FOURTH DIVISION
August 13, 2015

No. 1-13-0630

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 17219
	)	
NATHAN BROWN,	)	Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concur in the judgment.

ORDER

¶ 1 *Held*: Defendant cannot establish that his trial attorney was ineffective for failing to file motion to suppress. Inventory search of car defendant was driving was proper where police officer who pulled defendant over was required by law to impound defendant's car. Record is insufficient to support defendant's claim that field-sobriety tests performed by officer were unlawful, where record contains no information regarding the officer's reasons for conducting tests.

¶ 2 In this appeal, we must decide whether defendant Nathan Brown's trial counsel was ineffective for failing to file a motion to suppress evidence of a gun that was obtained during an inventory search of the car defendant was driving. Defendant contends that a motion to suppress would have been meritorious because the inventory search was unlawful and an improper pretext for an investigatory search. He also contends that the police officer who pulled defendant over unlawfully prolonged the stop to conduct 15 minutes of field-sobriety tests, even though he

claims that no facts supported the notion that defendant was intoxicated. Defendant argues that counsel's failure to pursue these meritorious fourth-amendment claims was unreasonable.

¶ 3 We conclude that counsel was not ineffective for declining to challenge the search of the car because the search was lawful under the inventory exception to the warrant requirement. Moreover, we cannot determine whether counsel was ineffective for failing to challenge the field-sobriety tests. At defendant's bench trial, defendant was precluded from inquiring into the officer's reasons for performing the tests—a ruling that defendant does not challenge on appeal. We affirm defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 The State charged defendant with being an armed habitual criminal and unlawful use or possession of a firearm by a felon. At defendant's bench trial, Illinois State Trooper Matthew Kiewiet testified that, around 2:50 a.m. on August 28, 2010, he was patrolling near Austin Boulevard on the Eisenhower Expressway in Chicago. He saw a red car "traveling at a high rate of speed." After following the car for about a quarter of a mile, Kiewiet determined that the car was traveling 80 miles per hour in a 45-mile-per-hour construction zone.

¶ 6 Kiewiet saw the car make "multiple lane changes," sometimes with its turn signal, sometimes without. Kiewiet also noticed that the vehicle "drove in the left lane for a significant period of time with its left signal on."

¶ 7 The car exited the expressway at 17th Avenue. Kiewiet followed and curbed the car at 17th Avenue and Lexington Street.

¶ 8 Kiewiet spoke to the driver, whom Kiewiet identified as defendant, after he pulled the car over. Defendant was alone in the car. Defendant told Kiewiet that "he did not have a driver's

license or insurance." After running a check on defendant's name, Kiewiet learned that defendant's license had been revoked.

¶ 9 Kiewiet ordered defendant out of the car. The officer then conducted a series of field-sobriety tests on defendant, which, Kiewiet estimated, took "[a]pproximately 15 minutes." Defense counsel asked Kiewiet if he conducted the sobriety tests because he "felt maybe that [defendant] was intoxicated," but the trial court sustained the State's objection to that question. The trial court also sustained the State's objection to defense counsel asking, "Why did you have him do field sobriety tests?"

¶ 10 After Kiewiet finished the tests, he handcuffed defendant and put him in the back of his squad car. Kiewiet told defendant that he "was under arrest for driving while revoked."

¶ 11 After Kiewiet and defendant had been sitting in Kiewiet's squad car for "[l]ess than a minute," Trooper Brian Lavin arrived at the scene. Kiewiet testified that he "did not call" Lavin. Kiewiet asked Lavin "to fill out the State Police tow form which involves a vehicle inventory and other information about the vehicle being towed." Kiewiet saw Lavin enter the car to perform the inventory search. Kiewiet said he planned to remain at the scene while Lavin searched the car.

¶ 12 While Lavin was looking through the car, Kiewiet remained near defendant. Kiewiet testified that defendant said, "I can't believe I left that in there."

¶ 13 Lavin concluded the search and told Kiewiet, "1032," which, according to Kiewiet, means, "Man with a gun." Kiewiet read defendant his rights, and defendant asked if he could use the bathroom before he was taken in. Kiewiet asked defendant why he thought he was being brought in to the police station, and defendant replied, "You already found that thumper in my glove." Kiewiet testified that he had heard the term "thumper" used before as "slang for

handgun." Kiewiet went to the car and saw a silver, .38-caliber revolver in the glove compartment.

¶ 14 Kiewiet testified that, before Lavin found the gun in the car, he was not going to bring defendant in to the police station. Kiewiet explained, "[T]he State Police has I bond books that we use for traffic misdemeanors, very commonly. So driving while revoked would be several citations and an I bond unless I have some reason to go further than that." Kiewiet said that his "plan" was to release defendant on an "I bond" until Lavin found the gun. He added, "Driving on revoked is a very common offense. We don't go into the station for several hours to print everyone for that." Kiewiet testified that he has the authority to write "I bonds," and that it was within his discretion to do so.[1]

¶ 15 After defendant was brought to the police station, Kiewiet spoke to defendant again. Defendant said that the gun did not belong to him; his friend asked to leave the gun in the glove compartment while the friend went to a club. Defendant forgot that the gun was in the glove compartment.

¶ 16 The State also introduced evidence of defendant's prior convictions, which were used to establish the elements of armed habitual criminal and unlawful possession of a firearm by a felon. The parties stipulated that the car defendant had been driving belonged to someone else.

[1] An "I bond" is an "individual bond" issued pursuant to Illinois Supreme Court Rule 553(d) (eff. Aug. 6, 2010). Under Rule 553(d), a police officer has the discretion to release the offender for certain traffic offenses, including driving while license revoked, on an individual bond given by the police officer. *Id.*; *People v. Taylor*, 388 Ill. App. 3d 169, 180 (2009) (Hutchinson, J., dissenting).

¶ 17 The trial court found defendant guilty of being an armed habitual criminal and of unlawful use or possession of a firearm by a felon. The trial court sentenced defendant to six years' incarceration. Defendant appeals.

¶ 18 II. ANALYSIS

¶ 19 Defendant claims that his trial counsel was ineffective for failing to move to suppress the evidence of the gun recovered from the car. He asserts that, because such a motion would have been meritorious, counsel acted unreasonably in failing to seek suppression of the evidence of the gun, which formed the basis of his armed habitual criminal conviction. The State contends that counsel cannot be considered ineffective because a motion to suppress would not have been successful.

¶ 20 The United States and Illinois Constitutions guarantee a criminal defendant's right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *People v. Domagala*, 2013 IL 113688, ¶ 36. An attorney renders ineffective assistance where his or her performance falls below an objective standard of reasonableness, and, but for counsel's unprofessional errors, a reasonable probability exists that the result of the proceedings would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 15. The defendant bears the burden of showing that his attorney's performance was unreasonable and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687-88, 696.

¶ 21 When a claim of ineffective assistance of counsel is premised upon counsel's failure to file a motion to suppress, the defendant must show that the suppression motion would have been meritorious, and that there was a reasonable probability that the outcome of trial would have been different had the motion been granted. *Henderson*, 2013 IL 114040, ¶ 15. We apply *de novo*

review to this issue. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 38. We first address the merit of a potential motion to suppress in this case, *i.e.*, the constitutionality of the traffic stop.

¶ 22 A. Inventory Search

¶ 23 A police search conducted without a warrant violates the constitutional prohibition on unreasonable searches unless it fits within an exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception exists when the police, prior to impounding a vehicle, conduct an inventory search of the vehicle. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

¶ 24 However, an inventory search must genuinely be that; it may not serve as a pretext for an otherwise unlawful search. Thus, three requirements must be met for an inventory search to be valid: (1) the impoundment of the vehicle must be lawful; (2) the purpose of the inventory search must be to protect the owner's property and to protect the police from claims of lost, stolen, or vandalized property and to guard the police from danger; and (3) the inventory search must be conducted in good faith pursuant to reasonable standardized police procedures. *People v. Hundley*, 156 Ill. 2d 135, 138 (1993).

¶ 25 Defendant claims that the State would not have been able to meet the first and third requirements for a valid inventory search had counsel filed a motion to suppress. We address each of those requirements in turn.

¶ 26 1. *Lawfulness of the Impoundment*

¶ 27 Defendant first argues that Trooper Kiewiet unlawfully impounded the car because an impoundment is only authorized if it is incident to an individual's incarceration, and Kiewiet testified that he planned to release defendant at the time he elected to conduct the impoundment. The State contends that Kiewiet lawfully impounded the vehicle because section 6-303(e) of the

Illinois Vehicle Code (625 ILCS 5/6-303(e) (West 2010)) requires that a vehicle be impounded when an individual is driving on a suspended license and lacks insurance.

¶ 28 Section 6-303(e) provides that, when an individual drives on a suspended or revoked license, and that individual "is also in violation of Section 7-601 of this Code [(625 ILCS 5/7-601 (West 2010))] relating to mandatory insurance requirements," the individual "shall have his or her motor vehicle immediately impounded by the arresting law enforcement officer." 625 ILCS 5/6-303(e) (West 2010). In *People v. Nash*, 409 Ill. App. 3d 342, 349-50 (2011), the court, reviewing the legality of an inventory search, found that the impoundment of the defendant's car was lawful where the police officer was required to impound it pursuant to section 6-303(e). The officer had arrested the defendant for driving while her license was suspended and for failing to provide proof of her car insurance. *Id.* at 344. Even though the defendant actually had car insurance, the court found that section 6-303(e) still applied because, when an individual cannot present proof of his or her insurance to the police, that person " 'shall be deemed to be operating an uninsured motor vehicle.' " *Id.* at 350 (quoting 625 ILCS 5/3-707(b) (West 2008)). The court also rejected the defendant's argument that the mandatory impoundment was unlawful because section 6-303(e) did not provide for alternatives to impoundment. *Nash*, 409 Ill. App. 3d at 352-53. In rejecting that argument, the court stressed that alternatives to impoundment were unavailable to the officer because the car could not be legally driven without proof of insurance. *Id.*

¶ 29 The rationale of *Nash* applies in this case. Like *Nash*, defendant was arrested for driving on a revoked license and for lacking car insurance. Pursuant to section 6-303(e), Kiewiet was authorized to—and, in fact, required to—impound defendant's car. The record reveals no possible alternatives to impoundment that Kiewiet could have pursued. The only available driver

was defendant, who lacked a driver's license or insurance to operate the car. Thus, the impoundment of defendant's car was lawful.

¶ 30 Defendant attempts to distinguish *Nash* because, in that case, the arresting officer testified that he was required to tow the car because of the defendant's lack of a license or insurance, whereas Kiewiet testified that he had planned to release defendant until Lavin found the gun. Defendant conflates Kiewiet's reasons for taking *defendant* into custody with Kiewiet's reasons for impounding defendant's *car*. While Kiewiet testified that he planned to release defendant on an individual bond before Lavin found the gun, he never testified that he planned to release the car to defendant. To the contrary, the record shows that, even though Kiewiet initially planned to release defendant on an individual bond, he had also initiated the procedures for the car's impoundment at that time. Contrary to defendant's argument, the record does not show that Kiewiet was unaware of section 6-303(e) or his duty to impound defendant's car.

¶ 31 Defendant also argues that *Nash* is inapplicable because, in this case, Kiewiet did not testify that he towed the car pursuant to section 6-303(e). According to defendant, because Kiewiet was not aware of this provision, the State may not rely on that provision to justify the impoundment of the car. We disagree. While Kiewiet never specified that the impoundment was mandatory, he was not asked about his reasons for towing the vehicle. Thus, the record is unclear as to whether he was aware that section 6-303(e) required him to tow the car or not. As defendant bears the burden of establishing his attorney's ineffectiveness (*Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986)), the record's silence does not aid his cause.

¶ 32 Defendant cites *People v. Nogel*, 137 Ill. App. 3d 392 (1985), in support of his claim that the police could not impound the car when they did not plan to arrest him. In *Nogel*, a police officer arrested the defendant for violating a city ordinance after the officer saw the defendant

fighting with his girlfriend. *Id.* at 394. The officer testified that, when dealing with an ordinance violation, it was customary practice to book the suspect, fill out a complaint, write a report, and obtain a $50 bond from the suspect. *Id.* at 395. However, when the officer arrested the defendant, the officer put him in a jail cell until the defendant relinquished the combination for a locked briefcase he had with him. *Id.* The officer found a gun inside the briefcase. *Id.* The defendant had $110 on his person when he was booked. *Id.*

¶ 33 On appeal, the State attempted to characterize the officer's search of the briefcase as an inventory search pursuant to the defendant's arrest. *Id.* at 396. The court stated that "a [inventory] search of any container or article in the possession of an arrested person *** is permissible only if it is incident to the further incarceration of that person." *Id.* at 398. The court noted that, at most, defendant could be required to post a $50 bond, which he could have easily covered with the $110 he had on him. *Id.* Thus, the court reasoned, the officer had no reason to believe that the defendant would be subject to future incarceration, and the police could not justify searching his briefcase on the grounds that it was a valid inventory search pursuant to his incarceration. *Id.* at 398-99.

¶ 34 Defendant argues that *Nogel* applies here because Kiewiet could not inventory defendant's car absent further incarceration of defendant, and Kiewiet indicated that he initially planned to release defendant on an individual bond. But *Nogel* is distinct from this case because this case does not involve an inventory search of an item found on defendant's person. In *Nogel*, the court required that the officer have a reasonable expectation that the defendant would remain in their custody because, if they did not, the officers had no reason to inventory the defendant's property. If the defendant were released, the police could not simply keep the briefcase they found on his person. Here, however, Kiewiet planned to impound defendant's car. Even if

defendant had been released, it does not follow that Kiewiet would also have to release defendant's car to him. To the contrary, section 6-303(e) would require his car to be impounded, regardless of whether defendant was incarcerated or not. Thus, the rationale of *Nogel* does not apply here.

¶ 35 For similar reasons, we find the other cases relied on by defendant to be inapplicable here. In both of those cases, the defendants did not lack both a driver's license and insurance under section 6-303(e). See *People v. Clark*, 394 Ill. App. 3d 344, 345 (2009) (defendant was unable to produce driver's license, but could produce insurance card); *People v. Valdez*, 81 Ill. App. 3d 25, 26 (1980) (defendant was arrested for possessing cannabis and only had license suspended). Thus, the officers in *Clark* and *Valdez* were not required to impound the defendants' vehicles under section 6-303(e). Here, where defendant had no driver's license and no automobile insurance, section 6-303(e) required—and necessarily authorized—Kiewiet to tow his car.

¶ 36 Defendant also contends that the impoundment was unlawful because Kiewiet did not explain why the tow was an exercise of his community-caretaking function. Defendant notes that the simple fact that a car will be left unattended is insufficient reason to impound it. Defendant adds that Kiewiet did not testify that defendant's car was illegally parked, that the car would impede traffic, or that the car would pose a danger to the public.

¶ 37 It is true that the fact "[t]hat a defendant's car would be left unattended is not a sufficient reason for impoundment unless the vehicle is illegally parked." *People v. Mason*, 403 Ill. App. 3d 1048, 1054 (2010). Pursuant to the police's community-caretaking authority, the police may impound a car if it impedes traffic or threatens public safety or convenience. *Id.* But this court has held that, where a driver lacks a license and insurance, officers may impound a car regardless

of the traffic conditions or parking restrictions because a vehicle without insurance may not be driven by anyone. See, *e.g.*, *Nash*, 409 Ill. App. 3d at 353 ("section 6-303(e) mandated impoundment *because* the vehicle could not be removed legally" without proof of insurance for the car (emphasis in original)); *Mason*, 403 Ill. App. 3d at 1055 (mandatory tow policy reasonable because "an uninsured vehicle operated by a driver with a revoked or suspended license must be towed"). In other words, without insurance, the only reasonable option for the police was to tow the vehicle. In this case, defendant did not have insurance, and there was no proof of insurance in the car. Without insurance, the car could not be driven away, regardless of whether it was parked illegally or impeded traffic. Thus, Kiewiet was not unreasonable in impounding the car rather than leaving the immobile car on the side of the street for an indefinite period of time. Kiewiet's impounded the car pursuant to his community-caretaking authority.

¶ 38 Moreover, the record lacks sufficient information regarding the location of defendant's car or the condition of the intersection where the stop occurred to determine whether the impoundment was necessary to protect public safety or convenience. Kiewiet did not testify to the location of defendant's car, the traffic conditions, or the presence or absence of any parking restrictions in the area. While defendant urges us to use Google Maps' "Street View" feature to view the intersection, those images still would not provide us with any information regarding the condition of the intersection on the night of defendant's arrest, or whether there were parking restrictions in place. It is defendant's burden to show that his attorney was ineffective for failing to file a meritorious motion to suppress. *Kimmelman*, 477 U.S. at 381. Where the record lacks information to support defendant's contention that the impoundment was unlawful, we cannot say that he has shouldered that burden.

¶ 39 2. *The Existence of Reasonable Procedures*

¶ 40 Defendant also claims that Trooper Kiewiet failed to act in accordance with reasonable police procedures in deciding to impound defendant's car. Defendant notes that Kiewiet testified that, under normal procedures, he would not have brought defendant to the police station for driving while his license was revoked and driving without insurance. Instead, Kiewiet testified that he planned to release defendant on an individual bond until Lavin found the gun. Thus, defendant contends, Kiewiet's decision to impound defendant's car ran counter to the established procedures of his department.

¶ 41 Again, defendant has conflated Kiewiet's decision to impound the car with his decision regarding whether to take defendant to the police station for booking. While Kiewiet testified that he planned to release defendant on an individual bond, he did not testify that he also planned to leave defendant's car on the street or to let defendant drive the car away. As we explained above, his testimony suggests the opposite: he made the decision to impound defendant's car when he was still planning on releasing defendant on the individual bond. Thus, Kiewiet's testimony does not show that the inventory was a mere pretext for an investigatory search. Rather, he appeared to make the decision to tow defendant's car independently of his decision to release defendant on an individual bond.

¶ 42 Moreover, the record lacks sufficient testimony regarding the inventory procedure in order to determine whether it was reasonable. See *Massaro v. United States*, 538 U.S. 500, 504-05 (2003) (noting difficulty of bringing ineffectiveness claims on direct appeal because "appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose"); *People v. Weeks*, 393 Ill. App. 3d 1004, 1011 (2009) ("Claims of ineffective assistance of counsel are usually reserved for postconviction proceedings[,] where a trial court

can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies."). The only testimony relating to the impound procedure was Kiewiet's assertion that Lavin was going to fill out a form for the impoundment, including a list of the items in defendant's car. We see nothing in the record to suggest that Kiewiet failed to follow a reasonable police procedure in impounding defendant's car and conducting an inventory search. Defendant carries the burden of establishing that counsel acted unreasonably in not challenging the search. *Kimmelman*, 477 U.S. at 381. Given this record, he cannot meet that burden.[2]

¶ 43 B. Improper Prolongation of Traffic Stop

¶ 44 Along with challenging the propriety of the search of the car, defendant also challenges Kiewiet's seizure of the vehicle. A routine traffic stop, which is considered a "seizure" under the fourth amendment, "is a relatively brief encounter" that has been analogized to a brief, investigatory seizure pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), rather than a formal arrest. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). During a traffic stop, officers are free to question the driver about matters unrelated to the reason for the stop. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). But a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [the] mission" of the initial stop. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). That is because "[a]uthority for the seizure *** ends when tasks tied to the traffic

[2] Defendant also claims that the search was not a proper search incident to his arrest under *Arizona v. Gant*, 556 U.S. 332 (2009). However, as defendant cannot show that the search was an unauthorized inventory search, we do not need to address this argument. See *Mason*, 403 Ill. App. 3d at 1055 (valid inventory search not subject to suppression under *Gant*).

infraction are—or reasonably should have been—completed." *Rodriguez v. United States*, 575 U.S. ___, ___, 135 S. Ct. 1609, 1614 (2015).

¶ 45 In this case, defendant contends that Trooper Kiewiet unreasonably prolonged the stop when he conducted 15 minutes of field-sobriety tests without possessing a reasonable, articulable suspicion that defendant was intoxicated. Defendant argues that, at the time Kiewiet conducted the tests, he had already completed the mission of the traffic stop by determining that defendant's license had been revoked and that he lacked insurance. He claims that Kiewiet used the sobriety tests "to prolong the detention so that when assistance arrived, he could order that Brown's vehicle could be subjected to an inventory search."

¶ 46 We decline to reach the question regarding the length of the traffic stop because the record is not fully developed as to Kiewiet's reasons for performing the field-sobriety tests. The record does show some basis for the officer's suspicion—defendant's vehicle was traveling nearly twice the legal limit, making multiple lane changes, sometimes without a signal, and proceeded in the left lane for a long time with its turn signal flashing—but we are not satisfied that this issue was fully litigated. When defense counsel asked Kiewiet why he performed the tests, the State objected and the trial court sustained those objections before Kiewiet could answer. If Kiewiet possessed sufficient suspicion to perform field-sobriety tests, the duration of the tests would be irrelevant; he would have been entitled to take the time necessary to perform the tests. Thus, we cannot determine whether Kiewiet possessed a reasonable, articulable suspicion that defendant was intoxicated, which would have justified the sobriety tests in any event.

¶ 47 We also decline to address the question of whether the trial court erred in sustaining the State's objections because defendant has not challenged those rulings on appeal. Defendant does

not claim that the trial court erred in sustaining the State's objections. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Ramirez*, 402 Ill. App. 3d 638, 644 (2010) (points not argued on appeal are forfeited).

¶ 48 Because we cannot determine whether Kiewiet possessed a reasonable, articulable suspicion that defendant was intoxicated, we cannot ascertain the possible merit of a motion to suppress, or whether counsel was unreasonable in filing such a motion. Defendant cannot meet his burden of showing that his attorney was ineffective in failing to file a motion to suppress. *Kimmelman*, 477 U.S. at 381. However, this order should not be construed as foreclosing defendant's ability to pursue his claims in a collateral proceeding, should he be able to locate evidence that would have supported his motion to suppress. See *Massaro*, 538 U.S. at 504-05 (collateral proceedings are preferred method of bringing ineffective-assistance-of-counsel claims); *Weeks*, 393 Ill. App. 3d at 1011 (same); *People v. Burns*, 304 Ill. App. 3d 1, 11-12 (1999) (courts allow ineffective-assistance claims to be brought in postconviction proceedings "where resolution of the issues requires an inquiry into matters outside the common law record").

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm defendant's conviction. The inventory search of the car defendant was driving was lawful and we lack sufficient information to determine the lawfulness of the field-sobriety tests to which defendant was subjected.

¶ 51 Affirmed.