

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVON LEWIS BIVINS,

Defendant-Appellee.

UNPUBLISHED

October 9, 2012

No. 305555

Wayne Circuit Court

LC No. 11-003928-FH

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of firearm,¹ carrying a concealed weapon (CCW),² and possession of a firearm during the commission of a felony (felony-firearm).³ Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 3 to 5 years for his felon in possession of firearm and CCW convictions, and 2 years for his felony-firearm conviction. Defendant appeals by right. We affirm.

I. BASIC FACTS

Defendant was riding in the front passenger seat of a vehicle seen leaving a gas station where the police suspected narcotics activity occurred. Police attempted to effectuate a traffic stop because defendant and the driver were not wearing seat belts. Police signaled the vehicle several times to pull over, but it continued on for several blocks. Before the vehicle stopped, police observed defendant making furtive movements, as if he was trying to conceal something under the front passenger seat. After the vehicle stopped, the driver was taken into custody for driving with a suspended license. Police then searched underneath the front passenger seat, where they found a revolver.

II. ANALYSIS

¹ MCL 750.224f.

² MCL 750.227.

³ MCL 750.227b.

Defendant first argues that he was denied the effective assistance of counsel when his trial counsel did not move to suppress the firearm seized during the search of the automobile. We disagree.

“Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.”⁴ “The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.”⁵ Where, as here, claims of ineffective assistance of counsel have not been preserved, this Court’s review is limited to errors apparent on the record.⁶

Determining whether a defendant’s trial counsel was ineffective requires conducting a two-stage inquiry. First, “the defendant must show that counsel’s performance fell below an objective standard of reasonableness.”⁷ “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.”⁸ Second, “the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable.”⁹

“The basic rule is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”¹⁰ However, prior to ascertaining whether a search was proper under both the United States and Michigan Constitutions, a defendant must have standing to challenge the search.¹¹ “Regarding vehicles, where a stop of a vehicle is legal, a passenger with no property or possessory interest in the

⁴ *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 481; 684 NW2d 686 (2004).

⁵ *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁶ *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

⁷ *Armstrong*, 490 Mich at 290, citing *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁸ *Armstrong*, 490 Mich at 290, citing *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

⁹ *Armstrong*, 490 Mich at 290, citing *Strickland*, 466 US at 694-696.

¹⁰ *People v Earl*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 302945, issued June 19, 2012), slip op p 2, quoting *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009) (citations and internal quotation marks omitted by *Earl*).

¹¹ *Id.*

vehicle does not have standing to contest the search of the vehicle.”¹² Here, defendant neither challenges the legality of the stop, nor does he assert a property or possessory interest in the automobile.¹³ Accordingly, defendant does not have standing to challenge the search. Therefore, counsel was not ineffective for failing to file a motion to suppress.¹⁴

Next, defendant argues that counsel was ineffective because counsel failed to object expert testimony relating to fingerprints. Again, we disagree. The expert’s testimony was admissible under MRE 702 because it assisted the jury in understanding the evidence. The arresting officers testified that they observed defendant making furtive movements as if he was trying to conceal something under the front passenger seat. A subsequent search uncovered a revolver; however, no fingerprints were found on the firearm. The expert testimony, which explained that fingerprints are not always recoverable from firearms, tended to make it more probable that defendant placed the gun under the seat, and thus carried the gun and was in actual possession of it.¹⁵ Therefore, counsel was not ineffective for failing to object.¹⁶

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

¹² *Id.*

¹³ *Id.*

¹⁴ See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”)

¹⁵ See MRE 401. See also *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982) instructs as follows:

The case law indicates that the concepts of “carrying” and “possession” have much in common. . . . [A] defendant carries a weapon when he exercises some element of intentional control or dominion over it. Most jurisdictions have held that this control need not amount to “actual possession” but that it encompasses “constructive possession” of the forbidden instrument as well. [Deletion added.]

¹⁶ *Ericksen*, 288 Mich App at 201.