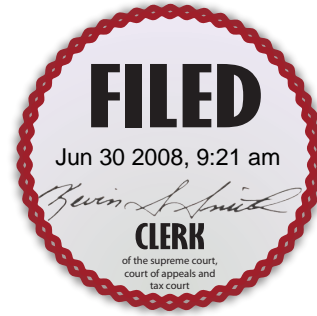


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RICK G. GWINN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 33A01-0801-CR-26

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APPEAL FROM THE HENRY SUPERIOR COURT

The Honorable Bob A. Witham, Judge

Cause No. 33D02-0703-FD-74

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**June 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Rick G. Gwinn appeals his convictions of operating a vehicle while intoxicated, driving while suspended as an habitual traffic violator, and criminal mischief, as well as the determination he is an habitual substance offender. He argues he received ineffective assistance of counsel. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On the evening of March 23, 2007, John and Kathy Frazier were home watching television when they heard a car engine revving. The Fraziers went outside and saw a car stuck in the middle of their neighbor's yard. The driver was rocking the car back and forth, trying to get out of the yard. Kathy called the police, and the Fraziers watched the vehicle while the police were en route. Gwinn exited the car "wobbling" and "staggering." (Tr. at 86, 96.) The Fraziers watched Gwinn begin walking along Grand Avenue. John followed him from a distance.

Officer Brad Flynn was dispatched to the scene. On his way, the dispatcher told him the driver had left on foot. John flagged down Officer Flynn and told him he had just passed the driver on Grand Avenue. Officer Flynn had noticed Gwinn as he drove past, and he described him to the dispatcher. He then went back to Grand Avenue to look for Gwinn, but he was no longer on the street. Officer Flynn parked his car and began looking in back yards. He saw Gwinn walking toward Village Pantry.

Officer Ty Terrell went to Village Pantry and found Gwinn sitting in a truck. Officer Terrell approached Gwinn and told him he was "looking for a subject that matched his description in the area who was involved in an accident with a vehicle." (*Id.* at 111.) Officer Terrell asked him if he had any keys, and Gwinn said he did not. Officer

Terrell asked Gwinn to exit the truck. He conducted a pat-down and found a set of keys. Officer Flynn arrived and identified Gwinn as the man he had seen walking on Grand Avenue. When Officer Flynn spoke to Gwinn, he noticed Gwinn smelled strongly of alcohol, his balance was unsteady, his speech was slurred, and his eyes were bloodshot.

Officer Terrell was able to start the car using the keys he found in Gwinn's pocket. Officer Flynn took Gwinn back to the scene of the accident to see if the Fraziers could identify him. They could not positively identify Gwinn, but they said he resembled the man they had seen. A blood test revealed Gwinn's blood alcohol level was .24%.

Gwinn was charged with operating while intoxicated as a Class A misdemeanor and a Class D felony;<sup>1</sup> operating a vehicle with elevated blood or breath alcohol concentration, a Class A misdemeanor;<sup>2</sup> public intoxication, a Class B misdemeanor;<sup>3</sup> operating while suspended as an habitual traffic violator, a Class D felony;<sup>4</sup> criminal mischief, a Class B misdemeanor;<sup>5</sup> and being an habitual substance offender.<sup>6</sup> Gwinn was found guilty as charged. The trial court entered judgment of conviction on operating while intoxicated as a Class D felony, operating while suspended as an habitual traffic violator, and criminal mischief and imposed a sentence of ten years, including a 7.5-year habitual substance offender enhancement.

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<sup>1</sup> Ind. Code §§ 9-30-5-2 and -3.

<sup>2</sup> Ind. Code § 9-30-5-1.

<sup>3</sup> Ind. Code § 7.1-5-1-3.

<sup>4</sup> Ind. Code § 9-30-10-16.

<sup>5</sup> Ind. Code § 35-43-1-2(a).

<sup>6</sup> Ind. Code § 35-50-2-10.

## DISCUSSION AND DECISION

Gwinn argues his counsel was ineffective because he did not move to suppress or object to (1) the seizure of Gwinn's keys, and (2) Gwinn's statement to Officer Terrell that he had no keys. To succeed on a claim of ineffective assistance of counsel, Gwinn "must demonstrate both deficient performance and resulting prejudice." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *cert. denied* 534 U.S. 830 (2001). 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). There is a strong presumption that counsel rendered adequate assistance. *Conner v. State*, 711 N.E.2d 1238, 1248 (Ind. 1999), *reh'g denied, cert. denied*. "Prejudice exists when 'there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation.'" *Ben-Yisrayl*, 729 N.E.2d at 106 (quoting *Cook v. State*, 675 N.E.2d 687, 692 (Ind. 1996)). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008).

### 1. Seizure of the Keys

Gwinn argues the seizure of his keys violated the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. The record does not establish Officer Terrell had probable cause to arrest Gwinn when he conducted the pat-down search, and the pat-down was not permissible under *Terry v. Ohio*, 392 U.S.1, 88 S Ct. (1968) because Officer Terrell had no safety concerns. *See C.D.T. v. State*, 653 N.E.2d 1041, 1045 (Ind. Ct. App. 1995) ("The purpose of the *Terry*

search is not to discover evidence of crime, but rather to allow the officer to pursue his investigation without fear of violence.”).

Nevertheless, counsel’s failure to object did not prejudice Gwinn. Officer Flynn identified Gwinn as the man he had seen leaving the vicinity of the accident. He testified Gwinn smelled strongly of alcohol, his balance was unsteady, his speech was slurred, and his eyes were bloodshot. Officer Flynn had probable cause to arrest Gwinn for public intoxication and operating while intoxicated. Officer Flynn could have lawfully conducted a search incident to arrest, *see Edwards v. State*, 759 N.E.2d 626, 629 (Ind. 2001), and would have found the keys. The exclusionary rule does not apply if the State establishes the information ultimately would have been discovered by lawful means. *Gibson v. State*, 733 N.E.2d 945, 956 (Ind. Ct. App. 2000). Therefore, we conclude Gwinn was not prejudiced by counsel’s failure to object to the evidence relating to the seizure of Gwinn’s keys.

## 2. Gwinn’s Statement

Gwinn argues he was in custody but had not been given *Miranda* warnings when Officer Terrell asked him if he had any keys. Therefore, Gwinn asserts counsel’s performance was deficient in that he failed to object to the admission of Gwinn’s statement that he had no keys. This statement may have served to undermine Gwinn’s credibility to some degree, but there is no reasonable probability the outcome of his trial would have been different. John watched Gwinn walk away on Grand Avenue and saw Officer Flynn drive past him. Officer Flynn took note of Gwinn when he passed in his car and was able to identify Gwinn when he was located at the Village Pantry. Gwinn

was visibly intoxicated and was found to have a blood alcohol level of .24%. Gwinn's keys fit the car stuck in the Fraziers' neighbor's yard. Counsel's failure to object to the admission of Gwinn's statement was, at most, an isolated error and does not undermine our confidence in the outcome. *See Conner*, 711 N.E.2d at 1248 ("Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective."). Therefore, we affirm.

Affirmed.

MATHIAS, J., and VAIDIK, J., concur.