STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARTAGNAN EDWARD TURNER,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 354978
Wayne Circuit Court
LC No. 18-005802-01-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for carrying a concealed weapon, MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to two to five years' imprisonment for the carrying a concealed weapon conviction, two to five years' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction. On appeal, defendant argues that his trial counsel was ineffective for failing to move to suppress the evidence of the handgun seized because it was the fruit of an illegal search. We affirm because the evidence was discovered during an inventory search that was consistent with the police department's standard policy and there is no evidence that other options provided by the policy were practically available. Further, there was no evidence that the search was actually an attempt to obtain evidence of criminal activity rather than a standard inventory search.

I. BACKGROUND

In the early morning hours of July 3, 2018, defendant was a passenger in a vehicle that was stopped in Dearborn by police because the driver was suspected of operating while intoxicated (OWI). The driver was arrested for OWI. Defendant was detained because he had an outstanding warrant out of Detroit. Defendant and the other passengers were placed in the back of patrol cars. The two officers on the scene conducted a search of the vehicle prior to its impoundment. During the search, the officers removed the contents of a backpack located in the backseat of the car, where defendant had been sitting. The backpack contained several pieces of mail addressed to

defendant and a loaded black handgun wrapped in a white towel. Defendant later admitted that the backpack belonged to him. Defendant was charged and convicted of illegally possessing the handgun as outlined above.

II. DISCUSSION

Defendant argues that his trial counsel was ineffective for failing to challenge the legitimacy of the search that led to the discovery of the handgun. We disagree.[1]

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Id*. at 687-688. Second, a defendant must show that he was prejudiced by counsel's deficient performance. *Id*. at 687. "The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

The United States Constitution and the Michigan Constitution prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Warrantless searches are presumptively unreasonable if they do not fall under a recognized exception to the warrant requirement. *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). One such exception to the warrant requirement is for a valid inventory search. *People v Houstina*, 216 Mich App 70, 77; 549 NW2d 11 (1996). The exception exists "because such a search is considered to be an administrative function rather than part of a criminal investigation." *Id*. Under the inventory search exception, the police may conduct a search of a vehicle that is going to be impounded following the arrest of the driver. *People v Toohey*, 438 Mich 265, 271-272; 475 NW2d 16 (1991).

"The legality of the inventory search that follow[s a driver's] arrest depends in part on whether the car was lawfully impounded." *People v Poole*, 199 Mich App 261, 265; 501 NW2d 265 (1993). Police may exercise discretion in determining whether to impound a vehicle so long as that decision is exercised "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Colorado v Bertine*, 479 US 367, 368; 107 S Ct 738; 93 L Ed 2d 739 (1987). "Police have the authority to promulgate administrative procedures to conduct [inventory] searches, unless violative of the reasonableness requirement of the Fourth Amendment." *Toohey*, 438 Mich at 278.

[1] An ineffective assistance of counsel claim can be preserved for appellate review by moving in this Court to remand for an evidentiary hearing, regardless of whether this Court grants or denies the motion. *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8. Defendant moved in this Court to remand for an evidentiary hearing, and this Court denied the motion. Thus, the issue is preserved, but because no evidentiary hearing was held, our review is limited to mistakes apparent on the record. *Id*.

Under the Dearborn Police impoundment policy, officers are authorized to impound a vehicle when the driver is being taken into custody and the vehicle would be left unattended on the street.[2] Defendant does not argue that this aspect of the department's policy is unreasonable or that it is unconstitutional on its face. He does assert that these circumstances may not have been met in this case and argues that rather than impounding the vehicle, the police officers should have left it where it was or inquired into other arrangements for the storage of the vehicle. The policy provides three circumstances in which an officer "may secure and leave the vehicle of an in-custody person" rather than impound the vehicle despite the arrest of the driver: (1) the driver gives permission to leave the vehicle, provided that it is legally parked in a public parking area or on private property; (2) the driver gives permission for another valid operator, who is present or can respond to the scene within a reasonable time, to drive the car away; or (3) there are other extenuating circumstances and a supervisor approves. Defendant suggests that there may be evidence that these circumstances existed, but he fails to proffer any evidence, or refer us to any source of such possible evidence, that the vehicle could have been safely and legally parked on the shoulder of Ford Road or that the driver informed the police that there was a person available to promptly drive it away or that any such person existed. Similarly, defendant does not refer us to any caselaw indicating that the police have an affirmative duty to move the car to a safe location and park it there or to invite the driver to find someone to drive it away. Thus, the officers' decision to impound the vehicle was made in accordance with the department's policy and their decision not to leave the vehicle on the side of Ford Road or suggest to the driver that he contact someone to pick up the vehicle did not render the subsequent inventory search unconstitutional.

Defendant also argues that the inventory search was pretext for a criminal investigation. It is impermissible to use an inventory search as a ruse to search for evidence of a crime, *Poole*, 199 Mich App at 266, and "[t]he lack of an underlying motive or bad faith by the police in conducting an inventory search is an important aspect which courts must consider in determining the validity of such a search," *Toohey*, 438 Mich at 276. But the record in this case does not support a conclusion that the officers intended to use the inventory search as cover for an illegal search. The encounter started as an investigation of the vehicle's driver for suspected OWI. The driver was confirmed to be operating while intoxicated and arrested. As outlined above, consistent with the department's policy, the constitutionality of which is not challenged, the police had authority at that point to impound the vehicle and conduct an inventory search. There is no suggestion in the record of any ulterior motive for the search. Defendant was detained for having an outstanding warrant, but there is nothing to suggest he was suspected of having contraband or evidence of some crime.[3] There is also nothing to suggest the officers had some suspicion of the backpack's

[2] The department's written policy on vehicle impoundment was not introduced at trial or otherwise contained in the lower court record. However, we exercise our discretion to consider the policy under MCR 7.216(A)(4), which "permit[s] . . . additions to the . . . record[.]" See *People v Posey*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 345491, 351834, 346039); slip op at 12 n 6.

[3] Defendant asserts that "the officers began to search even before determining whether they would arrest [him] on the warrant." But the pertinent question is whether the *driver* of the vehicle was under arrest before the search was conducted, see *Toohey*, 438 Mich at 285, and there is no dispute in this case that he was.

contents. Neither officer saw any of the car's occupants touch the backpack or put anything inside of it. The officers did not know who the backpack belonged to until they found defendant's mail inside. And the impoundment policy requires the officers to open closed containers "within the vehicle whose contents cannot be positively determined from the containers." Accordingly, the inventory search was conducted according to standardized procedure. See *Toohey*, 438 Mich at 275-276 ("An inventory search that is conducted pursuant to [constitutional] standardized police procedure is considered reasonable because the resulting intrusion will be limited to the extent necessary to fulfill the caretaking function.").

Defendant also argues that he had a right to privacy of his backpack located in the car of another under *People v Mead*, 503 Mich 205, 214; 931 NW2d 557(2019). *Mead* held, in part, that the passenger of a vehicle has standing to contest an alleged Fourth Amendment violation if he or she can show, by the totality of the circumstances, that he or she "had a legitimate expectation of privacy in the area searched and that [his or] her expectation of privacy was one that society is prepared to recognize as reasonable." *Id*. While *Mead* supports the conclusion that defendant would have had standing to raise a Fourth Amendment challenge, that case did not involve an inventory search. Rather, in *Mead* the driver consented to the search of the vehicle. *Id*. at 209. Thus, defendant's reliance on *Mead* is misplaced because it does not pertain to the substantive question in this case of whether the police conducted a proper inventory search.

In sum, defendant fails to establish that his trial counsel's performance fell below objective standards of reasonableness by failing to move to exclude the handgun found in defendant's backpack. For the reasons discussed, a motion to exclude the evidence would have failed because, based on the existing record, the evidence was discovered pursuant to a valid inventory search. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Accordingly, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola