

No. 2—09—0868  
Order filed May 27, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court of
OF ILLINOIS,	)	Boone County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—CF—58
	)	
HEATHER M. RIMKAVICH	)	Honorable
	)	John H. Young,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hutchinson and Hudson concurred in the judgment.

**ORDER**

*Held:* Where, at a purported stipulated bench trial, trial counsel stipulated instead that a guilty finding would enter and permitted defendant to plead guilty to the charged offense, trial counsel was ineffective where defendant's guilty plea was not knowing and voluntary because it was based on otherwise inadmissible hearsay evidence of her guilt. We reverse and remand the cause for new proceedings.

Defendant, Heather M. Rimkavich, was convicted of aggravated driving under the influence (DUI). 625 ILCS 5/11—501(a)(2), (d)(1)(G) (West 2004), as amended by Pub. Act 94—329, §5, eff. January 1, 2006 (2005 Ill. Legis. Serv. P.A. 94—329 (H.B. 1471) (West)). She was sentenced to an agreed 18-month term of conditional discharge with certain conditions, including that she pay

various fines and fees. Defendant appeals, arguing that: (1) she received ineffective assistance of counsel at a purported “stipulated” bench trial on the charge of aggravated DUI; and (2) the court imposed sentence without entering a finding regarding her criminal history. We reverse and remand for new proceedings.

## I. BACKGROUND

### A. Motion to Quash Arrest and Suppress Evidence

Defendant was charged by indictment with one count of aggravated DUI, a Class 4 felony. 625 ILCS 5/11—501(d)(2)(A) (West 2008). The indictment alleged that, on February 9, 2008, she drove a vehicle while under the influence of alcohol and that she did not possess a driver’s license or permit, restricted driving permit, or judicial driving permit.

On May 1, 2008, assistant public defender Carie Poirier, defendant’s attorney, moved to quash the arrest and suppress evidence, arguing that defendant was stopped by Belvidere police without probable cause or reasonable grounds to believe that defendant had committed an offense and in the absence of any warrant.

On April 22, 2009, at a hearing on defendant’s motion, defendant presented the following evidence. Belvidere police officer Chris Washburn testified that, while on patrol at 12:44 a.m. on February 9, 2008, he heard a police dispatch directed to Officer Paul Derry of a suspicious vehicle in the 4100 block of Fallen Oaks Drive. An unidentified caller reported that the vehicle had been in front of his or her residence for about one-half hour. Washburn drove to the location, arriving before Derry. There, he observed a blue SUV matching the dispatcher’s description parked on the side of the road. Washburn parked his squad car behind the SUV, approached it, and knocked on the window. The person in the driver’s seat (later determined to be defendant), rolled down the

window. There was one other individual in the car—a male, later determined to be Steven, defendant's friend; he was seated in the front passenger seat. Washburn further testified that, given that it was nighttime, he "probably" had with him a flashlight.

When defendant rolled down the window, Washburn informed her that a report had been received concerning a suspicious vehicle and he asked what the two were doing. They replied that they were talking. According to Washburn, he smelled alcohol from inside the car. The occupants appeared young, so, he asked both individuals for identification. Defendant provided Washburn with her name and date of birth, which disclosed that she was age 18. Washburn further testified that, in answering his questions, defendant's speech was slightly slurred. He asked her to exit the vehicle and asked her how much she had to drink. Defendant replied "a couple." Washburn did not ask defendant to perform any field sobriety tests, had no further discussions with her, and did not arrest her. Washburn asked Steven if there was any alcohol in the vehicle, and Steven turned over two bottles of alcohol.

Officer Derry testified that the dispatch he received that evening related that the caller told police he or she observed a lighter being lit every few seconds inside the vehicle and was concerned that the occupants were using drugs. The caller described the vehicle as a Jimmy GMC and provided its license plate number. When Derry arrived at the scene, he parked behind Washburn's squad car and Washburn briefed him on his observations. Addressing his arrival and whether he saw the vehicle that was stopped, Derry replied: "It wasn't stopped. It was already parked and Officer Washburn had approached the vehicle from the rear of the vehicle. He didn't activate his emergency lights or anything like that."

When Derry arrived, Steven remained in the passenger seat of the vehicle, but defendant had been placed in the rear seat of Washburn's squad car. Washburn informed Derry that he separated the two "so they couldn't get their stories straight" and that he placed defendant in his squad car because it was very cold outside. Derry spoke to defendant and Steven. He performed field sobriety tests on defendant, including the horizontal gaze nystagmus, walk-and-turn, and one-legged stand tests. Derry testified that defendant failed the "test," and he arrested her for DUI. He did not observe defendant driving, but Washburn had told him that the keys to the vehicle were in the ignition when Washburn spoke to the occupants and that he had smelled alcohol on the "driver." (Derry also arrested Steven for consumption of alcohol by a minor.)

As part of the defense case, a DVD containing audio and video and recorded by Derry was played for the court. The court reviewed the recording up to the time indicated thereon as 1:13:51 (*i.e.*, before the field sobriety tests). On the DVD, there is snow on the lawns and the officers are wearing knit hats and gloves. Derry's car can be seen pulling up to the area at about 1:04 a.m. Derry spoke to Washburn, who told Derry that he had spoken to both occupants of the SUV. Washburn reported that defendant told him that she was 18 years old and Steven told him that he was 19 years old. As to defendant, Washburn told Derry that "[h]er license has been invalidated." Washburn also told Derry that he knocked on the window of the SUV and, when defendant rolled down the window, he smelled alcohol "right away." Defendant told Washburn that her best friend had just passed away.

Washburn also reported to Derry that he asked Steven if he had been drinking, to which Steven replied that he had. Washburn commented that, while speaking to the occupants, he noticed that the key was in the ignition and the radio was on; also, defendant was in the driver's seat. Steven told Washburn that there was alcohol in the car, and he handed two bottles to the officer.

At this point in the DVD, Derry took over questioning the two individuals. First, he spoke to Steven while Steven was still in the SUV. Steven admitted to Derry that he had been drinking that evening and stated that he had consumed about 1 1/2 cups of vodka and “Jäger” 1 1/2 hours earlier. Steven also related that he had been driving for a period that night, that he drove the SUV from defendant’s home to the present location, and that he and defendant then switched seats. Derry remarked that this scenario did not make sense and asked if that is what actually occurred. Steven stated, “I’m pretty sure.” Derry then said “Let me just stop you; this is the time to be honest with me.” Steven then related that *both he and defendant* had driven the car through the neighborhood before they started drinking; *defendant drove first*. They started drinking after they stopped at the location where the SUV was parked. Derry then stated that he had someone “who saw you guys driving around.” He asked: “Who are they going to tell me was driving?” Steven replied that they would say defendant was driving because *she* was the one who drove to the location where the car was parked. However, he stated that the two drank only while the car was sitting in the parked location and nowhere else.

Next on the DVD, Derry walked to Washburn’s squad car and asked defendant to exit. (Defendant kept her hands in her jacket pockets during a large portion of her encounter with Derry.) Derry showed defendant two bottles of alcohol and asked if “he” retrieved them from her car. Defendant responded that she was unaware if they were in her car and that “he,” whom she identified as Steven, might have put them there. Defendant told Derry that she consumed a couple of drinks because her best friend had just died. Steven had driven and pulled over to where they were parked; the two were talking. Defendant denied that she drove the SUV at any time that evening. They had been at Steven’s house. She explained that she was sitting in the driver’s seat when the SUV was

parked because it was her car and she felt more comfortable in the driver's seat. Defendant further explained that she and Steven had been drinking "not even half an hour ago" down the street, the next block over, while they sat outside the car. Then, Steven drove the car to the parked location.

When Derry inquired if it made sense that Steven would drive the car to the parked location and that defendant would then get into the driver's seat, defendant responded that she knew they were going to switch positions because she had a suspended license and could not drive. She reiterated that she "feels more safe" sitting in the driver's seat because it was her vehicle. Derry informed defendant that he would have her perform field sobriety tests. Before they commenced, he asked her how much she had to drink that night. Defendant responded that she had two drinks (of orange juice and vodka) about 20 minutes earlier.

The field sobriety tests were recorded on the DVD, but the record reflects that the court did not review that portion of the recording because, it explained, it was assessing a motion to quash. Derry administered the horizontal gaze nystagmus test with defendant's back to the video camera. He next administered the heel-to-toe test. During the one-legged stand test, the DVD reflects that defendant had trouble balancing. After the tests were administered, Derry handcuffed defendant and informed her that she was under arrest for DUI. This portion of the DVD terminates at 1:18 a.m.

After the defense rested, the State moved for a directed finding, arguing that Washburn engaged in community caretaking when he approached defendant's car and questioned her. Defense counsel argued that defendant was stopped when Washburn "asserted his authority and made her open her window" and that there was no basis for the stop. The court took the matter under advisement and, on May 13, 2009, granted the State's motion and denied defendant's motion to quash. The court found that defendant had not met its burden on the motion to quash, where

Washburn was engaged in community caretaking at the time he approached and knocked on defendant's SUV and that the DUI investigation began only after the officer smelled alcohol. The trial court subsequently denied defendant's May 18, 2009, motion to reconsider.

B. "Stipulated" Bench Trial/Plea

The parties next appeared in court on August 19, 2009. Defense counsel advised the court that the parties had reached an agreement, stating, "There has been a prior hearing and a transcript. My client would be stipulating to that—to the facts in the transcript that have come about and stipulating that a finding of guilt would enter." Counsel also advised the court that the parties had agreed to a disposition of the case, including, among others, that: (1) defendant would be placed on 18 months' conditional discharge; and (2) various costs, fees, and fines would be assessed.

The trial court admonished defendant, and defendant agreed that she was not under the influence of any substance that would affect her ability to understand the proceedings. She also agreed that the "deal" was "not binding on the Court." The judge further explained the nature of the charge "to which you are pleading to today" and advised defendant of the possible sentence. He noted that he did not need a factual basis because defendant was stipulating to the facts (presented at the suppression hearing) and he had an independent recollection of the suppression hearing evidence and his ruling. The court asked, "In view of those facts, you still wish to plead guilty here today; correct?" Defendant replied in the affirmative. Further, the court told defendant that she had "certain rights here today that by pleading guilty you are going to give them up." He then related those rights (*i.e.*, right to jury trial; to present and cross-examine witnesses; the presumption of innocence; and that the State must prove its case beyond a reasonable doubt). See Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). Defendant agreed that she understood that "by pleading guilty

here today you are giving up all of those rights including the right to have a trial” and affirmed that this was what she wanted to do. Both defense counsel and the State advised the court that they were waiving the presentence investigation.

Defendant denied that any promises had been made to her other than what had been discussed in open court and agreed that she was entering her plea as a free and voluntary act. See Illinois Supreme Court Rule 402(b) (eff. July 1, 1997). When the court inquired if defendant had a guilty plea in front of her, defense counsel interjected, “It’s stipulated.” The court responded, “I’m sorry, it’s stipulated. I apologize.” The judge continued;

“Based upon the stipulated findings I’m going to also find that there was a factual basis. I’d also find that she’s been advised of her rights, charges, and possible penalties, and that this agreement on the sentencing is made voluntarily without any threats or promises other than in the plea agreement.

It’s therefore the judgment of the Court that she be placed on 18 months of conditional discharge, fines and costs as previously set forth \*\*\* on the sentencing order.”

After noting to defendant what she needed to do to comply with some of the conditions of her conditional discharge, the court then admonished her concerning her appeal rights, including: the requirement that a motion to reconsider first be filed “because it’s on a stipulated one” (see Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001) (requiring trial court to admonish the defendant that he or she must file a motion to reconsider the sentence, that any issue not raised in the motion can be deemed waived on appeal, and that, following the disposition of the motion, the defendant must file a notice of appeal within 30 days)); certain rights if she is indigent; and that any

claim might be forfeited if not first raised in the motion to reconsider. Defendant agreed that she understood her appeal rights.

Two days later, on August 21, 2009, defense counsel filed a notice of appeal that listed the order being appealed as the motion to quash arrest. Further, it listed the dates of the judgments being appealed as April 22, 2009 (motion to quash), and June 17, 2009 (motion to reconsider). However, on September 8, 2009, the Office of the State Appellate Defender filed an amended notice of appeal, listing the date of the judgment being appealed as August 19, 2009 (“stipulated” bench trial/plea).

## II. ANALYSIS

### A. Ineffective Assistance Claim

Defendant argues first that she was denied effective assistance of counsel when trial counsel failed to follow proper procedures for a stipulated bench trial and allowed defendant instead to enter a guilty plea to a charge of aggravated DUI. Further, by allowing defendant to plead guilty, trial counsel waived review of her fourth amendment claim (raised in her motion to quash). See *People v. Gonzalez*, 313 Ill. App. 3d 607, 617 (2000) (guilty plea waives suppression issues on appeal). Defendant specifically contends that trial counsel was ineffective in allowing defendant to plead guilty to the DUI charge. Additionally, defendant contends that: (1) her guilty plea was not knowing and voluntary because it was based on insufficient evidence of her guilt; and (2) counsel failed to present a second motion to suppress concerning statements defendant made to Derry. Defendant urges that there can be no confidence in the reliability of the outcome below (*i.e.*, she was prejudiced) and asks that we vacate her conviction and remand the cause for new proceedings. For the following reasons, we reverse and remand.

A defendant has a sixth amendment right to effective assistance of counsel. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). We review claims of ineffective assistance of counsel according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), which requires a defendant to show both that: (1) as determined by prevailing professional norms, counsel’s performance fell below an objective standard of reasonableness (deficient-performance prong); and (2) the defendant was prejudiced by counsel’s deficient performance (prejudice prong). The defendant must satisfy both prongs to prevail on a claim of ineffective assistance of counsel, but a reviewing court may analyze the facts under either prong first and, if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008). To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he or she was not functioning as the “counsel” guaranteed by the sixth amendment. *People v. Thompson*, 359 Ill. App. 3d 947, 952 (2005). To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. *People v. Haynes*, 192 Ill. 2d 437, 473 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

Turning to stipulated bench trials:

“A defendant desiring to appeal denial of a suppression motion makes a mistake in pleading guilty because a guilty plea waives all nonjurisdictional errors and defects. [Citation.] Generally, in order to preserve pretrial objections for appeal, a defendant must go to trial even if the evidence in favor of conviction is overwhelming. Enter the so-called ‘stipulated bench trial.’

A stipulated bench trial is a legal fiction created solely to give defendants the benefit and convenience of a guilty plea while avoiding the consequences of waiver or forfeiture.

[Citation.] In a stipulated bench trial, a defendant enters a plea of not guilty, and a ‘trial’ is held based on a set of facts agreed to by the parties.” *Gonzalez*, 313 Ill. App. 3d at 617.

In stipulated bench trials, precise language must be used. *Id.* To preserve for review the denial of a pretrial motion, the stipulation must be only to the *existence* of the evidence. *Id.* However, where “counsel stipulates that the evidence is *sufficient* to convict, then the stipulated bench trial mutates into a guilty plea and the suppression issues are waived on appeal.” (Emphasis added.) *Id.* A stipulated bench trial is tantamount to a guilty plea: (1) when the State’s entire case is presented by stipulation and the defendant does not present or preserve a defense; or (2) where the stipulation includes a statement that the evidence is sufficient to convict the defendant. *People v. Campbell*, 208 Ill. 2d 203, 218 (2003); *Horton*, 143 Ill. 2d at 21-22 (further noting that, if a stipulated bench trial is tantamount to a guilty plea, then the supreme court rules pertaining to guilty pleas must be followed).

Here, trial counsel stipulated “that a finding of guilt would enter” and permitted defendant to plead guilty to aggravated DUI. Indeed, by repeatedly referring to defendant’s “*de facto*” guilty plea, the State concedes that the trial court proceedings mutated into a guilty-plea scenario. Therefore, we analyze the parties’ arguments in this context.<sup>1</sup> Defendant argues that, by stipulating

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<sup>1</sup>It is perhaps arguable that the August 19, 2009, hearing concluded with both trial counsel and the trial judge ultimately understanding that the proceeding they were participating in was intended to be a stipulated bench trial and that the earlier guilty plea portion was in a sense corrected or vacated. However, it nevertheless remains that defendant was allowed to plead guilty to the

to both a guilty finding and permitting her client to plead guilty when there were issues as to both the quality and quantity of evidence, defense counsel forever removed the possibility of defendant raising a successful challenge to her conviction. In this respect, she urges, she was denied effective assistance of counsel. See *People v. Palmer*, 162 Ill. 2d 465, 474 (1994) (where a plea is made in reasonable reliance on counsel's advice or representation, which advice or representation was incompetent, then the defendant's plea is not voluntary). Defendant also argues that, by allowing her to plead guilty, trial counsel thereby waived review of defendant's suppression motion (and any claim of innocence defendant may have brought) and, thus, was ineffective.

Viewing the proceedings below as a guilty-plea scenario, the parties next preliminarily address whether defendant forfeited her argument that her plea should be vacated. Defendant did not file a post-plea motion, but requests that we review the validity and voluntariness of her plea for plain error. She maintains that her plea was not voluntary and knowing because she did not enter it with the assistance of competent counsel. "A defendant who pleads guilty waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Due process of law requires that this waiver be voluntary and knowing. If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and, therefore, is void." *People v. Williams*, 188 Ill. 2d 365, 370 (1999). Further, unless there is plain error, a voluntary guilty plea results in the forfeiture of all non-jurisdictional challenges to the conviction, including violations of constitutional rights. *People v. Billops*, 125 Ill. App. 3d 483, 484 (1984). The plain-error doctrine bypasses normal forfeiture

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charge brought against her and the State does not dispute this point. Accordingly, we do not view the August 19, 2009, hearing as, effectively and ultimately, a stipulated bench trial.

principles and allows a reviewing court to consider unpreserved error where either the evidence is close or the error is serious. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In deciding whether the plain error doctrine applies, we first determine if there was error. *Id.* at 187.

We agree with defendant that it would be unjust in this case to determine that she has forfeited her arguments concerning the validity and voluntariness of her plea. As defendant notes, her failure to file a proper post-plea motion is a consequence of her trial counsel's misunderstanding that the proceedings constituted a stipulated bench trial. For example, the notice of appeal that trial counsel prepared indicates that she believed that she was preserving for review the motion to quash. Further, as defendant notes, the trial court instructed defendant that, because the proceeding was "a stipulated one," she would have to file a motion to reconsider the sentence and to have the judgment vacated and reconsidered." (Indeed, the State acknowledges that defendant was admonished only to file a motion to reconsider sentence.) However, because defendant essentially entered a negotiated guilty plea, she could only have properly preserved the case for review by filing a motion to vacate her plea. See *People v. Cochrane*, 257 Ill. App. 3d 1047, 1050 (1994). Trial counsel filed no such motion. Based on this obvious and serious error, we decline to find that defendant has forfeited her argument.

#### 1. Sufficiency of the Evidence

Turning to defendant's first claim of error, defendant contends that she received ineffective assistance of counsel because her *de facto* guilty plea was not knowing and voluntary because it was based on insufficient evidence of her guilt. She argues that the evidence from the suppression hearing (to which trial counsel later stipulated at the plea hearing) was insufficient to prove her guilty beyond a reasonable doubt of aggravated DUI because trial counsel stipulated to the court's

consideration of: (1) inadmissible hearsay evidence; (2) insufficient evidence of impaired driving; and (3) insufficient evidence of an aggravating factor—namely, whether she possessed a driver’s license. For the following reasons, we conclude that counsel erred with respect to defendant’s hearsay argument.

*(a) Admission of Hearsay Evidence*

Defendant argues that trial counsel was ineffective, where she stipulated to the trial court’s consideration of otherwise inadmissible evidence. Defendant asserts that evidence from the suppression hearing (to which trial counsel later stipulated at the “stipulated” bench trial) included statements from a non-testifying third party (*i.e.*, Steven), asserting that *defendant* drove the vehicle at some time that night. Defendant notes that she consistently *denied* that she drove any time that evening. Because she was charged with driving a vehicle “upon a highway” and not of being in “actual physical control” of the vehicle (625 ILCS 5/11—501(a) (West 2008)), the issue whether she drove was one that should not have been resolved by the use of hearsay evidence that she was never given the opportunity to challenge.

We agree that counsel’s failure to challenge the admission of Steven’s statements was deficient and prejudiced defendant. Because neither the officers nor any witnesses observed defendant drive her vehicle on the evening in question, the issue whether she drove was largely determined based upon her’s and Steven’s statements, which contradicted each other. (The other evidence was the fact that defendant sat in the driver’s seat when Washburn first approached her vehicle.) Had counsel attempted to exclude Steven’s statements, there existed a (more than) reasonable probability of success on the merits—the State does not challenge defendant’s assertion

that Steven’s statements were inadmissible hearsay<sup>2</sup>—and it is not absolutely certain that the State would have met its burden to prove this element of the offense. Rather than arguing that the statements were not hearsay, the State claims that, viewing that evidence against defendant’s denial that she drove that evening in the light most favorable to the State, the trial court could have resolved the conflicts by determining that defendant drove her vehicle upon a highway as charged. This position supports our conclusion that defendant was clearly prejudiced by counsel’s performance.

In sum, we agree that trial counsel was ineffective in failing to raise a hearsay challenge to Steven’s statements concerning whether defendant drove her vehicle.

Although we reverse on the hearsay argument, we address defendant’s remaining arguments.

*(b) Impaired Driving*

Next, defendant argues that, *assuming that she drove*, the evidence was insufficient to show that her driving was *impaired*. Defendant notes that she was charged with driving while under the influence of alcohol (625 ILCS 5/11—501(a)(2) (West 2008)) and not with having an alcohol concentration in her blood or breath of 0.08 or more (625 ILCS 5/11—501(a)(1) (West 2008)). Further, no evidence was presented at the August 19, 2009, hearing of the results of any blood or breath tests. Defendant argues that it is not sufficient to show that a person had some degree of

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<sup>2</sup>“Hearsay is defined as ‘testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter.’ ” *People v. Evans*, 373 Ill. App. 3d 948, 964 (2007), quoting *People v. Rogers*, 81 Ill. 2d 571, 577 (1980). Hearsay evidence is generally inadmissible because there is no opportunity to cross-examine the declarant. *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004).

alcohol in his or her system; rather, the State must also prove that, as a result, the person's driving was impaired. See *People v. Winfield*, 15 Ill. App. 3d 688, 690 (1973) (evidence must be presented showing that the defendant was under the influence of alcohol so that he or she was less able to safely operate vehicle). Defendant notes that the officers never observed her driving her vehicle (assuming she drove at all) and, therefore, the question whether her driving was impaired was, "at a minimum, a close one." She further contends that the fact that Derry testified that defendant failed the field sobriety "test" did not aid the State's case because Derry did not specify how defendant performed on each test or in what manner or on what test she failed to perform adequately. Defendant reasons that one cannot be confident in the trial court's determination that her driving was impaired to the degree necessary to sustain a conviction.

We reject defendant's claim, which she concedes is "close." The evidence was sufficient to show that, *assuming defendant drove*, her driving was *impaired*. An arresting officer's testimony is sufficient to sustain a DUI conviction. *People v. Hires*, 396 Ill. App. 3d 315, 318 (2009). Further, neither expert testimony nor a showing of scientific principles is required before a factfinder may conclude that a person who performs poorly on field sobriety tests may have his or her mental or physical faculties "so impaired as to reduce his [or her] ability to think and act with ordinary care." *People v. Sides*, 199 Ill. App. 3d 203, 206-07 (1990). Although she notes Derry's testimony that defendant failed a field sobriety test, defendant fails to mention that the evidence also reflected that Washburn testified at the suppression hearing that he smelled alcohol when he first approached defendant's vehicle and defendant rolled down her window; that defendant's speech was slurred; and that defendant admitted to Washburn that she had "a couple" of drinks. Further, on the DVD,

defendant told Derry that she consumed two drinks of orange juice and vodka 20 minutes earlier and that she drank before she arrived at the location where she and Steven were met by the officers.

*(c) Existence of Aggravating Factor—Whether Defendant Possessed A Driver’s License*

Defendant next claims that the existence of the aggravating factor that raised her offense from a Class A misdemeanor to a Class 4 felony—specifically, that she did not possess a driver’s license, permit, restricted driving permit, or a valid judicial driving permit—was also “questionable.” She asserts that the record reflects that, at the time of the incident, she identified herself to Derry with an Illinois driver’s license; that the report of her felony conviction to the Secretary of State lists an Illinois driver’s license; and that the record contains notice to her of the statutory summary suspension of her license, effective March 26, 2008, showing her to be a first offender. Defendant argues that these documents call into question the State’s allegation that, at the time in question, defendant did not possess a driver’s license. Further, she contends that, even if it is sufficient for the State to show that a defendant did not possess a *valid* license, as opposed to *no* license at all, no proof was ever presented that this was the case, except for defendant’s own statements to the officers. Defendant notes that trial counsel stipulated that, upon Derry’s arrival, Washburn commented to Derry that defendant’s license had been “invalidated.” No explanation was ever given. Later, defendant told Derry that she did not drive that evening because her license had been suspended. Without citation to any authority, defendant notes that her driver’s license abstract was never offered into evidence either during the suppression hearing or at the time of the plea; therefore, in her view, no objective proof was offered that her license had been suspended.

This claim also fails. As the State notes, documents reflecting a driver’s license number for defendant and that she was a first offender were not before the trial court on August 19, 2009.

Further, we note that defendant does not complain that trial counsel erred in failing to object to the admissibility of the officers' testimony; she argues only that trial counsel erred in stipulating that the evidence was sufficient. Although the State bears the burden to prove beyond a reasonable doubt every element of the offense at issue (*People v. Cunningham*, 212 Ill. 2d 274, 278 (2004)), we are aware of no requirement that this burden can *only* be met when a defendant's driver's license abstract is introduced to establish the status of one's driver's license and, accordingly, reject defendant's claim. See, e.g., *People v. Banks*, 378 Ill. App. 3d 856, 861-62 (2007) (in assessing the sufficiency of the evidence that the defendant's license was suspended, the appellate court rejected the defendant's claim that no driver's abstract or other documentary evidence was contained in record to show the status of her license).

## 2. Failure to File A Second Suppression Motion

Defendant's fourth and final argument is that trial counsel was ineffective for failing to file a suppression motion, seeking to suppress defendant's statements to *Derry* concerning: (1) the status of her driver's license; and (2) her admissions as to how much she had to drink and when she drank. Defendant contends that *Derry* questioned her at the scene and elicited admissions without first giving her *Miranda* warnings. In her view, a motion to suppress her statements to *Derry* had a reasonable probability of success.<sup>3</sup> For the following reasons, we reject defendant's argument.

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<sup>3</sup>Defendant concedes that the suppression motion that trial counsel actually *did* file (seeking to suppress her statements to Washburn) "had no reasonable probability of succeeding" because Washburn did not seize her when he approached her parked vehicle and knocked on the window. See *People v. Luedemann*, 222 Ill. 2d 530, 565-66 (2006) (no seizure where officer approached the defendant's vehicle from rear driver's side; used a flashlight because it was nighttime; did not block

A defendant claiming ineffective assistance of counsel must overcome the strong presumption that counsel's action was merely trial strategy. *People v. Medrano*, 271 Ill. App. 3d 97, 100 (1995). "Whether to file a motion is a matter of trial strategy [that] will be accorded great deference." *People v. Steels*, 277 Ill. App. 3d 123, 127 (1995). Further, where there is no reasonable likelihood that a motion to quash would have been granted based on lack of probable cause, the defendant has not satisfied *Strickland's* prejudice prong. *People v. Robinson*, 167 Ill. 2d 397, 404 (1995).

Defendant maintains that it was reasonable for her to believe at the time she was interrogated by Derry that she was in custody because she had been segregated from Steven and placed in Washburn's squad car. The police knew there were two bottles of alcohol retrieved from defendant's car, that she had alcohol on her breath, that she had admitted to Washburn that she "had a couple," and that she was under age 21. Thus, even prior to Derry's arrival, police had probable cause to believe that defendant was guilty of consumption of alcohol by a minor. 235 ILCS 5/6—20 (West 2008). Moreover, defendant contends that, after learning these facts, Washburn removed her from her vehicle and placed her in his squad car. A reasonable person in defendant's shoes, she asserts, would have believed that she was not "free to leave."

The fact that a defendant is unable to leave and thus subject to a *Terry* seizure, is not dispositive of whether the defendant is "in custody" for purposes of *Miranda*. *Berkemer v. McCarty*,

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defendant's vehicle with his vehicle; did not turn on his vehicle's overhead flashing lights; did not use coercive tone or language or touch the defendant; and did not display his weapon); see also 4 W. LaFave, Search and Seizure §9.4(a), at 433-35 (4th ed. Supp. 2010-2011) (generally, "the mere approaching and questioning of [persons seated in parked vehicles] does not constitute a seizure").

468 U.S. 420, 439 (1984) (distinguishing between a *Terry* stop and formal arrest); see also *People v. White*, 331 Ill. App. 3d 22, 27 (2002) (distinguishing between being in custody for *Miranda* purposes and being “merely detained” for *Terry* purposes). The inquiry is whether “at any time between the initial stop and the arrest, [the defendant] was subjected to restraints comparable to those associated with a formal arrest.” *Berkemer*, 468 U.S. at 439-42.

We conclude that defendant has not overcome the presumption that trial counsel, as a matter of trial strategy, decided not to file a motion to suppress based on the failure to give *Miranda* warnings because there was no reasonable probability that the motion would have succeeded in suppressing evidence. Furthermore, because such motion had no reasonable probability of succeeding, defendant fails to satisfy *Strickland*’s prejudice prong as to this claim. The Supreme Court has noted that the danger of self-incrimination, which is present during a custodial interrogation, is mitigated by the brief and public nature of a traffic stop and the fact that a motorist is typically confronted by only one or two officers. *Berkemer*, 468 U.S. at 437-39. Here, defendant’s detention was fairly brief; Washburn testified that he arrived at the scene at 12:44 a.m. and the DVD reflects that Derry handcuffed/arrested defendant at 1:18 a.m. Defendant was placed in Washburn’s squad car, according to Washburn, because it was very cold out and to separate her from Steven. Defendant was arrested in early February and the DVD reflects that it had recently snowed in the area, the officers wore knit hats and gloves, and defendant kept her hands in her jacket pockets during a large portion of her encounter with Derry. Under these circumstances, when defendant was placed in Washburn’s squad car, she was not “subjected to restraints comparable to those associated with formal arrest.” *Berkemer*, 468 U.S. at 439-42; see also *United States v. Torres-Sanchez*, 83 F.3d 1123, 1128 (9th Cir. 1996) (investigatory stop did not become an arrest, where the defendant

was asked to leave pickup truck and placed in officer's squad car to separate him from other truck occupants so officer could compare their stories and where the defendant was never required to sit in the squad car; rather, it was suggested to him by the officer because of the cold weather conditions); *United States v. Manbeck*, 744 F.2d 360, 377-78 (4<sup>th</sup> Cir. 1984) (placement of suspect in squad car acceptable where inclement weather provided no other alternative). The officers parked their squad cars behind defendant's car, and no emergency lights were activated. Further, the officers testified that they smelled alcohol when they first spoke to defendant, that she slurred her speech, failed a field sobriety test, and admitted to recently drinking alcohol. Given these circumstances, there was no reasonable probability that a motion to suppress based on a failure to give *Miranda* warnings would have succeeded. See *Berkemer*, 468 U.S. at 439-42 (officer's questions did not rise to level of a custodial interrogation where the defendant was unsteady on his feet when he stepped out of the vehicle, failed a field sobriety test, admitted that he had consumed beer and smoked marijuana, and where the officer, before he placed him under arrest, observed that the defendant slurred his speech and was difficult to understand). Given that defendant has not shown prejudice, we reject her claim.

We note that, because we agree with defendant's first claim of error that she received ineffective assistance of trial counsel and that this warrants reversal, we need not address defendant's second claim of error concerning the presentence investigation.

Finally, we emphasize that a stipulated bench trial is not a guilty plea. A guilty plea results in the forfeiture of a defendant's right to appeal an adverse pretrial ruling. *Gonzalez*, 313 Ill. App. 3d at 617. However, a procedure evolved that allows a defendant to preserve a right to appeal in an

adverse pretrial ruling without the necessity of proceeding with a trial where witnesses testified in open court. This procedure is known as a stipulated bench trial.

A stipulated bench trial is a *trial* in which a defendant maintains a plea of *not guilty*. Thus, the defendant has the opportunity for an opening statement and closing argument, though this is often waived. The State offers its evidence by way of stipulation; that is, the State, by oral or written stipulation, recites what each witness would testify to, together with any exhibits or other documentary evidence the witnesses would identify, and introduces those exhibits. The defendant should renew objections to the State's evidence, particularly evidence that was the subject of pretrial motions, and defense counsel should then stipulate only that, given the pretrial rulings, the State's recitation is what the witnesses would testify to if called to the stand. See *Gonzalez*, 313 Ill. App. 3d at 617 (precise language must be used; a defendant enters a plea of not guilty and stipulates only to the *existence* of the evidence, not that the evidence is *sufficient* to convict). A defendant may also present a defense, which, again, is generally done by stipulation. Before the defense rests, the trial court should ensure that the defendant understands that he or she is giving up the right to testify on his own behalf. Finally, at the close of the case, the trial judge weighs the evidence, enters findings, and determines whether the State has, beyond a reasonable doubt, proven the defendant's guilt. Throughout the process, the trial court and the parties should treat the proceeding as a trial, albeit an abbreviated one.<sup>4</sup>

### III. CONCLUSION

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<sup>4</sup>Although not required, it is prudent, in our view, to inquire on the record whether the defendant understand that, by stipulating to the evidence, he or she is giving up his or her right to cross-examine witnesses.

For the foregoing reasons, the judgment of the circuit court of Boone County is reversed and the cause is remanded for new proceedings.

Reversed and remanded.