

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 22, 2011

v

JOVAN FORT,

No. 298378
Oakland Circuit Court
LC No. 08-223943-FH

Defendant-Appellant.

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant Jovan Fort was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon in a vehicle (CCW), MCL 750.227. He was sentenced to concurrent terms of 180 days' imprisonment on the drug and CCW convictions, along with a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of a traffic stop in which defendant was pulled over by police for having tinted windows and an inoperable license plate light. The police noticed the strong smell of alcohol emanating from defendant's vehicle. On obtaining consent from defendant to search the car, police discovered a pistol in the center console, 15 baggies of crack cocaine in a cigarette box located in a rear passenger cup holder, numerous empty baggies in a cigarette box in the center console, shotgun and handgun ammunition located in the back of the vehicle, cash, and defendant's CCW license, which had been suspended and revoked. Defendant claimed that he was unaware of the suspension and revocation having never received notice.

Defendant first argues that the trial court erred in finding that defendant gave the police broad, unlimited consent to search his car, where defendant only consented to a search for alcohol; therefore, the trial court erred in denying defendant's motion to suppress the drug and gun evidence, violating his Fourth Amendment rights.

A trial court's findings at a suppression hearing are reviewed for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *Id.*

We hold that the trial court did not err in denying defendant’s motion to suppress the evidence. The Fourth Amendment of the United States Constitution and Const 1963, art 1, §11, secure the right of the people to be free from unreasonable searches and seizures. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). Searches conducted absent a warrant are per se unreasonable aside from a few well-delineated exceptions. *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967); *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). These established exceptions to the warrant requirement include searches that are performed pursuant to the consent of the defendant. *Florida v Jimeno*, 500 US 248, 250-251; 111 S Ct 1801; 114 L Ed 2d 297 (1991); *In re Forfeiture of \$176,598*, 443 Mich 261, 266; 505 NW2d 201 (1993). Further, in *Jimeno*, 500 US at 250-252, the United States Supreme Court explained and observed:

The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. Thus, we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of “objective” reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect? The question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is.

The scope of a search is generally defined by its expressed object. In this case, the terms of the search's authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. . . .

* * *

Respondent argues, and the Florida trial court agreed with him, that if the police wish to search closed containers within a car they must separately request permission to search each container. But we see no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness. A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization. [Citations omitted.]

In the present case, the police officer lawfully stopped defendant’s vehicle and questioned him about the smell of alcohol in the car. Defendant stated that he had not been drinking and that the alcohol had been spilled in the backseat of the car earlier in the day by a friend. Defendant expressly denied having anything illegal in the car. The officer then proceeded to ask defendant if he could search his vehicle and defendant responded by saying, “okay.” A DVD from a police cruiser camera confirmed the verbal exchange. While walking back to his patrol car to check the Law Enforcement Information Network (LEIN), the officer

shined his flashlight in the back of defendant's car. We note that the mere use of a flashlight does not constitute a search when the contents revealed would have been visible in ordinary daylight. *People v Edwards*, 73 Mich App 579, 583; 252 NW2d 522 (1977). Moreover, consent had already been given by that time and nothing of relevance was observed through use of the flashlight. After running the LEIN check on defendant, the officer and a second officer went to defendant's vehicle and conducted the search, which produced the evidence alluded to above.

Based on the short but clear conversation between the officer and defendant, an objective and reasonable person would find that the officer had general, unlimited consent to search defendant's car. At the evidentiary hearing, defense counsel attempted to box the officer into a corner, seeking to elicit testimony that the officer was searching for something specific in relationship to his request for consent. The officer simply responded, "I asked for a consent to search the car." The officer acknowledged that the conversation was focused on alcohol prior to the request for consent; however, he did not testify, nor does the DVD show, that the actual request was framed in terms of consent solely to search for alcohol.

Defendant relies on and emphasizes his own testimony at the hearing where he stated, "[the officer] asked me to search my vehicle for open alcohol beverage[s]." This statement is not heard in the DVD of the stop and arrest, and defendant neglects to inform this Court that, on cross-examination, defendant admitted that the DVD did not reveal the words allegedly spoken by the officer. Defendant also conceded that he never told the officer that he could only search the car for alcohol. Although defendant claims that he believed the officer was only looking for alcohol, the footage from the DVD clearly reflects that there were no limitations with respect to the parameters of the search and could have reasonably involved "anything illegal." We note that after the officer obtained the unlimited consent to search the vehicle, went to his patrol car to run the LEIN, returned to defendant's vehicle, and before the search actually commenced, the officer made the statement that he was going to check the car to make sure that there was no open alcohol in the vehicle. However, at this point, and regardless of the statement, the officer had already obtained the unlimited consent to search defendant's car. Furthermore, searching the center console and the cigarette boxes inside the car was within the general scope of the consent given by defendant. In *United States v Ross*, 456 US 798, 825; 102 S Ct 2157; 72 L Ed 2d 572 (1982), the Court determined that general consent to a warrantless search extended to containers, even those not in plain sight.

Moreover, the smell of alcohol provided probable cause to search the car's center console regardless of any consent,¹ and even if the consent to a search was limited to a search for alcohol, as claimed by defendant, such consent would also provide a reasonable basis to search the console. *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000); *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). Upon finding the gun in the center console, there was probable cause to search for weapon-related evidence in the vehicle, and the police were of course free to continue searching for alcohol. It would be reasonable to search for

¹ Automobile searches are another exception to the warrant requirement. *In re Forfeiture*, 443 Mich at 266.

items such as ammunition in the cigarette boxes, one of which contained cocaine. In fact, a cigarette box, which appears to have been a carton and not an individual pack, could also conceal alcohol. Additionally, the search did not require the exclusion of the evidence, as it was a search made in good faith incident to arrest.² While the search may have violated the principles in *Arizona v Gant*, 566 US __; 129 S Ct 1710; 173 L Ed 2d 285 (2009), relative to searches incident to arrest, *Gant* had not been decided when the search was conducted here. The Supreme Court has now ruled that although *Gant* is to be applied retroactively, the good-faith exception to the exclusionary rule is applicable where officers relied on the ruling in *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981),³ at the time of the search at issue. *Davis v United States*, 564 US __; 131 S Ct 2419; __ L Ed 2d __ (2011). The Court held that “searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.” *Id.* at 2423. Because the present incident took place before *Gant* was decided, the good-faith exception to the exclusionary rule applies. There is no evidence in the record even remotely suggesting that the police searched defendant’s vehicle in any manner other than good faith.

Defendant next argues that he could not be convicted of CCW under MCL 750.227⁴ unless he had been properly notified pursuant to MCL 28.428⁵ that his CCW license had been

² A search incident to arrest is another exception to the warrant requirement. *In re Forfeiture*, 443 Mich at 266.

³ *Belton* was widely understood to have authorized an automobile search incident to arrest of a recent occupant, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. See *Gant* generally.

⁴ The CCW statute, MCL 750.227, provides in pertinent part:

(2) A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such a license.

(3) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than \$2,500.00.

⁵ MCL 28.428 provides in relevant part:

(2) Except as provided in subsections (3), (4), and (5), a license shall not be revoked under this section except upon written complaint and an opportunity for a hearing before the board. The board shall give the individual at least 10

days' notice of a hearing under this section. The notice shall be by personal service or by certified mail delivered to the individual's last known address.

(3) If the concealed weapon licensing board is notified by a law enforcement agency or prosecuting official that an individual licensed to carry a concealed pistol is charged with a felony or misdemeanor as defined in this act, the concealed weapon licensing board shall immediately suspend the individual's license until there is a final disposition of the charge for that offense and send notice of that suspension to the individual's last known address as indicated in the records of the concealed weapon licensing board. The notice shall inform the individual that he or she is entitled to a prompt hearing on the suspension, and the concealed weapon licensing board shall conduct a prompt hearing if requested in writing by the individual. The requirements of subsection (2) do not apply to this subsection.

(4) The concealed weapon licensing board that issued a license to an individual to carry a concealed pistol shall revoke the license if the board determines that the individual is not eligible under this act to receive a license to carry a concealed pistol. The concealed weapon licensing board shall immediately send notice of the fact of and the reason for the revocation order under this subsection by first-class mail to the individual's last known address as indicated on the records of the concealed weapon licensing board. The requirements of subsection (2) do not apply to this section.

* * *

(7) A suspension or revocation order or amended order issued under this section is immediately effective. However, an individual is not criminally liable for violating the order or amended order unless he or she has received notice of the order or amended order.

(8) If an individual is carrying a pistol in violation of a suspension or revocation order or amended order issued under this section but has not previously received notice of the order or amended order, the individual shall be informed of the order or amended order and be given an opportunity to properly store the pistol or otherwise comply with the order or amended order before an arrest is made for carrying the pistol in violation of this act.

(9) If a law enforcement agency or officer notifies an individual of a suspension or revocation order or amended order issued under this section who has not previously received notice of the order or amended order, the law enforcement agency or officer shall enter a statement into the law enforcement information network that the individual has received notice of the order or amended order under this section.

suspended and revoked; therefore, the trial court erred in denying his pretrial motion to dismiss the charges and erred in crafting the jury instructions.

A trial court's decision to deny a motion to dismiss criminal charges is reviewed for an abuse of discretion; however, we review de novo underlying questions of law associated with the motion. *People v Owen*, 251 Mich App 76, 78; 649 NW2d 777 (2002); *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001). Jury instructions or claimed instructional errors involving legal questions are reviewed de novo, although a court's determination that an instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). With respect to preserved constitutional issues, which include claims of inadequate jury instructions relative to the elements of a crime, the Court must rule on whether or not any error was harmless beyond a reasonable doubt. *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2 444 (1995); *People v Carines*, 460 Mich 750, 761, 774; 597 NW2d 130 (1999); *People v Wright*, 408 Mich 1, 26-30; 289 NW2d 1 (1980).

The trial court did not err in denying defendant's pretrial motion to dismiss, given that, even if MCL 28.428 applied to a CCW charge brought under MCL 750.227, it is evident to us from the record that the licensing board was invoking subsection (3) of MCL 28.428 in support of the suspension and subsection (4) for the revocation.⁶ Therefore, personal service of the suspension notice or service of the notice by certified mail was not necessary. Moreover, assuming that subsection (2) was applicable and consistent with subsections (7) – (9) of MCL 28.428, even if personal service or certified mail was not utilized under subsection (2), verbal notice given by a law enforcement agency or police officer can suffice as "notice" where a defendant is later stopped and is still carrying a concealed weapon despite the previous notice, thereby allowing an arrest and criminal liability. There was evidence of verbal notice prior to the date on which defendant was arrested for the crimes at issue here. Accordingly, dismissal of the CCW charge would not have been proper.

With respect to the CCW jury instruction, assuming error relative to the issue of notice based on MCL 28.428 or constitutional due process principles, we find that the claimed error was harmless beyond a reasonable doubt. Defendant was permitted by the trial court to argue lack of notice as a theory of defense in regard to the CCW charge, and the court itself instructed the jury on said theory.⁷ Therefore, even if the specific CCW instruction was problematic or confusing on the issue of notice, the jurors well understood that inadequate notice would support

⁶ The suspension notice was dated the same day that defendant was arrested for malicious destruction of property. Also, there was no evidence of a "written complaint," an immediate suspension was issued, which is not provided for in subsection (2), and a regular mailing was utilized. We do agree, however, that a suspension pursuant to subsection (3) was improper because the prosecution declined to charge defendant with malicious destruction of property. Defendant never showed up at the scheduled hearing on the suspension.

⁷ We note that the jury was present when the trial court overruled the prosecutor's objection that examination of defendant on notice matters was irrelevant.

an acquittal; why else would defendant argue lack of notice and the court set forth the theory. The jurors likely considered and rejected the argument that defendant was not on notice of the suspension and revocation. Furthermore, there was strong evidence that defendant received notice, such that the giving of a CCW instruction that more adequately addressed the notice issue would still have resulted in a guilty verdict. An officer who pulled defendant over about six months earlier than the stop involved in the case at bar testified that he gave defendant notice of the suspension. The officer further testified that the LEIN check relative to that earlier stop indicated that defendant had previously been given verbal notice of the suspension. Considering that defendant was arrested and charged in that case with carrying a loaded firearm in a vehicle other than a pistol, MCL 750.227c, and later pled guilty, it would defy logic to believe that the suspension and revocation never came to defendant's attention during that whole process. Additionally, the suspension letter and the revocation letter from the licensing board to defendant were admitted into evidence. Any presumed instructional error was harmless beyond a reasonable doubt.

Finally, defendant argues that there were multiple instances of ineffective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law, which this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Where claims of ineffective assistance of counsel were not preserved below, as is the case here, our review is limited to errors and mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Effective assistance of counsel is presumed and the defendant has a heavy burden to prove otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). The Sixth Amendment entitles criminal defendants to effective assistance of counsel, that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms. *Bobby v Van Hook*, 558 US ___; 130 S Ct 13; 175 L Ed 2d 255 (2009). As the United States Supreme Court established in *Strickland v Washington*, 466 US 668, 686-687; 104 S Ct 2052; 80 L Ed 674 (1984):

[T]he right to counsel is the right to the effective assistance of counsel. Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance.

* * *

[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

* * *

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant

must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. [Citations omitted.]

The defendant must show that but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different and the result that did occur was fundamentally unfair or unreliable. *Id.* at 694; *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). The defendant must overcome the presumption that the challenged action or inaction was sound trial strategy, and this Court will not substitute its judgment for that of counsel in hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *Leonard*, 224 Mich App at 592.

In the present case, defendant argues that he was denied the right to the effective assistance of counsel when trial counsel did not present evidence at the pretrial hearing on the motion to dismiss and at trial showing that he was never charged with malicious destruction of property, despite being arrested for the offense. Subsection (3) of MCL 28.428 only requires notice by ordinary mail sent to a person's last known address, but it also clearly indicates the necessity of a charge being brought against the license holder for committing a felony or misdemeanor; an arrest alone does not suffice. Accordingly, defendant's argument here is that counsel was ineffective at the hearing and trial for not presenting evidence and not arguing that the suspension and revocation were legally invalid. Contrary to defendant's argument, the pretrial motion to dismiss touched on the lack of charges emanating from the arrest for malicious destruction of property, and defense counsel attached as exhibits the documents showing that defendant was never charged with a crime. Defendant is correct, however, that the evidence and argument was not presented at trial. Nevertheless, defendant fails to explain or provide an analysis with respect to why he is entitled to collaterally attack the validity of the suspension and revocation at his criminal trial, especially when there was substantial evidence that defendant received notice and no indication that defendant ever approached the licensing board about its actions. And again, any issues concerning notice do not warrant reversal. The requisite prejudice has not been established.

Defendant also argues ineffective assistance of counsel relative to counsel's failure to be prepared with caselaw in support of the argument that the officer's brief use of a flashlight to quickly glance into the car as he walked by it constituted a constitutionally deficient search. This argument fails because there was no resulting prejudice to defendant, where the officer's action did not implicate Fourth Amendment protections, *Edwards*, 73 Mich App at 583, where there was probable cause to glance into the car, where nothing of relevance was observed by the officer, and where defendant had already given his consent for the officer to search the vehicle.

Finally, defendant argues that counsel was ineffective at the sentencing hearing, where OV 15 was initially scored at zero, the prosecutor stated that it should be scored at 5 points, defense counsel objected to any change but could not articulate a sound basis for the objection

and indicated that she was not prepared to address the matter, and where the court changed the score to 5 points. The first problem with this argument is that defendant does not claim that a score of 5 points was legally incorrect. Further, defendant does not argue that the scoring difference affected the sentencing range. Finally, a score of 5 points was proper, given that the “offense involved the . . . possession with intent to deliver . . . any . . . controlled substance[.]” MCL 777.45(1)(g). Accordingly, an ineffective assistance claim was not established.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot