

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20080933-CA	
v.)		
)	F I L E D	
Victor Clinton,)	(March 11, 2010)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2010 UT App 54</td></tr></table>	2010 UT App 54
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Second District, Ogden Department, 071901735
The Honorable Pamela G. Heffernan

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City,
for Appellee

Before Judges Orme, Thorne, and Bench.¹

BENCH, Senior Judge:

Defendant Victor Clinton appeals his conviction for possession of a controlled substance within a correctional facility, see generally Utah Code Ann. § 58-37-8(2)(a), (e) (2007). Defendant claims ineffective assistance of counsel and plain error arising out of his trial counsel's failure to move to suppress evidence that was the product of an allegedly illegal search and seizure.² Specifically, Defendant argues that he was

¹The Honorable Russell W. Bench, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-103(2) (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

²Defendant purports to raise the search and seizure issue under both the federal and state constitutions, but he makes only a cursory reference to the Utah Constitution, without any separate analysis. We "refrain[] from engaging in state constitutional law analysis unless an argument for different analyses under the state and federal constitutions is briefed," (continued...)

detained without reasonable suspicion when a voluntary encounter allegedly escalated into an illegal involuntary stop.

To prevail on an ineffective assistance of counsel claim, Defendant "'must show that counsel's performance was deficient'" and "'that the deficient performance prejudiced the defense.'" Nicholls v. State, 2009 UT 12, ¶ 36, 203 P.3d 976 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)). Defendant "bears the burden of establishing that his trial counsel was ineffective." Id. (internal quotation marks omitted). "[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality. . . . born[e] out by the record." Id. (citation and internal quotation marks omitted). "[W]e are not fact-finders and do not investigate factual allegations" Id. Consequently, we will only review a claim for ineffective assistance of counsel if the "record is adequate to permit decision of the issue." Id. (internal quotation marks omitted).

Neither requesting identification nor conducting a warrants check is a per se escalation from a voluntary encounter into an involuntary stop. See State v. Adams, 2007 UT App 117, ¶ 11, 158 P.3d 1134; Salt Lake City v. Ray, 2000 UT App 55, ¶¶ 12, 13 n.2, 998 P.2d 274. Rather, a voluntary "encounter becomes a[n involuntary] stop when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave." Adams, 2007 UT App 117, ¶ 10 (internal quotation marks omitted). Necessarily, "the legal analysis of a search and seizure case is highly fact dependant." Id. ¶ 2. And "[h]ere, the record lacks evidence sufficient to support [Defendant]'s ineffective assistance of counsel claim," see Nicholls, 2009 UT 12, ¶ 36, based on his assertion that he was subject to an illegal involuntary stop.

Although Defendant alleges that the police officer confiscated his identification and detained him while conducting a warrants check, there are no facts in the record to support this allegation. As a result, we must "construe[this deficiency in the record] in favor of a finding that [trial] counsel performed effectively." See State v. Litherland, 2000 UT 76, ¶ 17, 12 P.3d 92. Defendant also raises a plain error claim supported by an identical argument, which must similarly fail due to the factual deficiency in the record. See generally State v. Parker, 2000 UT 51, ¶¶ 7, 10, 4 P.3d 778 (requiring a defendant

²(...continued)

State v. Worwood, 2007 UT 47, ¶ 16, 164 P.3d 397 (internal quotation marks omitted), and accordingly decline to address Defendant's state constitutional argument.

claiming plain error to prove an error occurred that was both obvious and harmful and noting the similarity between the plain error test and the ineffective assistance of counsel test).

Accordingly, we affirm.

Russell W. Bench,
Senior Judge

WE CONCUR:

Gregory K. Orme, Judge

William A. Thorne Jr., Judge