STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1930

State of Minnesota,
Respondent,

vs.

Frank Junior Jones,
Appellant.

Filed June 8, 2010
Affirmed in part and reversed in part
Kalitowski, Judge

Anoka County District Court
File No. 02-CR-08-3872

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Frank Junior Jones challenges his convictions of possession of theft tools and tampering with a motor vehicle and the district court's order denying postconviction relief. Appellant argues that (1) his trial attorney provided ineffective assistance of counsel by failing to challenge appellant's arrest and search; (2) the evidence is not sufficient to support appellant's conviction of tampering with a motor vehicle; and (3) the tampering offense and possession-of-theft-tools offense were part of the same behavioral incident. We affirm appellant's conviction of possession of theft tools, and reverse his conviction of tampering with a motor vehicle

D E C I S I O N

I.

Appellant contends that the postconviction court erred by concluding that appellant did not receive ineffective assistance from his trial attorney. Specifically, appellant argues that his attorney's failure to file a suppression motion constitutes deficient performance because the record indicates that the stop and search of appellant was unconstitutional. We disagree.

A postconviction court's decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and thus we review the decision de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

The United States Constitution and the Minnesota Constitution guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const.

art. I, § 6. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). In order to obtain a new trial based on a claim of ineffective assistance of counsel, an appellant must prove that (1) his counsel's representation "fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted). We may dispose of the claim on one prong without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

"The reasonableness of counsel's performance is judged by an objective standard of representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Id.* (quotation omitted). "There is a strong presumption that counsel's performance was reasonable." *Id.* (quotation omitted).

Here, we conclude that it was reasonable for appellant's attorney to advise appellant not to challenge the arrest and search because the record indicates that the evidence seized was admissible under the inevitable-discovery doctrine.

The officers had reasonable suspicion that appellant was involved in criminal activity to justify an investigatory stop based on the following: (1) an off-duty police officer's observation of appellant and another individual wandering among parked cars in the parking lot of a fitness club; (2) the officer's observation of appellant and the other individual getting into a parked Cadillac and riding from one end of the parking lot to the

other; (3) the officer's observation of appellant exiting the Cadillac, approaching a red Pontiac Grand Am and manipulating the handle for 10-15 seconds while the other individual appeared to act as a lookout; (4) appellant and the other individual getting back in the Cadillac, riding a short distance and entering a store; and (5) appellant, upon seeing two police officers approach him as he left the store, turning abruptly and walking back into the store. *See State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) ("A brief investigatory stop requires only reasonable suspicion of criminal activity, a lesser quantum of proof than probable cause."); *Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000) (stating that the factual basis needed to justify an investigatory stop is minimal).

When the officers detained appellant to investigate, the officers learned that there was an outstanding warrant against appellant, justifying an arrest and search of appellant. Therefore, the hammer and spark plugs found on appellant's person were admissible at trial under the incident-to-arrest exception to the warrant requirement. *See State v. Lussier*, 770 N.W.2d 581, 589 (Minn. App. 2009) (providing that the search-incident-to-arrest exception to the Fourth Amendment warrant requirement allows officers to conduct a warrantless search of an individual's person incident to a lawful arrest).

Appellant concedes that there was an outstanding warrant, but argues that the police officers did not discover the warrant until after the unlawful search. But even if the officers prematurely searched appellant before discovering the warrant, the evidence was admissible based on the inevitable-discovery doctrine. *See State v. Harris*, 590 N.W.2d 90, 105 (Minn. 1999) (stating that the inevitable-discovery exception to the

Fourth Amendment warrant requirement applies when "the police would have obtained the evidence if no misconduct had taken place") (quotation omitted). Here, the officer's investigation of appellant would have inevitably led to the discovery of the outstanding warrant, which would have resulted in appellant's arrest, the search incident to arrest, and the discovery of the hammer and spark plugs.

Finally, appellant's attorney testified that he presented his analysis of the Fourth Amendment issues to appellant and that appellant chose not to challenge the search and to proceed to trial as soon as possible. We conclude that in light of the totality of the circumstances, appellant's trial attorney's decision to not challenge the search in a pretrial proceeding was reasonable and the postconviction court did not abuse its discretion by denying appellant's claim of ineffective assistance of counsel.

II.

Appellant argues that his conviction of tampering with a motor vehicle is not supported by sufficient evidence. Specifically, appellant argues that (1) the state failed to present evidence that appellant changed, altered, or substantially interfered with the car, and (2) the state failed to present evidence that appellant did not have permission to access the car. Because the state failed to prove that appellant substantially interfered with the car as required by *In re Welfare of W.A.H.*, 642 N.W.2d 41, 46 (Minn. App. 2002), we agree.

In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict

that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minn. Stat. § 609.546 (2008) provides in pertinent part that "[a] person is guilty of a misdemeanor who intentionally . . . (2) tampers with or enters into or on a motor vehicle without the owner's permission." "[T]he phrase 'tampers with,' as used in Minn. Stat. § 609.546(2), requires that an individual engage in conduct that results in some degree of change or alteration to, or substantial interference with a vehicle." *W.A.H.*, 642 N.W.2d at 46. In *W.A.H.*, we held that the evidence was insufficient to establish that the defendant tampered with a car when the defendant looked inside a car with a flashlight and pulled the door handle. *Id.*

Here, as in *W.A.H.*, the state failed to show that appellant changed or substantially interfered with the car. The off-duty police officer testified that he observed appellant approach the car and manipulate the door handle for 10-15 seconds while another individual appeared to act as a lookout. But when the officer later inspected and photographed the car, he did not observe any visible damage. And the car's owner did not indicate that she noticed any damage or change to her car. Thus, we conclude that the evidence is insufficient to support appellant's conviction of tampering with a motor vehicle.

We note that the jury instructions did not include the *W.A.H.* requirement of substantial interference with the vehicle, instead defining "to tamper with" as "to make objectionable or unauthorized changes or to interfere with improperly." Appellant did not challenge the jury instructions below, and does not challenge them on appeal. But due process requires the state to prove every element of the crime charged beyond a reasonable doubt. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). And because the state did not present evidence that appellant tampered with the car, as defined by *W.A.H.*, the state failed to meet this burden.

Because we reverse appellant's conviction of tampering with a motor vehicle on the ground that there was insufficient evidence to show substantial interference, we need not reach appellant's arguments that there was insufficient evidence to show lack of owner's permission or that the tampering offense was part of the same behavioral incident as the possession-of-theft-tools offense.

Affirmed in part and reversed in part.