

No. 1-09-1327

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FIFTH DIVISION
January 28, 2011

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. 06 CR 21159
)	
GEORGE BROWN,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

Held: Defendant forfeited claims that his fourth amendment rights were violated by invalid search, and where no motion to suppress challenging search had been filed, court could not evaluate defendant's claim of ineffective assistance of counsel.

After a jury trial, defendant, George Brown was convicted of identity theft, theft, aggravated possession of a stolen motor vehicle, and forgery. He was sentenced to six years in the Illinois Department of Corrections on identity theft, six years on theft, and five years on forgery, to be served concurrently. He now appeals.

I. BACKGROUND

George Brown was arrested on August 10, 2006. On September 14, 2006, he was charged by indictment with identity theft, theft, aggravated possession of a stolen motor vehicle, and forgery.

On February 11, 2009, Mr. Brown filed a motion to quash arrest and suppress evidence in which he challenged his arrest and primarily contended that, at the time, he “was not observed in the commission of an offense nor did police officers have reasonable grounds to believe the defendant had committed an offense.”

A hearing on Mr. Brown’s motion to quash arrest and suppress evidence was held on February 20, 2009. Defense counsel’s focus, similar to the focus in the filed written motion, was on the arrest itself.

Maria Ankum testified for the defense as follows. On August 10, 2006, Ms. Ankum was waiting for a real estate agent to show her a house on Old Plank Boulevard in Matteson, Illinois. Ms. Ankum noticed a man next door, whom she identified at the hearing as defendant, George Brown. Mr. Brown was doing yard work with a younger man. The real estate agent arrived about ten minutes later, and began talking to Ms. Ankum and showing her around the house. During this time, Ms. Ankum saw an unmarked police car drive up to the home next door and saw the driver speak to Mr. Brown. Ms. Ankum saw the police car leave a short while later, but did not see where it went. After the police car left, Ms. Ankum saw Mr. Brown and the young man leave in a silver truck. She saw the young man enter the driver’s side of the vehicle but she did not see Mr. Brown get in the truck. After the truck turned onto Ridgeland Avenue, it was

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stopped by the unmarked police car. She was able to see this from where she stood at the Old Plank Boulevard house. Ms. Ankum did not see what happened after the vehicle was stopped.

Later that year, Ms. Ankum received a telephone call from the real estate agent, who informed her that Mr. Brown was trying to get in touch with her. Ms. Ankum called Mr. Brown who told her that he needed someone to testify. She eventually met with Mr. Brown and his attorney.

Defense counsel next called defendant to testify. On cross-examination, Mr. Brown invoked his fifth amendment rights and refused to answer the State's questions regarding the ownership of the Old Plank Boulevard residence. The court allowed defendant to invoke his fifth amendment rights but struck his testimony in its entirety from the record "because the State [had] not had a full and fair opportunity to cross-examine him."

Defense counsel then called Sergeant Johnson to the stand, who identified defendant in court. Sergeant Johnson testified that he arrested Mr. Brown on August 10, 2006 in the area of 21800 Ridgeland Avenue in Matteson, Illinois. Sergeant Johnson stated that Mr. Brown was in a silver Ford truck at the time and Sergeant Johnson recovered, from the center console, a checkbook in which there were several checks printed in the name of George Brown, and an Indiana driver's license with Mr. Brown's picture on it identifying him as "Alfred" Brown. Sergeant Johnson also recovered from the vehicle "numerous pieces of paper, documents and paperwork pertaining to the purchase of a vehicle that [Mr. Brown] was driving." Sergeant Johnson testified that these items, which were found in the center console as well as a glove box area, had to do with the ownership of the vehicle being driven by Mr. Brown, and he believed

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that the prosecution intended to use these documents in Mr. Brown's prosecution.

At the close of defendant's case in chief, the State moved for a directed finding. The State argued that defendant had not established his burden of showing that he held a reasonable expectation of privacy in the place searched or the items seized. The trial court denied the motion.

The State then recalled Sergeant Johnson to the stand. On direct examination, Sergeant Johnson testified to the following facts. He went to the house at 6345 Old Plank Boulevard, in the area of Old Plank Boulevard and Ridgeland Avenue, at approximately 6 p.m. on August 10, 2006. He was investigating a forgery/deceptive practices case in which the water bill for that residence had been paid in April 2006 using a stolen money order. When Sergeant Johnson arrived at the residence, he saw a young man standing next to a silver Ford truck parked in the driveway. Sergeant Johnson also saw Mr. Brown, whom he identified in court as defendant, cutting grass on the front parkway. He approached Mr. Brown and asked him if he had any type of identification, whereupon Mr. Brown provided an Illinois driver's license with his picture, identifying him as George Brown. Sergeant Johnson asked Mr. Brown if he knew who lived at the residence and defendant told him that his brother, Jim Brown, lived there. Sergeant Johnson "ran" the driver's license that Mr. Brown had given him and it came back as revoked. He gave the license back to Mr. Brown, told him why he had stopped by, and asked Mr. Brown to talk to Jim Brown about the matter. Sergeant Johnson "ran" the license plate on the vehicle parked in the driveway and it came back as registered to Jeff Pardue at the 6345 Old Plank Boulevard residence.

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Sergeant Johnson then drove his car across Ridgeland Avenue and parked in the next subdivision to surveil Mr. Brown. He watched Mr. Brown put away a lawn mower while the young man entered the passenger side of the truck. Mr. Brown then entered the driver's side of the truck and backed out of the driveway. He drove westbound on Old Plank Boulevard, and then turned at Ridgeland Avenue and continued to drive south.

Knowing that Mr. Brown's license was suspended, Sergeant Johnson followed and curbed the vehicle in the 21800 block of Ridgeland Avenue. This location was five blocks from the residence where Mr. Brown had been cutting the grass. There were two trailer parks in the area, one on the east side of Ridgeland Avenue, and the other on the west side of Ridgeland Avenue.

Sergeant Johnson approached the driver's front door. Mr. Brown was seated behind the wheel in the driver's seat and the young gentleman was in the front passenger seat. Sergeant Johnson told Mr. Brown that he could not drive because his license was revoked. He asked for Mr. Brown's license once more and called it in again to confirm that it had been revoked. The radio dispatcher informed Sergeant Johnson that the license was revoked and also suspended.

Sergeant Johnson asked Mr. Brown who owned the vehicle that he was driving, and Mr. Brown told him that it was his friend, Jeff Pardue's vehicle. Mr. Brown also said that he was driving the vehicle to Richton Park.

Sergeant Johnson walked Mr. Brown to the rear of the truck. A backup officer arrived and Mr. Brown was placed under arrest. Sergeant Johnson then asked the passenger, whom he eventually learned was Ellis Poteete, for identification. Mr. Poteete answered that he did not

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have any identification and Sergeant Johnson walked him to the rear of the truck. Sergeant Johnson was told by one of the other officers that they had recovered an Indiana driver's license from Mr. Poteete.

Sergeant Johnson ran the number that was on the Indiana driver's license, as well as the name and the date of birth. Both of them came back as having no record on file. Sergeant Johnson testified that he learned that Mr. Poteete was 16 years old. The officers called for a tow truck for the vehicle and Sergeant Johnson performed an inventory search. He recovered, from the glove box, documents pertaining to the purchase of the vehicle and recovered, from the center console, a checkbook that contained checks in the name of George Brown. Inside the checkbook was an Indiana driver's license in the name of "Alfred" Brown with defendant's picture on it. The paperwork from the glove box included a Vehicle Buyers Order Form that listed Jeff Pardue as the purchaser of the vehicle. The address listed was the 6345 Old Plank Boulevard residence.

On cross examination, Sergeant Johnson testified that when he first arrived at 6345 Old Plank Boulevard and saw Mr. Brown, he did not see him engaged in any criminal activity. Sergeant Johnson testified that after approaching Mr. Brown he first identified himself and asked Mr. Brown for his identification. He did not read him his rights, tell him he had the right to remain silent, or inform him that he had the right to refuse. Over objection, Sergeant Johnson stated that if defendant had refused, Sergeant Johnson "[p]robably would have just told him the reason [he] was there." He denied that he would have arrested Mr. Brown should he have continued to refuse to give him any identification.

Sergeant Johnson also testified that when he was surveiling Mr. Brown from the next

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subdivision, he was a “couple hundred feet away.” He further testified that he saw Mr. Brown get into the driver’s side of the truck and, although he could “guess” that it would be possible for someone to enter that side and actually get in the back seat, that was not what happened.

Sergeant Johnson further testified Mr. Poteete was taken to the back of the truck because they were towing the vehicle since Mr. Poteete did not have a driver’s license and would not be able to drive the truck. He testified that Mr. Poteete was free to leave and he had no intention of arresting Mr. Poteete. Sergeant Johnson stated that the reason the officers asked Mr. Poteete for identification was to see whether he was old enough to be given the vehicle that Mr. Brown was driving. He admitted that, had Mr. Poteete been the person driving the car, Sergeant Johnson could not have pulled the car over unless Mr. Poteete committed some other traffic offense. Sergeant Johnson testified that Mr. Poteete was eventually charged as a juvenile for possession of fraudulent identification.

On redirect examination, Sergeant Johnson testified that the reason he requested a tow was that neither Mr. Brown or Mr. Poteete could drive the vehicle, the vehicle was parked on the roadway, and that they “towed the vehicle consistent [*sic*] to arrest.” The vehicle was in fact towed.

On recross examination, Sergeant Johnson denied that the police detained Mr. Poteete because he was driving the vehicle.

In arguing the motion to quash arrest and suppress evidence, defense counsel challenged the initial stop of defendant at the residence and the subsequent arrest, and did not challenge the validity of the inventory search itself. He specifically argued that Sergeant Johnson’s initial

approach of Mr. Brown at the Old Plank Boulevard residence, during which he obtained Mr. Brown's license, constituted a violation of Mr. Brown's fourth amendment rights. Defense counsel argued that Mr. Poteete, not Mr. Brown, was the driver of the truck. He also argued that all of the recovered documents flowed from the illegal initial detention of Mr. Brown and must be suppressed. The State countered that Sergeant Johnson's initial approach at the house was consistent with the fourth amendment, and that once Sergeant Johnson observed defendant driving the truck on a revoked license, he properly stopped the vehicle and placed defendant under arrest. The State also argued that the vehicle could not be left on the road and had to be towed, and therefore, the documents were properly recovered during the inventory search.

In denying defendant's motion to quash arrest and suppress evidence, the trial court expressly found that Sergeant Johnson was credible and that Ms. Ankum was not.

A jury trial commenced on March 31, 2009. The jury returned guilty verdicts on all counts. Defendant's motion for a new trial was denied. The court sentenced defendant to six years in the Illinois Department of Corrections on identity theft, six years on theft, and five years on forgery, to be served concurrently. The court denied defendant's motion to reconsider his sentence. Defendant filed this timely appeal.

II. ANALYSIS

Defendant argues on appeal that the trial court erred in denying his motion to quash arrest and suppress evidence because the search of the vehicle violated his fourth amendment rights where it was neither a valid inventory search or a valid search incident to arrest. Mr. Brown has also argued that he received ineffective assistance of counsel. The State asserts that defendant

failed to challenge the inventory search in the trial court and has “waived” the issue on appeal. The State further contends that Mr. Brown was provided with effective assistance of counsel because his trial counsel, as a matter of trial strategy, sought to suppress the evidence on other grounds.

A. Standard of Review

A trial court’s ruling on a motion to suppress presents a mixed question of law and fact. *People v. Mason*, 403 Ill. App. 1048, 1052 (2010). Thus, “[o]ur standard of review is bifurcated.” *People v. Johnson*, 385 Ill. App. 3d 585, 590 (2008). The trial court’s factual findings are entitled to great deference and will not be disturbed on review unless they are manifestly erroneous, *i.e.*, against the manifest weight of the evidence. *Mason*, 403 Ill. App. at 1052; *People v. Clark*, 394 Ill. App. 3d 344, 347 (2009). “This deferential standard of review is grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses’ demeanor, and resolve conflicts in their testimony. [Citation.]” *People v. Johnson*, 385 Ill. App. 3d at 590. When it comes to applying the law to the facts, however, the trial court’s vantage point is not any superior to that of the reviewing court. *People v. Johnson*, 385 Ill. App. 3d at 590. Therefore, this court applies a *de novo* standard of review to the ultimate question of whether suppression of the evidence is warranted. *People v. Gipson*, 203 Ill. 2d 298, 304 (2003).

B. Law Governing Motions to Suppress

The burden of establishing the unlawfulness of a search and seizure rests with the defendant who moves to suppress the evidence. *People v. Dillon*, 102 Ill. 2d 522, 526 (1984);

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People v. Clark, 394 Ill. App. 3d 344, 347 (2009). “The fourth amendment protection against unreasonable government search and seizure extends only to individuals who have a reasonable expectation of privacy in the place searched or property seized.” *People v. Johnson*, 114 Ill. 2d 170, 191 (1986), citing *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L. Ed. 2d 387, 401 (1978). A defendant challenging a search has the burden of establishing that his fourth amendment rights were violated by proving that he had a legitimate expectation of privacy in the searched property. *People v. Sutherland*, 92 Ill. App. 3d 338, 342 (1980). Factors relevant in determining whether a defendant has a reasonable expectation of privacy in the place searched or the property seized include: whether a defendant was legitimately present in the area searched; whether he has a legitimate ownership or possessory interest in the area or property seized; his prior use of the area searched or property seized; his ability to control or exclude others' use of the property; and his subjective expectation of privacy in the property. *People v. Johnson*, 114 Ill. 2d at 191-92.

In this appeal, Mr. Brown has not specifically argued that he had a legitimate expectation of privacy in silver Ford Expedition truck or the documents that were retrieved from it. Although Mr. Brown testified at trial that he had purchased the vehicle that is the subject of this case, during the hearing on Mr. Brown's motion to quash arrest and suppress evidence, the only testimony regarding ownership of the vehicle was that of the arresting officer who testified that he had run the license plate and it came back as being registered to Jeff Pardue. The officer also testified that defendant told him that the owner of the car was defendant's friend, Jeff Pardue. The State moved for a directed finding at the hearing on defendant's motion to quash arrest and

suppress evidence, arguing that defendant did not meet his burden of establishing that he had a legitimate expectation of privacy in the vehicle. The trial court denied the motion for a directed finding and the State has not raised the argument before this court. Although defendant has not specifically contended here that he had a legitimate expectation of privacy in silver Ford Expedition truck or the documents that were retrieved from it, it is clear that this is his position based on his challenge to the inventory search of that vehicle now presented in this appeal.

C. Forfeiture

Assuming *arguendo* that Mr. Brown had a legitimate expectation of privacy in the searched property, the State argues that defendant has “waived” the argument regarding the inventory search because he did not challenge it before the trial court. Defendant notes that waiver is “the intentional relinquishment or abandonment of a known right” (*People. Blair*, 215 Ill. 2d 427, 444 n.4 (2005)) and asserts that the issue was not waived. He additionally argues that he did not forfeit the issue regarding the propriety of the inventory search.

It is well-settled that in order to preserve an issue for review, a defendant must object to the alleged error at trial and include the issue in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant, citing *People v. Miller*, 355 Ill. App. 3d 898, 900 (2005) concedes in his brief that “a suppression issue is forfeited if it is not raised in a motion to suppress and in a post-trial motion.” He argues, however, that his claim was not forfeited because he raised the issue in both his motion to quash arrest and suppress evidence, and his post-trial motion.

In the motion to quash arrest and suppress evidence, defendant contested his arrest and argued that, “[a]t the time of the arrest, the defendant was not observed in the commission of an

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offense nor did police officers have reasonable grounds to believe the defendant had committed an offense.” Defendant also argued that “[b]ecause the conduct of the defendant prior to his arrest was such as would not reasonably be interpreted by the arresting officers as constituting probable cause, the detention, arrest and seizure was therefore illegal.” Defendant’s pre-trial motion fails to mention the inventory search at all. Nor did he amend his grounds at any time during the motion to argue the lack of justification for an inventory search. The remainder of the written motion contains facts and arguments that apparently refer to a different case since the instant case does not involve a “warrantless entry into defendant’s home,” as the motion states.

During the hearing on Mr. Brown’s motion to quash arrest and suppress evidence, his attorney considered, but did not pursue an argument that the inventory search itself was improper. He stated:

“The law is that an inventory search can certainly be performed based on arrest, and that’s allegedly what happened here.

So we are not making a claim here that somehow the actual search of the car was illegal. According to all the information that we have, a search of this vehicle occurred after the arrest of my client.”

During the hearing, defense counsel made two arguments. The first argument was that the approach of the officer when he originally met defendant and discovered that his license was revoked, was improper. Regarding the officer’s approach of defendant, counsel asked the court to consider the suppression based on that activity alone.

Defense counsel’s second argument was that defendant was not the driver of the car.

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Defense counsel stated as follows:

“As I repeated over and over again, we believe the evidence shows that it is more likely than not that Mr. Poteete was driving that car, not my client, based on the objective evidence presented by the police officer as to who got arrested and for what, and also the unimpeached testimony of [the eyewitness who stated Mr. Poteete was driving the car].”

Defendant concedes that “defense counsel focused at the suppression hearing on challenging the reason for the traffic stop,” but argues that his counsel “included in his motion to suppress that the search was unreasonable.” As noted earlier, however, defense counsel argued that the search was unreasonable based *only* on the alleged improper arrest and never addressed the inventory search. Defendant also asserts that his counsel “also argued in the post-trial motion that the trial court erred by denying the pre-trial motions.” But, as the State notes, “this is unhelpful * * * because there [was no] pre-trial motion or hearing about the validity of the inventory search.”

“Broad and general allegations in a post-trial motion are inadequate to advise the court of the challenge being raised, and are inadequate to preserve an issue for appellate review.” *People v. Johnson*, 250 Ill. App. 3d 887, 893 (1993). A defendant may not argue on appeal that a motion to suppress should have been granted for a reason not specified in the motion and not argued in the trial court. *People v. Blankenship*, 353 Ill. App. 3d 322, 324 (2004). In *Blankenship*, the court concluded that despite the fact that the defendant had challenged the propriety of the traffic stop, defendant forfeited the issue that a computer check itself was improper. Similarly here,

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despite the fact that Mr. Brown contested the propriety of the initial stop and request for his driver's license which revealed that the license had been revoked, and despite the fact that Mr. Brown contested the subsequent vehicle stop and his arrest, arguing that he was a passenger, not the driver, of the vehicle, Mr. Brown did not argue that the inventory search itself was improper. We conclude that defendant has forfeited the issue of whether the inventory search was proper.

Defendant here has also argued that his fourth amendment rights were violated under *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710 (2009) because the search of the vehicle was not a valid search incident to arrest. We note that *Arizona v. Gant*, was decided after the hearing on the motion to quash arrest and suppress evidence, but also note that the record contains no testimony from any State witness that the search was performed incident to arrest. Rather, the testimony was that the search was performed as an inventory search. In any event, because the search itself was not challenged in the motion to quash arrest and suppress evidence, this argument also has been forfeited.

D. Ineffective Assistance of Counsel

Defendant argues that, if this court determines that the issue of the propriety of the search has been forfeited, we should conclude that his trial counsel was ineffective for failing to challenge the search itself as illegal.

Claims of ineffective assistance of counsel are evaluated under the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984) that was adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish a violation of the constitutional right to effective assistance of

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counsel under the *Strickland* test, a defendant must show first that his attorney's representation fell below an objective standard of reasonableness, and second, that the deficient performance so prejudiced the defense that there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064. A defendant has the burden of demonstrating that he has received ineffective assistance of counsel. *People v. Lundy*, 334 Ill. App. 3d 819, 829 (2002). A defendant must satisfy both prongs of the *Strickland* test. *People v. Jones*, 219 Ill. 2d 1, 24 (2006). Even assuming *arguendo* that defendant could satisfy the first prong of the *Strickland* test, he cannot establish prejudice on this record.

“In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.” *People v. Patterson*, 217 Ill. 2d 407, 438 (2005); see also *People v. Bew*, 228 Ill. 2d 122, 128-129 (2008) (same).

Defendant asserts that, at the time of the motion to suppress, the challenge to the search based on *People v. Hundley*, 156 Ill. 2d 135 (1993) and *People v. Clark*, 394 Ill. App. 3d 344 (2009) was well-established. However, *Clark* was decided on September 3, 2009, which was *after* the hearing on the motion to quash arrest and suppress evidence in this case, after defendant's trial, and after his sentencing.

In *People v. Hundley*, the Illinois Supreme Court explained that “[a]n inventory search is a judicially created exception to the warrant requirement of the fourth amendment.” 156 Ill. 2d

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135, 138 (1993). As the *Hundley* court further noted:

“Three requirements must be satisfied for a valid warrantless inventory search of a vehicle: (1) the original impoundment of the vehicle must be lawful [citation]; (2) the purpose of the inventory search must be to protect the owner's property and to protect the police from claims of lost, stolen, or vandalized property and to guard the police from danger [citation]; and (3) the inventory search must be conducted in good faith pursuant to reasonable standardized police procedures and not as a pretext for an investigatory search [citation].” *Id.*

In *Hundley*, unlike the instant case, defendant *had* filed a motion to suppress evidence based on the search. Thus, in “[c]onsidering the applicable law as applied to the facts” in that case, the *Hundley* court had the benefit of a complete record to review in making its ultimate determination that the search was valid. *Hundley*, 156 Ill. 2d at 139. In the other case relied upon by defendant, *People v. Clark*, the court there also had the benefit of reviewing a motion to suppress that had been heard by the trial court and the evidence that was adduced at the hearing.

The procedural posture of the present case is different because no motion to suppress evidence based upon the inventory search itself was ever filed or argued. Therefore, because there was no hearing regarding the propriety of the search itself, no factual determinations were made by the trial court as to this issue and the record does not otherwise contain sufficient evidence for this court to find a reasonable probability that the motion would have been granted.

Defendant asserts that, under *Hundley* and *Clark*, the original impoundment of the vehicle was not lawful because “there was no evidence that [the vehicle] was impeding traffic,

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threatening public safety, or parked illegally.” As the State correctly notes, “[d]efendant is raising factual questions that were never litigated or subject to findings of fact.” Perhaps recognizing this to be true, on appeal, defendant also asks this court to take judicial notice of a Google map to assist this court in evaluating his assertion that the vehicle was stopped in a “residential area” and his claim that the impoundment of the vehicle was not lawful. We decline to do so. This court has been asked recently to take judicial notice on appeal – based upon a Google map – of certain facts, *i.e.* that a certain park was north of a certain intersection. *People v. Clark*, 2010 WL 5168886 (December 16, 2010). The *Clark* court did so, “but *only* for the purpose of *understanding* the statements made *at trial* by the witnesses and the trial court.” (Emphasis in original.) *Clark*, 2010 WL 5168886, slip op at 9. Here, defendant essentially asks this court to make a factual finding never addressed below. We cannot do so.

This court has consistently decided that, when the appellate record does not permit the court to make a determination as to a defendant's claim of ineffective assistance, the claim is better served in the context of a postconviction petition where a complete record can be made. See, *e.g.*, *People v. Holloman*, 304 Ill. App. 3d 177, 186-87 (1999).

In *People v. Holloman*, 304 Ill. App. 3d 177, 186 (1999), similar to the instant case, defendant claimed that trial counsel's failure to file a motion to suppress evidence constituted ineffective assistance. The State argued that because the defendant's arrest was not challenged in the trial court, “the State had no need or opportunity to present evidence on the propriety of the police officers' conduct.” *Holloman*, 304 Ill. App. 3d at 186. The court explained as follows:

“whether defendant suffered prejudice for counsel's failure to make the suggested

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motions depends on the likelihood of their success. As the State points out, the record is devoid of factual findings on the issues pertinent to defendant's claim.

The record contains nothing to review with respect to either the appropriateness of the officer's actions or defendant's standing to raise fourth amendment issues.”

Holloman, 304 Ill. App. 3d at 186.

The court declined to address the issue on direct appeal because the record contained nothing to review with respect to the officer's actions or defendant's standing to raise fourth amendment issues, and explained that defendant could pursue his claim under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1996)). *Holloman*, 304 Ill. App. 3d at 186.

As this court noted again in a case involving the failure to file a motion to suppress evidence:

“whether defendant suffered prejudice for his trial counsel's failure to move to suppress evidence *** depends on the likelihood of the motion's success.

However, the record is devoid of factual findings on the issues pertinent to defendant's claim. Because the record contains nothing to review with respect to the appropriateness of the police officers' actions *** , we decline to consider defendant's argument. In so doing, we note that the argument defendant makes is almost never appropriate on direct appeal because absent a motion to suppress, *it is highly unlikely that the State would garner its resources to prove the propriety of the officers' actions.* Thus, in such cases, we cannot be certain that the record contains all of the evidence that could have been presented on the issue.”

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(Emphasis added.) *People v. Durgan*, 346 Ill. App. 3d 1121, 1142-1143 (2004) (in the section designated as nonpublishable under Supreme Court Rule 23).

Although this portion of *Durgan* was not published, this court has previously noted with respect to an unpublished opinion, “we are free to deem it persuasive.” *Nulle v. Krewer* 374 Ill. App. 3d 802, 806 n.2 (2007), citing *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 374 (2005) (“[t]he fact [that] one court has used certain reasoning in an unpublished opinion does not bar courts in this state from using the same reasoning in their decisions”).

On the record before us we cannot say that there is a reasonable probability that a motion to suppress challenging the inventory search would have been granted. We must reject Mr. Brown’s claim of ineffective assistance of counsel.

III. CONCLUSION

Defendant forfeited his claims that his fourth amendment rights were violated by an invalid search. Defendant’s claim of ineffective assistance of counsel has not been sustained on the record before us.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.