

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 15, 2014

v

STEVE ALPHONSO DURHAM,  
Defendant-Appellant.

No. 311852  
Wayne Circuit Court  
LC No. 11-012856-FH

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Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals his bench trial conviction of carrying a concealed weapon in a motor vehicle (CCW) under MCL 750.227(2), and his accordant one year probation. Specifically, he contends that: (1) his trial counsel gave him ineffective assistance; and (2) the trial court erred when it denied his motion to suppress the handgun. For the reasons stated below, we affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. PRESERVATION AND STANDARD OF REVIEW

A timely motion for a new trial that raises the issue of ineffective assistance of counsel is sufficient to preserve the issue for appellate review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Alternatively, a criminal defendant may request a *Ginther* hearing, to make a separate factual record supporting the claim of ineffective assistance of counsel, to preserve the issue for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant did not move for a new trial or request a *Ginther* hearing, this issue is not preserved on appeal. Unpreserved claims of ineffective assistance of counsel can still be reviewed, but our review is limited to errors apparent on the record below. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Generally, the trial court’s findings of fact are reviewed for clear error and the questions of constitutional law are reviewed de novo. *Id.*

B. ANALYSIS

Effective assistance of counsel is presumed and the challenging defendant bears the heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314

(2009). In order to show ineffectiveness of counsel, a defendant generally must show that: (1) counsel’s performance did not meet an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel’s errors, the results of the proceeding would be different; and (3) the result that did occur was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). This Court will not substitute its judgment for that of trial counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defense counsel has wide discretion as to matters of trial strategy because counsel may be required to take calculated risks to win a case. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). When claiming ineffective assistance due to counsel’s unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Trial counsel’s lack of experience alone does not establish ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001). A claim of ineffective assistance of counsel includes both a performance component and a prejudice component, and both prongs must be fulfilled. *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Id.* at 400-401, quoting *Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Here, defendant illogically asserts that his trial counsel gave him ineffective assistance when trial counsel supposedly: (1) failed to preserve his affirmative defense of inoperability; and (2) used the inoperability defense when this Court has already abolished it as a defense to a charge of carrying a concealed weapon. We address each issue in turn.

#### 1. PRESERVING THE INOPERABILITY “DEFENSE”

Defendant’s argument that his trial attorney failed to preserve his “inoperability defense”—in other words, that the firearm was “inoperable,” and thus somehow not able to serve as the basis for a CCW conviction under MCL 750.227<sup>1</sup>—is based on his trial attorney’s decision to move to admit a state police report on the firearm. Unfortunately for defendant, the police report revealed that the gun *was* operable at the time of testing. Defendant’s assertions focus on trial counsel’s conduct in making the motion to admit: specifically, trial counsel’s legal assumptions and statements, which allegedly reveal his inexperience and inability to understand the rules of evidence.

These contentions are unconvincing. Defendant was not prejudiced by defense counsel’s motion to admit the police report. The only admissible evidence defendant proffered to show that the gun was inoperable was his own testimony that he noticed rust on the gun, that there had

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<sup>1</sup> As we note later in the opinion, it is doubtful whether the operability of the firearm is relevant to a CCW conviction.

been a bullet lodged in the cylinder, and that the trigger would not budge. This testimony contradicted the testimony of one of the arresting officers, which stated that the gun was fully loaded when it was recovered from defendant's vehicle, and that the bullets were easily unloaded when the officer attempted to secure the weapon. Further, the trial judge found that defendant's testimony was "highly incredible and not believable." Therefore, the only evidence that defendant offered regarding the inoperability of the gun was his subjective belief that it would not fire, which the trial court did not find credible. The police officer's statement that the gun was found loaded and that he had little difficulty in unloading the bullets supports the prosecution's argument that the gun was loaded, and therefore, operable. The trial court heard other, credible testimony that the gun was operable, and thus had a legitimate basis to conclude that it was.<sup>2</sup>

Defendant's protestation that his trial attorney should have consulted a firearms expert, presumably to support his claim that the gun was inoperable, is equally unavailing.<sup>3</sup> There is no evidence that defendant was prejudiced by his counsel's failure to consult a firearms expert, especially because it may have been fruitless in light of the police report that said the gun was operable.

## 2. ASSERTION OF THE INOPERABILITY "DEFENSE"

After accusing his trial attorney of providing ineffective assistance for failing to preserve the inoperability "defense," defendant inconsistently asserts that the attorney's argument of that defense at trial also constitutes ineffective assistance, because it is not a valid defense to MCL 750.227(2) violations.

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<sup>2</sup> Even if the trial judge had found defendant's testimony credible, the prosecution could have moved to adjourn the trial and procure the lab technician in order to admit the Michigan state police laboratory report, which stated that the gun was operable, in its rebuttal case. See MCL 767.40a(4) ("The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties"). Defendant was aware of the existence of the lab report and its conclusion that the gun was operable, so he would not have been prejudiced had the prosecution requested to add the lab technician. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). Further, the necessity of calling the lab technician was not known until defendant offered the defense of inoperability in his case, so the prosecution would have had good cause to move for the late endorsement of the lab technician as a witness. *Id.* Therefore, defendant was not prejudiced when his trial counsel moved to admit the lab report and this conduct cannot support a finding of ineffective assistance of counsel.

<sup>3</sup> As noted, defendant did not request a *Ginther* hearing, so there is no separate factual record supporting the claim of ineffective assistance of counsel regarding defense counsel's apparent failure to consult a firearms expert. *Ginther*, 390 Mich at 443. Again, when the trial court does not conduct a hearing to determine the existence of ineffective assistance of counsel, this Court's review is limited to the facts on the record. *Wilson*, 242 Mich App at 352.

Leaving aside the logical absurdity and Catch 22–like nature of this assertion—how can trial counsel be ineffective for both: (1) failing to preserve a defense that is not valid; and (2) arguing said invalid defense at trial?—defendant’s argument is simply wrong. There is no published opinion of our Court or the Michigan Supreme Court that explicitly states that inoperability is not a defense to CCW violations under MCL 750.227(2). *People v Peals*, 476 Mich 636, 642; 720 NW2d 196 (2006) strongly suggests that the operability of a firearm is irrelevant for purposes of a CCW conviction under MCL 750.227—in other words, a defendant who possessed an inoperable concealed firearm may be convicted of violating MCL 750.227(2). An unpublished opinion of our Court has said this explicitly. *People v Fox*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2007 (Docket No. 268410). But unpublished opinions of our Court are not binding precedent, and the trial court was not required to follow this decision. MCR 7.215(C)(1). Accordingly, at worst, defense counsel had a colorable (if highly doubtful) claim that inoperability still exists as a defense to the charge against defendant. Defense counsel could have been taking a calculated risk, which falls under counsel’s wide discretion as to matters of trial strategy. *Heft*, 299 Mich App at 83.

In any event, defendant’s trial counsel convinced one person that the inoperability defense was still valid: the trial judge, who evidently believed that the prosecution needed to show that the gun was operable to sustain a conviction. This piece of advocacy is hardly the work of an ineffective lawyer—in fact, it speaks to trial counsel’s skill, as he managed to convince a trial judge of the relevancy of a defense that may or may not exist. Therefore, defense counsel’s assertion of the defense of inoperability did not fall below an objective standard of reasonableness under prevailing professional norms.

## II. SEARCH AND SEIZURE<sup>4</sup>

The lawfulness of a search or seizure depends upon its reasonableness, *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001), and whether a search is reasonable depends on the totality of the circumstances, *People v Collins*, 298 Mich App 458, 467; 828 NW2d 392 (2012). As a general rule, searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless the police conduct falls under one of the established exceptions to the warrant requirement. *Beuschlein*, 245 Mich App at 749.

The automobile exception to the warrant requirement allows searches of automobiles when there is probable cause. *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999). The facts needed to establish this exception are those that would establish sufficient probable cause to issue a warrant, based upon the information known to the officers at the time of the search. *Id.* “In order to effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of

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<sup>4</sup> This Court reviews the underlying factual findings at a suppression hearing for clear error, but reviews the ultimate ruling on a motion to suppress evidence de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Johnson*, 466 Mich 491, 497-98; 647 NW2d 480 (2002).

law.” *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009), quoting *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). The reasonableness of an officer’s suspicion is determined on a case-by-case basis, in light of all the surrounding circumstances and based on common sense. *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012). An officer may make reasonable inferences from the surrounding circumstances based upon his experiences. *People v Jones*, 260 Mich App 424, 429; 678 NW2d 627 (2004).

Here, defendant claims that the trial court erred when it denied his motion to suppress the handgun, because he says it was the result of an unlawful search and seizure. At the evidentiary hearing, one of the arresting officers testified that, on the day in question, he made a valid traffic stop after defendant ran a red light. After taking defendant’s driver’s license and running it through the law enforcement information network system, the officer saw defendant try to push something back under the driver’s seat. As he got closer, the officer saw what looked like the wooden handle of a handgun that defendant was trying to kick underneath the seat. At this point, the officer ordered defendant out of the vehicle and placed defendant in handcuffs. He then went back to the driver’s seat of defendant’s vehicle, recovered the handgun, and unloaded it. After defendant was arrested, he was also given a traffic citation for running the red light.

Defendant’s testimony provided a different version of events, but defendant does not contend that, if believed, the police officer’s testimony involved actions that constituted an unlawful search and seizure. Instead, he merely argues that the trial judge clearly erred in accepting the officer’s version of events over his own. This Court will rarely overturn a trial court’s determination when the only issue is the credibility of a witness, *People v Crump*, 216 Mich App 210, 215; 549 NW2d 36 (1996), and questions regarding the credibility of witnesses are left to the trier of fact, *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified and remanded in part on other grounds 457 Mich 885 (1998). Therefore, it cannot be concluded that the trial judge clearly erred in finding the police officer more credible than defendant.

Affirmed.

/s/ Cynthia D. Stephens

/s/ Henry William Saad

/s/ Mark T. Boonstra