

No. 1-11-0837

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 10 CR 2674
	)	
RICKEY TERRY,	)	Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE REYES delivered the judgment of the court.  
Presiding Justice Lampkin concurred in the judgment and opinion.  
Justice Gordon concurred in part and dissented in part, with opinion.

**ORDER**

¶ 1 *Held:* Defendant did not receive ineffective assistance of counsel. Defendant failed to establish the trial judge should have inquired into his posttrial complaints regarding counsel. Defendant's three-year term of mandatory supervised release is not erroneous. The appellate court directs the clerk of the circuit court to correct the mittimus to reflect one vehicular invasion conviction and sentence, rather than two.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Rickey Terry was found guilty of attempted aggravated kidnaping (720 ILCS 5/8-4, 10-2(a)(3) (West 2008)), two counts of vehicular invasion (720 ILCS 5/12-11.1 (West 2008)), and one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)). The trial court sentenced defendant to 15 years in

the Illinois Department of Corrections on the attempted aggravated kidnaping, with 15-year sentences on each count of vehicular invasion and a 7-year sentence for aggravated battery, with all sentences to run concurrently. The trial court also sentenced defendant to a three-year term of mandatory supervised release (MSR) on the attempted aggravated kidnaping and vehicular invasion convictions. Defendant now appeals, arguing: (1) he received ineffective assistance of counsel; (2) the trial court should have inquired into his posttrial claims of ineffective assistance of counsel; (3) this court should vacate one of his convictions for vehicular invasion under the "one act, one crime rule"; and (4) his term of MSR should be reduced to two years. For the following reasons, we affirm the judgment of the circuit court, but direct the clerk of the circuit court to correct the mittimus to reflect one vehicular invasion conviction and sentence, rather than two.

¶ 3

### BACKGROUND

¶ 4 The record on appeal discloses the following facts. Defendant and codefendant Marvin Thurman were charged by indictment with attempted aggravated kidnaping, vehicular invasion, attempted vehicular hijacking and one count of aggravated battery. Defendant and codefendant were tried together. Codefendant is not a party to this appeal.

¶ 5 At trial, Jaqueline Boyce testified that on January 4, 2010, at approximately 5:30 p.m., she was parking her automobile in the parking lot of the Cermak Road Park Mall. Boyce testified she was going shopping at Marshall's with her mother and nine-year-old daughter. Boyce did not observe anyone in the parking lot.

¶ 6 Boyce observed two men standing outside Marshall's as she entered the store. Boyce testified she told her mother to move her purse to her opposite shoulder, because Boyce did not understand why the men were standing around outside the store when it was very cold. Boyce described one of the men as taller than she, while the other was approximately her height, which is 5' 10". According to Boyce, the taller man wore a puffy jacket, blue jeans and a full face mask. Boyce also testified she could observe that the taller man was Caucasian, based on the exposed areas of skin around his eyes and mouth. The shorter man wore a dark, puffy coat and darker jeans. The shorter man wore a mask which extended from his ears to the middle portion of his nose. Boyce further testified the shorter man was African-American.

¶ 7 Boyce testified she was inside the store for 10 minutes at most because she did not find any of the items for which she had been looking. When Boyce exited the store, she immediately looked to her right to determine whether the two men were still standing around, but they were no longer there. As Boyce, her mother and daughter began walking back to her automobile, Boyce heard screaming from the area next to her vehicle. Boyce then observed a man grabbing a woman who was yelling for help and for the man to stop. She later learned this woman was named Juana Godinez. Boyce and a man in a wheelchair both started advancing toward the individual who grabbed the woman, both yelling for the man to leave Godinez alone. According to Boyce, two or three other women appeared on the scene and also began shouting for the man to leave Godinez alone and for someone to contact the police.

¶ 8 Boyce testified Godinez was standing next to a dark sport utility vehicle, right next to her own automobile. Godinez was standing in front of the open driver's side door. According to

Boyce, the taller Caucasian male was hitting Godinez with his fists, while the shorter African-American male was on the passenger side of the sport utility vehicle, attempting to open the other door. Godinez was fighting back against the Caucasian male. Boyce also testified these two males were the males she had observed in front of the store a few minutes earlier.

¶ 9 The struggle between Godinez and the Caucasian male went on for two or three minutes. The African-American man then said something and ran away. The Caucasian man then released Godinez and ran along behind the African-American man. According to Boyce, the two men ran toward the McDonald's at the corner of Harlem Avenue and Cermak Road. Boyce testified there is a bus stop at the Cermak Road intersection. Boyce lost sight of the two men momentarily, due to signage at the McDonald's, but observed the men through the glass partitions at the bus stop. Boyce also observed a CTA bus pull up to the stop. Boyce did not observe whether the two men entered the bus, but they were no longer at the bus stop when the bus departed and she did not observe them cross the street, enter another vehicle or run in any other direction.

¶ 10 According to Boyce, a police officer arrived as these events occurred. Boyce told the officer what had occurred and described the clothing the two men were wearing. According to Boyce, the bus was on Cermak Road, but not traveling quickly because it was during rush hour. Boyce testified she told the police the two men were probably on that bus. Boyce also testified the police officer relayed the information over his radio.

¶ 11 Boyce further testified the police officer inquired whether she could identify the two men. According to Boyce, she replied she did not observe their faces, but knew what they were

wearing. The police officer asked Boyce to wait in her automobile, and she complied with his request.

¶ 12 Two to five minutes later, a police officer requested Boyce to step into a police vehicle so the police could transport her to the bus, which the police had already detained. The police vehicle transported Boyce and Godinez to the bus, which was stopped a few blocks away from the Marshall's parking lot on Cermak Road. When they arrived, the police placed Boyce and Godinez in separate vehicles.

¶ 13 The police then removed three men from the bus. Boyce described them as a taller Caucasian, a shorter African-American, and a larger Hispanic. Boyce informed the police she excluded the Hispanic male because he was really too large. Boyce identified the other two men by their clothing and stature. Boyce also informed the police the men had been wearing masks and described the masks to the police. The police subsequently presented Boyce with two masks, which she identified from photographs presented in court. Boyce also identified defendant and codefendant in court as the men brought from the bus by the police. Boyce estimated approximately five minutes elapsed from the time she was asked to wait until she identified the men who were on the bus.

¶ 14 Godinez testified she drove her sport utility vehicle to Marshall's at 7153 West Cermak Road in Berwyn, Illinois, at approximately 5:40 p.m. on January 4, 2010. Godinez was speaking on her telephone as she was exiting her vehicle. Godinez testified that as she tried to close the driver's side door, two men appeared and tried to push her back into her vehicle. The taller man

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pushed her head down and caused her to fall between automobiles in the parking lot. Godinez then began screaming.

¶ 15 According to Godinez, the two men were wearing puffy jackets, jeans and masks, although one mask was complete and the other was not. Godinez testified she could observe the skin surrounding the taller man's eyes and observed the man was Caucasian. The taller man struck Godinez in the forehead and attempted to push her back into her vehicle, which remained open. The taller man repeatedly ordered Godinez to enter the vehicle, using a scary tone of voice. Godinez testified she believed the shorter man, an African-American, grabbed her telephone and kicked it under her vehicle. The shorter man then went around to the passenger side of her vehicle and attempted to pull her into her vehicle. Godinez was screaming for help and offered the men her purse and keys as they attempted to force her into the vehicle.

¶ 16 Godinez heard a woman shouting during the attack. Afterwards, she heard the shorter man say something and observed him run from the scene. The taller Caucasian man pushed her again, then ran after the shorter man. Godinez observed 10 or 12 people emerging from the surrounding stores. According to Godinez, the two men ran toward the intersection of Harlem Avenue and Cermak Road, but she did not know their exact location. Godinez testified she suffered bruises to her arms and back as a result of the struggle.

¶ 17 Godinez further testified that shortly after the attack, police brought her to a bus stopped four or five blocks away from the scene of the attack. The police presented her three or four people for possible identification. Godinez testified she excluded one man due to his complexion, but identified the last two men because they were together. She also identified these

men in court as defendant and codefendant. She recognized defendant from his expression and testified defendant and codefendant were wearing exactly the same clothes they wore during the attack. Godinez also identified masks shown to her by the police from photographs presented at trial.

¶ 18 On cross-examination, Godinez acknowledged she was still crying when she was taken by police to the bus for the showup identification. Godinez also acknowledged she informed the police she could not be certain the men were the offenders, although the clothes were exactly the same. Godinez recognized the masks when they were shown to her. According to Godinez, she linked the identification together from the height and complexion of the men.

¶ 19 Cynthia Esters testified she worked as a bus operator for the Chicago Transit Authority (CTA) on January 4, 2010. Esters drove a route along Cermak Road at approximately 5 p.m. on that date. According to Esters, another CTA employee named Clarence Covington was seated in the first seat behind her on the bus.

¶ 20 Esters also testified she paid attention to passengers entering and exiting her bus to ensure no one was injured in the process. In addition, Esters monitors her passengers using her rearview mirror.

¶ 21 At approximately 5:44 p.m., Esters pulled up to the bus stop at Harlem Avenue and Cermak Road. According to Esters, approximately five passengers entered the bus at this stop. The first passenger was an African-American male wearing a heavy down coat and a ski mask covering his nose and mouth. The second passenger was a Caucasian male wearing a heavy coat and a full ski mask. Esters identified these first two passengers in court as codefendant and

defendant. Esters testified both men were breathing heavily, which she found unusual because she had not observed anyone running for the bus. Defendant stopped at the fare box and Esters inquired whether he was going to pay his fare. Defendant paid his fare and walked to the rear of the bus. The three remaining passengers who entered the bus at the stop were not wearing masks.

¶ 22 According to Esters, defendant and codefendant initially sat on opposite sides of the very rear of the bus, but then sat together. Esters testified she told Covington, "those guys must be up to something." Esters observed the two men remove their masks, but she had a better view of defendant, whom she observed place his mask in his right pocket. A police vehicle stopped her bus while proceeding to the next stop. The police entered the bus and inquired who entered the bus at the prior stop. Esters testified she "pointed to the guys in the back." According to Esters, the bus had perhaps six passengers, which she described as empty.

¶ 23 Esters further testified CTA buses are equipped with surveillance video cameras and the equipment on her bus on the date in question was checked and was found to be working properly at the outset of her shift. In addition, Esters testified the videodisc recovered from her bus fairly and accurately depicted the events which occurred at 5:44 p.m. on January 4, 2010, after defendant entered the bus.

¶ 24 The contents of the videodisc were shown to the judge. The videodisc, which contains multiple views within the bus, depicts a Caucasian male entering the bus wearing a mask, walking to the rear of the bus, and sitting near an African-American male. The Caucasian male removes his mask and placed it in his pocket. The police enter the bus seconds later. A police

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officer frisks the Caucasian male. The Caucasian male leaves the bus approximately six minutes later, but returns and sits in a different seat approximately one and one-half minutes later. The Caucasian male reaches into his pocket and places what appears to be a hat on his head approximately 13 minutes later. A police officer enters the bus and the Caucasian male hands his hat to the officer approximately six minutes later. The police officer leaves the bus, carrying the hat, but returns just over a minute later. The police officer appears to place the Caucasian male in handcuffs.

¶ 25 Berwyn police officer Richard Volanti testified he was assigned to patrol duty on January 4, 2010, and received a dispatch call at approximately 5:44 p.m., regarding a disturbance at the Cermak Road Plaza, located at Harlem Avenue and Cermak Road. The dispatch call indicated two males were involved in the disturbance, wearing dark, puffy, hooded jackets and wearing masks. While proceeding to the scene, officer Volanti received another dispatch indicating the two males had possibly boarded a bus traveling eastbound on Cermak Road from the scene. Officer Volanti drove his vehicle in front of the bus and stopped the bus.

¶ 26 Officer Volanti testified he spoke to the bus operator, who identified three individuals in the rear of the bus as having entered together. He then observed defendant and codefendant, who wore clothes matching the description given in the dispatch. In preparing his report, Officer Volanti indicated all three men wore puffy jackets. Officer Volanti walked to the rear of the bus. According to officer Volanti, neither defendant nor codefendant were wearing masks at this time.

¶ 27 Officer Volanti testified he waited for additional police officers to arrive, whereupon he learned there was a possible victim and witness to the disturbance. Officer Volanti further

testified he conducted a showup identification involving the three individuals seated in the rear of the bus who boarded the bus at Harlem Avenue and Cermak Road. Officer Volanti brought each passenger out separately, the other passengers had already been requested to leave the bus.

According to officer Volanti, Godinez could not make a positive identification of defendant or codefendant because the offenders had worn masks, but indicated they wore the same clothes and had the same physical build as the offenders. Officer Volanti also showed Godinez the third passenger, a heavy set Hispanic male, whom Godinez excluded as a possible offender.

¶ 28 Shortly after the showup, officer Volanti reentered the bus to look for masks. Officer Volanti observed defendant was wearing a hat. Officer Volanti testified he searched defendant and recovered the hat from his head. Officer Volanti also testified that when he unraveled the hat, it became a full knit ski mask. Officer Volanti identified the ski mask in court and from a photograph taken by the Berwyn police.

¶ 29 In addition, Officer Volanti testified he then walked over to the codefendant and recovered a neoprene hat that covered up to the nose. The hat was around codefendant's neck. Officer Volanti also identified this mask in court and from a photograph taken by the Berwyn police. Godinez and Boyce were shown the masks by Officer Volanti. According to officer Volanti, both Godinez and Boyce identified the masks as those worn by the offenders. Officer Volanti testified defendant and codefendant were then placed in custody and transported to the police station for further investigation.

¶ 30 The State rested its case. Defendant made a motion for a directed finding, which the trial court denied.

¶ 31 Berwyn police officer Ricky Smith testified on behalf of defendant. Officer Smith was called to investigate the disturbance at 7105 West Cermak Road and spoke to Godinez at the scene. According to officer Smith, Godinez described her attackers as tall and thin, wearing all black clothes. Officer Smith's report described the Caucasian male as slightly taller than the other man, whose ethnicity Godinez was not entirely sure of at the moment when she spoke to the police. Officer Smith testified Godinez was very upset and visibly shaken when he first spoke to her and it was difficult for Godinez to explain the incident in detail at that time.

¶ 32 Following closing arguments, during which defense counsel attacked the strength of the identification, the trial judge found defendant guilty of attempted aggravated kidnaping, two counts of vehicular invasion, and one count of aggravated battery. The trial judge found defendant not guilty of attempted vehicular hijacking.

¶ 33 On February 10, 2011, defendant filed a posttrial motion for a new trial, which the trial court denied on March 8, 2011. The trial court also conducted a sentencing hearing on March 8, 2011. At the outset of the hearing, the trial judge informed defense counsel she received a letter from defendant during the prior month and requested defense counsel to explain to defendant that he cannot have *ex parte* communications with the court. After considering the factors in aggravation and mitigation and affording defendant an opportunity to make a statement (which defendant declined), the trial judge sentenced defendant to 15 years in the Illinois Department of Corrections on the attempted aggravated kidnaping, 15-year sentences on each count of vehicular invasion and a 7-year sentence for aggravated battery, with all sentences to run concurrently. The trial judge further sentenced defendant to a three-year term of mandatory supervised release

(MSR) on the attempted aggravated kidnaping and vehicular invasion convictions. Defendant then filed a notice of appeal to this court on March 18, 2011.

¶ 34

#### DISCUSSION

¶ 35 On appeal, defendant contends: (1) he received ineffective assistance of counsel; (2) the trial court should have inquired into his posttrial claims of ineffective assistance of counsel; (3) this court should vacate one of his convictions for vehicular invasion under the "one act, one crime rule"; and (4) his term of MSR should be reduced to two years. We address defendant's arguments in turn.

¶ 36

#### Ineffective Assistance of Counsel

¶ 37 Defendant first argues he received ineffective assistance of counsel, where trial counsel did not move to suppress the ski mask and resulting identifications. The sixth amendment to the United States Constitution provides criminal defendants shall "have the [a]ssistance of [c]ounsel for his defen[s]e." U.S. Const., amend. VI. Generally, in order to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984), adopted by *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984).

¶ 38 When considering whether the first prong of the *Strickland* test is satisfied, we must allow great deference to the attorney's decisions as there is a strong presumption an attorney has acted adequately. *Strickland*, 466 U.S. at 689. A defendant must overcome the strong presumption the challenged action or inaction "might have been the product of sound trial

strategy." *E.g., People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). Every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To satisfy the second prong of the *Strickland* test, a defendant must demonstrate a reasonable probability the outcome of the trial would have been different or the result of the proceeding was unreliable or fundamentally unfair. *Strickland*, 466 U.S. at 687; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 39 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied. *Id.*

¶ 40 In particular, determining whether or not to file a motion to suppress is a matter of trial strategy, and thus, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004).

Accordingly, to establish trial counsel's failure to file a motion to suppress the evidence was ineffective, defendant must demonstrate a reasonable probability exists that the motion would have been granted and the outcome of the trial would have been different if the evidence had been suppressed. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). If a motion to suppress would

have been futile, then counsel's failure to file that motion does not constitute ineffective assistance. *Id.*

¶ 41 Defendant's claim requires an initial understanding that encounters between police and citizens have been divided by the courts into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, commonly referred to as " *Terry* stops," which must be supported by a police officer's reasonable, articulable suspicion of criminal activity; and (3) consensual encounters which involve no detention or coercion by the police, and thus, do not implicate fourth amendment interests. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006).

¶ 42 Defendant argues counsel should have moved to suppress the ski mask and resulting identifications because the police went beyond the permissible scope of a *Terry* stop.<sup>1</sup> In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held a brief investigatory stop, even in the absence of probable cause, is reasonable and lawful under the fourth amendment when the totality of the circumstances reasonably lead the officer to conclude criminal activity may be afoot and the subject is armed and dangerous. *Id.* at 30. The " 'crux' " of *Terry*, however, is the " 'immediate' " government interest in allowing a police officer to " 'tak[e] steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and

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<sup>1</sup> Defendant's argument implicitly presumes defendant was arrested after the police showed his ski mask to Boyce and Godinez. The police, however, had probable cause to arrest defendant from the time police observed defendant and Thurman on the bus near the scene of the offense, wearing clothing described by witnesses at the scene. See *infra*, ¶ 44.

fatally be used against him.' " *People v. Colyar*, 2013 IL 111835, ¶ 34 (quoting *Terry*, 392 U.S. at 23). Thus, the purpose of a pat-down search under *Terry* "is to protect the officer and others in the vicinity, not to gather evidence." *People v. Moss*, 217 Ill. 2d 511, 533 (2005). "The scope of the search must be limited to actions which are reasonably likely to discover weapons that could be used to harm the officer." *Id.* at 533-34 (citing *Terry*, 392 U.S. at 29). "A search that exceeds this scope is constitutionally invalid." *Id.* (citing *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993)). In this case, defendant contends he was frisked by police at the outset of the stop and Officer Volanti's subsequent search and seizure of his ski mask exceeded the valid scope of a *Terry* stop.

¶ 43 The State initially responds there was no second search in this case. The State relies on the video feed showing defendant put the hat on his head during the stop and later handed it to a police officer. Defendant, however, relies on Officer Volanti's testimony that he searched defendant and recovered the hat. The video feed in this case lacks audio, which precludes this court from resolving any discrepancy between what is depicted in the video and Officer Volanti's description of his acts.

¶ 44 In this case, however, we need not resolve this discrepancy or determine whether the subsequent unrolling of the hat, which revealed the hat to be a full ski mask, constitutes a search for fourth amendment purposes. Assuming *arguendo* Officer Volanti obtained or discovered the ski mask as the result of a search, defendant's argument fails. A general description of a suspect coupled with other specific facts and circumstances that would lead a reasonably prudent person to believe the action taken was appropriate can constitute not only sufficient cause for a *Terry*

stop, but also probable cause to arrest. See, e.g., *People v. Robinson*, 299 Ill. App. 3d 426, 431-33 (1998) (and cases discussed therein). In particular, probable cause may exist where the police observe a suspect wearing clothes similar to those described, near the scene of a reported offense, close in time to the offense, heading in the direction described. *People v. Wilson*, 141 Ill. App. 3d 156, 158 (1986). In this case, Officer Volanti was informed two males were involved in a disturbance, wearing dark, puffy, hooded jackets and wearing masks, and had possibly boarded a bus traveling eastbound on Cermak Road from the scene. Officer Volanti, upon stopping the bus minutes later, discovered three males who boarded the bus at the stop near the location of the offense, wearing clothing matching the description from the police dispatch. At this juncture, the police had a reasonable, articulable suspicion that two of these men committed an offense, justifying their temporary detention until the victim and an eyewitness arrived on the scene. *Robinson*, 299 Ill. App. 3d at 433.

¶ 45 Godinez and Boyce both identified defendant and codefendant by their clothing, which is not a positive identification, but nonetheless an identification. See *People v. Ward*, 66 Ill. App. 3d 690, 693 (1978). Boyce also identified defendant and codefendant by their stature, while Godinez also identified defendant by his expression. Both Godinez and Boyce excluded the Hispanic man based on his physical characteristics. Given the identifications from the victim and eyewitness, who had the opportunity to observe the offenders' gender, height, weight and race, the police had probable cause to arrest defendant prior to recovering his hat. See *Robinson*, 299 Ill. App. 3d at 431-33.

¶ 46 "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." *United States v. Robinson*, 414 U.S. 218, 224 (1973). A search incident to a lawful arrest may include a search of the person of the arrestee and the area within his immediate control. *Id.* The term " 'within his immediate control' " has been defined as "the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). A search incident to a lawful arrest is justified by concerns for not only officer safety, but also the preservation of evidence. *Id.* "[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.*

¶ 47 Moreover, where the formal arrest follows quickly on the heels of the challenged search, it is not particularly important whether the search precedes or antedates the arrest, so long as probable cause already exists when the search occurs. *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 & n.6 (1980). Conversely, "a search need not be conducted immediately upon the heels of an arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events." *U.S. v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004). The requirement the search and the arrest be roughly contemporaneous is not strictly temporal in nature, but depends upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former. See *id.*

¶ 48 Defendant maintains his hat was not seized in a search incident to arrest, arguing the second search of defendant caused his formal arrest. In this case, however, the police already had probable cause to arrest defendant and the second search was part of a continuous series of

events. Though defendant contends the identification of his mask was an intervening event, we disagree. As the police already had probable cause to arrest defendant, it is not particularly significant the police searched defendant and had Godinez and Boyce identify his mask prior to the formal arrest, instead of vice versa. *Rawlings*, 448 U.S. at 110-11. Indeed, the police also would have been entitled to seize defendant's clothing hours later, if that was when police became aware the clothing was evidence of the crime charged. See *United States v. Edwards*, 415 U.S. 800, 806 (1974). In this case, police searched for and seized the masks incident to the arrest once they became the focus of the investigation.

¶ 49 In short, defendant's hat, if it was seized in a search, was seized in a search incident to a lawful arrest. Accordingly, a motion to suppress the mask and resulting identifications would have been futile. Thus, defendant cannot establish his trial counsel was ineffective in deciding not to file a motion to suppress.

¶ 50 Indeed, while unnecessary to our disposition of this issue, we further note defendant could not demonstrate a reasonable probability the outcome of his trial would have differed had the mask and identifications been suppressed. An identification "need not be positive to support a conviction, its weight being a question for the jury or the court, as the case may be, to be determined in connection with the other circumstances in the case." *People v. Pelkola*, 19 Ill. 2d 156, 163 (1960). In *Pelkola*, the witness "had ample opportunity, under favorable conditions, to observe the men who robbed her, even though the extent of her observation was limited by the masks they wore on their faces, that she described the clothing of the robbers to the police, that men wearing such clothing were found in the area, and that, to the extent possible, the

prosecuting witness unhesitatingly identified the men once they were apprehended." *Id.*

Persuasive corroboration for the identification was found in the fact the men were arrested a few blocks from the scene of the crime within minutes after its commission. *Id.* The evidence here is stronger than the evidence in *Pelkola*. In this case, the victim and an eyewitness identified the men found near the scene by their clothing, stature and expression. The bus operator testified defendant was wearing a mask when he boarded the bus near the scene, shortly after the offense. The videodisc of the video feed from the bus corroborates the bus operator's testimony.

Accordingly, even without the mask and resulting positive identifications, the evidence was more than sufficient to identify and convict defendant in this case. Thus, defendant has failed to demonstrate the outcome of the trial would have differed had defense counsel filed a motion to suppress the evidence.

¶ 51 Posttrial Allegations of Ineffective Assistance of Counsel

¶ 52 In the alternative, defendant argues the trial judge violated Illinois law by failing to inquire into defendant's posttrial claims of ineffective assistance of counsel. When a defendant brings a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must inquire adequately into the claim and, under certain circumstances, must appoint new counsel to argue the claim. *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984); see *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). New counsel is not automatically required merely because the defendant presents a *pro se* posttrial claim his counsel was ineffective. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). The trial court must first examine the factual basis of the claim. *Id.* at 77-78. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the

claim. *Taylor*, 237 Ill. 2d at 75. If the court concludes the claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim. *Id.* If the court fails to conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. *People v. Serio*, 357 Ill. App. 3d 806, 819 (2005). The threshold question of whether the defendant's allegations constituted a *pro se* claim of ineffective assistance sufficient to trigger the court's duty to inquire into the factual basis of the claim is a question of law; thus, our review is *de novo*. See *Taylor*, 237 Ill. 2d at 75.

¶ 53 "To raise an ineffective-assistance-of-counsel claim, \*\*\* 'a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention.' " *People v. Whitaker*, 2012 IL App (4th) 110334, ¶ 15 (quoting *Moore*, 207 Ill. 2d at 72). Here, defendant asserts he raised a *pro se* ineffective-assistance-of-counsel claim in the trial court with his January 13, 2011 letter addressed to the trial judge. The record establishes that the court and the attorneys were made aware of the letter. Accordingly, we examine whether the contents of the letter warranted a *Krankel* inquiry.

¶ 54 In his five-page letter, defendant explains that he is writing the trial judge so that at least she will know the real truth concerning the offense before she sentences him. Defendant speculates that it probably no longer matters because he has been found guilty, but either God or defendant's conscience nevertheless compels him to tell the judge what he was too afraid or intoxicated to tell the police. For two pages, defendant describes the offense as a "freak accident" where he and codefendant Thurman simply were running between parked cars in the

mall parking lot when the victim suddenly opened her car door and struck defendant. According to defendant, he then slipped and fell on the ice. A verbal argument ensued, and defendant thought the victim was going to step on him, so he pushed her leg back into her vehicle. After a "little skirmish," defendant and Thurman "took off [towards] the bus [and] never even thought [the victim] would call the police [because it] was no big deal." Defendant thought the victim would tell the truth, but the police just trumped up the charges. Defendant expresses relief that at least his conscience is clear for finally telling the truth to someone. He asserts that he wanted to take the stand, but his lawyers advised him not to because:

"no identification could be made that there was no way for the  
[S]tate to meet the burden of proof! What a winner I had?"

¶ 55 Defendant then explains that he wants the judge to know some details about his life before she sentences him. He states his age; describes his unsuccessful attempts to "stay out of trouble" and his work history; mentions his young son; and asks for mercy. After his signature and in a postscript, defendant repeats his assertions of fact concerning the "fluke accident" and adds:

"I had bad advice, my lawyer did nothing, no motions, no visits, no  
nothing, no 402, no offer of cop out plea, no speaking really even  
about the case. Now [it's too] late, I just want you to know how  
[unintelligible] of our own case by our own P.D.s!"

¶ 56 We conclude that the contents of defendant's letter did not sufficiently raise an ineffective-assistance-of-counsel claim that required the trial court to conduct a *Krankel* inquiry.

Defendant's letter contains a few bare, general allegations concerning his attorney's conduct.

However, the focus of defendant's letter is to plead for mercy before sentencing and offer an explanation for why he did not testify at the trial and refute the State's evidence himself.

Consequently, defendant's letter is subject to more than one interpretation and is not clearly an ineffective-assistance-of-counsel claim. See *Taylor*, 257 Ill. 2d at 77 (a *Krankel* inquiry was not warranted where the defendant's complaint—that he would have pled guilty if he had understood the potential sentence he faced—could be interpreted merely as an expression of regret for not taking the offered plea deal); *Whitaker*, 2012 IL App (4th) 110334 ¶ 21 (even though the defendant raised specific complaints about counsel's performance, a *Krankel* inquiry was not warranted because those complaints merely explained why the defendant attempted to contact the judge directly, *i.e.*, to obtain a writ in order to be present at the "pretrial"). Accordingly, the trial court did not err by not conducting a *Krankel* hearing.

¶ 57 The One-Act, One-Crime Rule

¶ 58 Defendant further contends his conviction on two separate counts of vehicular invasion violates the one-act, one-crime rule, which prohibits multiple convictions where more than one offense is carved from the same physical act. *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001).

Whether a defendant has been improperly convicted of multiple offenses based upon the same act is a question of law we review *de novo*. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 59 In this case, the State concedes both counts of the indictment alleging vehicular invasion in this case were based on the same physical act, *i.e.*, reaching into Godinez's vehicle. The record on appeal supports this conclusion. Therefore, pursuant to our powers granted by Illinois



399 Ill. App. 3d 77, 81-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995).

¶ 63 Defendant acknowledges this body of case law, but argues it is cast into doubt by *People v. Pullen*, 192 Ill. 2d 36 (2000). In *Pullen*, our supreme court considered the consecutive sentencing provision and its application to section 5-5-3(c)(8) of the Unified Code of Corrections, making certain offenders Class X eligible by background. *Id.* at 38; 730 ILCS 5/5-5-3(c)(8) (West 2008). The supreme court explained section 5-5-3(c)(8) requires persons subject to its provisions to be sentenced as Class X offenders, not that their offenses are to be treated as Class X felonies for sentencing purposes. *Pullen*, 192 Ill. 2d at 43. Therefore, where the defendant was convicted of two Class 2 felonies, but was sentenced as a Class X offender, the maximum permissible sentence imposed should have been based on the maximum permissible sentence for two Class 2 felonies, not two Class X felonies. *Id.* at 43-44.

¶ 64 This court, however, has repeatedly considered *Pullen* and nevertheless come to the conclusion a defendant sentenced as a Class X offender due to prior convictions is required to serve the Class X MSR term of three years. *Brisco*, 2012 IL App (1st) 101612, ¶ 62 (and cases cited therein). "These cases have reasoned, and we agree, that *Pullen* merely 'limits the extent to which separate sentences for separate offenses may be served consecutively.'" *Id.* (quoting *McKinney*, 399 Ill. App. 3d at 83). "*Pullen* does not disturb the conclusion that because the MSR term is part of the sentence, an individual subject to Class X sentencing for whatever reason will

be subject to the Class X MSR period." *Id.* (citing *Lee*, 397 Ill. App. 3d at 1073). Adhering to these well-reasoned decisions, we conclude defendant's three-year MSR term is not erroneous.

¶ 65 CONCLUSION

¶ 66 In sum, we conclude defendant did not receive ineffective assistance of counsel, where trial counsel did not move to suppress the ski mask and resulting identifications. Defendant failed to show the trial judge should have inquired into his posttrial complaints regarding counsel. We further conclude defendant's three-year MSR term is not erroneous. For the reasons previously given, however, we direct the clerk of the circuit court to correct the mittimus to reflect one vehicular invasion conviction and sentence, rather than two. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is otherwise affirmed.

¶ 67 Affirmed; mittimus corrected.

¶ 68 JUSTICE GORDON, concurring in part and dissenting in part:

¶ 69 I concur with the majority's conclusions that the trial court did not err in imposing a three-year MSR term and that the mittimus must be corrected to reflect one count of vehicular invasion. *Supra* ¶ 2. However, as I explain below, I must dissent from the majority's discussion of *Krankel*, because it contravenes decades of well-established, black-letter law.

¶ 70 In the case at bar, defendant was a 52-year-old divorced male, with an associate degree in welding, who is the father of three and gainfully employed. In his posttrial statements in the presentence report and in a letter to the trial court, defendant stated that an altercation ensued when, as he was jogging through the parking lot of a shopping center towards a bus stop, the complainant opened her vehicle door and he ran into it and fell down. At trial, the complainant

confirmed that she had just opened the door of her truck, when she noticed two men to the side of it. She admitted she was distracted because she was talking on her cellular telephone as she was parking her truck and opening its door. In his posttrial statements, defendant admits that he was angry and shoved her into her truck. Similarly, the complainant testified that defendant shoved her into her truck and she started screaming. She also testified that she offered them her purse but they did not take it; instead, one of the men took her cell phone and tossed it under her truck. She admitted she "was very confused." Defendant was later arrested on the bus. After a joint bench trial with codefendant Marvin Thurman, defendant was convicted of attempted aggravated kidnaping, unlawful vehicle invasion and aggravated battery and sentenced to three concurrent 15-year terms, and one 7-year term for aggravated battery.

¶ 71 Defendant's allegations of ineffective assistance are contained in two statements directed to the trial court: the presentence report; and a handwritten letter. Defendant's presentence investigation report states in relevant part:

"The Defendant dictated the following statement to the Investigator:

'I feel like I wasn't properly represented. He never came to see me. He came in March to read the Discovery and that was it. He never talked about the case or strategy. I feel I was excluded from my own trial.

He advised me not to take the stand because I had a background he said. He never asked me what happened. He never

took any of my phone calls. He never came back to the bullpen to talk to me. Even the day of my trial he never came back to talk to me. He didn't do nothing. I would have liked a relationship where I could have talked to him and told him what happened.

\*\*\*

Our side of the story was never heard.

I know that you never got a chance to hear our side of the story, but according to my lawyer, this was an identification case and there was no need for me to testify.

\*\*\*

Also, I was never made aware of any of these charges. I was found guilty of other than the attempted kidnaping, never knew there were five counts until she found us guilty of them. Only knew there were two, from jail, the carjacking, and kidnaping.

I'm not even aware of the severeness of the charges cause my lawyer never told me about them or what they carry.' "

¶ 72 Defendant's *pro se* letter alleged: "My lawyer did nothing. No motions, No visits, No nothing. No 402. No offer of a cop out plea. No speaking really even about the case." These sentences are part of a paragraph which is partly obscured on the copy in the record. Instead of the original handwritten letter, the clerk of the circuit court provided a photocopy in the appellate

record. The copy depicts a fold or a crease in the original that runs through the middle of defendant's allegations of ineffective assistance, and the words inside the fold or crease are not visible on the copy. None of the parties addressed why only a photocopy was provided in the record.

¶ 73 Defendant's allegations are supported, in part, by the record. Except for an unsigned form discovery letter, the record contains no evidence that a 402 conference was held or that counsel filed any motions such as for severance or to suppress the show-up identification. The record does disclose that defendant was represented, in part, by a law student. Other than adopting the testimony of a witness called by codefendant, counsel offered no witnesses at trial and asked no questions of the one defense witness. In closing, counsel argued only: "I would adopt [codefendant's counsel's] closing in its entirety and just ask that you substitute [defendant's] name any time [codefendant's] name was mentioned." The posttrial motion contains only boilerplate language such as "[t]he finding is against the weight of the evidence" and "defendant was denied due process of law." When given the opportunity to argue this motion, counsel declined, stating that he would stand on the motion.

¶ 74 During sentencing, defendant's counsel volunteered that he and the law student spent "well over two hours" preparing this case with defendant. Defendant initially turned down the opportunity to make a statement but then asked: "Can I ask you a question?" The trial court responded: "I gave you that opportunity." After sentencing, codefendant's counsel filed a motion to reduce codefendant's sentence which the trial court granted. No postsentencing motion was filed on behalf of defendant.

¶ 75 On this appeal, defendant claims that the trial court failed to inquire, at all, into his posttrial claims of ineffective assistance of counsel. As the majority correctly observes, when a defendant brings a *pro se* posttrial claim of ineffective assistance, the trial court *must* inquire adequately into the claim. *Supra* ¶ 52 (citing *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984), and *People v. Taylor*, 237 Ill. 2d 68, 75 (2005)). Our supreme court has held that "the operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 78 (2003). If the trial court fails to conduct an examination into the factual basis for defendant's claim, then the case *must* be remanded for the limited purpose of allowing the trial court to conduct such an inquiry. *Supra* ¶ 52 (citing *People v. Serio*, 357 Ill. App. 3d 806, 919 (2005)). See also *Moore*, 207 Ill. 2d at 81.

¶ 76 Although the trial court acknowledged receipt of both the letter and the presentence report, it issued no ruling on whether defendant's claims were with or without merit. However, the majority finds that the trial court was not required to conduct an inquiry or even to make a ruling.

¶ 77 First, our supreme court, as well as this court, have held that claims that have been brought to the attention of the trial court are sufficient to trigger a *Krankel* inquiry. "To raise an ineffective-assistance-of-counsel claim, our supreme court has held 'a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention.'" *People v. Whitaker*, 2012 IL App (4th) 110334, ¶ 15 (quoting *People v. Moore*, 207 Ill. 2d 68, 79 (2003)).

In support of this conclusion, our supreme court in *People v. Taylor*, 237 Ill. 2d 68, (2010), cited and discussed two appellate court cases:

"[N]either the defendant in *Giles* nor the defendant in *Finley* filed a conventional, written *pro se* posttrial motion alleging ineffective assistance. Instead, in each case, the 'claim' was included in correspondence to the trial court. In *Giles*, '[a]fter defendant's trial and before his sentencing hearing, defendant *sent a letter* to the trial court criticizing his counsel's performance.' *People v. Giles*, 261 Ill. App. 3d 833, 846 (1994). The letter included five separate bases for claiming that his counsel was ineffective. Similarly, in *Finley*, following defendant's conviction, he 'wrote three *letters* to the trial judge' providing the names of potential witnesses. *People v. Finley*, 222 Ill. App. 3d 571, 576 (1991)." (Emphasis added.)  
*People v. Taylor*, 237 Ill. 2d 68, 76 (2010).

Thus, it has been well-established, black-letter law in this state for decades that claims brought to the court's attention in writing are sufficient to trigger a *Krankel* inquiry.

¶ 78 Second, the fact that defendant did not use the words "ineffective assistance" or request new counsel does not eliminate the need for a *Krankel* inquiry. The majority concludes that defendant's claims were not "clearly" ineffective-assistance-of-counsel claims and cites in support *People v. Whitaker*, 2012 IL App (4th) 110334, ¶ 21. *Supra* ¶ 56. However, in *Whitaker*, defendant did not ask for new counsel and specifically did ask for other relief. The

*Whitaker* court stated: "The issue here is whether defendant's request for relief *other than new counsel* makes a *Krankel* inquiry unwarranted." (Emphasis added.) *Whitaker*, 2012 IL App (4th) 110334, ¶ 21. The appellate court held that it would not expect a trial court to "divine" the need for a *Krankel* inquiry from a letter that did not ask for new counsel while making a specific request for other relief. *Whitaker*, 2012 IL App (4th) 110334, ¶ 21. Thus, *Whitaker* does not require a defendant to use the legal term "ineffective assistance" or to request new counsel for posttrial proceedings in order to trigger a *Krankel* inquiry.

¶ 79 Third, the fact that defendant did not raise the issue when he and his counsel next appeared in court also does not eliminate the need for a *Krankel* hearing. Justice Freeman, writing on behalf of our supreme court, rejected this argument 10 years ago in *People v. Moore*, stating:

"The State contends that defendant waived this issue when he and his trial counsel 'stood mutely and did nothing to request further inquiry.' This contention lacks merit. It would be inappropriate for trial counsel to argue a motion that is predicated on allegations of counsel's own incompetence. [Citations.] Further, a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention, which the defendant did in this case. [Citations.]" *Moore*, 207 Ill. 2d at 79.

As Justice Freeman stated 10 years ago, "[t]his contention lacks merit." *Moore*, 207 Ill. 2d at 79.

¶ 80 Following the law set forth by our supreme court in *Moore* and other cases, I would:

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"remand the case for the limited purpose of allowing the trial court to conduct the required preliminary investigation. If the court determines that the claim of ineffectiveness is spurious or pertains only to trial strategy, the court may then deny the motion and leave standing defendant's convictions and sentence. If the trial court denies the motion, defendant may still appeal his assertion of ineffective assistance of counsel along with his other assignments of error." *Moore*, 207 Ill. 2d at 81-82.

Since there is simply no ruling for us to review, I would remand to permit the trial court to make an inquiry and a ruling in the first instance. Therefore, I must respectfully dissent from the majority's *Krankel* ruling.