

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK D. SMARTT,

Defendant-Appellant.

UNPUBLISHED

May 19, 2011

No. 295612

Genesee Circuit Court

LC No. 09-024822-FH

Before: SAAD, P.J., and JANSEN and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals his jury convictions of carrying a concealed weapon, MCL 750.227, and possession with intent to deliver a controlled substance, MCL 333.7401(2)(b)(ii). For the reasons set forth below, we affirm.

The Flint Area Narcotics Group received an anonymous tip that drug sales were occurring in the area of Madison and Harold streets. A team of undercover officers observed a white Cadillac occupied only by defendant. The officers watched as defendant sat in his vehicle for approximately 30 minutes while two men approached the vehicle at different times, stayed for a short period, and then left on foot.

The officers followed defendant as he drove to an apartment complex. When defendant exited his car, the officers identified themselves as police and asked to talk to defendant. A pat down search revealed a weapon in defendant's right pocket. The officers handcuffed defendant, secured the weapon, and searched the vehicle incident to defendant's arrest.

The search revealed two pill bottles that were prescribed to defendant and had been dispensed that day. A bottle of Vicodin, a controlled substance, was labeled as containing 120 pills but contained only 90 pills. A bottle of Soma was labeled as containing 90 pills but contained only 80 pills.

On the day of the search, defendant told the officer in charge that he sold 27 Vicodin pills to someone named JJ, gave two pills to a friend named Mike, and took one pill himself. He also said that he gave ten Soma pills to Mike. At trial, however, defendant testified that after being in handcuffs for over an hour he simply told the police what they wanted to hear, and that he had not sold any pills to JJ or Mike.

The events in question occurred on May 23, 2008. Eleven months later on April 21, 2009, the United States Supreme Court decided *Arizona v Gant*, 556 US ____; 129 S Ct 1710; 173 L Ed 2d 485 (2009), in which it held that police may only search a vehicle incident to arrest if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the arrest, or if evidence related to the offense of arrest is believed to be in the vehicle, or based on the existence of another exception to the warrant requirement. 129 S Ct at 1723-1724. Defendant's trial took place six months later. Defendant's trial counsel did not bring a motion pursuant to *Gant* to suppress the prescription pills as part of an illegal search of defendant's vehicle. On appeal, defendant claims that trial counsel's failure to bring such a motion constituted ineffective assistance. We disagree.

Defendant failed to raise this issue below; thus, it is not preserved for appellate review. An unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id.* Defendant did not move for a new trial or an evidentiary hearing on the issue of ineffective assistance; therefore, review is limited to errors apparent on the record. *Id.*

"Effective assistance of counsel is presumed, and defendant bears the burden of proving otherwise." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To meet that burden, defendant must show that (1) based on professional norms, counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for an error by counsel, the result would have been different, and the result that did occur was fundamentally unfair or unreliable. *Seals*, 285 Mich App at 17.

Pursuant to *Gant*, officers may only search a vehicle incident to arrest if the "arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 129 S Ct at 1723. If those conditions do not apply, a vehicle search will be considered unreasonable without a warrant or the application of another exception to the warrant requirement. *Id.* at 1724.

One exception to the warrant requirement is that officers may search a vehicle without first obtaining a warrant if probable cause exists to believe that the vehicle contains contraband. *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000). Probable cause exists "where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Id.*, at 417-418.

In *People v Short*, ____ Mich App ____; ____ NW2d ____ (Docket No. 292288, issued August 26, 2010), lv gtd ____ Mich ____ (Docket No. 141822, 2010), this Court held that if a vehicle search incident to arrest was performed prior to the decision in *Gant*, and adhered to the then widely accepted understanding that such a search was valid, the search would fall under the

good faith exception to the warrant requirement, and evidence from that search would not be suppressed. *Id.*, slip op at 3-8. *Short* “has precedential effect under the rule of stare decisis[,]” notwithstanding the fact that our Supreme Court has granted leave to appeal in the case. MCR 7.215(C)(2).

Because this Court has held that a good faith exception applies to vehicle searches incident to arrest that occurred before *Gant*, defendant cannot show a reasonable probability that the result in this case would have been different had counsel brought a motion to suppress.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly