

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY READY,

Defendant-Appellant.

UNPUBLISHED

April 8, 2003

No. 238392

Wayne Circuit Court

LC No. 01-004049-01

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of possession of a controlled substance (cocaine) less than twenty-five grams, MCL 333.7403(2)(a)(v). He was sentenced to two years' probation and placed on a tether for the first six months.¹ Defendant appeals as of right. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

This case arises out of a police search of an apparently abandoned drug house, wherein defendant was arrested for possession of cocaine that was discovered during a search of his person. Defendant was searched, according to police, incident to an arrest for being in the house without the owner's permission. Police had conducted surveillance on the house for a couple of days following complaints of narcotic sales, and another individual had been arrested the night before defendant's arrest. The police entered the house at approximately 1:00 a.m. and arrested defendant along with a male friend who was also arrested for drug possession. Defendant had not been observed previously at the house.

Police officers testified that no one lived in the house and that it was vacant for as long as they could remember. According to police, the house was only used by persons engaged in illegal drug activities. Defendant told officers that he did not live in the house and that he did not know who lived in or owned the house. Most of the windows were either boarded up or broken, there was no running water, the doors had no locks, and there was no heat supplied to the home. The house had no furniture, sink, countertop, stove, or refrigerator, and the only electricity came from a bypassed electric meter. There was no testimony regarding the actual owner of the house,

¹ We note that defendant subsequently violated his probation and was sentenced to 120 days in jail and 18 months' continued probation.

although a defense witness, the individual arrested with defendant, stated that someone named “Tree” stayed there on occasion. Police opined that the house was uninhabitable.

The police did not obtain a search warrant before entering the premises; however, defendant did not directly challenge the search below. On appeal, defendant argues that the search was unconstitutional because the police lacked a search warrant and failed to knock and announce before entering the house; therefore, the fruits of the search, i.e., the cocaine, should have been excluded. Additionally, defendant argues that there was a lack of exigent circumstances that might have permitted the search without a warrant. Finally, defendant argues that trial counsel was ineffective for failing to move to suppress the evidence on the basis that the police lacked a search warrant and on the basis that the arrest, for being in the home without the owner’s permission, was not made on probable cause because no owner was ever identified. Defendant’s arguments lack merit.

In light of defendant’s failure to preserve the suppression issue, our review is for plain error. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).² However, because defendant also wraps the issue around an ineffective assistance of counsel argument, we must take into consideration principles concerning such a claim. In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the

² The *Carines* Court explained:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “ ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Carines*, *supra* at 763 (citations omitted; alteration in original).]

existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther*³ hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Turning to the substantive questions presented, we conclude that defendant lacked the expectation of privacy necessary to challenge the search of the house and that it was not improper to search defendant because it was incident to a lawful arrest. Therefore, there was no plain error with regard to the introduction of the evidence, and there was no ineffective assistance of counsel because counsel was not required to pursue a meritless and futile motion. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

The right to be protected against unreasonable searches and seizures is guaranteed in both the United States Constitution and the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11; *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). However, not all searches implicate the Fourth Amendment. *Taylor, supra* at 404. In *Taylor*, a case very similar to the case at bar, this Court stated:

Because the Fourth Amendment protects people, as opposed to places or areas, the United States Supreme Court emphasized that a search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy.

* * *

An expectation of privacy is legitimate only if the individual exhibited an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the intrusion. [*Id.* at 404-405 (citations omitted).]

The *Taylor* panel continued by stating that there is no expectation of privacy in abandoned property, and because Fourth Amendment protections only apply where there is such an expectation of privacy, the defendant bears the burden of showing that the property searched was not abandoned. *Id.* at 406. This Court then stated:

With respect to abandoned or vacant structures, objective factors pertinent to the totality of the circumstances inquiry must be evaluated. Case by case, these factors will become relevant to determine whether police officers must secure a warrant before entering: (1) the outward appearance, (2) the overall condition, (3)

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure. [*Id.* at 407]

Here, based on the testimony presented at the bench trial and referenced by us above, it is clearly evident, when weighing the factors enunciated in *Taylor*, that the house in which defendant was apprehended had been abandoned. In fact, most if not all of the factors weighed in favor of an abandonment finding. Under the totality of the circumstances, there was insufficient evidence that defendant had a reasonable or justifiable expectation of privacy within the abandoned structure.

“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment.” *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). The search of a person incident to an arrest requires no additional justification. *Id.* The scope of a search incident to an arrest properly extends to the opening of containers found within the control area of the person arrested.⁴ *Id.* “A search conducted immediately before an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search.” *Id.* at 115-116. “Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Id.* at 115.

Simply because the police were unaware of the true owner’s identity or whereabouts, it did not mean that the police lacked probable cause to arrest defendant. The property was owned by someone or some entity other than defendant, and defendant told police that he did not live there and that he did not know who lived in or owned the house. Defendant did not claim that he had any legal right to be inside the house, nor that he had permission from someone who had authority to allow him on the premises. Additionally, there existed a history of persons trespassing on the property to use controlled substances, and defendant’s arrest occurred at one o’clock in the morning. In light of these facts, police had probable cause to arrest defendant and search him.

There is no basis to reverse defendant’s conviction for possession of a controlled substance.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen

⁴ The cocaine at issue was found in a cigar tube in the pocket of defendant’s sweat pants.