

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 24, 2014

v

ANTONIO DESHON BERNETTE,

Defendant-Appellant.

No. 313917
Wayne Circuit Court
LC No. 12-000594-FH

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of breaking and entering a building with intent to commit larceny, MCL 750.110, possession of burglar's tools, MCL 750.116, malicious destruction of a building between \$1,000 and \$20,000, MCL 750.380(3)(a), resisting or obstructing a police officer, MCL 750.81d(2), and larceny in a building, MCL 750.360. He was sentenced, as a habitual offender, second offense, MCL 769.10, to 36 to 180 months' imprisonment for the breaking and entering and possession of burglar's tools convictions, and 24 to 72 months' imprisonment for the malicious destruction, resisting a police officer, and larceny in a building convictions. Defendant appeals by right, and we affirm.

This prosecution stems from a break-in of a liquor store. Detroit Police officers responded to the scene twice in the early morning hours of December 28, 2011. On the first visit to the scene, the officers did not see anyone, but observed that bricks had been removed from the rear of the building. One of the officers testified that it looked "as if someone may have been banging or trying to protrude into the location." When the officers returned a little over an hour and a half later, they observed that the hole had been enlarged. The officers found a man standing 10 to 15 feet away from the hole. As the officers approached the man, other individuals, including defendant, emerged from the building through the hole. An officer ordered defendant to stop, but he fled the scene. Defendant was ultimately apprehended after a foot chase and taken to the police station.

At the police station, defendant asked a cell block supervisor if his girlfriend could come and retrieve from his property the keys to a rental car because he was concerned that the car would not be returned on time. In light of his past experience, the supervisor thought the request was odd and opined that most individuals engaged in breaking and entering commonly kept a vehicle near the scene of the crime. Police officers located the rental car "one block over right at

the same alleyway” from the store. One officer testified that by looking through the windows into the car she could see “burglary tools,” including “a large sledge hammer and bolt cutters” in the back seat. The car was driven by police back to the police station. At the police station, another officer observed a large sledge hammer and some bolt cutters through the windows. This officer also saw rotary saws through the windows of the hatchback. These items were seized and admitted into evidence at trial without objection.

Defendant argues that the warrantless search of his car violated his constitutional right to be free from unreasonable searches and seizures. Defendant did not raise this issue below, and therefore, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

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 affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id.* at 763-764 (citations and internal quotation marks omitted).]

Both the United States and Michigan Constitutions prohibit unreasonable search and seizure. US Const, Am IV; Mich Const 1963, art 1, § 11. “Evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule, or exclusion from being used against the defendant.” *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998), citing *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). Searches and seizures conducted without a valid warrant are per se unreasonable, unless the factual circumstances bring the search or seizure into one of the recognized exceptions to the warrant requirement. *Coolidge v New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971); *People v Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973). There are two recognized warrant exceptions at issue in this case—the automobile exception, *Chambers v Maroney*, 399 US 42, 52; 90 S Ct 1975; 26 L Ed 2d 419 (1970), and the plain view doctrine, *Arizona v Hicks*, 480 US 321, 326-327; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

The automobile exception “provides that a search without a warrant of an automobile is reasonable if probable cause exists to believe it contains contraband.” *People v Clark*, 220 Mich App 240, 242; 559 NW2d 78 (1996). Defendant argues that the automobile exception does not apply because no exigency existed given that he was in custody at the time of the search and seizure. “Although one of the justifications for the automobile exception is exigency, . . . if police have probable cause to search a car, they need not get a search warrant first even if they have time and opportunity to do so.” *Id.* (citation and internal quotation marks omitted).

The second applicable exception is the plain view doctrine. The plain view doctrine allows a police officer to seize items without a warrant if the items are in plain view from a location the officer is legally allowed to be, and the item's incriminating character is immediately apparent. *Horton v California*, 496 US 128, 136; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *People v Johnson*, 431 Mich 683, 691 n 5; 431 NW2d 825 (1988).

Defendant contends that the tools found in his car did not have an immediately apparent incriminating nature. Our Supreme Court has held that "'immediately apparent' means that without further search the officers have 'probable cause to believe' the items are seizable." *People v Champion*, 452 Mich 92, 102; 549 NW2d 849 (1996) (citation omitted). The meaning of "immediately apparent" is related to the definition of probable cause. Both the automobile exception and the plain view doctrine require the police to have probable cause.

[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband . . . ; it does not demand any showing that such a belief be correct or more likely true than false. Once an officer has probable cause to believe that an object is contraband, he may lawfully seize the object. The fact that the officer is ultimately wrong in his assessment of the object does not render the seizure unlawful. [*People v Custer*, 465 Mich 319, 332; 630 NW2d 870 (2001) (Opinion by MARKMAN, J.) (citations and internal quotation marks omitted).]

The plain view exception to the warrant requirement allowed the police officers to seize the tools. Officers were not required to be absolutely certain that the vehicle and the tools were used in the crime before seizing them. *Id.* A reasonably prudent person, viewing the totality of the circumstances, could conclude that there was a probability that defendant's vehicle and the tools that were visible inside of it were used in the commission of the crimes. Police officers received a call to the liquor store and saw the early stages of forced entry into the building. An officer testified that he observed broken rocks where the bricks were located on the building. There was a hole approximately the size of a fist in the wall. Less than two hours later, when the police were called to return to the scene, the wall contained a complete hole large enough for an adult male to pass through, and individuals, including defendant, were observed coming from inside the liquor store out of the hole. According to the police, a canvas of the immediate area revealed items commonly used in break-ins, including masks or caps, a flashlight, backpacks or bookbags, and work gloves. While in custody, defendant expressed concern about his rental vehicle. This caused the officers to return to the scene to locate the vehicle¹ within a block of the liquor store, and the tools were observed in plain view in the car. The hole in the building appeared to have been made with a sledge hammer. Bolt cutters, a sledge hammer, and saws were in plain view in defendant's car, and the tools did not appear to be new, but were dusty. Accordingly, defendant failed to establish plain error. *Carines*, 460 Mich at 763-764.

¹ Although defendant contends that the police had the only set of keys to the vehicle, there is no record evidence to support that assertion.

Defendant also argues that his attorney’s failure to move to suppress the tools constituted ineffective assistance of counsel. Because the items were legally seized and admitted at trial, this argument fails. “Trial counsel is not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, we note that the failure to seek suppression of the evidence found in the vehicle appeared to be deliberate trial strategy. One officer admitted on cross-examination that some of the tools could be used for home improvements. In closing argument, defense counsel argued that the vehicle was legally parked in front of a house where defendant resided, and the tools were used by defendant as a “working man.”² We do not second-guess matters of trial strategy with the benefit of hindsight. *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013).

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering

² The prosecution objected to both statements, alleging that there was no testimony to support the assertions.