2016 IL App (1st) 132537-U

FIFTH DIVISION
January 15, 2016

No. 1-13-2537

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 12 CR 18350
BACNER PENA,	)	
Defendant-Appellant.	)	Honorable James B. Linn, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming convictions where defendant failed to satisfy the performance or prejudice prongs to show ineffective assistance of trial counsel and where the *Krankel* hearing requirements, if any, were met.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Bacner Pena was found guilty of criminal damage to property and sentenced to serve one year in the Illinois Department of Corrections. On appeal, defendant contends he received ineffective assistance of

trial counsel, where counsel failed to seek a hearing or obtain a ruling on a motion to quash arrest and suppress evidence. Defendant also contends the trial court erred in failing to conduct an adequate inquiry into his claim of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. For the following reasons, we affirm the decision of the trial court.

¶ 3 I. BACKGROUND

¶ 4 On October 9, 2012, defendant was charged by information with 16 counts of criminal damage to property exceeding $300 but less than $10,000 (720 ILCS 5/21-1(1)(a) (West 2012)) occurring on or about September 16, 2012. All counts of the information alleged damage to automobiles, six of which were the property of Pep Boys Auto (Pep Boys).

¶ 5 On April 22, 2013, defense counsel filed a motion to quash arrest and suppress evidence. The motion asserted that defendant's conduct prior to his arrest would not reasonably be interpreted by the arresting officers as constituting probable cause to arrest defendant. Also on April 22, the trial judge and defense counsel discussed the motion and agreed to set it for hearing on the same date as the bench trial. Defense counsel, however, did not obtain a hearing or ruling on the motion.

¶ 6 The bench trial commenced on May 22, 2013. Chris Sewall (Sewall) testified that he was a service manager for a Pep Boys facility at 2604 North Elston Avenue in Chicago. Sewall knew defendant as a mechanic who worked at his facility for 10 to 12 years and identified defendant in court. On September 14 or 15, 2012, Sewall terminated defendant's employment. Sewall explained to defendant that he had failed to follow the established procedures for mounting wheels on a vehicle and displayed to defendant a video of defendant failing to follow the procedure. According to Sewall, defendant shook his hand and said, "You finally got me."

Sewall testified that as defendant left the office, he added, "I guess I'll just have to bring everybody down now." Defendant then left the facility.

¶ 7 On September 16, 2012, Sewall arrived at the Pep Boys facility at approximately 8 a.m. Sewall noticed that a large number of vehicles in the parking lot were heavily damaged. According to Sewall, the windshields and windows on all of the vehicles were smashed, while mirrors, headlights and tail lights on some of the vehicles were destroyed. In addition, the tires on some of the vehicles were slashed. Sewall testified that 6 of the damaged vehicles were Pep Boys delivery vehicles, while 10 other vehicles were owned by individuals, including Pep Boys employees.

¶ 8 After discovering the damaged vehicles, Sewall telephoned the police. Sewall provided a report of the incident to the police when they arrived at the facility. After the police arrived, Sewall viewed a surveillance video of the facility's parking lot.

¶ 9 In court, Sewall identified a compact disc as containing a video from approximately 3 a.m. on the date of the incident; Sewall described the contents of the video as "Bacner in the parking lot damaging multiple vehicles." While the trial judge viewed the surveillance video, Sewall identified defendant's vehicle as a white Honda with a distinctive quarter-panel. Sewall identified an individual walking through the middle of the parking lot, smashing the windows and otherwise damaging vehicles. The Pep Boys vehicles were off-camera. Sewall identified the suspect vehicle leaving the parking lot at the conclusion of the video.

¶ 10 Sewall also identified photographs of defendant's Honda Accord as accurately depicting the appearance of the vehicle at the time defendant's employment was terminated. He further identified photographs of the damaged vehicles in the parking lot. In addition, he identified photographs of a Pep Boys truck that had already been repaired, although tape remained on its

windshield. According to Sewall, the photographs did not depict all of the damage sustained by the vehicles because some of the vehicles had been reclaimed by their owners. He testified that the estimated damage to five of the Pep Boys vehicles amounted to $5,420.

¶ 11 On cross-examination, Sewall testified that when defendant was terminated, he had been on final notice for not following procedures, based on past incidents. That final notice was based on an incident which occurred three weeks prior to defendant's termination.

¶ 12 Sewall acknowledged that defendant was not the first employee with whom he had issues and that other employees had quit as well. He also acknowledged that he was not present in the parking lot at the time of the incident and only identified defendant and defendant's automobile from the surveillance video. Sewall further acknowledged the surveillance video was taken under artificial light and was not high-definition in quality. In addition, the vehicles on the surveillance video were approximately 100 feet from the security camera. Sewall agreed that the Honda Accord is a common vehicle and that a damaged quarter-panel is often marked in black.

¶ 13 On redirect examination, Sewall testified that he had no other disgruntled employees or customers in the two weeks prior to the incident. On recross-examination, he conceded he did not work every single day of those two weeks. On re-redirect examination, Sewall testified he would know if there was any security risk at Pep Boys from fellow employees. At the conclusion of Sewall's testimony, the trial was continued to June 5, 2013.

¶ 14 When the bench trial resumed, defendant informed the trial judge he wished to file a motion alleging ineffective assistance of counsel. The trial judge inquired into the nature of the claim, to which defendant responded: "It's a lot of counts right here, if you want to read it." The trial judge replied that a public defender had been appointed to assist defendant and that if defendant did not want the public defender to assist him, he would be representing himself.

Defendant asserted that he had told his counsel that he was arrested without a warrant, but counsel did not care. The trial judge responded that "[t]hey don't always need a warrant to make every arrest. Sometimes you do, sometimes you don't. It depends on the individual case." The trial court declined to dismiss defense counsel. The trial judge observed, "He is before me everyday [*sic*] and he is an extremely competent lawyer." The trial judge then inquired whether defendant wished to proceed with his appointed defense counsel or represent himself. Defendant elected to proceed with his counsel.

¶ 15 Chicago police detective Cruz Reyes (detective) testified that he was assigned to investigate the incident at issue. The detective spoke to the manager at the facility. After that conversation, he had information regarding defendant (whom he identified in court) and defendant's automobile.

¶ 16 The detective drove by defendant's residence on a couple of occasions. He observed defendant's vehicle near the residence on September 16, 2012. He did not observe the vehicle outside defendant's home on September 18, 2012, when he and defendant had a conversation on the porch of defendant's residence. The detective informed defendant of the allegations made against him by the Pep Boys manager. According to the detective, defendant was "very anxious," fidgeting and moving around quite a bit on the porch. The detective testified that he and his partner, detective Michael Takaki, performed a protective pat-down search of defendant, recovering a large, folding serrated knife from defendant's pants pocket.[1]

¶ 17 After the search, the detective continued to question defendant regarding the allegations that he may have traveled to the Pep Boys in his automobile and destroyed vehicles in the parking lot. The detective inquired regarding the location of defendant's automobile. According

[1] Detective Takaki did not testify at trial.

to the detective, defendant "freely stated" that the vehicle was parked around the block. He and defendant went to defendant's automobile.

¶ 18 The detective inquired whether he could inspect defendant's vehicle. According to the detective, defendant stated that he had "no problem" and provided the vehicle's key to the detective. Upon opening the automobile's door, the detective immediately noticed shards of glass on the driver's seat and on the floor between the door and the seat, as well as a steering wheel locking device on the floor on the front passenger side of the vehicle. At this juncture, defendant lifted his arm to scratch his head or move his hat, whereupon the detective noticed defendant's right arm was deeply bruised from the hand to the elbow. The detective identified photographs of the bruised arm, the interior of defendant's vehicle, and the damaged vehicles in the Pep Boys parking lot. He further testified that the Pep Boys manager had displayed the surveillance video to him.

¶ 19 On cross-examination, the detective testified he observed a male subject exiting a white vehicle in the parking lot on the surveillance video. He also reiterated that defendant told him the location of defendant's vehicle, provided the key and consented to the search of the vehicle. The detective acknowledged that steering wheel locking devices are not unusual. He also acknowledged that the Honda Accord is a common make of automobile, though he added that Accords with a black front fender "kind of are" unusual.

¶ 20 The parties stipulated that if the State were to call all of the individuals named in the charges with respect to their respective counts of criminal damage to property, they would all testify that their vehicles were damaged during the incident and that the amount of damage exceeded $300. The State then rested its case.

¶ 21 Maria Sanchez (Sanchez), defendant's girlfriend, testified that on September 16, 2012,

she spent the night with defendant. Sanchez also testified that during dinner, defendant informed her he had been "suspended," but did not dwell on the topic. According to Sanchez, she and defendant went to bed at 11 p.m. and defendant was there when she awakened the following morning. She further testified that she would have awakened if defendant left during the night, because she was a light sleeper. She did not hear anyone enter or leave the premises during the night.

¶ 22 On cross-examination, Sanchez acknowledged telling the detective on September 18, 2012, that she had no way of knowing whether defendant left the bed on the night of the incident because she was sleeping.

¶ 23 Defendant testified that he was suspended from Pep Boys for not following procedures. He acknowledged telling the manager "Finally you got me," but denied stating "I have to bring everyone down." Defendant also denied going to Pep Boys at 3 a.m. with any kind of weapon or damaging any vehicles there with a striking device. He attributed the bruising on his arm to his work as a mechanic and his ingestion of blood thinners for a medical condition. According to defendant, the broken glass in his vehicle was from his own window when his vehicle's radio was stolen. After the theft, defendant purchased the steering wheel locking device. Defendant further agreed that he spent the night of the incident with Sanchez.

¶ 24 On cross-examination, defendant testified that his vehicle's radio was stolen approximately a year to one and one-half years prior to his testimony. He also testified that he filed a lawsuit against Pep Boys regarding a December 4, 2010, work injury that put him out from work for 11 months. Defendant was questioned as to whether he informed the police he could not admit to the criminal damage because he thought it would ruin his lawsuit against Pep Boys. He answered that he said, "[H]ow I can do that, that crime if I got, you know, a lawsuit,

you know? That's pointless, you know." Defendant acknowledged telling the police that he could not admit to the criminal damage because it would mean certain deportation back to Guatemala. He further testified that he believed he had been suspended from work and had telephoned Pep Boys' corporate offices regarding the matter, but that he did not know how his arrest would affect his employment.

¶ 25 The detective testified in rebuttal that defendant had informed him he could not admit to the criminal damage due to his pending lawsuit against Pep Boys and the potential deportation to Guatemala. On cross-examination, the detective testified that defendant had waived his right to an attorney before speaking and answered all of the police questions.

¶ 26 Following closing arguments, the trial judge found defendant guilty as charged on each count of criminal damage to property, stating:

> "The court has heard the evidence *** I believe what happened on this case is that Mr. Pena got fired from his job, as some employees do. He got very upset about it and *** told the person who fired him that he was going to do something, 'take everybody down' in a manner of speaking. Later I saw tapes of the car that looked just like Mr. Pena's car, getting in and out of the car with an item from the car, consistent with The Club in his car, going up and smashing up as many windows as he could. Destroying all kinds of cars on the lot.
>
> Mr. Pena then gives a story and police investigate and find glass in *** his car; that would be consistent with the glass destroyed. He said that somehow he didn't clean up glass from his radio being taken a year and a half ago. The bruises are consistent with the incident. He had motive, he had an opportunity. His car was seen coming into the lot. The person getting out of the car, the person that

had the motive that said they were going to do something was Bacner Pena."

¶ 27 On July 22, 2013, defense counsel filed a posttrial motion for a new trial. On the same date, the trial judge denied the posttrial motion and proceeded to a sentencing hearing. Based on defendant's lack of a criminal record, the trial judge sentenced defendant to serve one year in the Illinois Department of Corrections, with credit for 308 days served. On the same date, defense counsel also filed a motion to reconsider defendant's sentence, which the trial judge denied at the conclusion of the sentencing hearing. Defendant filed a timely notice of appeal to this court later on the same date.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant argues that: (1) he received ineffective assistance of trial counsel, where counsel failed to seek a hearing or obtain a ruling on a motion to quash arrest and suppress evidence; and (2) pursuant to our supreme court's decision in *Krankel* and its progeny, the trial court failed to conduct a proper inquiry into his *pro se* claim during trial that he was denied effective assistance of counsel. We address defendant's contentions in turn.

¶ 30 A. Ineffective Assistance of Counsel

¶ 31 Defendant contends on appeal that the detective's pat-down search was illegal and that "[t]his illegal search invalidated [defendant's] subsequent consent to search his vehicle, wherein [the detective] discovered broken shards of glass and The Club, evidence that was used against [defendant] at trial." "Had defense counsel moved to suppress the contents of [defendant's] vehicle as a product of a Fourth Amendment violation," defendant argues, "it would have led to the suppression of the evidence of the knife, the broken glass, and The Club." Defendant asserts that his trial counsel's failure to pursue a motion to suppress denied defendant his right to the effective assistance of counsel.

¶ 32 As a preliminary matter, the State contends "that the issue raised here is one best suited for a postconviction petition, and not to be resolved on direct appeal." Observing that "defense counsel actually filed a motion to quash and suppress but did not pursue it after it was filed," the State suggests that "the matter would *** be better suited for review where counsel's rationale, which is wholly outside the record, can be pursued further." We disagree. Our supreme court has recognized that where "the defendant's claim of ineffectiveness is based on counsel's failure to file a suppression motion, the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *People v. Henderson*, 2013 IL 114040, ¶ 22. However, the trial court in the instant case did not restrict defense counsel in his examination of the detective; the type of testimony elicited during trial arguably would have been elicited at a suppression hearing. See *id*. We view the record as adequately developed for this Court to address defendant's claims herein, without resort to speculation.[2] We thus turn to the merits.

¶ 33 Both the United States and Illinois Constitutions guarantee criminal defendants the right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, a court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007), citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*). Under *Strickland*, a defendant must prove both that: (1) his attorney's performance was deficient; and (2) the

[2] Furthermore, even assuming *arguendo* that the detective's pat-down of defendant was improper *and* that such illegality invalidated defendant's subsequent consent to the search of his vehicle – *i.e.*, the motion to suppress was meritorious – we do not believe that a reasonable probability exists that the trial outcome would be different. The *Strickland* prejudice prong, discussed below, cannot be met, regardless of the outcome of our suppression analysis.

deficient performance prejudiced the defendant. *Colon*, 225 Ill. 2d at 135.

¶ 34 "The decision whether to bring a motion to quash arrest and suppress evidence is considered trial strategy, and trial counsel enjoys the strong presumption that failure to challenge the validity of the defendant's arrest or to move to exclude evidence was proper." *People v. Spann*, 332 Ill. App. 3d 425, 432 (2002); see also *People v. Powell*, 355 Ill. App. 3d 124, 141 (2004) ("Defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence."). The Illinois Supreme Court in *People v. Henderson*, 2013 IL 114040, ¶ 15, explained:

> "[W]here an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Id.*

In the instant case, the success of the motion to suppress would be dependent on two related propositions advanced by defendant: (1) the pat-down search of defendant was "not authorized under the limited exception to the warrant requirement announced in *Terry v. Ohio*"; and (2) "the illegal search invalidated [defendant's] acquiescence to [the detective's] request to search his car." We consider each proposition below.

¶ 35 1. Pat-Down of Defendant

¶ 36 The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amends. IV, XIV; Ill. Const. 1970, art. I, § 6. Defendant contends that the pat-down search "ran afoul of the Fourth Amendment." The State asserts that because the detective "had a reasonable

articulable suspicion, based on the information known to him, that defendant had likely recently committed a criminal offense with the use of a weapon, combined with [the detective's] own observations of defendant's demeanor, he was justified in conducting a limited pat-down pursuant to *Terry v. Ohio*."

¶ 37 In *Terry*, the United States Supreme Court considered whether a defendant's right to personal security was violated by an unreasonable search and seizure during an "on-the-street encounter." *Terry*, 392 U.S. 1, 9 (1968). The court held:

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment[.]" *Id.* at 30-31.

"The sole justification for the search allowed by the *Terry* exception is the protection of the police officer and others in the vicinity, not to gather evidence." *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). "If the protective search goes beyond what is necessary to determine if a suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.*

¶ 38 *Terry* requires that the facts be judged against an objective standard: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable

caution in the belief' that the action taken was appropriate?" *Terry*, 392 U.S. at 21-22. According to *Terry*, "[a]nything less" than judging the facts against an objective standard "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22. The Illinois Supreme Court similarly has stated that "[t]hese facts need not meet probable cause standards, but must constitute more than a mere hunch." *People v. Flowers*, 179 Ill. 2d 257, 264 (1997).

¶ 39 Under the circumstances, we believe a reasonably prudent officer would have been warranted in the belief that defendant posed a danger to the officer's safety or the safety of others. See *id.* at 264. Prior to speaking with defendant on September 18, 2012, the detective had met the Pep Boys manager regarding the criminal damage to property; the damage included smashed windows and slashed tires. The detective had viewed the video, which showed the vehicle with the distinctive quarter-panel; he had observed a "white Honda Accord with a black right front fender" outside of defendant's home on September 16, 2012. According to the detective, defendant was "fidgeting, moving around quite a bit on the small front porch" on September 18; the detective thought defendant was "very anxious." As a result of the "protective pat down search," a large folding serrated knife was recovered from defendant's pants pocket.

¶ 40 We do not view the limited pat-down search as "a general exploratory search," which is not permitted under *Terry*. *People v. Walker*, 2013 IL App (4th) 120118, ¶ 35. For example, the officer in *Flowers* indicated that he frisked the defendant "not because of any particularlized suspicion that defendant was armed, but simply because it was his routine to frisk persons stopped for investigatory questioning." *Flowers*, 179 Ill. 2d at 266. In *People v. Holliday*, 318 Ill. App. 3d 106, 111 (2001), the officer testified that "he had no indication that the defendant

possessed a weapon at the time of his search" and "that he was looking for drugs during the search." Unlike the improper searches in *Flowers* and *Holliday*, nothing in the record herein indicates that the detective was engaged in any exploratory search or that the pat-down of defendant was part of any routine. See also *Walker*, 2013 IL App (4th) 120118, ¶ 51 (where detective "never testified he searched the [defendant's] purse as a protective measure before allowing defendant to retrieve her identification" but "[r]ather, [the detective's] curiosity was piqued about what was in the purse," the appellate court concluded that the detective's "curiosity does not justify a *Terry* search").

¶ 41 Citing *People v. Davis*, 352 Ill. App. 3d 576 (2004), defendant contends that "anxiousness does not create a reasonable belief that someone is armed with a weapon." In *Davis*, the defendant was observed riding his bicycle at nighttime without a light, in violation of the Illinois Vehicle Code. *Id.* at 577; 625 ILCS 5/11-1507(a) (West 2002). Two police officers advised the defendant of the violation and, "while talking with defendant, one of the officers observed defendant acting nervously and attempting to put his hand in his pocket." *Davis*, 352 Ill. App. 3d at 577. That officer frisked the defendant, detecting a box cutter in his pocket. *Id.* "When the officer removed the box cutter from defendant's pocket, a baggie of cocaine was discovered," and the defendant subsequently was indicted for unlawful possession of a controlled substance. *Id.* The trial court granted the defendant's motion to quash his arrest and suppress the evidence. *Id.* In affirming the trial court's decision, the appellate court noted that "[a]lthough nervous behavior can be a pertinent factor in determining reasonable suspicion [citation], nervousness alone does not justify a frisk [citation]." *Id.* at 581.

¶ 42 One important distinction between *Davis* and the instant case is that the defendant in *Davis* "was stopped for a minor traffic offense" (*id.* at 582) whereas defendant was suspected of

criminal damage to property, which included smashed glass and slashed tires. Furthermore, the *Davis* officer presumably had no information regarding that defendant prior to his observation of and interaction with him during the encounter at issue. In the instant case, the detective had spoken with the Pep Boys manager, viewed the videotape and observed defendant's vehicle prior to his interaction with defendant on September 18.

¶ 43 Although we agree with defendant that "nervousness alone does not justify a frisk," certain cases cited by defendant involve relatively innocuous, non-violent offenses where the officer had no apparent reason to believe that the suspect may be armed or dangerous. See, *e.g.*, *People v. Kramer*, 208 Ill. App. 3d 818, 819 (1991) (defendants stopped in "high-crime area" for parking in a no-parking zone); *People v. Creagh*, 214 Ill. App. 3d 744, 746 (1991) (defendant was a passenger in an automobile with a "loud muffler and an improper display of license plates").

¶ 44 Unlike in *People v. Creagh* – where there was "absolutely no evidence" that the officer "had reason to believe that the defendant was armed and dangerous" (*Id.* at 748) – the detective herein had reasons, in addition to defendant's nervousness, to potentially believe that defendant posed a danger to the detective or others. Coupled with the information then possessed by the detective, defendant's nervousness is a "pertinent factor" (*Davis*, 352 Ill. App. 3d at 581) in our determination that the pat-down search was valid. Furthermore, although we recognize that the nature of the offense involved does not *per se* justify the pat down of the defendant (*People v. Galvin*, 127 Ill. 2d 153, 173 (1989); *People v. Fox*, 2014 IL App (2d) 130320, ¶ 23), "an officer's experiences and subjective opinion may be considered" when they are "tied to some other, specific circumstance that justifies a reasonable, articulable suspicion of danger." *Fox*, 2014 IL App (2d) 130320, ¶ 22.

¶ 45 The State concedes that the detective did not testify at trial that he feared for his safety or the safety of others. However, the State contends – and we agree – that his "lack of testimony regarding his reasonable, articulable suspicion is not fatal here, particularly where such suspicion is easily inferred from the facts testified to by [the detective] concerning his investigation." In sum, we conclude that the detective was justified in conducting a limited pat-down search of defendant in accordance with *Terry* and its progeny. However, as discussed below, even if we reached a different conclusion regarding the validity of the pat-down, our decision herein would not change.

¶ 46 2. Consent to Search of Defendant's Vehicle

¶ 47 Defendant contends that "[a]lthough [he] ultimately gave [the detective] permission to search his car, where an officer's detention of a person goes beyond the limited restraint of a *Terry* investigative stop, a subsequent consent to search may be found to have been tainted by the illegality." The State responds that "even if the pat-down is characterized as unjustified by this Court, it was entirely separate from the remainder of the consensual encounter which took place between defendant and the officers."

¶ 48 "Consent searches are part of the standard investigatory techniques of law enforcement agencies." *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-32 (1973); see also *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) (noting that "we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so"). "[C]onsensual encounters do not implicate the fourth amendment." *People v. Gherna*, 203 Ill. 2d 165, 177 (2003). However, the "law is settled that, where an illegal detention has occurred, a subsequent consent to search may be found to have been tainted by the illegality." *People v. Brownlee*, 186 Ill. 2d 501, 521 (1999). In light of such taint, a defendant's consent to

search following an illegal detention may "require suppression of any evidence found pursuant to the illegally obtained consent." *People v. Delaware*, 314 Ill. App. 3d 363, 373 (2000); see also *People v. Kelly*, 76 Ill. App. 3d 80, 86 (1979) (stating that "consent is ineffective to justify a search when a search or entry made pursuant to consent immediately following an illegal search, involving an improper assertion of authority, is inextricably bound up with illegal conduct and cannot be segregated therefrom").

¶ 49 However, as our supreme court has stated, "evidence which comes to light through a chain of causation that began with an illegal seizure is not *per se* inadmissible." *Henderson*, 2013 IL 114040, ¶ 34. We thus consider " 'whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality.' " *Henderson*, 2013 IL 114040, ¶ 33, quoting *United States v. Crews*, 445 U.S. 463, 471 (1980). "Factors relevant to an attenuation analysis include the temporal proximity of the illegal police conduct and the discovery of the evidence; the presence of any intervening circumstances; and the purpose and flagrancy of the official misconduct." *Henderson*, 2013 IL 114040, ¶ 33.

¶ 50 In the instant case, after recovering the knife from defendant's pocket, the detective testified that he continued to question defendant and "talk to him about the allegations against him." The detective then testified:

> "I asked him where his vehicle was because I had noticed it directly in front of the house on a couple different prior occasions. Mr. Pena freely stated that the car was parked around the block. I believe it was on Spaulding. We went to that, where the car was parked, we went to the car where it was parked and I asked Mr. Pena if he would mind if I inspected the vehicle. He said he had no problem with

it and handed me the key."

After the pat-down on the front porch, the detectives and defendant exited the porch and walked "around the block" to defendant's vehicle. The continuing dialogue after the protective pat-down, coupled with the walk to another street to the location of the vehicle, appear indicative of some "temporal" distance between the pat-down and defendant's consent to the search of the vehicle. The walk "around the block" also seems to be an intervening circumstance between the pat-down on the porch and defendant handing the key to the detective. In evaluating "the purpose and flagrancy of the official misconduct," nothing in the record indicates that the detective's actions were carried out in such a manner that they would cause surprise, fear or confusion or that they had a quality of "purposeful or intentional misconduct." (Internal quotation marks omitted.) *Henderson*, 2013 IL 114040, ¶ 49.

¶ 51 In *People v. Cosby*, 231 Ill. 2d 262, 265 (2008), our supreme court considered consolidated cases involving unrelated traffic stops of vehicles driven by the two defendants. The relevant question in each case was "whether the officers' actions after the initial traffic stops had concluded constituted a second seizure of either defendant." *Id.* at 276. The court discussed the United States Supreme Court decision in *United States v. Mendenhall*, 446 U.S. 544 (1980), in which the Court "set forth *** certain factors the presence of which would tend to indicate that a seizure had occurred": "(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person of the citizen; and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Cosby*, 231 Ill. 2d at 287, citing *Mendenhall*, 446 U.S. at 554. With respect to defendant Michael Cosby, our supreme court concluded that he was not seized and therefore his consent to search his vehicle was voluntary. *Id.* at 284-85. The court noted that "[t]here is no

indication in the record that either of the officers touched Cosby's person, that they displayed their guns, or that [the police officer] used language or a tone of voice indicating to Cosby that he had no choice but to consent to the search of his car." *Id.* at 278. With respect to defendant Hugo Mendoza, the court similarly concluded that the "absence of all of the *Mendenhall* factors strongly suggests that Mendoza was not seized for fourth amendment purposes." *Id*. at 287. The court thus held that "subsequent discovery of the gun, the second stopping of Mendoza's car, and the officers' search of the car did not violate Mendoza's fourth amendment rights." *Id.* at 288.

¶ 52 Conversely, in *People v. Delaware*, 314 Ill. App 3d 363, 374 (2000), "[t]here were *** no intervening circumstances between the illegal arrest and" the defendant's consent to a search of his vehicle. Concluding that "defendant's consent to search was tainted by his illegal arrest and that the contraband found in the car should have been suppressed," the court discussed the "purposefulness" of the police conduct, including: "detaining defendant, handcuffing defendant, removing him from the apartment, removing him from the building, bringing him to the parking lot, and questioning him in the parking lot." *Id.* at 374-75. See also *People v. Al Burei*, 404 Ill. App. 3d 558, 565 (2010) ("We do not reach the question of whether a second seizure took place because the initial seizure of the defendant had not been concluded at the time [the police officer] made the request to search the minivan."). In the instant case, there is no indication that defendant was seized after the detective conducted a limited pat-down for weapons. As opposed to the "removal" of the *Delaware* defendant in handcuffs, defendant voluntarily exited the porch, walked around the block and handed his key to the detective. We agree with the State that "[b]ecause defendant was no longer seized when defendant consented to the search of his car, defendant's consent was valid and did not flow from the seizure of defendant."

¶ 53 "Voluntariness of consent to search *** is determined by consideration of a totality of the

circumstances." *Spann*, 332 Ill. App. 3d at 439. "Factors to consider when determining voluntariness include the defendant's age, education, and intelligence, the length of the detention and the duration of the questioning, whether the defendant was advised of his constitutional rights, and whether the defendant was subjected to any physical mistreatment." *Id.* As the State observes, "defendant owned the vehicle for which he consented to the search, was approximately 39 years of age when he consented to the search of his vehicle, graduated from high school and auto-repair trade school, was in good psychological condition, and did not suffer from any alcohol or drug abuse problems." Nothing in the record indicates that defendant was physically restrained, except to the extent that the brief protective pat-down constituted physical restraint. The detective testified, "I asked Mr. Pena if he would mind if I inspected the vehicle. He said he had no problem with it and handed me the key." Reviewing the totality of the circumstances, we conclude that defendant's consent to the search of his vehicle was voluntarily given and therefore valid. Furthermore, we agree with the State that "even if the pat-down is characterized as unjustified by this court, it was entirely separate from the remainder of the consensual encounter which took place between defendant and the officers."

¶ 54 The State advances other arguments regarding the validity of the search of defendant's vehicle. For example, the State contends that "even if this Court were to find that the search of defendant's vehicle cannot be characterized as consensual, that search still did not violate the Fourth Amendment where (1) the search involved an automobile; and (2) the officers had probable cause to believe that the automobile was the instrument of a crime and contained evidence." "Probable cause" is a "reasonable belief that a search of a particular place or thing will disclose evidence, fruits of the crime, or is necessary for the protection of the police officer." *Kelly*, 76 Ill. App. 3d at 84. The Illinois Supreme Court has held that law enforcement officers

may conduct a "warrantless search of a vehicle if there is probable cause to believe that the automobile contains evidence of criminal activity that the officers are entitled to seize." *People v. James*, 163 Ill. 2d 302, 312 (1994); see also *People v. Davis*, 93 Ill. App. 3d 217, 226-27 (discussing the "exigency" created by the "inherent mobility of an automobile" and the "diminished expectation of privacy in an automobile"); *Kelly*, 76 Ill. App. 3d at 84 (because the defendant did not voluntarily consent to the search, "the search must be justified, if at all, as incident to an arrest, or as a search made with probable cause and under the exceptional circumstances as might exist when the object of the search is a motor vehicle"). The State also invokes the "doctrine of inevitable discovery," which provides that evidence arguably tainted by a prior illegality may be introduced if the prosecution is able to show that "(1) the condition of the evidence when actually found by lawful means would have been the same as that when improperly obtained; (2) the evidence would have been discovered through an independent line of investigation untainted by the illegal conduct; and (3) the independent investigation was already in progress at the time the evidence was unconstitutionally obtained." *Davis*, 352 Ill. App. 3d at 583, citing *People v. Alvarado*, 268 Ill. App. 3d 459, 470 (1994). We need not address the foregoing arguments, however, because we have concluded that defendant voluntarily consented to the search of his vehicle.

¶ 55 3. The *Strickland* Analysis

¶ 56 The failure to file a futile motion does not constitute ineffective assistance of counsel. *People v. Givens*, 237 Ill. 2d 311, 331 (2010) (noting that "the failure to file a motion to suppress or the withdrawal of such a motion prior to trial does not establish incompetent representation when it turns out that the motion would have been futile"). In the instant case, defense counsel filed – but did not pursue – a suppression motion. However, for the reasons discussed above, we

conclude that a motion to suppress would not have been granted, and thus defendant cannot satisfy his burden under *Strickland*. See *Henderson*, 2013 IL 114040, ¶ 51.

¶ 57 Although he acknowledges that "trial counsel's decision to file or not to file a motion to suppress is generally considered a matter of professional judgment," defendant contends that "Illinois courts have found ineffective assistance of counsel when the motion that counsel neglected to present was defendant's strongest defense or was patently meritorious." However, the cases cited by defendant in support of this proposition are distinguishable from the instant case. For example, in *People v. Spann*, "[t]he State's entire case was based on the testimony of the" arresting police officer. *Spann*, 332 Ill. App. 3d at 434. In *People v. Stewart*, 217 Ill. App. 3d 373, 374-75 (1991), the sole testimony at trial was from the two arresting officers.

¶ 58 Even if the evidence has been suppressed, we do not believe a reasonable probability exists that the trial outcome would be different. See *Henderson*, 2013 IL 114040, ¶ 15. "Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome." *Spann*, 332 Ill. App. 3d at 433. Although the trial court considered the results of the vehicle search in reaching its decision, we do not believe that there is a reasonable probability that the court would have reached a different conclusion absent such results. In this case, Sewall identified defendant's vehicle – with a distinctive quarter panel – in the Pep Boys video. Sewall also testified regarding the termination of defendant's employment and defendant's arguably threatening remarks. The detective viewed the video and later observed a vehicle matching the description in front of defendant's home. The court, after viewing the video, indicated that the vehicle in the video "looked just like Mr. Pena's car." Defendant's girlfriend testified at trial that she would have awakened if defendant left the bed on the night of the incident; however, she indicated on cross-examination that she had previously "told [the detective] that [she] would not

be able to know whether the defendant had in fact got up out of bed and gone to the Pep Boys." Simply put, even if the evidence recovered from the vehicle search had been suppressed, there is not a reasonable probability that the trial outcome would be different.

¶ 59 "[I]f the ineffective assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not determine whether counsel's performance was constitutionally deficient." *People v. Haynes*, 192 Ill. 2d 437, 473 (2000). In the instant case, as discussed above, we conclude that neither the "performance" nor the "prejudice" prongs of *Strickland* have been satisfied. We thus reject defendant's claim of ineffective assistance of counsel.

¶ 60 B. *Krankel* Inquiry

¶ 61 Defendant also argues that pursuant to our supreme court's decision in *Krankel*, the trial court failed to conduct a proper inquiry into his *pro se* claim during trial that he was denied effective assistance of counsel. "Through *People v. Krankel* and its progeny, the Illinois Supreme Court has provided our trial courts with a clear blueprint for the handling of posttrial *pro se* claims of ineffective assistance of counsel." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 21 (and cases cited therein). Our supreme court has detailed this blueprint as follows:

> "In interpreting *Krankel*, the following rule developed. New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se*

motion. However, if the allegations show possible neglect of the case, new counsel should be appointed. [Citations.] The new counsel would then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. [Citations.] The appointed counsel can independently evaluate the defendant's claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position. [Citations.]

The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. [Citations.]" *People v. Moore*, 207 Ill. 2d 68, 77-79 (2003).

¶ 62 We review *de novo* whether a trial court properly conducted a preliminary *Krankel* inquiry. *People v. Jolly*, 2014 IL 117142, ¶ 28. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25. If,

however, the trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous. *Id*. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id*., citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 63 The vast majority of cases addressing *Krankel* have involved – as did *Krankel* – a *pro se* motion alleging ineffective assistance of counsel that was filed *after* the trial. See *Krankel*, 102 Ill. 2d at 187. However, in *People v. Jocko*, 239 Ill. 2d 87 (2010), the Illinois Supreme Court considered the application of *Krankel* to a defendant's *pro se* pretrial claim of ineffective assistance of counsel. The supreme court concluded a circuit court is not required to conduct a pretrial inquiry into a defendant's *pro se* allegations of ineffective assistance of counsel where the defendant's allegations must be resolved under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jocko*, 239 Ill. 2d at 92-93. The *Jocko* court observed that *Strickland* requires a defendant to demonstrate " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id*. at 92, quoting *Strickland*, 466 U.S. at 694. Our supreme court reasoned:

> "The fundamental problem with addressing *Strickland* claims prior to trial is that the outcome of the proceeding has not yet been determined. Because there is no way to determine if counsel's errors have affected an outcome that has not yet occurred, the circuit court cannot engage in this analysis prior to trial." *Jocko*, 239 Ill. 2d at 93.

The Illinois Supreme Court thus rejected "the appellate court's conclusion that a circuit court is obligated to address a *pro se* defendant's *Strickland* claims prior to trial." *Id*.

¶ 64 The *Jocko* court also stated that "[g]enerally a *pro se* defendant is not obligated to renew

claims of ineffective assistance once they are made known to the circuit court [citation], and there is, of course, nothing to prevent a circuit court from addressing, at the conclusion of trial, a *pro se* claim of ineffective assistance that was previously raised by the defendant." *Id*. at 93. The court noted that "[i]n this case, however, we cannot fault the circuit court for not pursuing defendant's *pro se* claims further." *Id.* First, one of the *Jocko* defendant's contentions – that the defendant was not represented by counsel at arraignment – was refuted by the record. *Id.* Furthermore, the record appeared to indicate that the circuit court, defendant's counsel and the State were all unaware of a letter and "affidavit" sent by the defendant to the office of the clerk of the court. *Id.* at 93-94. Our supreme court concluded, "We cannot criticize the circuit court for failing to take action on defendant's concerns when there is no indication that the court was ever made aware of them." *Id.* at 94.

¶ 65 Subsequent to *Jocko*, the Illinois Appellate Court decided *People v. Washington*, 2012 IL App (2d) 101287. In *Washington*, the defendant filed a *pro se* pretrial motion claiming his counsel was ineffective because counsel: (1) failed to hold the State to a 30-day deadline set forth in the Code of Criminal Procedure of 1963 (725 ILCS 5/109-3.1(b) (West 2008)); (2) failed to arrange for the defendant to be writted to court for a status hearing; and (3) had not shown the defendant any of the material the State produced in discovery. *Washington*, 2012 IL App (2d) 101287, ¶ 5. The trial court advised defense counsel and the State of the defendant's motion, and defense counsel requested a continuance to discuss the motion with the defendant. *Id*. ¶ 6. After the defendant informed the court that he did not want any more continuances, counsel requested a trial date, and "[n]o further mention was made of defendant's motion." *Id*.

¶ 66 On appeal, the *Washington* court concluded the trial court was not required to revisit the defendant's pretrial motion after trial because the defendant's allegations were insufficient on

their face or "simply not serious ineffective-assistance-of-counsel claims." *Id*. ¶¶ 24-25. Before reaching its conclusion, the appellate court remarked:

> "[A] trial court's duties with respect to a pretrial *pro se* filing or oral representation claiming ineffective assistance of counsel are as follows. First, the court, at a minimum, must review the defendant's assertions to assess whether or not the court must consider the possible prejudicial effect on the outcome of the proceeding. Next, if the court determines that resolution of the defendant's claims does not require that it consider possible prejudice (*e.g*., in situations where there is a potential conflict of interest or there has been a complete deprivation of counsel), then it must apply *Krankel* before trial. If the court determines that it must consider possible prejudice as to the outcome, then it is not obligated to apply *Krankel* before trial, although, at the end of trial, the court should address the defendant's previously raised ineffective-assistance claims by conducting a posttrial *Krankel* analysis (*i.e.*, examining the factual bases of the defendant's claims to determine if they have merit and whether counsel should be appointed." *Id*. ¶ 22.

¶ 67 As an initial matter, we observe that *Krankel* arguably is inapplicable where the motion alleging ineffective assistance is filed *during* the trial. The *Washington* court acknowledged that "the supreme court has explicitly applied *Krankel* only to posttrial motions." *Washington*, 2012 IL App (2d) 101287, ¶ 19.

¶ 68 Furthermore, the record does not indicate that defendant was asserting any ineffective assistance claims that did not require a showing of prejudice under *Strickland*. As our supreme court observed in *Jocko*, a claim of ineffectiveness raised before a defendant is convicted is

premature because in considering the claim of allegedly deficient representation, the trial judge cannot know if defense counsel's performance affected the outcome of defendant's trial. *Jocko*, 239 Ill. 2d at 92-93. We recognize that "[i]n a narrow range of cases, a defendant complaining of the ineffective assistance of counsel need not demonstrate that he suffered actual prejudice from counsel's deficient performance." *People v. Barfield*, 187 Ill. App. 3d 190, 198 (1989). For example, "[w]here 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' " *Id.* at 198, quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984). In the instant case, there is no evidence – and seemingly no allegation – that defense counsel "failed to act as a true advocate" (*Barfield*, 187 Ill. App. 3d at 198) or that any other exception applied that would not require a showing of prejudice.

¶ 69 In any event, we agree with the State that even presuming that the trial court "was obligated to conduct a *Krankel*-type inquiry based upon the mid-trial claims, the colloquy that took place here sufficed to satisfy the requirements." The following exchange occurred between the court and defendant:

> "THE DEFENDANT: I want to file a motion.
>
> THE COURT: What kind of motion you got?
>
> THE DEFENDANT: For ineffective assistance of counsel.
>
> THE COURT: What's wrong?
>
> THE DEFENDANT: It's a lot of counts right here, if you want to read it.
>
> THE COURT: Look, here is where we are at. You are in jail; you didn't have your own lawyer; I appointed a public defender to help you. If you don't want the Public Defender to help you, you are going to end up representing

yourself, and I don't know that you know what you are doing in court enough to represent yourself.

THE DEFENDANT: It's the last time --

THE COURT: I will hold you to the same standards as a lawyer if you don't know how to ask questions and ask them properly.

THE DEFENDANT: No, also the counselor, you know, I tell him, uh, about my arrest and they don't have a warrant for me. And like I say, Judge, he don't care.

THE COURT: They don't always need a warrant to make every arrest. Sometimes you do, sometimes you don't. It depends on the individual case. I am not dismissing him as your lawyer. There is nothing I see that is even close to that. He is before me everyday and he is an extremely competent lawyer. Either he represents you or you can represent yourself. You don't want to do that, do you?

THE DEFENDANT: I don't have a choice.

THE COURT: You have a choice. You can represent yourself if you want to --

THE DEFENDANT: Go with him then."

¶ 70 Our supreme court has stated, in the posttrial context, that "[t]he law requires the trial court to conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* *** claim of ineffective assistance of counsel." *Moore,* 207 Ill. 2d at 79. In the exchange between the trial court and defendant, defendant was allowed to voice his concerns regarding his counsel's performance. The trial court made an effort to determine the nature and substance of

defendant's allegations of ineffective counsel. The court responded to defendant's stated concern – defense counsel's alleged indifference regarding defendant's warrantless arrest – and found it to be without merit. See *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007) ("Where a defendant's *pro se* posttrial ineffective assistance claims address only matters of trial strategy, the court may dismiss those claims without further inquiry."). The trial court was permitted to "draw upon its observation of defense counsel's performance at trial and the adequacy of defendant's allegations on their face." *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 71 Defendant also argues that the trial judge failed to address his previously raised ineffective-assistance claims by conducting a posttrial *Krankel* analysis. The State responds, in part, that "[w]hile it is correct that *Jocko* and *Washington* suggest that a defendant is not obligated to renew his claims of ineffective assistance, this particular case presents a unique circumstance because the one claim that the court was aware of regarding the ineffective representation of counsel was presented and resolved during the course of the trial." We agree with the State that "without some sort of presentation of additional claims, the court, similar to the court in *Jocko*, could not address any alleged ineffectiveness." Furthermore, as in *Washington*, "after the trial, no prejudice was evident." *Washington*, 2012 IL App (2d) 101287, ¶ 16. "Thus," as in *Washington*, "nothing in defendant's claims required the court to revisit the motion posttrial." *Id.*

¶ 72 In sum, the trial court was not required to *sua sponte* revisit defendant's claims after trial. Even if it had done so, defendant's complaint involved a matter of trial strategy that generally does not support a claim of deficient representation. Defendant's remarks during his trial did not present a claim of ineffective counsel sufficient to warrant further inquiry under *Krankel*. We thus reject defendant's request that we "remand for an inquiry into the basis" of defendant's

ineffectiveness claims.

¶ 73 III. CONCLUSION

¶ 74 For all of the aforementioned reasons, defendant's convictions are affirmed. The State's request for fees and costs is denied.

¶ 75 Affirmed.