2017 IL App (4th) 150408-U

NO. 4-15-0408

Order filed September 12, 2017

Modified upon denial of rehearing October 11, 2017

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
LEAVELL ALLEN,	)	No. 14CF314
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner concurred in the judgment.
Justice Holder White dissented.

ORDER

¶ 1 *Held*: (1) Defendant forfeited the issue of whether the electronically recorded statements he made to himself, while alone in a squad car, are the fruit of an unconstitutional arrest, because he never raised that issue in his motions for suppression and in his posttrial motion.

(2) Absent any clear or obvious error in the admission of those statements, the doctrine of plain error does not avert the forfeiture.

(3) Because there is no reasonable probability that the trial court, acting in accordance with law, would have agreed with an argument that defendant's arrest was unsupported by probable cause, the omission of such an argument from the motions for suppression and the posttrial motion fails to qualify as ineffective assistance of counsel.

(4) The trial court conducted a sufficient inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel.

¶ 2 Defendant, Leavell Allen, is serving concurrent terms of imprisonment for three counts, of which a jury found him guilty: armed violence (720 ILCS 5/33A-2(a) (West 2014)),

being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)), and manufacturing or delivering a controlled substance (720 ILCS 570/401(c)(2) (West 2014)). He appeals on three grounds.

¶ 3 First, he argues the trial court erred by denying a motion to suppress some statements he made while he was alone and handcuffed in the backseat of a squad car. According to defendant, these statements—which, as it turned out, were recorded by an in-car audio-video camera—were the fruit of an unconstitutional seizure of his person. In his motions for suppression, however, and in his posttrial motion, defendant never disputed the constitutionality of his arrest. Consequently, he has forfeited that issue on appeal. Although he attempts to avert the forfeiture by invoking the doctrine of plain error, we conclude the doctrine is inapplicable because we find no clear or obvious error in the admission of the statements in question. Thus, the forfeiture, the procedural default, will be honored.

¶ 4 Second, defendant argues that by causing this forfeiture, his trial counsel rendered ineffective assistance. Because there is no reasonable probability, however, that the trial court, acting in accordance with the law, would have agreed with an argument that defendant's arrest was unsupported by probable cause, the omission of such an argument from the motions for suppression and the posttrial motion fails to qualify as ineffective assistance of counsel. A claim of ineffective assistance requires prejudice, and there was none.

¶ 5 Third, defendant argues the trial court failed to conduct an adequate inquiry into his claim of ineffective assistance of trial counsel, a claim he raised in his *pro se* motion for a new trial. We conclude that, in this particular case, the court conducted an adequate inquiry merely by reading the *pro se* motion in the light of the record and statutory law.

¶ 6 Therefore, we affirm the trial court's judgment.

¶ 7 I. BACKGROUND

¶ 8 A. The Hearing on Defendant's Motions To Suppress His Statements

¶ 9 On September 29, 2014, trial counsel filed a "Motion To Suppress Statements," and on November 10, 2014, he filed a "Supplementary Motion To Suppress Statements." Before recounting the arguments in the motion and the supplementary motion, we will discuss the evidence in the suppression hearing, which was held on November 10, 2014. That way, the arguments trial counsel made in those motions will have a factual context and will make more sense. The evidence in the suppression hearing was substantially as follows.

¶ 10 Around noon on March 4, 2014, in Urbana, Illinois, defendant was riding as a passenger in the backseat of a Chevrolet Tahoe sport utility vehicle. At the intersection of West Green Street and North Lincoln Avenue, three Urbana police officers—Matthew Quinley, James Kerner, and Matthew Mecum—were in an unmarked white minivan, waiting for the traffic light to change, when the Tahoe went by, heading east on West Green Street. Kerner noticed that the driver of the Tahoe was holding a cell phone to his ear while driving. This was a traffic offense. See 625 ILCS 5/12-610.2(b) (West 2014). Quinley, the driver of the minivan, turned the minivan around and followed the Tahoe.

¶ 11 From West Green Street, the Tahoe took a left onto South Birch Street and went north, with the minivan still following. As the Tahoe drew near the intersection with West Elm Street, Mecum turned on the emergency lights—"the police lights"—of the minivan. The Tahoe took a left onto Springfield Avenue and then a right onto South McCullough Avenue and continued two blocks north, with the minivan still following, its emergency lights flashing. Near the intersection with West Griggs Street, the Tahoe came to a halt. Kerner saw a rear passenger

door of the Tahoe open and a man, later identified as defendant, get out of the Tahoe and begin running north.

¶ 12 Mecum and Kerner got out of the minivan and ran after defendant. They never actually saw him drop anything along the way, but Mecum saw him reach toward his waistband. After chasing him for about 500 meters, they caught up with him at the parking lot of a hotel and arrested him for resisting or obstructing a peace officer (720 ILCS 5/31-1(a) (West 2014)).

¶ 13 On direct examination, Kerner testified:

> "A. He was arrested for resisting as he fled from the traffic stop. And then it was later learned that he had a Douglas County arrest warrant for him, and cocaine and a firearm were both located in his flight path."

Trial counsel asked Kerner on cross-examination:

> "Q. You said that he was arrested at that point for—immediately, for resisting?
>
> A. He was arrested for, yes, resisting a police officer whenever he fled from the traffic stop."

¶ 14 Mecum and Kerner handcuffed defendant and put him in the backseat of a squad car, which was assigned to Urbana police officer Harold D. Hazen. Kerner testified: "[Defendant] was the only person inside the vehicle." The squad car was equipped with two audio-video cameras, one pointed at the front seat and the other pointed at the backseat. Seated in the backseat and looking forward, defendant was facing a sign, mounted on the Plexiglas divider. The sign read: " ['Y]ou are subject to audio and video recording in this vehicle.['] " A camera recorded defendant saying in the backseat, as if to himself, " '[D]on't find the banger, that's all I'm asking, don't find the banger.' " (Kerner, Quinley, and another Urbana police officer, Adam

Chacon, testified that "banger" was slang for a firearm. They testified they knew this from their years of duty-related interactions with people on the street.)

¶ 15 Retracing defendant's path of flight, Quinley found a digital scale, a loaded pistol, and a bag of what was later determined to be cocaine. When Quinley found the pistol, the camera recorded defendant, still alone in the squad car, saying, " 'No, no, no, no.' "

¶ 16 After defendant made those remarks in the solitude of the squad car, with only the camera listening (*i.e.*, " '[D]on't find the banger, that's all I'm asking, don't find the banger' " and " 'No, no, no, no.' "), Kerner opened a door of the squad car and recited to him his *Miranda* rights, asking defendant if he understood each right and receiving affirmative answers. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶ 17 The prosecutor asked Kerner:

> "Q. *** [N]ow this portion after you read him *Miranda*, is this the first time anyone actually questioned him about anything?
>
> A. Yes.
>
> Q. Okay. And during this portion of the statement, did he basically deny all knowledge of guns or drugs that were found at the scene?
>
> A. Yes.
>
> * * *
>
> Q. Towards the end of this portion of the statement, the Defendant, did he then ask you, '[A]re we done with questions now?'
>
> A. Yes.
>
> Q. How did you respond?
>
> A. I said, '[W]e can be. Are you done talking to me[?]'

Q. And what did the Defendant indicate to you?

A. That he was done talking to me.

Q. Okay. Did he say, 'I'm done?'

A. Yes.

Q. On [*sic*]. Did you immediately end the conversation at that time?

A. I did, and I closed the squad door."

¶ 18 Shortly after Kerner left, Urbana police officer Robert Morris got into the squad car and spoke with defendant. By Morris's understanding at the time, defendant already had been read his *Miranda* rights.

¶ 19 The prosecutor asked Morris:

"Q. And at some point early on in that conversation, did you ask [defendant] whether or not you guys were going to talk about the situation?

A. Yes.

Q. Do you remember what his response was?

A. He said something to the effect of, '[O]f course we are. I'm on probation.' "

Morris's purpose (which he did not disclose to defendant) was to see if, by talking with defendant, he "could develop enough information *** to author a search warrant for the apartment [defendant] shared with a young lady at Town Apartments." Morris asked defendant if he wanted him, Morris, to "meet him at the satellite jail." Defendant was leery of that idea, "fear[ing] that other people," "particularly inmates," "would see that interaction." He was more amenable to talking with Morris in the interview room of the Urbana police department, a more secluded setting.

¶ 20 Later, in the interview room of the Urbana police department, Morris began reading to defendant his *Miranda* rights, but defendant said his *Miranda* rights already had been read to him at the scene. Defendant "seemed to indicate that he didn't need to hear it again," Morris testified. The prosecutor asked Morris:

"Q. Okay. And instead, what did you do with him?

A. Instead, I wanted to make it clear that he understood what the—in my mind, the hallmark of those rights are; and that's that, any Defendant has the right to remain silent. So I asked him to explain in his own words what that—that term or that phrase means to him.

Q. Was he able to give an answer?

A. He was.

Q. What did he say?

A. He said, essentially, [']I don't have to speak to you if I don't want to.[']

Q. And after that, was he willing and able to give you another statement?

A. Yes.

Q. What was the tone of this statement?

A. It was very cordial and low key. It was merely a conversation more than an interrogation.

Q. Did anyone get upset during that time?

A. No.

Q. Was it during this conversation that he admitted that he possessed the firearm and cocaine involved in the Urbana investigation?

A. Yes."

The interview in the police station was audio- and video-recorded. In the interview, Morris suggested to defendant that he had "no other choice" but to cooperate because otherwise he, defendant, was "going to disappear." In other words, unless defendant received "consideration" from the police, he was "looking at 60 years in the penitentiary."

¶ 21 As we said, on September 29, 2014, defense counsel filed a "Motion To Suppress Statements," and on November 10, 2014, he followed up with a "Supplementary Motion To Suppress Statements."

¶ 22 The first motion was to suppress the statements that defendant had made to Morris in the interview room of the Urbana police department. The motion reasoned as follows. In his conversation with Kerner earlier, in the squad car, defendant evinced a faulty understanding of his *Miranda* rights by asking Kerner, in so many words, whether he had to continue answering Kerner's questions and by asking him if the interview was over. To knowingly waive his *Miranda* rights, defendant had to understand them, and, evidently, in the squad car, he did not quite achieve that understanding. Therefore, later on, before Morris interviewed defendant in the police station, it was necessary to advise defendant of the *Miranda* rights again and, this time, obtain his knowing and intelligent waiver of each of them. Morris advised defendant of his right to remain silent, but he did not obtain from defendant an express waiver of that right. Having omitted to advise defendant of the remaining *Miranda* rights, Morris obviously did not obtain from him either an express or implied waiver of those rights. Quoting *Berghuis v. Thompkins*, 560 U.S. 370, 396 (2010), which in turn quoted *Miranda*, 384 U.S. at 475, the motion argued: " 'But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.' "

¶ 23 The other motion, the "Supplementary Motion to Suppress Statements," sought to suppress the statements that defendant had made in the squad car, except his statements to Kerner. The rationale for this other motion was as follows. Defendant was "not advised that he [would be] continuously audio/video recorded as he [sat] alone in the [squad] car." Consequently, he "talk[ed] to himself in a way that clearly indicate[d] that he believe[d] he [was] speaking privately and not making statements to any other person." This "surreptitious recording [was] improper and [could] even be construed as an interrogation technique executed without warnings of the recording and of the defendant's right to remain silent." As for defendant's subsequent, in-car statement to Morris, defendant already had "invoked his right not to answer further questions." He had invoked that right in his exchange with Kerner. Nevertheless, Morris entered the squad car and, without readvising him of his *Miranda* rights, resumed the questioning.

¶ 24 On February 10, 2015, after hearing two days of testimony, the trial court issued a written order on the "Motion To Suppress Statements" and the "Supplementary Motion To Suppress Statements." After providing an evidentiary background and a reasoned analysis, the order concluded:

> "(A) Defendant's motion to suppress, as evidence at trial, the spontaneous statements made by Defendant while seated in the rear seat of Officer Hazen's squad car before Officer Kerner had the opportunity to advise him of his *Miranda* rights is denied.
>
> (B) Defendant's motion to suppress, as evidence at trial, statements made by Defendant in response to questions posed by Officer Kerner after Defendant

had been admonished as to *Miranda* rights and prior to Defendant indicating that he was done answering questions is denied.

(C) Defendant's motion to suppress, as evidence at trial, statements made by Defendant to Detective Morris while both were seated in the rear seat of Officer Hazen's squad car and statements made by Defendant to Detective Morris and Officer Kerner while being interrogated in the Urbana Police Department interview room is allowed. The People are barred from using such statements at trial, or any other proceeding, in this cause."

¶ 25 B. The Jury Trial

¶ 26 The jury trial occurred from March 23 to 24, 2015. The State presented the testimony of Chacon, Kerner, Hazen, and Quinley.

¶ 27 Also, the trial court admitted five stipulations. The first stipulation was that as of the date of the charged offenses, defendant had two prior felony convictions. The second stipulation was that the police had found "10.1 grams of cocaine" at the scene. The third, fourth, and fifth stipulations consisted of stipulated testimony by forensic scientists, namely, that neither defendant's fingerprints nor his deoxyribonucleic acid (DNA) had been found on any of the physical evidence presented during the trial and, specifically, none of the DNA on the handle of the pistol had come from him.

¶ 28 During its deliberations, the jury sent out a note asking what percentage of certainty was required for a proposition to be accepted as true beyond a reasonable doubt. Without objection, the trial court replied: "There is no math formula for beyond a reasonable doubt. It is for you to determine what that means."

¶ 29 The jury found defendant guilty of all three counts of the information.

¶ 30 C. Trial Counsel's Motion for a New Trial

¶ 31 On April 23, 2015, trial counsel filed a motion for a new trial. The motion argued, for the first time in the proceedings, that the Illinois eavesdropping statute (720 ILCS 5/14-1 *et seq.* (West 2014)) barred the audio- and video-recorded statements that defendant had made while alone in the squad car because he had not made those statements "while in the presence of a uniformed peace officer" (720 ILCS 5/14-3(h-5) (West 2014)). The trial court denied the motion for a new trial.

¶ 32 D. The Sentences

¶ 33 On April 30, 2015, the trial court sentenced defendant to 30 years' imprisonment for each of the three counts, ordering that the prison terms run concurrently.

¶ 34 E. The *Pro Se* Motion for a New Trial

¶ 35 On May 11, 2015, defendant filed a *pro se* motion entitled "Motion for Ineffective Assistance of Counsel." After citing section 116-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-1 (West 2014)) (authorizing the filing and granting of a written motion for a new trial), the *pro se* motion alleged as follows:

> "1. On November 10, 2014[,] my attorney, Daniel C. Jackson, filed the supplementary motion to suppress in-car video.
>
> 2. In that motion[,] he neglected to put any supporting laws or statu[t]es[,] which led to his ineffective arguing of the motion.
>
> 3. February 10, 2014[,] the supplementary motion was denied for lack of facts.

4. After the trial was over[,] I was able to get access to the criminal law manual. By simply looking in the Index[,] I was easily able to find the pertinent facts of law to prove that the in-car video should have been suppressed.

5. Pursuant to 720 ILCS 5/14[,] use of a recording device in this situation is eavesdropping on the part of the State by [the] State's Attorney.

6. During my trial[,] each police officer that was put on the stand for questioning said that the physical evidence was not taken off my person[,] nor was it connected to me by D.N.A. or fingerprints. When the State played the video then asked each police officer, 'What is a banger in your professional opinion?' and they all responded with 'a gun.'

7. After sentencing[,] I found out that I would be serving 85% of my time. Dan C. Jackson told me before trial that all counts carried 50%[,] not 85%.

8. That would make a big difference in my time to be served.

9. The above[-]mentioned points resulted in the State erroneously being allowed to use illegal yet highly prejudicial evidence resulting in my guilty conviction."

¶ 36 The trial court never held a hearing on defendant's *pro se* "Motion for Ineffective Assistance of Counsel." Instead, in an order entered on May 15, 2015, the trial court "dismissed" the *pro se* motion. For two reasons, the court found the motion to be "frivolous" and "patently without merit." First, trial counsel "argued on at least two occasions that the squad car video should be suppressed." Second, the armed-violence conviction required defendant to serve 85% of his sentence only if (a) he had committed the armed violence with "a category I or II weapon,"

and (b) " 'the conduct leading to conviction [had] resulted in great bodily harm to the victim.' " The court noted: "The facts in this case do not support this section."

¶ 37 II. ANALYSIS

¶ 38 A. The Constitutionality of the Warrantless Arrest of Defendant

¶ 39 1. *The Exclusionary Rule*

¶ 40 On appeal, defendant argues that the statements he made to himself while alone in the squad car (" '[D]on't find the banger, that's all I'm asking, don't find the banger' " and " 'No, no, no, no.' ") should have been excluded from the trial because those statements were the fruit of an unconstitutional warrantless arrest. To deter unconstitutional searches and seizures, case law has developed the exclusionary rule, which excludes from the criminal trial any evidence obtained through the exploitation of an unconstitutional search or seizure. *People v. Horton*, 2017 IL App (1st) 142019, ¶ 51.

¶ 41 2. *Recognizing the Initial Problem of Procedural Default, Defendant Invokes the Doctrine of Plain Error*

¶ 42 In the proceedings below, defendant never raised the issue of whether his warrantless arrest was constitutional. Failing to raise this issue in a motion for suppression and in a posttrial motion results in a procedural default. See *People v. Coleman*, 129 Ill. 2d 321, 340 (1989); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Andras*, 241 Ill. App. 3d 28, 36 (1992).

¶ 43 Defendant argues, however, that the doctrine of plain error should avert the forfeiture. See *Enoch*, 122 Ill. 2d at 187. An error can qualify as a plain error if the error was made in a case that was close from an evidentiary point of view. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Alternatively, even if the case was not close, an error can qualify as a plain

error if the error, in and of itself, was so serious as to threaten the integrity of the judicial process. *Id.* Defendant invokes both theories of plain error.

¶ 44 The plain error, according to defendant, is the State's use, as evidence against him in the trial, of the statements he made while alone in the squad car—statements that, he argues, should have been excluded because they were the fruit of his unconstitutional warrantless arrest.

¶ 45 Unless there was a "clear or obvious error," there was no plain error. (Internal quotation marks omitted.) *Id.* Therefore, we ask whether it is clear or obvious that the warrantless arrest of defendant was indeed unconstitutional.

¶ 46 Under the fourth amendment to the United States Constitution (U.S. Const., amend. IV), which the fourteenth amendment (U.S. Const., amend. XIV) makes applicable to the states (*Payton v. New York*, 445 U.S. 573, 576 (1980)), and under article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6), individuals have the right to be secure in their persons against unreasonable seizures. An arrest is a seizure of an individual's "person," or body (*People v. Melock*, 149 Ill. 2d 423, 436 (1992))—and, in the present case, there is no dispute that police officers arrested defendant in the parking lot of the hotel and that they did so without a warrant. An arrest is an unreasonable seizure within the meaning of the fourth amendment and article I, section 6, unless the arrest is (1) supported by probable cause *or* (2) authorized by a warrant based on probable cause. *People v. Lee*, 214 Ill. 2d 476, 484 (2005).

¶ 47 To effectuate this constitutional right against unreasonable seizures of the person, section 107-2(1)(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/107-2(1)(c) (West 2014)) allows a warrantless arrest (by which we mean an arrest made in the absence of a judicial warrant) only if a peace officer "has reasonable grounds to believe that the person is committing or has committed an offense." The statutory term "reasonable grounds" has the same meaning

that the term "probable cause" has in case law. *Id.* A police officer has probable cause, or reasonable grounds, to arrest someone if "the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Love*, 199 Ill. 2d 269, 279 (2002).

¶ 48 Thus, for purposes of our plain-error review, the question is as follows. Given the evidence in the record, is it clear or obvious that the police lacked probable cause to arrest defendant? See *Walker*, 232 Ill. 2d at 124; *Lee*, 214 Ill. 2d at 484. The answer is no. If anything is clear or obvious from the record, it is that the police did have probable cause to arrest him. A case that the State cites, *People v. Johnson*, 408 Ill. App. 3d 107 (2010), illustrates why.

¶ 49 In *Johnson*, the Chicago police pulled over a car for failing to come to a complete halt at a stop sign. *Id.* As a police officer was about to ask the driver for his driver's license, the defendant, a passenger, got out of the car and took off running. *Id.* The police pursued the defendant and caught him less than a block away. *Id.* Because it was a high-crime neighborhood, the police officers, for their own safety, put handcuffs on the defendant before patting him down for weapons. *Id.* at 110. During the pat-down, they found a pistol (*id.*), which led to a charge of aggravated unlawful use of a weapon (*id.* at 108).

¶ 50 The trial court granted a motion by the defense to "suppress the handgun." *Id.* at 110-11. The court reasoned along these lines. The frequency of criminal activity in the area of the traffic stop justified an investigatory stop of the defendant—otherwise known as a "*Terry* stop" (see *Terry v. Ohio*, 392 U.S. 1, 22 (1968))—of the defendant. *Johnson*, 408 Ill. App. 3d at 110. Nevertheless, handcuffing him transformed the *Terry* stop into an arrest without probable cause, and the pistol was the fruit of that unlawful arrest. *Id.*

¶ 51 The State appealed (*id.* at 108-09), and, on appeal, the appellate court disagreed with the State that "handcuffing [the] defendant was a proper restraint during a *Terry* stop" (*id.* at 111). The appellate court agreed, however, with the State's other argument, that the police actually had probable cause to arrest the defendant and that handcuffing him was a permissible means of effectuating that arrest. *Id.*

¶ 52 The appellate court explained that when the vehicle was detained in a traffic stop, both the driver and the passengers were subject to that detention—regardless of whether the police had cause to suspect the passengers of any criminal activity. *Id.* at 120. The moment the vehicle was pulled over for a traffic offense, any passenger in that vehicle was seized; "such a stop communicate[d] to a reasonable passenger that he [was] not free to leave." *Id.* at 120-21. The fact that the passenger was not the driver who had committed the traffic offense was "irrelevant to the validity of [the passenger's] detention during the traffic stop." *Id.* at 122. Because rolling past a stop sign was illegal—and because the seizure of the vehicle and, hence, of its occupants was "lawful at its inception"—"[the] defendant's attempt to evade the police [by] running from the vehicle gave the officers probable cause to arrest him for obstructing authorized action by a peace officer[,] in violation of section 31-1(a) of the [Illinois Vehicle] Code" (720 ILCS 5/31-1(a) (West 2008)). *Johnson*, 408 Ill. App 3d at 122.

¶ 53 In the present appeal, defendant admits that "because the driver of the vehicle [(*i.e.*, the Tahoe)] committed a traffic infraction, officers had probable cause to initiate a traffic stop of the vehicle." He argues, however: "[T]he record *** does not establish that the officers ever ordered [defendant] to stop running[,] nor does it indicate that [defendant] had knowledge of the police pursuit until his eventual seizure." But an order to stop running was unnecessary. And whether defendant knew the police were pursuing him, after he took off running, is

irrelevant. Of course, to have knowingly fled the scene of a traffic stop, defendant would have had to know, in the first place, that the vehicle in which he was riding had been stopped by the police. Under the circumstances, a reasonably cautious person would have believed that defendant probably had *that* knowledge. The flashing police lights were an order for the driver and the passengers to stop—and to stay put until a police officer signified to them that they were free to leave. See *id.* at 120-21. By violating that order, by getting out the Tahoe and running, defendant, a passenger in a *lawfully* detained vehicle, committed the offense of resisting or obstructing a peace officer—a Class A misdemeanor (720 ILCS 5/31-1(a) (West 2014)), for which a person could be arrested (*Johnson*, 408 Ill. App. 3d at 122). The cases that defendant cites in which people walked or ran away from *unlawful or unjustified* detentions are inapposite. See *People v. Shipp*, 2015 IL App (2d) 130587, ¶ 50; *People v. Moore*, 286 Ill. App. 3d 649, 654 (1997).

¶ 54 In sum, we do not find it to be clear or obvious that Kerner and Mecum lacked probable cause to arrest defendant. Therefore, we do not find it to be clear or obvious that their warrantless arrest of defendant was unconstitutional. And, it further follows, we do not find it to be clear or obvious that the statements defendant made to himself while handcuffed in the backseat of the squad car should have been excluded from the trial. In short, we find no clear or obvious error in the admission of those statements—and, thus, we find no plain error. See *Walker*, 232 Ill. 2d at 124. The forfeiture stands. See *Coleman*, 129 Ill. 2d at 340; *Enoch*, 122 Ill. 2d at 186; *Andras*, 241 Ill. App. 3d at 36.

¶ 55 3. *Defendant's Claim That Trial Counsel Rendered Ineffective Assistance by Causing the Forfeiture*

¶ 56 Defendant accuses his trial counsel of rendering ineffective assistance by failing to amend either of the motions for suppression so as to allege that the warrantless arrest of

defendant was unconstitutional and that the statements he made while alone in the squad car should be suppressed for that reason (not just for *Miranda*-related reasons).

¶ 57 A claim of ineffective assistance has two elements: (1) counsel's performance was objectively unreasonable when compared to prevailing professional standards; and (2) there is a reasonable probability that, but for counsel's objectively unreasonable performance, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81. "[A] 'reasonable probability' is defined as a showing sufficient to undermine confidence in the outcome, rendering the result unreliable or fundamentally unfair." *Id.*

¶ 58 We may "dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong," without making a determination as to counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17. That is what we will do in the present case. We find no prejudice from trial counsel's decision not to amend a motion for suppression so as to claim the arrest was unconstitutional. There is no reasonable probability that the trial court, "act[ing] according to law," would have found a lack of probable cause to arrest defendant. *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984).

¶ 59 "In dealing with probable cause, *** we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (Internal quotation marks omitted.) *Love*, 199 Ill. 2d at 279. Keeping in mind that probable cause is an eminently commonsensical matter, consider the facts of which the arresting officers, Mecum and Kerner, were aware at the time they arrested defendant. See *id.*

¶ 60 The driver of the Tahoe had been holding a cell phone to his ear while driving. The minivan tailed the Tahoe, and although the minivan was unmarked, it turned on its police

lights for the final three or so blocks of the pursuit. The moment the Tahoe came to a stop, defendant, a passenger, got out of the Tahoe and took off running, and he kept running for 500 meters, until Mecum and Kerner caught up with him.

¶ 61 A reasonably cautious police officer, experiencing those facts, would, first of all, regard the traffic stop as lawful. See 625 ILCS 5/12-610.2(b) (West 2014). Second, this reasonably cautious police officer would infer it was at least *probable* that when fleeing the scene of the traffic stop, defendant did so with the required *mens rea* of knowledge and that he thereby had committed the offense of obstructing or resisting a peace officer (720 ILCS 5/31-1(a) (West 2012) ("A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his or her official capacity commits a Class A misdemeanor.")). See *Love*, 199 Ill. 2d at 279.

¶ 62 Thus, we find no reasonable probability of a different outcome in this case if trial counsel had amended either of the motions for suppression so as to allege that the warrantless arrest of defendant was unconstitutional. For the reasons we have explained, the omission of such an amendment does not undermine our confidence in the outcome. It is unlikely that the trial court, applying common sense and "act[ing] according to law," would have been convinced by such an amendment. *Strickland*, 466 U.S. at 694-5.

¶ 63 B. The Adequacy of the Trial Court's Preliminary Inquiry Into Defendant's *Pro Se* Claim of Ineffective Assistance of Counsel

¶ 64 Defendant argues the trial court failed to make a sufficient inquiry into his *pro se* posttrial claim of ineffective assistance of counsel.

¶ 65 Under *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny, if a defendant makes a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must examine the factual basis underlying the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court

need not appoint new counsel for the defendant merely because he or she has raised a claim of ineffective assistance. *Id.* at 78. Instead, "the trial court must conduct an adequate inquiry ***, that is, [an] inquiry sufficient to determine the factual basis of the claim." (Internal quotation marks omitted.) *People v. Ayres*, 2017 IL 120071, ¶ 11. Having ascertained the factual basis of the claim, the court then should determine whether the claim has any potential merit. "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." (Internal quotation marks omitted.) *Id.*

¶ 66 What passes for an adequate inquiry depends on the specific case. Each case is different. Sometimes, maybe even most of the time—but not always—it will be necessary to ask questions of the trial counsel. *Id.* ¶ 12. If the factual basis of the *pro se* motion is obscure, it might be necessary to seek clarification from the defendant, as well. *Id.* If, on the other hand, the *pro se* motion is clear as to the facts on which it relies, a dialogue with the trial counsel or defendant might be unnecessary, and the court can make its decision on the basis of the legal sufficiency or insufficiency of the *pro se* allegations on their face. *Id.*

¶ 67 In our *de novo* review (see *People v. Jolly*, 2014 IL 117142, ¶ 28), defendant's *pro se* posttrial motion seems clear and straightforward. The legal theory of the *pro se* motion is essentially as follows. It was a violation of the Illinois eavesdropping statute (720 ILCS 5/14-1 *et seq.* (West 2014)) to electronically record defendant talking to himself in the squad car. He made some highly damaging statements while talking to himself in the squad car, most notably his expression of anxiety that the police would find the "banger." If only in one of the motions for the suppression of statements, or in an amendment to thereto, trial counsel had cited the

eavesdropping statute and had made a reasoned argument that the in-car recording was inadmissible under the statute, the trial court would have barred the statement about the "banger" from being presented as evidence in the trial. Considering the absence of defendant's fingerprints or DNA on any of the physical evidence, including the pistol, there is a reasonable probability that such a ruling would have made a difference in the verdicts.

¶ 68 The fatal weakness of this theory is that the eavesdropping statute bars, from use in a criminal trial, only "evidence obtained in violation of this Article," that is, article 14 of the Criminal Code of 2012. 720 ILCS 5/14-5 (West 2014); *e.g.*, 720 ILCS 5/art. 14 (West 2014). The in-car electronic recording could have violated article 14 only if it was a recording of a "private conversation" (720 ILCS 5/14-2(a) (West 2014)), defined as "any oral communication between [two] or more persons" (720 ILCS 5/14-1(d) (West 2014)). When saying, " '[D]on't find the banger, that's all I'm asking, don't find the banger' " and " 'No, no, no, no,' " defendant was not having a private conversation with another person. Instead, he was alone in the squad car, talking to himself. That much is clear from the record, from both the testimony and the admissions. Therefore, the eavesdropping statute is, by its terms, inapplicable. No amount of additional factual development could have changed the text of the eavesdropping statute.

¶ 69 Granted, in his *pro se* motion, defendant also faults his trial counsel for advising him he could receive day-for-day good-conduct credit. Defendant argues in his petition for rehearing that, actually, he must serve at least 85% of his prison sentence for armed violence and being an armed habitual criminal and at least 75% of his prison sentence for manufacturing or delivering a controlled substance. In this connection, he cites "730 ILCS 5/3-6-3(2)," which is not a correct citation. In any event, defendant appears to be correct at least with respect to his conviction of being an armed habitual criminal. Section 3-6-3(a)(2)(ii) of the Unified Code of

Corrections provides: "[A] prisoner serving a sentence for *** being an armed habitual criminal *** shall receive no more than 4.5 days of sentence credit for each month of his or her sentence of imprisonment ***." 730 ILCS 5/3-6-3(a)(2)(ii) (West 2014). Contrary to the advice his trial counsel allegedly gave him, he cannot receive day-for-day good-conduct credit against his prison sentence for being an armed habitual criminal, but, rather, he must serve at least 85% of that sentence. See *id.*

¶ 70 It seems the only theory that defendant could build around that alleged erroneous advice would be a theory of ineffective assistance in plea negotiations. And, indeed, in his petition for rehearing, he argues: "The practical harm [defendant] suffered was that he was denied a *Krankel* review of an ineffectiveness claim that, if true, would have resulted in him receiving erroneous legal advice during the plea negotiation process."

¶ 71 The trouble is that, in his *pro se* motion, defendant said nothing about plea negotiations. He did not even mention plea negotiations. Under *Krankel* and its progeny, the trial court must "examine the factual basis of *the defendant's claim*," and a claim of ineffectiveness in plea negotiations would be inconsistent with the claim that defendant actually made in his *pro se* motion. (Emphasis added.) *Moore*, 207 Ill. 2d at 77-78. Defendant claimed that, but for the alleged ineffective assistance, he would have been *acquitted*. The final numbered paragraph of his *pro se* motion asserts: "The above[-]mentioned points resulted in the State erroneously being allowed to use the illegal yet highly prejudicial evidence *resulting in my guilty conviction*." (Emphasis added.) The implication is that, but for trial counsel's supposedly substandard motion practice, *no guilty conviction would have resulted*. Thus, the position that defendant took in his *pro se* motion was that this case should have ended in his acquittal, not in his pleading guilty in return for a negotiated sentence. See *People v. Hale*, 2013 IL 113140, ¶ 21 (to establish prejudice

for purposes of a claim of ineffective assistance in plea negotiations, the defendant must show "a reasonable probability that he would have accepted the earlier plea offer had he been afforded effective assistance of counsel"). Again, the trial court must examine the factual basis of the claim that defendant actually raises in his *pro se* posttrial motion (see *id.*; *Ayres*, 2017 IL 120071, ¶ 22), not some other, inconsistent claim unmentioned in the motion.

¶ 72 Therefore, we adhere to our conclusion that the trial court performed an adequate preliminary inquiry pursuant to *Krankel*, and we deny the petition for rehearing.

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, we affirm the trial court's judgment, and we assess $50 in costs against defendant. 55 ILCS 5/4-2002 (West 2016).

¶ 75 Affirmed.

¶ 76 JUSTICE HOLDER WHITE, dissenting.

I respectfully dissent. In this case, the trial court's inquiry into defendant's allegations of ineffective assistance of counsel consisted of the court reading defendant's motion. In fashioning the order denying defendant's motion, the court also relied on its knowledge of trial counsel's performance. Under the facts of this case, the court's inquiry was inadequate.

¶ 77 The trial court's order fails to fully resolve defendant's claim that his counsel erroneously advised him that he would serve 50% of any sentence imposed if convicted on any of the counts against him. While the court did address defendant's armed violence conviction, it failed to address this claim as it related to defendant's conviction for being an armed habitual criminal.

¶ 78 "The purpose of the preliminary inquiry is to ascertain the underlying factual basis for the ineffective assistance claim and to afford a defendant an opportunity to explain and support his claim." *Ayres*, 2017 IL 120071, ¶ 24. In light of how this allegedly erroneous advice took place, a conversation between counsel and defendant, the court had no way of knowing whether there was merit to the claim. Although defendant's motion did include some information as to the basis for his claims, the absence in the court's order of a resolution of this claim demonstrates the need for additional information.

¶ 79 Here, due to the nature of the trial court's inquiry, defendant was deprived of the opportunity to flesh out his claim as it related to counsel's allegedly erroneous advice about how he would serve his sentence. *Id.* ¶ 20. Thus, I would remand this matter and direct the court make an inquiry sufficient to allow it to determine the factual basis of the claim and either appoint new counsel or deny the *pro se* motion.