the lot of the Landmark Motel – and not on the side of a road, as was the case in *Poole* and *Toohey.* Therefore, the caretaking concerns recognized in *Toohey* are not present here.

On this record, we conclude that trial counsel's failure to raise a Fourth Amendment challenge to the search was a serious error[3] and that there is a reasonable probability that suppression of the evidence would have led to a different result. However, because the issue was not raised below, the prosecution was not called upon to make a record to support its claim that the search was proper. Therefore, rather than reverse, we remand for a *Ginther* hearing on the issue.

We briefly address defendant's additional claims. We reject defendant's claims that the prosecution arguments, and defense counsel's inaction, deprived him of a fair trial where the jury was informed that he was on parole, reference was made to an anonymous tip, and repeated references were made to the fact that the motel and the area were known for crime and drug trafficking. While all of this testimony would ordinarily be objectionable, here counsel's defense

---

[2] The *Sinistaj* Court upheld the defendant's convictions, and the admission of evidence seized from the defendant's vehicle on a separate ground--that the search of the vehicle's trunk supported by probable cause was proper under the automobile exception to search warrant requirement. 184 Mich App at 199-201.

[3] In addition to the Michigan cases discussed, see *Massachusetts v Brinson,* 440 Mass 609, 614-615; 800 NE2d 1032 (2003) (holding that impoundment of legally parked vehicle in commercial lot, following arrest of the defendant-car-owner, was not lawful, under circumstances that car posed no public safety risk or traffic hazard, parking lot owner had not requested car be towed, and record contained no evidence of threat of vandalism to justify impoundment, even though there was testimony that commercial lot was a common drug traffic area); *Oregon v Thirdgill,* 46 Ore App 595, 599-600; 613 P2d 44 (1980); *Benavides v Texas,* 600 SW2d 809, 812 (Tex Crim App 1980); *Dunkum v Georgia,* 138 Ga App 321, 324-325; 226 SE2d 133 (1976); and *Arizona v Bertram,* 18 Ariz App 579, 582; 504 P2d 520 (1972).

was that defendant had participated in "partying" with the women, even in using illegal substances, but that there was no buying or selling of drugs involved. We find no prosecutorial misconduct and no ineffective assistance of counsel. Regarding the anonymous tip, we conclude that the outcome of the trial was not affected.

Next, we reject defendant's claim that the evidence was insufficient to sustain his conviction. If the evidence found in the car is admissible, it was sufficient to support a conclusion that the cocaine belonged to defendant, in whose jacket it was located, and, given the quantity involved, and the amount of money defendant was carrying, that defendant possessed it with an intent to deliver. The trier of fact was not obliged to accept the testimony of one of the women that the cocaine belonged to her.

Lastly, we conclude that any prejudice from the prosecutor's closing argument could have been cured by a timely objection and that, even if improper, the arguments did not affect the outcome of the trial. We are unable to address defendant's claims of error regarding the jury instructions because his argument is insufficiently developed to enable our review.

We affirm in part, but remand for a *Ginther* hearing regarding the search. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens