STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PORSHA MONIQUE TYLER,

Defendant-Appellant.

UNPUBLISHED
December 2, 2021

No. 353914
Macomb Circuit Court
LC No. 2019-001480-FH

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

PER CURIAM.

Defendant was convicted by a jury of possession of two or more forged driver's licenses, MCL 257.310(9), and sentenced as a second-offense habitual offender, MCL 769.10, to 18 months' probation.[1] On appeal, defendant argues that her right under the federal and state constitutions to be free from unreasonable searches and seizures was violated when police officers searched her car without probable cause under the pretext of an inventory search, and that she was denied the effective assistance of counsel because her trial counsel failed to move to suppress evidence obtained from the unlawful inventory search. We affirm.

On February 9, 2019, defendant went to the Cricket Wireless store on Nine Mile Road in Warren with Kelby Snell, her fiancé. At the store, Snell got into a disagreement that escalated into a physical altercation with the employees of the store. During the commotion, defendant dropped her cell phone and then picked up a cell phone that she found broken on the ground during the altercation between Snell and the employees of the store. After leaving the store, defendant realized she did not pick up her own cell phone during the commotion but instead picked up a display cell phone, so she called her own cellular number. Defendant told the woman who answered her phone that she was returning to the store for her cell phone; defendant and Snell then returned to the store. Warren Police Department Officer Alana Jannette testified that when defendant returned to the store, she and Snell were immediately placed under arrest. Officer

[1] Defendant was also charged with larceny in a building, MCL 750.360, and disturbing the peace, MCL 750.170, but the prosecution dismissed both charges.

Jannette then instructed Officer Matthew Accivatti and his partner to conduct an inventory search of defendant's vehicle so that it could be towed, as was common practice—i.e., defendant and Snell had been handcuffed, searched, and then secured in a patrol car. Officer Jannette testified that this was the "procedure per an arrest."

Officer Accivatti saw the suspect vehicle, which was noted by dispatch to be a white Impala. The police officers on the scene gave Officer Accivatti keys to the white Impala. Because he saw that defendant and Snell were under arrest, Officer Accivatti walked over to the white Impala to confirm that the keys he was handed belonged to the suspect vehicle. When Officer Accivatti was confirming that the keys belonged to the suspect vehicle, he saw a cell phone in plain view in the vehicle. Officer Accivatti then requested that a tow truck arrive at the scene.

Thereafter, Officer Accivatti conducted a search of defendant's vehicle. A cell phone, which had a security device attached to it, was located in the passenger area. On the center console, Officer Accivatti discovered a purse where a wallet containing several credit cards was found. On the driver's seat was a jacket and several licenses from Pennsylvania were removed from a pocket. The licenses had the same identifying photograph of defendant, but different names appeared on each one of them. Warren Police Department detective Christopher Skridulis testified that defendant told him that "in 2018 she had met a subject who had taken her picture and forwarded her picture to somebody else who then made these IDs[.]" Defendant also told Detective Skridulis that she had these licenses because "someone might have wanted her to do something with them, however, she didn't do anything with them."

On appeal, defendant argues that the inventory search of her vehicle "was not an inventory search at all, but instead a discretionary search for evidence of [a] crime." Further, defendant's vehicle was legally parked at the shopping center, and thus, its impoundment was unlawful. Accordingly, the evidence discovered during the search should not have been admitted at trial and defendant was denied the effective assistance of counsel because her counsel failed to move to suppress that evidence. We disagree.

"A motion to suppress evidence must be made prior to trial or, within the trial court's discretion, at trial." *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004) (quotation marks and citation omitted). Defendant failed to preserve this issue by raising it in the trial court; therefore, this issue is not preserved for appellate review.

Generally, constitutional questions are questions of law that are reviewed de novo. *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). However, unpreserved issues are reviewed for plain error. *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015). To overcome forfeiture of an issue under the plain error rule, a defendant must demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). A plain error affects a defendant's substantial right when the error results in outcome-determinative prejudice. *Cain*, 498 Mich at 116. Further, because an evidentiary hearing was not held with regard to defendant's claim of ineffective assistance of counsel, our review is limited to mistakes apparent on the existing record. See *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions, and generally, lawfulness depends on reasonableness. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). A search conducted without a warrant is per se unreasonable under the Fourth Amendment unless it was conducted pursuant to an established exception to the warrant requirement. *Id*.

The established exception to the warrant requirement applicable in this case is the inventory search exception. Under the inventory search exception, a vehicle impounded by police under a reasonable departmental policy addressing when a vehicle may be impounded does not violate the constitutional prohibition against unreasonable searches and seizures. *People v Green*, 260 Mich App 392, 410-411; 677 NW2d 363 (2004), overruled in part on other grounds by *People v Anstey*, 476 Mich 436 (2006). The existence of a standard police procedure may be established through the testimony of an officer. *Green*, 260 Mich App at 411. The routine police practice of securing and inventorying impounded vehicles serves to: protect the owner's property while it remains in police custody, protect the police against claims or disputes over lost or stolen property, and protect the police from potential danger. *Id*. at 412, quoting *People v Toohey*, 438 Mich 265, 275; 475 NW2d 16 (1991), quoting *South Dakota v Opperman*, 428 US 364, 369; 96 S Ct 3092; 49 L Ed 2d 1000 (1976). The *Toohey* Court concluded: "An inventory search that is conducted pursuant to standardized police procedure is considered reasonable because the resulting intrusion will be limited to the extent it is necessary to fulfill the caretaking function." *Toohey*, 438 Mich at 275-276.

In this case, Officer Jannette testified that, pursuant to departmental policy, after defendant was arrested it was necessary to impound and conduct an inventory search of defendant's vehicle. Specifically, Officer Jannette testified that she instructed Officer Accivatti and his partner to conduct an inventory search of defendant's vehicle so that it could be towed, as was common practice. Officer Jannette testified that this was the "procedure per an arrest." In other words, Officer Jannette instructed Officer Accivatti to conduct an inventory search of the vehicle because it was to be towed from the scene, as was standard police departmental procedure when the driver is arrested.

This departmental procedure is like the one discussed in the plurality opinion of *People v Krezen*, 427 Mich 681; 397 NW2d 803 (1986). In that case, the defendant was arrested at an airport and her vehicle, which was parked at the airport, was impounded. *Id*. at 682-683. During the inventory search of the vehicle, cocaine was discovered. *Id*. at 682-683, 699. The defendant was tried and convicted for possession of cocaine, after the trial court determined that the cocaine found during the search was admissible. *Id*. at 683, 699. The defendant appealed and this Court reversed and remanded for a new trial, holding that the evidence was unlawfully obtained in an improper impoundment. *Id*. at 683. Our Supreme Court disagreed, noting that the police testified that the impoundment and search occurred within the context of a standard departmental policy (the specific terms of which were not disclosed at trial) that, upon arrest of the driver, all vehicles not released to another driver were to be impounded. *Id*. at 685. Referring to *Opperman*, 428 US 364, the *Krezen* Court noted that such an inventory search conducted according to standard departmental procedure, particularly after valuables are noticed in plain view, is considered a permissible caretaking function rather than an investigative search. *Id*. at 684-685.

In this case, both defendant and Snell were arrested and placed in the back of the police vehicle. There was nobody to take custody of defendant's vehicle. According to the testimony of Officer Jannette, it was common practice or standard police departmental procedure to have a vehicle towed from the scene when its driver was arrested. After Officer Jannette instructed Officer Accivatti to have the vehicle inventoried and towed, Officer Accivatti went to the vehicle to ensure that he had its proper keys. At that time, Officer Accivatti saw a cell phone in plain view. He arranged for the vehicle to be towed, and then conducted an inventory search of defendant's vehicle. Thus, the record evidence established that the reason for the search was to inventory the contents of the vehicle because it was being towed away, i.e., a permissible caretaking function. The vehicle was not searched in an effort to investigate any alleged crime. Therefore, defendant's argument that the search was a "discretionary search for evidence of [a] crime" is not supported by the record evidence.

Defendant also argues that the impoundment was unlawful because her vehicle was legally parked at the shopping center. However, again, Officer Jannette testified that it was standard police departmental procedure to have a vehicle towed from the scene when its driver was arrested. Therefore, based on the record evidence, the impoundment was lawful. See, e.g., *People v Poole*, 199 Mich App 261, 265; 501 NW2d 265 (1993). Further, as our Supreme Court explained in *Krezen*:

> [The] very nature [of a car] as a transportable nonfixed item makes it and its contents more subject to theft or damage. A number of courts have recognized that the possibility of theft or vandalism is a valid reason for impounding a car upon the arrest of the driver, especially where no other person is present to take control of the car. Other courts have recognized that leaving a car parked in a private location may be a nuisance. The impoundment was a caretaking function rather than an investigative one, instituted according to standard departmental policy to protect the defendant and the police from unnecessary thefts, recriminations, and civil suits. [*Krezen*, 427 Mich at 687-688 (internal citations omitted).]

Here, both defendant and Snell were arrested. By impounding defendant's vehicle and conducting the inventory search the police were preventing the vehicle was being vandalized or stolen, protecting the property owners from having an abandoned vehicle in their parking lot, protecting defendant from having any valuables in her vehicle stolen, and protecting the police officers against claims of damaged, lost, or stolen property.

In summary, the impoundment and inventory search of defendant's vehicle did not violate defendant's right to be free from unreasonable searches and seizures. According to the record evidence, the impoundment and inventory search were conducted by the police pursuant to standard police departmental procedure as part of a caretaking function and not for an investigatory purpose. Therefore, the evidence discovered during the lawful inventory search of defendant's vehicle was properly obtained, and the trial court did not commit plain error by admitting it at trial. Moreover, defendant's ineffective assistance of counsel claim premised on her counsel's failure to move to suppress the evidence obtained from the inventory search also fails. "It is well established

that defense counsel is not ineffective for failing to pursue a futile motion." *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael F. Gadola