FIRST DIVISION
Order Filed October 26, 2015
Modified Upon Denial of Rehearing December 14, 2015

No. 1-13-2679
2015 IL App (1st) 132679-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	11 CR 17685
LARRY MCDANIEL,	)	
	)	
	)	Honorable Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not proven guilty beyond a reasonable doubt of the crime of armed habitual criminal when the state failed to introduce evidence at trial that one of the predicate offenses, unlawful vehicular invasion, was a forcible felony; therefore defendant's conviction was reversed and his conviction for two counts of aggravated unlawful use of a weapon were reinstated since the Class 2 version of that statute and the requirement that a person possess a FOID card have consistently been held constitutional even in light of the Illinois Supreme Court's decision in *People v. Aguilar*. Defendant's conviction for possession of a controlled substance was upheld where the trial court did not err in denying defendant's motion to suppress and his trial counsel was not ineffective in litigating that motion.

¶ 2 After a bench trial, defendant was found guilty of the offense of armed habitual criminal, possession of 15-100 grams of heroin, and two counts of aggravated unlawful use of a weapon. The trial court merged the two counts of aggravated unlawful use of a weapon into the armed habitual criminal charge. Defendant was sentenced to twelve years for the charge of armed habitual criminal and eight years for the possession of heroin, with those sentences to run concurrently. On appeal, defendant argues: (1) that his conviction for the offense of armed habitual criminal must be vacated because the State failed to prove that his prior conviction for unlawful vehicular invasion was a qualifying conviction, an element the State was required to prove beyond a reasonable doubt, and that his conviction for two counts of aggravated unlawful use of a weapon, which were merged with the charge of armed habitual criminal at sentencing, should not be reinstated since the statute pursuant to which he was charged was declared unconstitutional in *People v. Aguilar*, (2) that the trial court erred in denying his suppression motion regarding the police search of a closed center console in which heroin was found, or alternatively, he asserts his trial counsel was ineffective for failing to adequately litigate the suppression motion, and (3) that during sentencing the trial court improperly considered his prior convictions for unlawful vehicular invasion and unlawful use of weapons by a felon since those convictions were also the predicate offenses for his conviction for armed habitual criminal. We reverse defendant's conviction for armed habitual criminal, and pursuant to *People v. Artis*, 232 Ill. 2d 159, 170 (2009), we remand for the entry of judgment and sentence to be imposed on the more serious offense of the two counts of aggravated unlawful use of a weapon. We affirm on all other issues.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment of twelve charges after police recovered heroin and a weapon in his car during a traffic stop. Defendant waived his right to a jury trial and his case proceeded through a bench trial after which he was found guilty of the offense of armed habitual criminal (720 ILCS 5/24-1.7A (West 2010)), possession of 15-100 grams of heroin (720 ILCS 570/402(a)(1)(2) (West 2010)), and two counts of aggravated unlawful use of a weapon ("AUUW") (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)) and (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)).

¶ 5 Motion to Quash Arrest and Suppress Evidence

¶ 6 On December 13, 2011, defendant, through counsel, filed a motion to quash arrest and suppress evidence arguing that his arrest was made without a valid arrest warrant or probable cause and that the evidence seized as a consequence should be excluded as the fruits of an unlawful arrest. On January 20, 2012, at the hearing on the motion to suppress, Chicago Police Officer John O'Keefe testified that on September 27, 2011, at approximately 12:45 a.m., he, his partner Officer Suing, and Sergeant Ramaglia, all dressed in plain clothes, were driving on routine patrol in an unmarked squad car when they observed defendant's vehicle stopped in the middle of a one-way street at 1518 South Christiana Avenue in Chicago. Officer O'Keefe testified that this area is a "gang stronghold" and is "extremely violent" and that about forty minutes prior, they had received a report of shots fired. He stated that he observed defendant's Pontiac Grand Prix parked in the middle of the street with the engine and lights off and the driver's side door open. Officer O'Keefe testified that he pulled up behind defendant's vehicle and "waited about ten seconds believing that [defendant] was just going to close the door and drive away." Nothing happened, so Officer O'Keefe then honked the horn and waited another ten to fifteen seconds. Officer O'Keefe testified that "[a]pproximately ten seconds after I honked

the horn, [defendant] exited his vehicle [and] made direct eye contact with our vehicle." Defendant then turned around, reached down and leaned forward to the driver's seat, appeared to pick up an item and then sat back down in the driver's seat. Officer O'Keefe testified that, at this point, he and his fellow officers were still in their vehicle. After observing defendant sit back down in his vehicle, Officers O'Keefe and Suing and Sergeant Ramaglia exited their vehicle and all started to walk toward defendant's vehicle. Officer O'Keefe stated that while they were walking toward defendant's car, he was yelling at defendant that he was blocking the roadway in an attempt to get him to move. Officer O'Keefe further testified that as he got closer to defendant's vehicle, he observed defendant grab an item with his right hand and reach across to the passenger side of the vehicle. Officer O'Keefe stated that defendant's actions, *i.e.* not responding to anything the officer has said, not moving the car, not turning on the engine or the lights, and not closing the driver's side door, were "suspicious." Then, as Officer O'Keefe approached the vehicle, defendant again reached toward the passenger compartment of the vehicle, and at that point, Officer O'Keefe ordered him to exit the vehicle with his hands up. Defendant complied with the officer's request. Officer O'Keefe testified that as defendant was getting out of the vehicle, he observed two spent shell casings on the driver's seat. His partner, Officer Suing, then approached the passenger side of the vehicle and stated "19 King," which is code for arrest. Officer O'Keefe testified that he then placed handcuffs on defendant and walked over to the passenger side of the vehicle where Officer Suing pointed to a Glock 17 model handgun with an extended magazine. Officer O'Keefe stated that, at that time, he also observed shell casings on the passenger seat. In addition to the weapon, the officers recovered a total of five spent shell casings and a black bag which contained heroin, cutting agents and a sifter.

Officer O'Keefe testified that the black bag which contained the heroin was recovered from the center console of defendant's vehicle, which, at the time of his arrest, was closed.

¶ 7 Defendant's counsel argued that the arrest was unlawful due to a lack of specific testimony establishing suspicious conduct by defendant. Counsel further argued that all of the items found in the vehicle were recovered after the unlawful detention and should be suppressed as fruits of the arrest. After the hearing, the trial court denied the motion to quash arrest and suppress evidence. Specifically, the trial court judge stated:

> "To me, it's not even a close issue. The officers clearly were acting reasonably in the situation. It does come under *Terry v. Ohio*. I believe that in looking at the totality of the circumstances, the officers had more than reasonable grounds to believe that a crime was about to be committed or had been committed and the stop and detention of the [d]efendant was reasonable. So the motion to quash arrest and suppress the evidence is denied."

¶ 8 Bench Trial

¶ 9 The bench trial in this case began on March 20, 2013. In its case-in-chief, the State called Officers O'Keefe and Suing to testify. The State entered stipulations as to the test results of the recovered suspect narcotics, the ownership of defendant's vehicle and defendant's lack of a FOID card. Officer O'Keefe's testimony at trial was consistent and substantially similar with his testimony at the suppression hearing. However, during his trial testimony, Officer O'Keefe added that after giving defendant his *Miranda* warnings, defendant repeatedly stated "you got my gun" and questioned "do you got my gun." Officer O'Keefe also added that when defendant was being escorted into the police station with Officer O'Keefe on one side and Officer Suing on the other, "[defendant] began throwing his shoulders and moving to escape our grasp." Officer O'Keefe stated that Officer Suing then executed an emergency takedown, which means that he took defendant to the ground by putting pressure on his shoulder and putting him on his stomach on the ground. As a result, defendant sustained a laceration above his left eye and was taken to

Saint Anthony's Hospital. After being treated, defendant later returned to the police station. Officer O'Keefe also testified that he recovered defendant's state identification card in the vehicle's cup holder.

¶ 10 Officer Suing's testimony was substantially the same as Officer O'Keefe's testimony. Officer Suing additionally testified that Officer O'Keefe indicated that he check the front passenger side of defendant's vehicle and that when he opened the door, he found the Glock 17 handgun lodged between the front passenger seat and the door. Officer Suing testified further that the handgun contained a high capacity 30 round magazine, with 17 live rounds and an additional round jammed in the chamber. Specifically, Officer Suing stated that when he first observed the firearm, "[it] had the 30 round magazine in it, and it was in what we call a stove pipe condition. There was a round partially fed into the chamber and partially sticking out of the injection." Suing also testified that he recovered five spent nine millimeter shell casings from the vehicle: two from the driver's seat, two from the passenger seat and one on the front passenger floor board. Officer Suing was present and observed Sergeant Ramaglia open the center console of the vehicle. He testified that "I saw him open the center console, and there was a black mesh type bag in there, opened it up, at which time, [Sergeant Ramaglia] stated that there is heroin. * * * Also recovered was a bag of multiple pieces of narcotics packaging, a blue and white bottle of suspect narcotics cutting agent, and a metal sifter." Officer Suing testified that he inventoried the suspect narcotics under inventory number 12429755, which the parties stipulated tested positive for 19.9 grams of heroin.

¶ 11 The parties further stipulated that the Pontiac Grand Prix was owned by both defendant and his girlfriend, Sarah Baker ("Baker"), and that as of January 20, 2013, which was the date of the certified record presented by the State, defendant had never been issued a FOID card.

Finally, the State introduced into evidence two certified copies of conviction, one for 07CR1869901, defendant's January 10, 2008 conviction for unlawful use of a weapon by a felon and one for 05CR19767901, defendant's June 8, 2006 conviction for unlawful vehicular invasion. The State then rested.

¶ 12 The defense presented a motion for a directed finding, which was denied. The defense presented its case on May 21, 2013 by calling two witnesses to testify: Baker and defendant's sister, Franella McDaniel ("McDaniel"). Baker testified that, at the time of her testimony, she had known defendant for four or five years and that they were dating. Unlike the officers, who testified that defendant was alone, the defense witnesses both testified that they were in the car with defendant at the time of his arrest. Baker testified that she was driving the vehicle, McDaniel was in the front passenger seat and defendant was in the back seat. She further testified that on September 27, 2011, between 12:30 and 12:45, she was in the 1500 block of South Christiana Avenue, because she was calling her babysitter, Amber Ward, who was on that block, to ask her to bring her and defendant's child outside. Baker stated that while on that block, a blue and white squad car pulled up behind her vehicle and "flashed the lights on us." She further testified that two officers, wearing police uniforms, approached, asked for her license and insurance, and then told them all to get out of the vehicle. All three complied and got out of the vehicle. Baker then stated that the officers told her and McDaniel to go home, so they "walked off." According to Baker, as she and McDaniel walked off, they turned back and observed defendant on the ground being kicked and beaten by two officers. Further, she observed the officers take defendant off the ground and put him in the back of the squad car. Baker testified that she did not know where on his body defendant was being kicked and beat but that she would guess "in his stomach and his ribs." She stated she did not see defendant being

kicked in the face. When she saw defendant a few days later, she observed that "[h]e had scratches on his face and his eyes was [*sic*] messed up." Baker also testified that she could not identify or provide a detailed description of the officers because it was dark. Also, she stated that she never saw a gun or drugs on defendant's person. She also testified that she did not tell anyone about seeing the officers beating defendant and she did not report it to the police. However, Baker testified that she contacted defense counsel and told him what happened.

¶ 13 McDaniel also testified on behalf of the defense on May 21, 2013. Her testimony was similar to that of Baker. However, McDaniel testified that the officers' vehicle was dark and was not a blue and white squad car. Also, she stated that the officers were not wearing uniforms but were wearing vests. McDaniel testified that she observed two officers kicking defendant but that she did not get a good look at where on his body they were kicking him or what the officers looked like. McDaniel stated that although she knew that officers beating defendant was improper, she did not report it. She testified that someone had directed her to contact "OPS." She testified that she did not know what the acronym "OPS" stands for but she "[knew] that they deal with the police when the police not doing right."

¶ 14 The defense then entered into evidence, by way of stipulation, the defendant's medical records from Saint Anthony's Hospital from September 27, 2011. Those records listed as defendant's chief complaint: "facial contusion and laceration, one brow. Denies back pain, chest, abdomen, back, extra deficits." Defendant then waived his right to testify and the defense rested.

¶ 15 In its rebuttal case, the State again called Officer O' Keefe and also called Officer Hefel, the officer who transported defendant from the scene. Officers O'Keefe and Hefel both testified that they did not observe Baker or McDaniel that night. Officer O'Keefe further testified that while on the scene he and his partners did not place defendant on the ground or kick him and that

Officer Suing's emergency takedown at the police station only occurred after defendant "began to throw his shoulders around in an attempt to defeat the arrest, to get away from us." Finally, the State published a page from defendant's medical record regarding his physical exam, which stated "[c]onstitution, patient is afebrile. Vital signs reviewed. Patient has a normal pulse, normal respiratory rate. While appearing, patient appears comfortable, alert, oriented three times." The record also indicated that defendant's chest was listed as "non-tender," his breath sounded normal and there was no respiratory distress. Further, defendant's abdomen was also listed as "non-tender, no distension." The State then rested and the defense stated that it had no surrebuttal.

¶ 16 The trial court found defendant guilty of one count of armed habitual criminal, one count of possession of a controlled substance and two counts of aggravated unlawful use of a weapon. Specifically, the court found that the defense witnesses were impeached and it did not accept their testimony. The court stated that defendant's physical exam was "not at all consistent with the officer's [*sic*] punching him, kicking him or hitting him in any way, shape or form." Also, the court stated that it did "accept the police version of what happened."

¶ 17 Post-trial Hearing and Sentencing

¶ 18 Defendant filed his motion for a new trial on June 24, 2013. The trial court conducted a hearing on his motion and sentencing on July 19, 2013. In his motion for a new trial, defendant asserted that the State failed to prove him guilty of the offenses for which he was convicted beyond a reasonable doubt. He also asserted that no sentence should issue for the two AUUW counts because they should merge into the offense of armed habitual criminal. The motion also argued that the State's witnesses were not credible, that none of them ever testified that they saw defendant actually or constructively possess the gun, that there was no proof beyond a reasonable

doubt that defendant knew or should have known the gun or the drugs were present in the vehicle and that the gun was never shown to be in working order. Thus, given the totality of circumstances, the defense asserted that defendant should have been found not guilty. The defense also argued that the court erred in denying its motion for a directed finding and in denying its pre-trial motion to quash arrest and suppress evidence. After listening to argument, the court denied defendant's motion for a new trial.

¶ 19 The trial court then conducted a hearing in aggravation and mitigation for sentencing. In aggravation, the State focused on defendant's six prior felony convictions and two pending cases. Specifically, the State provided a factual basis for each conviction, including the defendant's two convictions which were the predicate offenses for his conviction of armed habitual criminal, his 2007 unlawful use of a weapon ("UUW") by a felon and 2005 unlawful vehicular invasion. The State asserted that in the 2005 unlawful vehicular invasion case, defendant flagged down a passing motorist, went up to the passenger window, and then "*** he pulled a silver plastic handgun out of a paper bag, pointed it at the victim, and got into the passenger seat of the vehicle. The [d]efendant then demanded [the] victim's money and struck the victim about the face and head numerous times causing lacerations, went into the victim's pockets and stole $90.00."

¶ 20 The State proposed that since defendant had rejected its plea offer of 15 years that he should receive a sentence longer than what was offered. In mitigation, the defense argued that defendant had strong familial support from his mother and his girlfriend and that he was involved with his children by seeing them and making voluntary support payments. The defense also pointed out that defendant comes from a rough neighborhood where a lot of violence exists around him. Defendant attempted to cope with this through his rap music and he intended to

pursue a career in this area. Finally, the defense asked that the court show mercy on defendant so that he would be able to be there for his children. Defendant then gave a brief statement in allocution thanking the trial court, the State, and his lawyer for giving him a fair trial but stated that he was "wrongly accused of this crime."

¶ 21 The trial court stated that it had considered all factors in aggravation and mitigation. Specifically, the court acknowledged that defendant had "three juvenile arrests" and "three drug cases, in which [defendant] ended up going to the [j]uvenile [d]epartment of [c]orrections." Additionally, the court stated it took into consideration defendant's two prior gun case convictions and unlawful vehicular invasion, which the court deemed "crimes of violence." The court then stated "you obviously have an affinity towards weapons in my opinion." The court pointed out that in addition to his juvenile drug charges, defendant also had three other drug case convictions. The court acknowledged and agreed with defendant's statement that the drugs were "tearing [him] down." Finally, the court stated it did not feel a 15 year sentence was appropriate.

¶ 22 The trial court merged the two convictions of AUUW into the conviction for armed habitual criminal and sentenced defendant to twelve years. The court also imposed an eight year prison sentence for the conviction for possession of a controlled substance, which was to run concurrently. The defense brought an oral motion to reconsider sentence on July 19, 2013, which the court denied. The defense also filed its notice of appeal on July 19, 2013.

¶ 23 ANALYSIS

¶ 24 Armed Habitual Criminal / Aggravated Unlawful Use of a Weapon

¶ 25 On appeal, defendant argues that his conviction for the offense of armed habitual criminal must be reversed because the State failed to prove beyond a reasonable doubt that his prior conviction for unlawful vehicular invasion was a forcible felony under section 2-8 of the

Criminal Code of 1961 ("the Code"). 720 ILCS 5/2-8 (West 2010). Defendant further argues that in reviewing this issue, we should apply a *de novo* standard of review. Conversely, the State asserts that since this is a reasonable doubt challenge, this Court is to give great deference to the trial court since it saw and heard the witnesses. Illinois courts have recognized that where the sufficiency of the evidence is challenged on appeal, the relevant question is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). However, as defendant argues, the case before us is purely legal, thus the deferential standard proposed by the State is not applicable to the reasonable doubt challenge at bar since this case does not involve any assessment of witness credibility. Defendant asserts that Illinois courts have held that where a reasonable doubt claim does not entail any assessment of the credibility of witnesses, but only the question of whether a settled set of facts sufficed to meet the State's burden beyond a reasonable doubt, the standard of review is *de novo*. *In re Ryan B.*, 212 Ill. 2d 226 (2004) (citing *People v. Smith*, 191 Ill. 2d 408, 411 (2000)). In this case, because the credibility of the witnesses has not been questioned, and instead we are asked to decide whether the uncontested facts are sufficient to prove the elements of a crime, our review is *de novo*.

¶ 26 According to the Code, a person commits the offense of armed habitual criminal when he or she receives, sells, possesses or transfers any firearm after having been convicted two or more times of certain predicate offenses. 720 ILCS 5/24-1.7 (West 2010). The State must prove the prior convictions and the present conduct beyond a reasonable doubt. *People v. Adams*, 404 Ill. App. 3d 405, 412 (2010). In this case, the information alleged that defendant had two prior qualifying convictions, UUW by a felon and unlawful vehicular invasion. The parties

agree that defendant's prior UUW by a felon conviction in case number 07CR1869901 is a qualifying offense under section 24-1.7(a)(2) of the Code. 720 ILCS 5/24-1.7(a)(2) (West 2010). They also agree that unlawful vehicular invasion is not specifically listed as a qualifying offense under section 24-1.7, and therefore cannot serve as the second qualifying offense unless it is a "forcible felony" as defined in section 2-8 of the Code. In addition to certain enumerated felonies, the residual clause of section 2-8 defines "forcible felony" to include "***any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2010).

¶ 27 Defendant asserts that his conviction for armed habitual criminal must be overturned because the offense of unlawful vehicular invasion is not inherently a "forcible felony" and the State did not introduce any evidence at trial to show that unlawful vehicular invasion is a forcible felony, which is a requisite element that must be proven beyond a reasonable doubt. The State argues that unlawful vehicular invasion qualifies as a forcible felony as defined by the Code, and even if it does not, the record on appeal contains evidence that during the commission of the unlawful vehicular invasion, defendant pointed a handgun at the victim and struck her about the head and face causing lacerations, thus showing that defendant engaged in an act of physical force against an individual which renders his conviction a "forcible felony." Specifically, at the sentencing hearing, the State read into the record the factual basis for defendant's prior convictions, including his conviction in case number 05CR1967901 for unlawful vehicular invasion. Defendant argues that this was insufficient proof and that the State was required to prove beyond a reasonable doubt that unlawful vehicular invasion is a forcible felony *at trial*. We agree.

¶ 28 A crime can be shown to fall under the residual clause of section 2-8 in two ways. First, where a crime has as one of its elements the intent to carry out an act of physical force against an individual, every instance of that crime necessarily qualifies as a forcible felony. *People v. Thomas*, 407 Ill. App. 3d 136, 140 (2011) (attempted murder). Second, the State can prove that a particular crime is a forcible felony by presenting evidence that, under the particular facts of a case, the defendant contemplated the use of physical force against an individual and was willing to use it. *People v. Belk*, 203 Ill. 2d 187, 195-96 (2003). *See also People v. Greer*, 326 Ill. App. 3d 890, 894-95 (2002) (holding that although the offense of armed violence is not inherently a forcible felony, it was deemed to be one where defendant took a gun to a drug sale where he sought to collect debts owed from previous sales.) Here, defendant asserts that the State did not prove that his unlawful vehicular invasion was a forcible felony in either of these ways.

¶ 29 In analyzing the first possibility, we look to the language of the Code, which states that "[a] person commits vehicular invasion when he or she knowingly, by force and without lawful justification, enters or reaches into the interior of a motor vehicle as defined in The Illinois Vehicle Code while such motor vehicle is occupied by another person or persons, with the intent to commit therein a theft or felony." 720 ILCS 5/12-11.1 (West 2010).[1] Defendant contends that although the unlawful vehicular invasion statute requires an element that the offender enter or reach into a motor vehicle *by force*, the statute does not contemplate the use or threat of *physical force against an individual*, which is required under the residual clause of the forcible felony statute. (Emphasis added.) Defendant cites to the case of *People v. Isunza*, 396 Ill. App. 3d 127, 130-31 (2009) for an instructive explanation regarding the definition of "force."

[1] We note that the vehicular invasion statute pursuant to which defendant was convicted on June 8, 2006 in case number 05CR1967901 was previously codified as 720 ILCS 5/12-11.1. Pursuant to Public Act 97-1108, § 10-5 the vehicular invasion statute has since been renumbered as 720 ILCS 5/18-6, effective January 1, 2013.

In *Isunza*, the defendant appealed his conviction for vehicular invasion and argued that the State had not proved him guilty beyond a reasonable doubt because it had not adequately shown that he used the requisite "force" since the window of his victim's vehicle was open at the time he reached into it. *Isunza*, 396 Ill. App. 3d at 130. The State responded that "force" was synonymous with violence and since the defendant reached into the vehicle to punch the victim, the evidence was sufficient to convict defendant. *Id.* In conducting its analysis, the *Isunza* court noted that although the term "force" was not defined by the vehicular invasion statute, section 12-12 of the Code (720 ILCS 5/12-12 (West 2006)), which pertains to sexual assault offenses, defines "force" as "the use of force or violence," and is consistent with Black's Law Dictionary, which defines it as " '[p]ower, violence compulsion, or constraint exerted upon or against a person or thing.' " *Id.* at 130-31. (quoting Black's Law Dictionary 644 (6th ed. 1990)). Therefore, the court found that there was sufficient evidence to prove that the defendant had used force when he reached into the victim's vehicle. *Id.* at 131.

¶ 30 However, the question in this case is not whether defendant used the requisite force when he reached into his victim's vehicle during the commission of unlawful vehicular invasion as it was in the *Isunza* case, rather the question is whether the element "by force" required by the unlawful vehicular invasion statute (720 ILCS 5/12-11.1 (West 2010)) is synonymous with the element "the use or threat of physical force or violence against any individual" required by the forcible felony statute (720 ILCS 5/2-8 (West 2010)). We find that they are not synonymous. As a result, contrary to the State's assertion that "vehicular invasion falls squarely within the definition of forcible felony," we find that in order to have proven defendant guilty of the offense of armed habitual criminal, the State was required to prove beyond a reasonable doubt that defendant's conviction for vehicular invasion was a forcible felony. Such a conclusion cannot be

presumed. The forcible felony statute (720 ILCS 5/2-8 (West 2010)), which specifically enumerates various offenses but excludes unlawful vehicular invasion, evinces the legislature's intent not to automatically treat this offense as a forcible felony. For example, it is noteworthy that this section of the Code specifically lists aggravated hijacking as a qualifying offense but not the lesser offense of unlawful vehicular invasion. See *People v. Roberts*, 214 Ill. 2d 106, 117 (2005) (referencing the maxim *expression unius est exclusion alterius* which means "the expression of one thing is the exclusion of another" as being helpful in ascertaining the intent of the legislature when their intent is not clear from the plain language of the statute).

¶ 31 Further, we find convincing defendant's argument that, as the court in *Isunza* recognized, the force or threat of force required for defendant to have committed vehicular invasion does not necessarily involve the use or threat of physical force against *an individual*, which is required for a forcible felony. (Emphasis added.) Instead, the force contemplated by the vehicular invasion statute could be fulfilled through the use of force against a vehicle, *i.e.* a thing, which is consistent with the definition of "force" set forth in the Blacks' Law Dictionary. The State cites to the case of *People v. Wooden*, 2014 IL App (1st) 130907, in support of its position. In that case, the defendant argued that vehicular hijacking was not one of the enumerated felonies in the forcible felony statute and that it did not fall under the residual clause. *Wooden*, 2014 IL App (1st) at ¶ 17. The *Wooden* court concluded that the offense of vehicular hijacking fell within the definition of forcible felony since "the act of taking a motor vehicle from a person by the use of force or by threatening the imminent use of force necessarily involves at least the contemplation that violence might be necessary to carry out the crime." *Id.* at ¶ 17-20. The court also stated that "defendant has not suggested nor can we conceive of, a

situation in which a defendant could commit vehicular hijacking without using or threatening the use of physical force or violence." *Id.* at ¶ 20.

¶ 32 Unlike the scenario presented in *Wooden*, there could exist a situation in which a defendant could commit the offense of vehicular invasion without the use of physical force or violence against an individual. The Code states that "[a] person commits vehicular invasion when he or she knowingly, by force and without lawful justification, enters or reaches into the interior of a motor vehicle as defined in The Illinois Vehicle Code while such motor vehicle is occupied by another person or persons, with the intent to commit therein a theft or felony." 720 ILCS 5/12-11.1 (West 2010). When looking at the plain language of the statute, 720 ILCS 5/12-11.1 (West 2010), it is clear to this court that the language "by force and without lawful justification" refers to the manner in which the person "enters or reaches into the interior of a motor vehicle." Significantly, the action committed "by force," *i.e.* entering or reaching into a vehicle, is not necessarily carried out against an individual. We acknowledge that the statute also includes a requirement that the motor vehicle be "occupied by another person or persons," however this provision merely requires that a person or persons be present, not that force be used against those present. Of course, we acknowledge that a vehicular invasion *could* be a forcible felony. (Emphasis added.) There are certainly situations where a defendant could use force against an individual during the commission of a vehicular invasion rendering that defendant also guilty of a forcible felony. However, the question before us now is not whether it is *possible* that a vehicular invasion is also a forcible felony, but rather whether a vehicular invasion *always* is a forcible felony. (Emphasis added.)

¶ 33 To further support our conclusion on this issue, we point to the analysis in *People v. Anderson* where the court held that the "[vehicular invasion] statute's plain language evinces the

legislature's intent to protect the security of motor vehicles, which have been deemed adjuncts of the home in modern society." *People v. Anderson*, 272 Ill. App. 3d 537, 540 (1995) (citing *People v. Steppan*, 105 Ill. 2d 310, 321 (1985)). In *Anderson*, the defendant challenged the constitutionality of the vehicular invasion statute (720 ILCS 5/2-11.1 (West 1992)), and argued that it impermissibly imposed a more severe punishment for a crime that is essentially an attempted robbery. *Anderson*, 272 Ill. App. 3d at 538. The court held that the legislature could have determined that unlawful vehicular invasion was a more serious offense than robbery since it was enacted "[t]o preserve the integrity of the [vehicle] and to halt an increase in the number of 'smash and grab' crimes***" *Id.* at 540. We agree with the *Anderson* court that the purpose of the unlawful vehicular invasion statute is to protect the integrity of one's motor vehicle and deter smash and grab occurrences like the one we hypothesized above and which do not necessarily involve the use of force against an individual. Based on the foregoing, we refuse to hold that the offense of vehicular invasion is inherently a forcible felony.

¶ 34 Finding that vehicular invasion is not inherently a forcible felony, we must next examine the second manner in which the State could have proved that defendant's vehicular invasion constituted a forcible felony, namely, whether the State proved beyond a reasonable doubt, under the particular facts of this case, that defendant contemplated the use of physical force against an individual and was willing to use it. We find that this burden was not met. The defendant argues, and the State does not refute, that there was no evidence presented at trial regarding either of the two predicate offenses which formed the basis of defendant's conviction for armed habitual criminal. At trial, the only mention of defendant's two prior convictions came when two certified copies of convictions were admitted into evidence. Specifically, the record reflects that the State sought "***leave to introduce two certified copies of convictions where

we're only seeking to introduce these as so far as relevance [*sic*] as to the charged offenses and not for any other purpose*** [p]eople's exhibit 17, your Honor is a certified statement of conviction stating that [defendant], who is found guilty under case number 05CR1967901 of unlawful vehicular invasion and that he was found guilty on June 8, 2006." At no time during trial was any evidence of the facts which formed the basis of that conviction introduced into evidence. The State makes much of the fact that at the sentencing hearing it provided facts relative to the circumstances surrounding defendant's conviction for unlawful vehicular invasion. However, in order for defendant to have properly been found guilty of the offense of armed habitual criminal, the State needed to introduce evidence regarding that conviction *at trial*, not sentencing, which occurred after the court had already found defendant guilty of that offense. (Emphasis added.)

¶ 35 Defendant cites to the case of *People v. Carmichael*, 343 Ill. App. 3d 855 (2003), to support his position. In *Carmichael*, the defendant was charged with and found guilty of UUW by a felon, which is a Class 2 felony when the defendant '"has been convicted of a forcible felony.'" *Carmichael*, 343 Ill. App. 3d at 858 (citing 720 ILCS 5/24-1.1(e)). At the sentencing hearing, the State informed the court that the defendant had a prior conviction for armed violence but did not introduce any evidence regarding the circumstances surrounding the prior conviction. *Id.* The court then imposed a sentence for a Class 2 felony. *Id.* On appeal, the defendant argued that the State had not shown that his prior conviction for armed violence was a forcible felony. *Id.* The court agreed with the defendant and remanded the matter for imposition of a Class 3 sentence. *Id.* at 865. Specifically, the court found that armed violence was not inherently a forcible felony stating that "the questions we must answer in order to determine whether the defendant's armed violence conviction constitutes a forcible felony is whether the circumstances

surrounding the commission of that particular offense support the conclusion that the defendant contemplated that the use or threat of force or violence might be necessary to carry out the offense." *Id.* at 861. The court further found that the record before it was "silent as to the circumstances surrounding the defendant's armed violence conviction." *Id.* Thus, it ultimately held that the trial court erred in its implicit finding that the defendant's armed violence conviction satisfied the requirements of a forcible felony. *Id.*

¶ 36 We agree with defendant that the *Carmichael* case is instructive here, but we find that the circumstances before us in the case at bar are more egregious than that case. Here, the defendant's conviction is at issue rather than a sentence enhancement as in *Carmichael*. Due process requires the State to introduce sufficient evidence to prove beyond a reasonable doubt all of the elements of the charged offense. U.S. Const. amend. XIV; Ill. Const. 1970, art I, §2. In order to prove defendant guilty of the offense of armed habitual criminal, the State was required to introduce evidence regarding each and every element. A person commits the offense of armed habitual criminal when he or she receives, sells, possesses or transfers any firearm after having been convicted two or more times of certain predicate offenses. 720 ILCS 5/24-1.7 (West 2010). The parties agree that one of defendant's prior convictions, unlawful use of a weapon by a felon, is specifically enumerated in section 24-1.7(a)(2). 720 ILCS 5/24-1.7(a)(2) (West 2010). The other offense upon which his conviction is premised is not specifically enumerated, therefore the State had the burden to prove beyond a reasonable doubt that defendant's conviction for unlawful vehicular invasion was a forcible felony pursuant to section 2-8 of the Code. Since the State did not introduce any evidence at trial that defendant's conviction for unlawful vehicular invasion was a forcible felony, the trial court erred when it found defendant guilty of the offense of armed

habitual criminal. As a result, we reverse defendant's conviction and vacate his sentence of twelve years for the offense of armed habitual criminal.

¶ 37 Defendant argues that even though the trial court found defendant guilty of two lesser counts of AUUW, pursuant to section 24-1.6(a)(1)(3)(A) and section 24-1.6(a)(1)(3)(C), those convictions should not be reinstated because the AUUW statute was found unconstitutional in *People v. Aguilar*, 2013 IL 112116. 720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2010); 720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2010). The State responds that the two provisions of the AUUW statute under which defendant was convicted are severable and constitutional, thus they should be reinstated. We agree with the State and find that counts 9 and 10 for AUUW are to be reinstated upon remand to the trial court.

¶ 38 Defendant was found guilty of the offense of armed habitual criminal, two counts of AUUW, and possession of a controlled substance. Due to the one-act, one-crime doctrine, and the fact that the two lesser counts were based on the same conduct as the offense of armed habitual criminal, *i.e.* possession of the gun, defendant's two convictions for AUUW were merged into his conviction for armed habitual criminal. He now contends that the AUUW statute under which he was convicted is unconstitutional. Whether a statute is unconstitutional is reviewed *de novo*. *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011). *De novo* review also applies to issues of statutory interpretation. *In re S.L.*, 2014 IL 115424, ¶16. As a result, this court will review the issue of whether the AUUW statute can be enforced against defendant *de novo*.

¶ 39 Since there are two distinct portions of the AUUW statute under which defendant was convicted we will analyze each separately. In its entirely, subsection 24-1.6(a) reads:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal

dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; and

(3) One of the following factors is present:

(A) the firearm, other than a pistol, revolver, or handgun, possessed was uncased, loaded, and immediately accessible at the time of the offense; or

(A-5) the pistol, revolver, or handgun possessed was uncased, loaded, and immediately accessible at the time of the offense and the person possessing the pistol, revolver, or handgun has not been issued a currently valid license under the Firearm Concealed Carry Act; or

(B) the firearm, other than a pistol, revolver, or handgun, possessed was uncased, unloaded, and the ammunition for the weapon was immediately accessible at the time of the offense; or

(B-5) the pistol, revolver, or handgun possessed was uncased, unloaded, and the ammunition for the weapon was immediately accessible at the time of the offense and the person possessing the pistol, revolver, or handgun has not been issued a currently valid license under the Firearm Concealed Carry Act; or

(C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card; or

(D) the person possessing the weapon was previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a felony; or

(E) the person possessing the weapon was engaged in a misdemeanor violation of the Cannabis Control Act, in a misdemeanor violation of the Illinois Controlled Substances Act, or in a misdemeanor violation of the Methamphetamine Control and Community Protection Act; or

(F) (blank); or

(G) the person possessing the weapon had a order of protection issued against him or her within the previous 2 years; or

(H) the person possessing the weapon was engaged in the commission or attempted commission of a misdemeanor involving the use or threat of violence against the person or property of another; or

(I) the person possessing the weapon was under 21 years of age and in possession of a handgun, unless the person under 21 is engaged in lawful activities under the Wildlife Code or described in subsection 24-2(b)(1), (b)(3), or 24-2(f)." 720 ILCS 5/24-1.6(a) (West 2010).

¶ 40 Subsection 24-1.6(d) reads:

> "(d) Sentence.
> (1) Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years.
> (2) Except as otherwise provided in paragraphs (3) and (4) of this subsection (d), a first offense of aggravated unlawful use of a weapon committed with a firearm by a person 18 years of age or older where the factors listed in both items (A) and (C) or both items (A-5) and (C) of paragraph (3) of subsection (a) are present is a Class 4 felony, for which the person shall be sentenced to a term of imprisonment of not less than one year and not more than 3 years.
> (3) Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years.
> (4) Aggravated unlawful use of a weapon while wearing or in possession of body armor as defined in Section 33F-1 by a person who has not been issued a valid Firearms Owner's Identification Card in accordance with Section 5 of the Firearm Owners Identification Card Act is a Class X felony." 720 ILCS 5/24-1.6(d) (West 2010).

¶ 41 First, defendant contends that his conviction pursuant to subsection 24-1.6(a)(1), (a)(3)(A) of the AUUW statute should not be reinstated because that is the same statute which the court in *Aguilar* found to be unconstitutional. Defendant asserts that this court's prior decision in *People v. Burns*, 2013 IL App (1st) 120929, ¶ 27, [2] which held that a conviction for AUUW under subsection 24-1.6(a)(1), (a)(3)(A) is not void if the defendant had a prior felony conviction, is "legally unsound." We disagree and find that the "Class 2 form"[3] of the AUUW statute is constitutional and consistent with the court's holding in *Aguilar*. In *Burns*, the court addressed a singular issue which is identical to the issue before us, namely whether the Class 2

[2] Currently, this case is on appeal before our Supreme Court as Case No. 117387. The defense was granted leave to appeal on May 28, 2014. The matter has been fully briefed and was argued before the Court on March 10, 2015. We decline to wait for that case to be decided, which was requested as alternative relief by the State. Instead, we follow well-settled precedent from the First Appellate District.

[3] As the courts before us have done so too shall we refer to the two forms of AUUW contained in subsection 24-1.6(a)(1), (a)(3)(d) of the statute as the "Class 2 form" and "Class 4 form." See *Burns*, 2013 IL App (1st) 120929, *People v. Soto*, 2014 IL App (1st) 121937, and *People v. Moore*, 2014 IL App (1st) 110793-B.

form of the AUUW statute violates a person's right to keep and bear arms. *Burns*, 2013 IL App (1st) 120929, ¶ 22. The *Burns* court held that "[g]iven the nature of the ruling in *Aguilar*, and its multiple references to the Class 4 form of the offense, we agree 'the implication of the court's holding is that the so-called 'Class 2 form of the offense,' which enhances the penalty for felons, could potentially remain enforceable." *Burns*, 2013 IL App (1st) 120929, ¶ 24 (citing *Aguilar*, 2013 IL 112116, ¶ 47) (Theis, J., dissenting). The court also recognized that our Supreme Court observed that the right to keep and bear arms is subject to meaningful regulation, such as the " '*longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' " (Emphasis in original.) *Burns*, 2013 IL App (1st) 120929, ¶ 21, 26 (quoting *District of Columbia v. Heller*, 554 U.S. 570,626-27 (2008)). Ultimately, the *Burns* court acknowledged that "the history of prohibitions on the possession of firearms by felons has been expressly recognized by the United States Supreme Court and the Illinois Supreme Court." *Heller*, 554 U.S. at 626; *Aguilar*, 2013 IL 112116, ¶ 30. Consistent with that recognition, the court concluded that "the possession of firearms by felons is conduct that falls outside the scope of the second amendment's protection." *Burns*, 2013 IL App (1st) 120929, ¶ 27. Subsequent to the decision in *Burns*, the First District has consistently found that the Class 2 form of the AUUW statute is constitutional. See *People v. Moore*, 2014 IL App (1st) 110793-B; *People v. Soto*, 2014 IL App (1st) 121937. We see no reason to depart from this well-settled precedent. That being said, we find it worthwhile to acknowledge the Fourth District's decision in *People v. Campbell*, 2013 IL App (4th) 120635, ¶14, which held that because subsection 24-1.6(a)(1), (a)(3)(A) was "unconstitutional *on its face*," a defendant's status as a felon could not render his conviction constitutional. (Emphasis in

original.) In light of this circuit split, which we look to the Supreme Court for guidance in its decision in *Burns*, it may nonetheless be worthwhile for our legislature to clarify its intent by enacting a statute in which a defendant's prior felony conviction is an element of the AUUW statute, rather than a sentence enhancement. However, we follow the precedent established by the First District and find that defendant's conviction under subsection 24-1.6(a)(1), (a)(3)(A), Count 9 of his indictment, shall be reinstated.

¶ 42 Next, we examine whether defendant's conviction under subsection 24-1.6(a)(1), (a)(3)(C) may be reinstated. In his opening brief, defendant argued that judgment cannot be entered on his conviction under this subsection, Count 10 of the grand jury indictment, which was based on his failure to possess a FOID card. However, in his reply brief, which was filed on July 31, 2015, defendant acknowledges that if "this [c]ourt vacates defendant's armed habitual criminal conviction, then [we] should reinstate his AUUW conviction contained in Count 10 and remand for re-sentencing under the applicable Class 2 sentencing range[]" due to the Illinois Supreme Court's recent decision in *People v. Mosely*, 2015 IL 115872, which was handed down on February 20, 2015. The *Mosely* court held that the sections of the AUUW statute relating to the FOID card are severable, independently constitutional and enforceable. *Mosely*, 2015 IL 115872, ¶ 31. Specifically, the court found "[the] severability from [subsection 24-1.6(a)(1), (a)(3)(A)] does not undermine the completeness of, nor the ability to, execute the remaining subsections of section (a)(3)." *Id.* Therefore, pursuant to the decision in *Mosely*, we find that defendant's conviction pursuant to Count 10 of his indictment shall be reinstated.

¶ 43 Possession of a Controlled Substance

¶ 44 For his second issue on appeal, defendant argues that his conviction for possession of a controlled substance should be reversed outright since the trial court erred in denying his

suppression motion where the police search of his vehicle's closed center console was not justified as a search incident to arrest under *Arizona v. Gant*, 556 U.S. 332 (2009), or a protective search under *Michigan v. Long*, 463 U.S. 1032 (1983). Alternatively, defendant asserts that if the trial court did not err, then his trial counsel was ineffective for failing to adequately litigate the motion to suppress. The State responds that defendant forfeited any argument regarding suppression on that basis since the defense never raised this issue at trial or in his post-trial motion. In order to preserve an issue for appeal, a defendant must make "[*b*]*oth* a trial objection *and* a written post-trial motion raising the issue." (Emphasis in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Illinois courts have "often stated the general rule that the failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal." *Enoch*, 122 Ill. 2d at 186. In this case, the State contends that defendant never made an objection at trial regarding the introduction of the heroin found in the center console of his vehicle, nor did the defense argue that the heroin was found pursuant to an illegal search under the *Gant* and *Long* cases. We agree with the State and find that these arguments were raised for the first time on appeal and therefore forfeited by defendant.

¶ 45 Defendant filed a motion to quash arrest and suppress evidence on the basis that he was arrested without a warrant or probable cause and that the evidence seized as a result of his unlawful arrest should be excluded as the fruits of the poisonous tree. Defendant did not specifically challenge the search of the closed center console of his vehicle at any point during his motion to suppress, his trial, or his post-trial motion. He raised this issue for the first time on appeal. Defendant asserts that his omission is not fatal because "counsel filed a broadly worded suppression motion, invoking the Fourth Amendment's ban against unreasonable searches and seizure and challenging [defendant's] arrest. Counsel's motion for new trial re-alleged the trial

court's error in denying this motion. ***" To support his position, defendant cites to a string of cases, including *People v. Heider,* 231 Ill. 2d 1, 18 (2008), which held that there is no forfeiture by a defendant where the trial court clearly had an opportunity to review the same essential claim that was later raised on appeal." The court in *Heider* recognized that there are several purposes for requiring defendants to make an objection first at trial in order to preserve an issue for appeal. *Heider,* 231 Ill. 2d at 18. "One is that this allows the trial court an opportunity to review a defendant's claim of sentencing error and save the delay and expense inherent in appeal if the claim is meritorious." *Id.* (citing *People v. Reed*, 177 Ill. 2d 389, 394 (1997)). Another reason is "to prevent a litigant from asserting on appeal an objection different from the one he advanced below." *Id.* at 18. Ultimately, the *Heider* court found that the defendant had satisfied these purposes and therefore his argument on appeal was not waived. *Id.*

¶ 46 We find that the situation before this court is not analogous to *Heider*. Here, the trial court did not have any opportunity to review or analyze the arguments raised by defendant on appeal. The trial court merely examined a motion to suppress evidence based on the theory that the arrest was unlawful and therefore any evidence obtained pursuant thereto was also tainted. The trial court's analysis in this regard is completely dissimilar to the analysis it would have conducted under a suppression motion brought pursuant to *Gant* or *Long*. Further, neither of the purposes set forth in *Heider* are satisfied here. Defendant did not advance a similar argument in the court below, thus it is impossible for us to know how the trial court may have handled his claim of error pursuant to the *Gant* or *Long* cases. Likewise, defendant fails to fulfill the second recognized purpose since the arguments he raises on appeal are completely different than those he raised in the trial court. Further, the State was never afforded the opportunity to present any evidence on the propriety of the officers' conduct to refute defendant's arguments. Accordingly,

we find that defendant forfeited his arguments regarding suppression pursuant to *Gant* or *Long* when he failed to assert them at the trial court.

¶ 47 Alternatively, defendant has argued that his trial counsel was ineffective for failing to properly litigate his suppression motion. The facts relevant to our analysis are not disputed by the parties. The arguments made by the parties present questions of pure law. Accordingly, we review this matter *de novo*. *People v. Rivera*, 227 Ill.2d 1, 11–12 (2007). We find that defendant's argument that he received ineffective assistance of counsel fails. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficiency in counsel's performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The primary duties of a defense attorney are to advocate for the defendant's cause and to use his skill and knowledge so as to render the trial a reliable adversarial testing process. *People v. Jackson*, 318 Ill. App. 3d 321, 326 (2000) (citing *Strickland*, 466 U.S. at 687.) While a defense counsel's strategic decisions are generally immune from review, this is not the case where counsel's decision is founded upon a misapprehension of the law. *People v. Wright*, 111 Ill. 2d 18, 27-28 (1986). Counsel's performance is measured by an objective standard of competence under prevailing professional norms. *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Effective assistance of counsel means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). "[T]he the fact that another attorney might have pursued a different strategy is not a factor in the competency determination." *People v. Palmer*, 162 Ill. 2d 465 (1994). Prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *People v. Erickson*, 183 Ill. 2d 213, 224 (1998). This requires a showing that counsel's errors were so

serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. *Id.* at 693. A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffectiveness. *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999). For the following reasons we find that defendant cannot satisfy the *Strickland* test.

¶ 48 We first find that defendant has not adequately shown that his trial counsel's performance fell below an objective standard of reasonableness. Defendant's counsel sought suppression of the items recovered from defendant's vehicle by challenging the legality of the stop and arrest. The motion did not specifically seek suppression of those items independent from the arrest. Thus, defendant argues that his trial counsel was ineffective for failing to adequately challenge the search separate from the arrest. Defendant cites the case of *People v. Wilson*, 149 Ill. App. 3d 1075 (1986) as being instructive. In *Wilson*, the defendant's trial counsel failed to tender a jury instruction based on the then recently enacted statute authorizing the use of prior inconsistent statement as substantive evidence. *Id.* at 1078. Instead, the trial counsel submitted an inaccurate instruction which provided that prior inconsistent statements could only be considered for the purpose of deciding the weight to be given to the testimony. *Id.* The *Wilson* court held that the failure to recognize the substantive value of the evidence and argue it to the jury constituted ineffective assistance of counsel because it "deprived [the] defendant from having [an] essential element of his defense clearly explained and emphasized to the jury." *Id.* at 1079.

¶ 49 Here, defendant argues that, as in *Wilson* there is no reason, strategic or otherwise, why defendant's counsel would not take advantage of favorable law when he moved to suppress

the evidence. Conversely, the State asserts that *Wilson* is not instructive, specifically arguing that unlike *Wilson*, the record here does not support the contention that defendant's trial counsel's conduct deprived the trial court of evidence of an essential element of his defense or proper jury instructions. We agree.

¶ 50 Here, we do not have a situation that comes close to comparing to *Wilson*. In *Wilson*, the defendant's attorney submitted an entirely erroneous instruction to the jury, thus they were deprived of the opportunity to accurately apply the law. However, in this case, defendant's counsel merely presented a different legal basis in his motion to suppress than the one that defendant now proposes as more desirable. It is not as if defendant's counsel completely failed to file a motion to suppress. Defendant does not cite to, and we have not found, any case which says that a defendant's counsel should be deemed incompetent when he brought a singular motion which sought to both quash the arrest and suppress evidence rather bringing a separate motion for suppression. Defendant's arguments attack his trial counsel's strategy, and as Illinois courts have consistently recognized, counsel's strategic choices are virtually unchallengeable. *Palmer*, 162 Ill. 2d at 476. In defendant's motion to suppress, he sought to achieve a more desirable result for defendant than if he had solely sought to suppress, namely, defendant's counsel attempted to quash defendant's entire arrest and suppress any evidence obtained. Surely, where an attorney opts to bring a motion which could essentially undo his client's arrest, and suppress any evidence stemming therefrom, it does not show incompetence. As a result, we find defendant did not satisfy the first prong of *Strickland.* Since defendant cannot satisfy the first requirement, we need not conduct any further analysis under the *Strickland* test. *Morgan*, 187 Ill. 2d at 529-30. Based on the foregoing, we find that the trial court did not err in denying the

motion to suppress. Further, we find that defendant's trial counsel was not ineffective. Therefore, his conviction and eight year sentence for possession of a controlled substance stands.

¶ 51 Sentencing

¶ 52 The third argument defendant raises on appeal is that the trial court improperly considered his prior convictions for unlawful vehicular invasion and unlawful use of a weapon by a felon at sentencing because those convictions are factors inherent in the offense of armed habitual criminal. Since we have reversed defendant's conviction for the offense of armed habitual criminal, we find that this argument by defendant is now moot and will not address it.

¶ 53 CONCLUSION

¶ 54 We reverse defendant's conviction for the offense of armed habitual criminal, and we reinstate counts 9 and 10 of defendant's indictment. "This court has 'always held' that under the one-act, one-crime doctrine, sentence should be imposed on the more serious offense and the less serious offense should be vacated." *People v. Artis*, 232 Ill. 2d 156, 170 (2009) (citing *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004)). We remand to the circuit court for the entry of judgment and sentence on the more serious of the two counts of AUUW. Here, counts 9 and 10 are both Class 2 AUUW offenses; thus, consistent with the decision in *Artis*, we remand to the trial court for the determination which of the two offenses is more serious. *Artis, 232 Ill. 2d at 177* (concluding that "when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination"). We affirm the judgment of the circuit court in all other aspects.

¶ 55 Affirmed in part; reversed in part; remanded.