

No. 1-09-3352

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 4641
)	
DURWYN TALLEY,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred with the judgment.

ORDER

¶ 1 **HELD:** Defendant's convictions of armed robbery, armed-habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful restraint were affirmed where: (1) the circuit court correctly denied defendant's motion to suppress evidence, finding a valid *Terry* stop and probable cause for his arrest; (2) the circuit court correctly denied defendant's motion to suppress identification, finding that the show-up was not unduly suggestive; (3) trial counsel provided effective assistance; (4) defendant waived review of his claim that the State knowingly and deliberately included falsehoods and/or acted in reckless disregard of the truth during the motions to suppress and at trial; and (5) the circuit court showed no personal bias or prejudice toward defendant.

¶ 2 Following a bench trial, defendant, Durwyn Talley, was convicted of armed robbery, armed-habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful restraint. The

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circuit court sentenced defendant to 34 years' imprisonment for armed robbery and a concurrent 6 years' imprisonment for armed-habitual criminal and merged his remaining convictions into his armed robbery conviction. On appeal, defendant contends: (1) the circuit court erred by denying his motion to suppress evidence based on an allegedly illegal *Terry* stop and a subsequent arrest without probable cause; (2) the circuit court erred by denying his motion to suppress evidence based on an allegedly suggestive show-up identification (hereinafter referred to as the motion to suppress identification); (3) his trial counsel provided ineffective assistance; (4) the State knowingly and deliberately included falsehoods and/or acted in reckless disregard for the truth in order to bolster a show of probable cause to cover up an unduly suggestive show-up identification and to convict defendant at trial; and (5) the circuit court showed personal bias and prejudice toward defendant. We affirm.

¶ 3 The State charged defendant with armed robbery, armed-habitual criminal, unlawful use of a weapon by a felon, aggravated unlawful use of a weapon, and aggravated unlawful restraint. Prior to trial, defendant filed a motion to suppress evidence based on an allegedly illegal *Terry* stop and a subsequent arrest without probable cause. A hearing was held.

¶ 4 At the hearing, Officer Randall Jones testified that, at approximately 8:30 p.m. on February 19, 2008, he heard a "flash message" on his police radio stating that a Quiznos restaurant on 35th Street had just been robbed and that the offender was driving a red Jeep Cherokee northbound on Indiana Avenue. No description was given of the driver nor was a license plate number given. Officer Jones was already at a gas station on 31st Street between Michigan Avenue and Indiana Avenue, about four blocks from the Quiznos. He and his partner turned their car around so that they

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were "sitting facing Indiana at 31st Street" and waited for the red Jeep Cherokee to approach. About 30 seconds later, he saw a red Jeep Cherokee driving northbound on Indiana Avenue. Officer Jones followed it for approximately one block until it turned into a dead-end parking lot at 29th Street and Indiana Avenue. Officer Jones activated his police lights and the driver pulled over immediately. Officer Jones stopped the Jeep within one minute from first observing it traveling on Indiana Avenue.

¶ 5 Officer Jones testified he exited his police car and walked to the driver's side of the Jeep. His partner, Officer Jeffrey Lawson, walked toward the passenger side. At the same time, other police units arrived on the scene and approached the Jeep. Defendant asked Officer Jones why he had been pulled over. Before Officer Jones could answer, one of the other officers pulled defendant out of the car, handcuffed him, and took him to the back of Officer Jones' squad car. After defendant was secured in the patrol car, Officer Jones approached the officers who were on the passenger side of the Jeep. Officer Jones learned the officers had recovered a gun on the passenger-side floorboard. After the gun was recovered, some of the other officers took defendant back to the Quiznos for a show-up, where defendant was identified. The show-up occurred less than two minutes after his arrest.

¶ 6 Officer Quattrocki testified that, at approximately 8:30 p.m. on February 19, 2008, he was on patrol in a car with Officer Milazzo and Sergeant Rochowicz. They were in the vicinity of 126 East 35th Street when "an individual from [a nearby] Quiznos" approached the car "in a frantic manner" and said the Quiznos had just been robbed by an offender who was fleeing in a red Jeep Cherokee that was going northbound on Indiana Avenue. Sergeant Rochowicz sent out a flash

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message regarding the robbery and the location and make of the getaway vehicle, and the officers "took off and headed down Indiana." Approximately one minute later, Officer Quattrocki heard over the police radio that another police unit was in the process of pulling over the red Jeep Cherokee at 2901 South Indiana Avenue, which was approximately six blocks from the Quiznos. Less than two minutes had elapsed since the Quiznos employee had informed Officer Quattrocki of the robbery.

¶ 7 Officer Quattrocki testified they proceeded to 2901 South Indiana Avenue, where they heard another flash message over the police radio state that the offender was a black male, dressed in dark clothing and wearing a hat. Officer Quattrocki, Officer Milazzo and Sergeant Rochowicz exited their vehicle and approached the Jeep. Officer Quattrocki heard Officer Lawson yell that there was a gun on the floorboard. Officer Quattrocki and Sergeant Martin pulled defendant out of the Jeep. Officer Quattrocki and Sergeant Rochowicz took defendant to the Quiznos for a show-up, where he was positively identified.

¶ 8 Following Officer Quattrocki's testimony, defense counsel argued Officer Jones lacked a reasonable, articulable suspicion to effectuate a *Terry* stop where the only information he had was that the offender was seen leaving the crime scene in a red Jeep Cherokee. Defense counsel argued that, in the absence of any information regarding the offender's gender, race, age, clothing, or license plate number, the officer's stop of defendant's vehicle constituted a fourth amendment violation.

¶ 9 The State responded Officer Jones had a reasonable, articulable suspicion to effectuate a *Terry* stop where he observed the red Jeep Cherokee traveling northbound on Indiana Avenue only moments after a flash message had been sent indicating a nearby Quiznos had been robbed by an offender seen fleeing northbound on Indiana Avenue in such a vehicle. The State further argued

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probable cause to arrest defendant existed once Officer Lawson saw the gun in plain view. The circuit court agreed with the State and denied defendant's motion to quash arrest and suppress evidence. In so ruling, the court specifically found the officers to be credible.

¶ 10 Defendant filed a *pro se* motion to reconsider the ruling on the motion to suppress evidence. Defendant represented himself at the hearing and attacked the officers' credibility. The court informed defendant it had found the officers who testified at the hearing to be credible. Defendant argued the court erred in finding that the gun had been in plain view. The court reiterated it had found the officers to be credible and denied defendant's motion to reconsider.

¶ 11 Defendant, through counsel, filed a motion to suppress his identification based on the allegedly suggestive show-up that violated his fourth-amendment and due-process rights. At the hearing on this motion, Sergeant Rochowicz testified that, at approximately 8:30 p.m. on February 19, 2008, he, Officer Milazzo and Officer Quattrocki were in an unmarked police car in front of a Quiznos restaurant on 35th Street. Suddenly, Lamont Dorch, who was wearing a Quiznos uniform, rapped on the window of their car in a frantic manner and stated the Quiznos had just been robbed by a black man dressed in all black who was armed with a handgun. Mr. Dorch also told them the offender had driven northbound on Indiana Avenue in a red Jeep Cherokee.

¶ 12 Sergeant Rochowicz testified he notified the dispatcher of these facts, and then the officers proceeded northbound on Indiana Avenue in pursuit of the offender. As they were proceeding, they heard a transmission over the police radio that another unit had curbed the Jeep at 29th Street and Indiana Avenue. When they arrived at 29th Street and Indiana Avenue, Sergeant Rochowicz saw other police cars already at the scene and he heard from the dispatcher that a witness to the robbery,

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Dewanda McBride, had described the offender as a black male in his thirties wearing dark clothing and a dark hat and armed with a handgun.

¶ 13 Sergeant Rochowicz testified he exited his vehicle and approached the Jeep. He saw a couple of the officers taking defendant into custody and handcuffing him and he heard an officer "make reference to a gun." Sergeant Rochowicz looked inside the Jeep and saw a gun on the passenger side floorboard and a dark baseball hat on the front passenger seat. Sergeant Rochowicz placed defendant into one of the marked squad cars, and then he and Officer Quattrocki drove defendant to the Quiznos restaurant on 35th Street for a show-up. Officer Quattrocki exited the vehicle to locate Mr. Dorch. Mr. Dorch approached the squad car while Sergeant Rochowicz was in the process of opening the rear door to take defendant out of the vehicle to conduct the show-up. Prior to defendant exiting the squad car, Mr. Dorch identified defendant as the robber. Defendant was still handcuffed at this time. After Mr. Dorch made his identification, Sergeant Rochowicz removed defendant from the squad car. While defendant was standing outside the squad car in handcuffs, Ms. McBride walked up and also identified him as the robber. Sergeant Rochowicz testified that Ms. McBride's identification of defendant was made "under no direction" from the police officers. The identifications occurred not more than 15 minutes after Mr. Dorch had reported the robbery to the officers.

¶ 14 With respect to Mr. Dorch's and Ms. McBride's identifications of defendant at the show-up, Sergeant Rochowicz testified in pertinent part:

"Q. At any point while you had been out there with Mr. Dorch, did you have occasion to speak to Mr. Dorch concerning the show-up or the identification procedure?"

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A. No.

* * *

Q. Had you had any conversation with Ms. McBride prior to her identification of [defendant] regarding the process of the identification that was going to be used, any expectations or procedures that you were going to use?

A. No, sir.

* * *

Q. You didn't make any gestures or say anything to lead Lamont Dorch into identifying the defendant, did you?

A. No, ma'am.

Q. You didn't point at him?

A. Unh-unh.

Q. You didn't say this is the guy?

A. No, ma'am.

Q. And no other officer around did that either, did they?

A. Not that I was observing, no.

* * *

Q. You didn't say anything to [Ms. McBride] before she identified the defendant. Is that right?

A. Correct.

Q. You didn't make any gestures—

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A. No, ma'am.

Q. –pointing towards the defendant?

A. No, ma'am.

Q. When she identified the defendant, what exactly were you doing with the defendant?

A. I was standing next to him by the rear door actually making sure he was still in secure custody.

Q. No other officers around did anything to suggest that the defendant was the one that robbed him. Is that correct?

A. None to my observation, no."

¶ 15 Following Sergeant Rochowicz's testimony, the circuit court heard arguments and then denied the motion, finding the show-up occurred only minutes after the robbery and was necessary for the officers to determine whether they had the actual offender in custody, or whether they needed to continue searching for him. The court further found the show-up was not unduly suggestive.

¶ 16 A bench trial followed. Detoy James testified at trial that he owned the Quiznos at 126 East 35th Street on February 19, 2008. Mr. James had surveillance equipment set up in the restaurant. There was a camera that recorded the events that took place at the cash register and in the lobby area of the restaurant. When the Quiznos shift manager, Dewanda McBride, called him on February 19, 2008, following the robbery, Mr. James went to the Quiznos and spoke with two detectives. Mr. James then examined the surveillance footage and determined his surveillance equipment had recorded the robbery that occurred at approximately 8:30 p.m. on February 19, 2008. Mr. James

subsequently made a DVD recording from that surveillance footage.

¶ 17 Dewanda McBride testified that, on February 19, 2008, she was working as a nighttime shift manager at the Quiznos at 126 East 35th Street. At about 8:30 p.m. on that date, she was working with her co-worker, Lamont Dorch, when defendant walked in to the restaurant. The lights in the store were on and defendant was the only customer. Ms. McBride described the lighting as "bright" and as "very good." Ms. McBride stood face-to-face with defendant, who was three to four feet away. Defendant was wearing blue jeans and a dark hoodie and a hat that was slightly lighter in color than the hoodie. Defendant placed his order for a sandwich. Ms. McBride was able to see defendant's face as he placed his order.

¶ 18 Ms. McBride testified that, after she made his sandwich, she told defendant to step down toward the cash register. He did so. Ms. McBride rang up his order and told defendant what he owed. Defendant asked Ms. McBride where his sandwich was, and she told him it was being toasted. Defendant told her he did not want it toasted, so she turned to tell Mr. Dorch to take the sandwich out of the toaster. Ms. McBride turned back around, started getting the bag and napkins ready, and again told defendant what he owed. At that point, defendant "stepped back," which caused Ms. McBride to step back in response. Defendant then pulled up his jacket and showed her the handle of a gun and told her to give him all the money in the cash register. Ms. McBride hesitated because she was so scared, and Mr. Dorch told her to give defendant the money. Defendant told Ms. McBride not to "lose [her] life over somebody else's money." Ms. McBride opened the cash register and gave defendant some money. Defendant grabbed the rest of the money and walked out of the restaurant. Ms. McBride hit the emergency button which notified the police

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of trouble. She saw Mr. Dorch walk outside. Ms. McBride locked the door and called her boss, Mr. James.

¶ 19 Ms. McBride testified the police arrived about 10 minutes later. She heard Mr. Dorch identify someone for the police. The police asked her to step outside. An officer escorted her to the curb, and then she walked over to the police car and saw defendant sitting in the back seat. Ms. McBride identified defendant to the police as the robber.

¶ 20 The prosecutor moved to publish the DVD of the surveillance footage taken at the time of the robbery, using Ms. McBride to testify to the DVD's contents. The circuit court granted the motion. We have viewed the DVD, which is contained in the record on appeal. Our viewing reveals the DVD depicts an African-American man entering the Quiznos, which is very well lit. He is wearing a black jacket with a baseball-type cap on his head. He is also wearing a hood (either from the jacket or from a sweatshirt underneath the jacket; it is unclear from the DVD) on top of his head, covering most of the baseball cap except for its bill. His face is visible. He stands approximately three feet from Ms. McBride as he orders the sandwich. Ms. McBride viewed the DVD at trial, and pointed out for the court where the man showed her the gun handle and told her to give him the money in the cash register.

¶ 21 Officer Randall Jones testified that, at approximately 8:30 p.m. on February 19, 2008, he and his partner, Officer Lawson, were in their patrol car at the BP Amoco gas station on 31st Street and Michigan Avenue when they heard an emergency dispatch over the police radio. Based on that emergency dispatch, the officers began looking for a black male driving a red Jeep Cherokee northbound on Indiana Avenue. They saw the Jeep traveling northbound on Indiana Avenue at 31st

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Street. They followed the Jeep as it made a left-hand turn into a dead-end parking lot at 29th Street. The officers activated the emergency lights and pulled up behind the Jeep.

¶ 22 Officer Jones testified that, as he exited his police car, he noticed two other police cars had also responded to the scene. Officer Jones approached the driver's side and saw defendant, who was wearing a black sweatshirt with a hood, sitting in the driver's seat. Defendant asked why he had been pulled over. As he was about to respond, Sergeant Martin ran up, pulled defendant from the Jeep, and "took him to the ground." Defendant was handcuffed and placed in the back of Officer Jones' police car. Officer Jones then walked over to the passenger side of the Jeep, where he observed a small black handgun on the floorboard and a black and grey baseball cap on the passenger seat.

¶ 23 Edwin Jones, an evidence technician, testified that, at approximately 9:15 p.m. on February 19, 2008, he received an assignment to go to 2901 South Indiana Avenue. He arrived at approximately 9:32 p.m., looked inside the red Jeep Cherokee, and saw a black handgun on the floorboard and a baseball cap on the passenger seat. He photographed the scene, inventoried the gun, and found that it was loaded.

¶ 24 Detective Jamie Duignan testified she was working with her partner, Detective Kneip, on February 19, 2008, when she received an assignment to go to the Quiznos at 126 East 35th Street at approximately 9:15 p.m. Detective Duignan learned an offender was in custody. They went to the Quiznos, where Detective Duignan interviewed Dewanda McBride, who described the offender as a male black who was wearing a black, dark hoodie. Detective Duignan also spoke with Detoy James, who showed them the surveillance footage of the robbery. Mr. James later made a DVD

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copy of the surveillance footage and gave it to Detective Duignan.

¶ 25 Sergeant Rochowicz testified that, at 8:30 p.m. on February 19, 2008, he was working with Officer Quattrocki and Officer Milazzo. They were traveling in an unmarked vehicle on 35th Street heading eastbound when they were approached by Mr. Dorch, who was dressed in a Quiznos uniform. Mr. Dorch pounded on their car, spoke to the officers, and pointed north on Indiana Avenue. The officers put out a flash message and proceeded north on Indiana Avenue. The officers received a message from another police unit, learned the location of the car they were looking for, and then went to 29th Street and Indiana Avenue, where they saw a red Jeep Cherokee. Sergeant Rochowicz saw two officers take defendant into custody, after which Officer Quattrocki performed a pat-down on him. Officer Quattrocki recovered \$372 from defendant's right jacket pocket. Sergeant Rochowicz walked over to the passenger side of the Jeep, where he observed a handgun on the floorboard and a black hat.

¶ 26 Sergeant Rochowicz testified defendant was placed in a squad car. Sergeant Rochowicz and Officer Quattrocki drove defendant back to the Quiznos. Mr. Dorch walked out of the Quiznos, pointed at defendant, who was still in the squad car, and said "that's the guy that robbed the store." Dewanda McBride then walked out of the Quiznos, came up to the squad car, and identified defendant as the robber. To the best of Sergeant Rochowicz's recollection, defendant was outside the squad car at the time of Ms. McBride's identification.

¶ 27 Lamont Dorch testified that, at approximately 8:30 p.m. on February 19, 2008, he was working at the Quiznos restaurant at 126 East 35th Street with his coworker, Dewanda McBride, when defendant walked in and ordered a sandwich. Defendant was wearing a hoodie on his head,

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but Mr. Dorch could see his face. As Mr. Dorch made the sandwich, defendant walked over to the cash register. Ms. McBride suddenly jumped behind Mr. Dorch. Defendant flashed his jacket up and said, "don't get killed over nobody else's money." Mr. Dorch told Ms. McBride to give defendant the money. After she gave him the money, defendant walked outside.

¶ 28 Mr. Dorch testified he followed defendant outside and saw him jog down the street and enter a red Jeep Cherokee truck. Mr. Dorch stopped a police car that was driving past the Quiznos, reported the robbery, identified the get-away vehicle, and pointed out the direction in which it was driving. The police drove off in that direction. Mr. Dorch went back inside the Quiznos. Approximately 10 minutes later, an officer came into the Quiznos and told him to come outside. Mr. Dorch walked outside, went over to the police car, and saw defendant sitting inside wearing handcuffs. Mr. Dorch yelled, "That's him." Ms. McBride was standing away from Mr. Dorch when he identified defendant. Mr. Dorch went inside the Quiznos after identifying defendant. A short time later, Ms. McBride returned to the Quiznos.

¶ 29 The prosecutor played the DVD of the surveillance video of the robbery. Mr. Dorch viewed the DVD and identified defendant as the robber.

¶ 30 Mr. Dorch admitted on cross-examination that he had multiple prior convictions for retail theft and had used numerous alias names.

¶ 31 The State introduced into evidence certified copies of defendant's prior convictions of robbery and aggravated robbery for the limited purpose of establishing the elements of the armed-habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon charges. The State also introduced into evidence a photograph of defendant depicting how he

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appeared at the time of his arrest. In the photograph (which is contained in the record on appeal), defendant is wearing a black jacket with what appears to be a hooded sweatshirt underneath.

¶ 32 Detective Duignan testified for the defense that, at approximately 9:15 p.m. on February 19, 2008, she went to the Quiznos at East 35th Street and spoke with Mr. Dorch and Ms. McBride about the robbery. Mr. Dorch told her defendant was wearing a black skull cap and a black hooded sweatshirt.

¶ 33 Following all the evidence, the circuit court convicted defendant of armed robbery, armed-habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful restraint.

¶ 34 Defendant filed a *pro se* post-trial motion for substitution of judge, arguing the circuit court had engaged in improper *ex parte* communications with Mr. Dorch. The court stated, for the record, it had engaged in no such *ex parte* communications. Defendant eventually stated he was withdrawing the motion.

¶ 35 Defendant filed a *pro se* "motion for ineffective assistance of counsel" and an "amended motion for new trial." Defense counsel filed a separate motion for new trial. The circuit court denied all the post-trial motions.

¶ 36 The cause proceeded to sentencing. In aggravation, the State presented evidence defendant's criminal history included: five prior aggravated robbery convictions, a robbery conviction, a retail theft conviction, an obstruction of justice conviction, and a possession of controlled substances conviction. In mitigation, defense counsel argued defendant came from a "difficult family situation" in which his father was a drug abuser. Defense counsel also pointed out defendant is married, has two children, and has obtained his GED. Noting defendant's extensive criminal background and the

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increasingly violent nature of his crimes, including his threat to harm Mr. Dorch and Ms. McBride if they did not give him the money, the circuit court sentenced defendant to 34-years' imprisonment for the armed robbery conviction, and a concurrent 6 years' imprisonment for the armed-habitual criminal conviction. The other convictions merged into the armed robbery conviction.

¶ 37 Defendant filed this timely, *pro se* appeal.

¶ 38 First, defendant contends the circuit court erred in denying his motion to suppress evidence based on an allegedly illegal *Terry* stop. When reviewing the circuit court's ruling on a motion to suppress evidence, we accord great deference to the circuit court's findings of fact and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Close*, 238 Ill. 2d 497, 504 (2010). We review *de novo* the circuit court's ultimate decision to grant or deny the motion. *Id.* at 504.

¶ 39 The fourth amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const., amend. IV. A vehicle stop constitutes a "seizure" within the meaning of the fourth amendment. *Close*, 238 Ill. 2d at 504. A seizure generally must be supported by probable cause; however, the United States Supreme Court recognized a limited exception to the probable cause requirement in *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Under *Terry*, a police officer may conduct a brief, investigatory stop (a *Terry* stop) of a person if the officer reasonably believes the person has committed, or is about to commit, a crime. *Id.* at 21-22. A vehicle stop is analogous to a *Terry* stop and generally is analyzed under *Terry* principles. *People v. Maxey*, 2011 Ill. App. (1st) 100011, ¶44.

¶ 40 To justify a *Terry* stop, the police officer "must have a reasonable, articulable suspicion that

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the person detained has committed or is about to commit a crime." *Id.* at ¶46 (citing *Terry*, 392 U.S. at 21-22). "Under a 'reasonable suspicion' standard, the evidence necessary to justify a *Terry* stop need not rise to the level of probable cause and can even arise when no violation of the law is witnessed; however, a mere hunch is insufficient." *Maxey*, 2011 Ill. App. (1st) 100011, ¶46. The *Terry* standards have been codified in section 107-14 of the Code of Criminal Procedure of 1963:

"A peace officer *** may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense *** and may demand the name and address of the person and an explanation of his actions." 725 ILCS 5/107-14 (West 2008).

¶41 In the present case, Officer Quattrocki testified at the hearing on the motion to suppress that he and his two partners, Officer Milazzo and Sergeant Rochowicz, were in the vicinity of 126 East 35th Street when they were approached by a frantic Quiznos employee who said the Quiznos had just been robbed and the offender had fled in a red Jeep Cherokee traveling northbound on Indiana Avenue. Sergeant Rochowicz sent out a flash message regarding the robbery and the location and make of the getaway vehicle. Officer Jones testified he and his partner were near 31st Street and Indiana Avenue, four blocks from the Quiznos, when they heard the flash message. Approximately 30 seconds later he saw a red Jeep Cherokee traveling northbound on Indiana Avenue; as this vehicle matched the description of the getaway vehicle and was traveling on the same street, in the same direction, in the same area, and at the same time as the offender, Officer Jones had the reasonable, articulable suspicion under *Terry* to stop the vehicle.

¶42 This case is similar to *People v. Rodriguez*, 387 Ill. App. 3d 812 (2008). In *Rodriguez*, the

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victim was murdered as a result of a gang-related, drive-by shooting on April 1, 2000, at approximately 9:30 p.m., in the vicinity of 8707 South Escanaba Street in Chicago. *Id.* at 813. Officer Maras testified that, on April 1, 2000, subsequent to the shooting, he was working in an unmarked vehicle when he heard over the police radio that a man had been shot near 8707 Escanaba Street and the suspects were " 'two youthful Hispanics in a 4 door light gray or light blue Cadillac'" with " 'some damage *** to the passenger's side of the vehicle.'" *Id.* at 817-18. At approximately 10:20 p.m., Officer Maras was in the vicinity of 3650 East 97th Street, which was about one mile from 8707 South Escanaba Street, when he observed Rodriguez driving alone in a vehicle matching the description of the shooter's vehicle. *Id.* at 818. Officer Maras conducted a *Terry* stop and called on the police radio for detectives to bring the witnesses to their location. *Id.* After the detectives transported the witnesses, they identified the vehicle and Rodriguez in a street show-up. *Id.* On Rodriguez's appeal from his conviction, we held that when Officer Maras "spotted a vehicle that matched the description of the shooter's vehicle, as relayed over the police radio *** [he] had the reasonable suspicion required for a brief, investigative detention, commonly known as a *Terry* stop." *Id.* at 829-30.

¶ 43 Similarly, in the present case, when Officer Jones spotted a vehicle matching the description of the Quiznos robber's vehicle that had been relayed over the police radio only about one minute before, and which was traveling in the same area and direction as the robber's vehicle, the officer had the reasonable, articulable suspicion required for a *Terry* stop.

¶ 44 Next, defendant contends the circuit court erred in denying his motion to suppress based on his illegal arrest without probable cause. "Probable cause to arrest exists when the facts known to

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the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563 (2008). Following the *Terry* stop here, officers saw defendant's gun in plain view on the passenger-side floorboard of his Jeep. From the discovery of the gun in the vehicle matching the description, location, and direction of the get-away vehicle which was pulled over only minutes after Mr. Dorch reported the armed robbery of the nearby Quiznos, the officers reasonably could infer defendant was the armed robber. The discovery of the gun in plain view, in conjunction with all the evidence indicating defendant was driving the get-away vehicle, was sufficient to escalate the officers' suspicions to the level of probable cause to arrest. See *e.g.*, *People v. Staten*, 143 Ill. App. 3d 1039 (1986) (Following a *Terry* stop in the aftermath of a shooting of a police officer, the discovery of the victim's revolver in plain view on the floor behind the driver's seat of defendant's vehicle constituted probable cause to arrest defendant.)

¶ 45 Defendant argues there was no probable cause here because he was arrested *prior* to the officers seeing the gun. Defendant's argument is belied by Officer Quattrocki's testimony at the suppression hearing, in which he stated that, as he approached defendant's vehicle following the *Terry* stop, he heard Officer Lawson yell "there's a gun on the floorboard," *after which* Officer Quattrocki pulled defendant from the vehicle and defendant was arrested.

¶ 46 Defendant also argues the evidence at the suppression hearing did not establish his gun was in plain view. In support, defendant points out that Officer Lawson, who actually discovered the gun in plain view on the floorboard, never testified at the suppression hearing and none of the other officers who testified at the suppression hearing stated they saw the gun in plain view on the

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floorboard. Defendant's argument for suppression is without merit because Officer Jones and Sergeant Rochowicz testified at trial that, following the *Terry* stop, they saw the gun on the passenger-side floorboard of defendant's Jeep. "A reviewing court may use evidence presented at trial to *affirm* a trial court's denial of a motion to suppress." (Emphasis in the original.) *People v. Davis*, 335 Ill. App. 3d 1, 12 (2002).

¶ 47 Defendant contends Officer Quattrocki lied when he testified at the suppression hearing that he received a flash message with a description of the offender prior to making the arrest. Defendant contends Officer Quattrocki's testimony at the suppression hearing was contradicted by the trial testimony of Lamont Dorch, who only stated he gave the officers a description of the vehicle and the direction it was moving, and Dewanda McBride, who testified she spoke with officers about 10 minutes after the robbery, meaning any description she gave would have been *after* defendant had been arrested.

¶ 48 "When *** the defendant asks the reviewing court to rely on trial evidence to *reverse* the trial court's ruling, the defendant must properly preserve the issue in the trial court by asking the trial court to reconsider its ruling on the motion to suppress at the time the new evidence is introduced at trial. [Citation.] When the defendant fails to do so, he waives his right to argue suppression based on evidence presented at trial." *Id.* at 13. Here, defendant did not ask the circuit court to reconsider its ruling on the motion to suppress at the time the new evidence was introduced at trial. Accordingly, defendant waived review of this issue.

¶ 49 Moreover, any inconsistencies as to whether the officers received a description of defendant prior to his arrest is immaterial because the *Terry* stop and arrest were not made based on defendant's

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alleged description. As discussed, the *Terry* stop was made because defendant's Jeep matched the description, direction, and location of the get-away vehicle that had been involved in the Quiznos robbery only minutes before; the arrest was made because, after making the *Terry* stop, the officers saw a gun in plain view inside the Jeep. Neither the *Terry* stop nor the arrest was premised on defendant's alleged description, and any inconsistencies as to whether the officers had received such a description was immaterial to the circuit court's ruling denying defendant's motion for suppression.

¶ 50 Defendant contends the content of various police reports contained false information regarding the officers having received a description of defendant prior to his arrest. The police reports were not introduced as evidence at the pre-trial hearings or at trial and are not part of the record on appeal. Accordingly, any issue regarding the police reports is waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 51 Defendant contends Officer Jones' and Officer Quattrocki's testimony at the suppression hearing was generally incredible and should not be believed. In denying both the motion to suppress and the motion to reconsider, the circuit court expressly found the officers' testimony to be credible. Questions regarding the credibility of the witnesses are the responsibility of the trier of fact, and we will not substitute our judgment on such matters. *People v. Moorman*, 369 Ill. App. 3d 187, 190 (2006).

¶ 52 For all the foregoing reasons, we affirm the denial of defendant's motion to suppress, as the circuit court correctly found Officer Jones conducted a proper *Terry* stop of defendant's Jeep and the officers had probable cause to arrest defendant.

¶ 53 Next, defendant contends the circuit court erred by denying his motion to suppress

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identification based on the allegedly suggestive show-up. Under certain circumstances, prompt show-up identifications near the scene of the crime can be proper police procedure. Specifically, show-ups are justified where there is a need to determine: "(1) whether a suspect is innocent and should be released immediately; and (2) whether the police should continue searching for a fleeing culprit while the trail is still fresh." *Rodriguez*, 387 Ill. App. 3d at 830. "Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by law under the due process clause of the 14th amendment." *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994) (citing *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)).

¶ 54 "The due process analysis has two steps. First, the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. If the defendant meets this burden, the burden falls to the State to establish that the identification is independently reliable." *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003).

¶ 55 There was no due process violation here. The evidence established the police stopped defendant's vehicle approximately 2 minutes after the commission of the armed robbery, and then Sergeant Rochowicz and Officer Quattrocki returned him to the scene of the crime (the Quiznos on 35th Street) not more than 15 minutes after Mr. Dorch reported the robbery to the officers. While Sergeant Rochowicz remained with defendant, Officer Quattrocki went inside the Quiznos to ask Mr. Dorch to come outside to identify whether defendant was the offender. There was no evidence

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the officers made any statements or signals to Mr. Dorch suggesting defendant was definitely the armed robber and/or that Mr. Dorch should positively identify him as such. In fact, Sergeant Rochowicz specifically testified he had no conversation with Mr. Dorch concerning the show-up or identification procedure, and neither he nor any other officer said anything or made any gestures leading Mr. Dorch to identify defendant. Mr. Dorch walked over to the police car and saw defendant sitting inside wearing handcuffs. Mr. Dorch recognized defendant as the armed robber and yelled, "That's him." The fact the show-up was made with defendant in handcuffs does not automatically weaken the veracity of Mr. Dorch's identification. *People v. Howard*, 376 Ill. App. 3d 322, 331 (2007).

¶ 56 The evidence established the other witness to the crime, Ms. McBride, also was asked by the police to come outside the Quiznos approximately 10 to 15 minutes after the robbery had been reported. She heard Mr. Dorch identify someone for the police, after which an officer escorted Ms. McBride to the curb while Sergeant Rochowicz waited with defendant; however, there was no evidence the officers made any statements or signals suggesting Ms. McBride similarly identified defendant or suggested defendant was definitely the armed robber. In fact, Sergeant Rochowicz specifically testified he had no conversations with Ms. McBride prior to the show-up regarding the process of the identification or any expectations he had of her, and neither he nor any other officers suggested to Ms. McBride defendant was the armed robber. Ms. McBride walked over to the police car and identified defendant as the armed robber; Sergeant Rochowicz testified Ms. McBride made her identification "under no direction" from the officers. The fact that Ms. McBride made her identification after hearing Mr. Dorch identify defendant as the armed robber does not automatically

weaken the veracity of Ms. McBride's identification. See *Ramos*, 339 Ill. App. 3d at 898.

¶ 57 The police had an interest in determining whether defendant was the armed robber or whether they needed to continue their search. The police acted properly when they brought defendant back to the scene of the crime within 15 minutes of the armed robbery, and when they asked the witnesses, Mr. Dorch and Ms. McBride, to come outside so that they could identify whether defendant was the offender. In the absence of any evidence that the officers suggested to the witnesses that they identify defendant, the show-up passes constitutional muster.

¶ 58 Even if defendant had met his burden of proving that the show-up was unnecessarily or impermissibly suggestive, Mr. Dorch's and Ms. McBride's identifications of defendant were independently reliable and admissible. "The factors to be weighed in determining the independent reliability of the identification include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 897-98.

¶ 59 Here, both Mr. Dorch and Ms. McBride had an excellent opportunity to view defendant where he was the only customer at the Quiznos at the time of the robbery – the store was well-lit, and defendant was standing within a few feet of them. Both Mr. Dorch and Ms. McBride testified to being able to see defendant's face. Once defendant flashed his gun and demanded the money, he had both Mr. Dorch's and Ms. McBride's undivided attention. Sergeant Rochowicz testified Ms. McBride gave a description of defendant as a black male in his thirties, wearing dark clothing, a dark hat and carrying a handgun. Ms. McBride's description of defendant was accurate. Sergeant

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Rochowicz testified Mr. Dorch described defendant as a black man wearing all black and being armed with a handgun. Mr. Dorch's description of defendant (albeit general) was accurate. Both Mr. Dorch and Ms. McBride demonstrated certainty at the show-up, which occurred only about 15 minutes after the crime, as they each immediately identified defendant as the armed robber. On these facts, their identifications were reliable. The circuit court correctly denied defendant's motion to suppress his identification.

¶ 60 Defendant questions the credibility of the witnesses. As discussed above, questions regarding the credibility of the witnesses are for the trier of fact to resolve, and we will not substitute our judgment on such matters. *Moorman*, 369 Ill. App. 3d at 190.

¶ 61 Next, defendant raises 40 claims of ineffective assistance of counsel. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show "counsel's representation fell below an objective standard of reasonableness" (*id.* at 688), and second, he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶ 62 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 63 Here, we need not address defense counsel's allegedly deficient performance, where defendant was not prejudiced by his counsel's representation. Evidence that defendant robbed the

Quiznos while armed with a gun was overwhelming. Specifically, both Mr. Dorch and Ms. McBride testified defendant walked into the well-lit Quiznos at approximately 8:30 p.m. on February 19, 2008. Defendant was the only customer and Mr. Dorch and Ms. McBride were the only employees working that evening. Defendant ordered a sandwich and remained in the restaurant for several minutes. While at the register, defendant flashed a gun and ordered Ms. McBride to give him all the money. Both Mr. Dorch and Ms. McBride testified to being able to see defendant's face. Defendant's encounter with Mr. Dorch and Ms. McBride was recorded by a surveillance camera, which depicted a man matching defendant's description walking into the Quiznos and demanding money. After defendant fled from the restaurant, Mr. Dorch followed him outside and saw him flee in a red Jeep Cherokee traveling northbound on Indiana Avenue. Mr. Dorch told a nearby officer about the robbery and location of the getaway vehicle. Within minutes, defendant's vehicle was pulled over by officers while traveling northbound on Indiana Avenue, only a few blocks from the Quiznos. Approximately 15 minutes after the crime was reported, the officers returned defendant to the Quiznos, where Mr. Dorch and Ms. McBride each identified him as the armed robber.

¶ 64 Given all this evidence against defendant, there is no reasonable probability the result of the trial would have been different but for counsel's allegedly unprofessional errors. In the absence of any prejudice, defendant's claims of ineffective assistance fail.

¶ 65 Next, defendant states in his "issues presented for review":

"the government knowingly and deliberately included deliberate falsehoods and/or acted in reckless disregard for the truth in order to bolster a show of probable cause, to cover up an unduly suggestive show-up identification, and to convict the defendant, Durwyn Talley, at

trial."

Defendant has waived review of this issue by failing to make any arguments in support thereof. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 66 Next, defendant contends the circuit court was biased and prejudiced against him. Specifically, defendant argues the court demonstrated its prejudice by "allowing Sergeant Rochowicz to give testimony as to the probable cause to stop and arrest at the hearing on the motion to suppress identification, thus, revisiting the motion to suppress and quash arrest." Defendant's contention of bias and prejudice is without merit. At the hearing on the motion to suppress identification, Sergeant Rochowicz testified on direct examination to the stop of defendant's vehicle. Defendant objected, and the court engaged in the following colloquy with him:

"DEFENDANT: Your Honor, can I object to this?

THE COURT: This is your attorney asking these questions, sir.

DEFENDANT: I understand, but the nature of this is supposed to be about the show-up, and they are going back into testimony that should have been given at the suppression hearing.

THE COURT: I believe this is what we call prefatory information. We are getting from one point in time to another. Is that correct, Mr. Lee [defense counsel]?

MR. LEE: That is correct, Judge.

THE COURT: That's not being offered for the truth. With regard to this identification, I have to decide whether or not the identification was unduly suggestive. I understand your concern, but I believe it is relevant to bring us to a point in time. Go ahead,

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Mr. Lee."

¶ 67 The foregoing colloquy demonstrates that, when defendant objected to his own counsel's questioning of Sergeant Rochowicz regarding the stop of defendant's vehicle, the circuit court questioned defense counsel as to the purpose behind the questioning and determined it was intended to elicit certain "prefatory information" relevant to the motion to suppress the identification. Far from demonstrating any bias or prejudice against defendant, this record shows the circuit court took defendant's objection seriously and ensured defense counsel was providing effective representation.

¶ 68 Next, defendant contends the circuit court demonstrated its bias and prejudice by questioning Mr. Dorch as to whether he was mentally focused enough to testify and by allowing the State to "coach Dorch for over an hour" before resuming trial. Defendant's contention is without merit. The State had subpoenaed Mr. Dorch to testify. When he failed to appear, he was arrested. When Mr. Dorch appeared before the court, the following colloquy ensued:

"THE COURT: Mr. Dorch, you know why you are in custody now.

MR. DORCH: Yes, sir.

THE COURT: We can proceed on this case today, or I will proceed to set bond on you and we will continue the matter.

MR. DORCH: Do what you want. Just if we can get it on over with. I want to get it over with so I can go back to my family.

THE COURT: You know, it's [4:20 p.m.].

MR. DORCH: I understand.

THE COURT: Okay.

MR. DORCH: Yes, sir.

THE COURT: So, you know, if you need some time to calm down—

MR. DORCH: I'm not—

THE COURT: We can proceed—listen to me for a second. I can either go to a bond hearing today where I can set bond on this because right now you don't have a bail, which means that you are in custody until this matter gets resolved, at least the matter of you not coming to court, not the matter of the case that's on trial. Do you understand that? Or we can proceed on this today. So it is really up to you.

MR. DORCH: Let's go today.

THE COURT: I'm just telling you I'm not going to—it is [4:20] right now. Whatever time it takes—if it is going to be much longer in order to—

MR. DORCH: We can proceed now.

THE COURT: I am just telling you, sir, I don't know if your mind is focused or not. I hope it is.

MR. DORCH: I'm here to tell the truth.

THE COURT: Listen to me, sir. Either we can proceed on this today or we can proceed on it—not tomorrow, probably some time next week. So I will pass the case. You were subpoenaed by the State. I will allow you to talk to the State. And again, we are going to make this decision. We have been screwing around on this for awhile. Let's make this decision whether or not he is ready to testify today in the next five minutes."

¶ 69 The foregoing colloquy demonstrates no bias or prejudice by the court against defendant, but,

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rather, shows the court took reasonable steps ensuring Mr. Dorch's understanding that his bond hearing and defendant's trial were two separate proceedings, and ensuring Mr. Dorch wished to proceed with his trial testimony prior to the bond hearing. Further, contrary to defendant's argument that the circuit court allowed the State to "coach" Mr. Dorch "for over an hour," the record reflects the court allowed the State to speak with Mr. Dorch for "five minutes" in order to ensure he was ready to testify. Defendant points to no support in the record for his argument that the meeting between the State and Mr. Dorch lasted for over an hour or that it involved any "coaching" of his testimony.

¶ 70 Next, defendant contends the circuit court demonstrated its bias and prejudice by sentencing him to 34 years' imprisonment. Review of the sentencing hearing indicates the court sentenced defendant to 34 years in prison (which was within the sentencing range) because he had an extensive criminal history and his crimes were becoming more violent. There is no indication anywhere in the record that his 34-year sentence was the result of any bias or prejudice.

¶ 71 Finally, defendant contends the circuit court demonstrated its bias and prejudice by denying his *pro se* motion to reconsider the motion to suppress evidence. At the hearing, the circuit court reiterated it had found the officers who testified at the hearing on the motion to suppress to be credible and denied the motion to reconsider. There is no indication anywhere in the record that the denial of the motion to reconsider was the result of any bias or prejudice.

¶ 72 For the foregoing reasons, we affirm the circuit court.

¶ 73 Affirmed.