

NOTICE

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2015 IL App (4th) 130854-U

NO. 4-13-0854

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 5, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

MICHAEL TOWNSELL,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Vermilion County

) No. 12CF547

) Honorable

) Craig H. DeArmond,

) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part and vacated in part, declining to consider defendant's claim for ineffective-assistance-of-counsel on direct appeal, but vacating defendant's conviction for aggravated unlawful use of a weapon pursuant to the supreme court's ruling in *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321.

¶ 2 In May 2013, following a trial, a jury found defendant, Michael Townsell, guilty of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)) (count I), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (count III). The trial court subsequently sentenced defendant to 3 years' imprisonment on count I to be served concurrently with 10 years' imprisonment on count III.

¶ 3 Defendant appeals, asserting (1) defense counsel was ineffective for failing to file a motion to suppress the gun recovered from the vehicle in which he was a passenger; and (2) his conviction for aggravated unlawful use of a weapon must be reversed under the one-act, one-

crime doctrine or, in the alternative, based on the supreme court's ruling in *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321. We affirm in part and vacate in part.

¶ 4

I. BACKGROUND

¶ 5 In November 2012, the State charged defendant with (1) aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (West 2010)), based on defendant carrying a weapon that was uncased, loaded, and immediately accessible (count I); (2) aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)), based on defendant's lack of a Firearm Owner's Identification (FOID) card (count II); and (3) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (count III). All three counts arose out of a single incident occurring on November 22, 2012.

¶ 6 Defendant's trial commenced in May 2013 as to counts I and III after the State moved to *nolle prosequere* count II. The State presented the following evidence.

¶ 7 Officer Patrick Carley of the Danville police department testified, on November 22, 2012, at approximately 1:15 a.m., he was dispatched to the area of Commercial Street between Park and Elizabeth Streets due to reports of shots being fired in a nearby alley that connected Commercial and Bryan Streets. Upon arrival, he observed a silver or gray Chevrolet Trailblazer parked on Bryan Street, directly next to the alley where the shots were reportedly fired. At that time, he observed a female in the driver's seat and two black males standing near the passenger side of the vehicle. After checking the alley and the surrounding area, Officer Carley returned to the parked Trailblazer and pointed his patrol car's spotlight at the vehicle. At that point, Officer Carley observed the two males were no longer standing beside the vehicle, but he noticed one of the males, later identified as defendant, in the back passenger area of the vehicle. The female remained in the driver's seat. Upon approaching the front of the vehicle

with a flashlight, Officer Carley observed defendant lean far forward and then sit up straight, though he did not see anything in defendant's hands.

¶ 8 While Officer Carley approached the vehicle from the front, Officer Danielle Lewallan arrived and approached the passenger side of the vehicle. Based on what Officer Carley believed to be suspicious movement by defendant, he opened the back passenger door and "had [defendant] step out of the car" for a safety search. At that time, he also noticed a second male, later identified as Christopher Brown, sitting in the back of the vehicle behind the driver's seat. Officer Carley then "had [Brown] also step out of the vehicle" for a similar safety search.

¶ 9 Once Brown and defendant were out of the vehicle, Officer Carley spoke with Diane Brown, the driver of the vehicle. Diane told Officer Carley the vehicle belonged to her husband and thereafter consented to a search of the vehicle. Upon searching the vehicle, Officer Carley recovered a black handgun in a black holster located on the floorboard of the back passenger seat, where defendant had been sitting. He then ejected a live .45-caliber round from the chamber and a live .45-caliber round from the magazine of the gun. Upon recovering the gun, Officer Carley collected and placed swabbings from the hands of Brown and defendant in gunshot residue kits.

¶ 10 Officer Lewallan testified she arrived to assist Officer Carley with his investigation of the shots fired. She parked behind the Trailblazer Officer Carley was approaching and activated her spotlight. Upon doing so, she noticed the backseat passenger moving around in "a quick manner," so she immediately approached the vehicle to assist Officer Carley. Both Officers Lewallan and Carley admitted they were not closely watching the actions of the driver as they facilitated Brown's and defendant's removal from the vehicle.

¶ 11 Mary Wong, a forensic scientist with the Illinois State Police Forensic Services, testified she analyzed the two gunshot-residue kits submitted by the Danville police department. Upon analyzing the first kit, which was administered to Christopher Brown, Wong determined Brown "may not have discharged a firearm with either hand. If he did, then the particles were removed by activity, or were not detected, or not deposited." As to the second kit, which was administered to defendant, Wong opined defendant "either discharged a firearm, came into contact with a gunshot-residue-related item, or was in an environment of a discharged firearm with his right hand." According to Wong, the gunshot residue detected on defendant's hand did not necessarily arise from defendant firing a gun, but could have been the result of him touching a surface containing gunshot residue. She further explained her testing would be more likely to reveal gunshot residue within six hours of a weapon firing. Wong also acknowledged the laboratory was not provided with clothing samples, which retain gunshot residue longer, from either Brown or defendant.

¶ 12 The State then presented a certified copy of conviction in which defendant was convicted of delivery of a controlled substance, a Class 1 felony (Cook County case No. 08-CR-0484101).

¶ 13 Following deliberations, the jury found defendant guilty of both aggravated unlawful use of a weapon and unlawful possession of a weapon by a felon.

¶ 14 C. Posttrial and Sentencing Proceedings

¶ 15 In June 2013, defendant filed a motion for a new trial. The following month, the trial court denied the motion for a new trial and sentenced defendant to 3 years' imprisonment on count I to run concurrently with 10 years' imprisonment on count III. In August 2013, defendant filed a motion to reconsider his sentence asserting, in part, the court erred in sentencing him on

both counts due to the one-act, one-crime rule. In October 2013, the court denied the motion to reconsider defendant's sentence, finding defendant was convicted of two distinct offenses and could therefore be sentenced as to both counts.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues (1) defense counsel was ineffective for failing to file a motion to suppress the gun recovered from the vehicle in which he was a passenger; and (2) his conviction for aggravated unlawful use of a weapon must be reversed under the one-act, one-crime doctrine or, in the alternative, based on the supreme court's ruling in *Aguilar*, 2013 IL 112116, 2 N.E.3d 321. We address these arguments in turn.

¶ 19 A. Ineffective Assistance of Counsel

¶ 20 Defendant first claims defense counsel provided ineffective assistance of counsel by failing to file a pretrial motion to suppress evidence. Before proceeding on the merits of defendant's claim, we must first consider whether this issue should be considered on direct appeal or would be better addressed through a collateral attack, such as through postconviction proceedings.

¶ 21 In *People v. Henderson*, 2013 IL 114040, 989 N.E.2d 192, the supreme court considered the circumstances under which an ineffective-assistance-of-counsel claim should be considered on direct appeal versus a collateral attack. Where a defendant files a direct appeal challenging defense counsel's failure to file a motion to suppress, "the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *Id.* ¶ 22, 989 N.E.2d 192. Therefore, in those situations, a collateral attack is a more appropriate mechanism for challenging the effectiveness of his counsel because the defendant

would have the opportunity to create a record specifically developed to address whether the motion to suppress was meritorious. *Id.* ¶ 21-22, 989 N.E.2d 192. However, in *Henderson*, the supreme court held the defendant's situation was an exception to the general rule. *Id.* ¶ 22, 989 N.E.2d 192. The *Henderson* court noted the trial court allowed defense counsel considerable leeway in examining the officers who allegedly conducted the illegal search, which resulted in defense counsel eliciting the type of testimony the court would ordinarily consider during a suppression hearing. *Id.* The supreme court thereafter considered the merits of the defendant's ineffective-assistance-of-counsel claim arising from his direct appeal. *Id.* ¶ 24, 989 N.E.2d 192.

¶ 22 Defendant asserts the present case is analogous to *Henderson*, and we should therefore consider the merits of his ineffective-assistance-of-counsel claim on direct appeal. We disagree. In *Henderson*, the trial court had the opportunity to hear evidence that would otherwise have been presented at a suppression hearing. We are not presented with the same situation here. Rather, the record before us consists mostly of the officers' testimony against defendant during the trial. We agree with the State's assertion it would have elicited more detailed testimony from the officers regarding the validity of the search had the parties participated in a suppression hearing. Further, the present record contains no testimony from Diane, Brown, or defendant regarding their allegations of police misconduct to support defendant's contention that a motion to suppress was meritorious. Nor does the record contain any information which would help us determine whether defense counsel's failure to file a motion to suppress was a matter of trial strategy.

¶ 23 Where we have an undeveloped record before us, collateral review under the Postconviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)) is a more appropriate mechanism through which to present defendant's contentions of ineffective assistance of counsel.

In doing so, we follow a long line of precedent as set forth in *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990) ("Where, as here, consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief."). Given we lack a record fully developed for evaluating defendant's ineffective-assistance-of-counsel claim, we reject any suggestion that we reach this issue on direct appeal.

¶ 24 B. Aggravated-Unlawful-Use-of-a-Weapon Conviction

¶ 25 Defendant next asserts, based on the supreme court's holding in *Aguilar*, 2013 IL 112116, 2 N.E.3d 321, the trial court erred by sentencing him on the aggravated-unlawful-use-of-a-weapon charge (count I). The State concedes defendant's conviction for aggravated unlawful use of a weapon must be vacated based on *Aguilar*. We accept the State's concession.

¶ 26 In *Aguilar*, the supreme court held unconstitutional the Class 4 form of aggravated unlawful use of a weapon as set forth in 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010), the portion of the statute under which defendant was convicted. See *Aguilar*, 2013 IL 112116, ¶ 22, 2 N.E.3d 321. Accordingly, defendant's conviction on count I for aggravated unlawful use of a weapon must be vacated. His conviction for unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (count III) is affirmed.

¶ 27 Because we have concluded defendant's conviction for aggravated unlawful use of a weapon must be vacated pursuant to *Aguilar*, we need not examine his contentions under the one-act, one-crime doctrine.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the trial court's judgment in part and vacate in part. As part of our judgment, we grant the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 30 Affirmed in part and vacated in part.