SECOND DIVISION
May 21, 2013

No. 1-11-1793

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 17939
	)	
DARION TAYLOR,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on aggravated unlawful use of a weapon conviction affirmed over defendant's contention that he received ineffective assistance of trial counsel; fines and fees order corrected.

¶ 2 Following a bench trial, defendant Darion Taylor was convicted of aggravated unlawful use of a weapon and sentenced to 18 months' probation. On appeal, he contends that trial counsel was ineffective for failing to argue in his motion to suppress that the initial impoundment of defendant's car was invalid, and thus, the subsequent inventory search was illegal. In the alternative, defendant maintains that if the impoundment was valid, his counsel was ineffective

for failing to argue that the inventory search was illegal, thereby requiring suppression of the firearm discovered during the search. Defendant also requests that the fines and fees order be corrected.

¶ 3 The record shows that during the afternoon of September 8, 2009, defendant was driving southbound on Luna Avenue from Wabansia Avenue in Chicago, when police observed that his Illinois registration plate had expired. The officers stopped defendant to investigate, which led to defendant's arrest for possession of cannabis, possession of a firearm without a valid firearm owner's identification (FOID) card, unlawful use of a weapon, and aggravated unlawful use of a weapon. Defendant's vehicle was impounded and in the inventory search that followed, police discovered a firearm under the hood. As a result, defendant was charged by information with two counts of aggravated unlawful use of a weapon, predicated on his possession of cannabis and not having a current FOID card.

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and suppress the evidence resulting therefrom. He alleged that while driving on September 8, 2009, he had a reasonable expectation of privacy, and this conduct was such that no reasonable person could have inferred that he was in violation of any law. He thus requested the court to bar the State from using at trial any of the evidence obtained from the unreasonable stop, arrest, search and seizure.

¶ 5 At the suppression hearing, Chicago police officer Paul Peraino testified that at 1:15 p.m on September 8, 2009, he and his partners, Officers Michael Chernik and Rebecca Weathers, observed defendant driving with a passenger in the area of 1602 North Luna Avenue. Officer Peraino noticed that defendant's rear registration plate had expired, and pulled him over to investigate. As he approached the open driver's side window, he detected the smell of cannabis coming from inside the vehicle. The officer testified to his experience and training in the detection of cannabis, that he had been on the scene of hundreds of arrests with both fresh and burnt cannabis, and that he had observed offenders smoking cannabis. After detecting this

unique odor, Officer Peraino observed two small, burnt, brown, hand-rolled cigars in plain view on the center console between the driver's and passenger's seats. Based on his training and experience, he "reasonably believed that to be marijuana cigarettes."

¶ 6 Officer Peraino then ordered defendant out of his vehicle, detained him, and recovered the two suspect marijuana cigarettes, which he confirmed were "what [he] suspect[ed]." He placed defendant under arrest, searched him, and recovered a black sock which defendant had tied to his shorts underneath his pants. The sock contained two clear plastic bags with a green leafy substance inside them. The officer made an immediate cursory search of the inside of the vehicle for weapons and found none.

¶ 7 Officer Peraino further testified that Officer Chernik drove defendant's vehicle to the police district and completed "a tow inventory and vehicle impoundment" of it. The inventory procedure required a search underneath the hood of the vehicle and a report of the information obtained. Officer Chernick testified that he found a firearm next to the battery under the hood of defendant's vehicle, and that defendant subsequently made an inculpatory statement regarding the firearm.

¶ 8 The State moved for a directed finding arguing that the testimony established probable cause for the stop based on the invalid registration, and the officers' observation of two burnt marijuana cigarettes in plain view in the vehicle. The State further argued that the car was properly taken to the police district and that the impoundment inventory which revealed the firearm in the engine compartment of the vehicle was also proper.

¶ 9 Defense counsel responded that the inventory exception to the fourth amendment requires police to perform a routine, noncriminal inventory of the contents of the vehicle so the owner of the vehicle does not later accuse police of stealing something. He explained that the inventory should be for the protection of police, should be a noncriminal, noninvestigatory inventory of the contents, and should not be a search. Counsel further argued that:

> "[i]n this case it was more than just an inventory, it was a search. The police were investigating to see if there was evidence in the vehicle, and it's not a true inventory."

¶ 10 The trial court found that the search was done as part of the inventory procedure, that the tow report had a section asking police to "check yes or no as to what the search revealed from under the hood," and that the search was conducted as part of the inventory procedure. The court also found that Officer Peraino testified credibly as to the grounds for the stop, and the odor of cannabis which was also in plain view. The court concluded that there were reasonable grounds for the officer's actions "all along," and that the inventory was done "in accordance with the procedures," and thus granted the State's motion for a directed finding on defendant's suppression motion.

¶ 11 At the subsequent trial, the parties stipulated to the prior testimony of Officer Peraino at the suppression hearing. Officer Michael Chernik then testified that at 1:15 p.m. on September 8, 2009, he was working with his partners, Officers Peraino and Weathers, in plain clothes and in an unmarked vehicle when they observed defendant driving in the area of 1602 North Luna Avenue. He participated in the traffic stop of defendant which followed, and discovered two blunts of suspect cannabis on the center console of defendant's vehicle. The parties stipulated that the recovered hand-rolled cigars tested positive for cannabis. Officer Chernik further testified that they arrested and searched defendant and his passenger, Travis Moon, and found cannabis on both of them.

¶ 12 Officer Chernik also testified that defendant's car was impounded for narcotics and that he drove it to the police district where he performed a vehicle inventory search to see if anything valuable was in the car, and if anything was missing. As part of the inventory process, he checked the exterior and interior for damage, as well as underneath the hood of the car to see if any major components were missing. He was also required to disclose his findings on an

inventory report, and to note anything missing in the engine. When Officer Chernik opened the hood of defendant's car, he saw a firearm next to the battery, and inventoried it. Officer Chernik also spoke to defendant, who told him that he had the firearm since he was 15 years of age, and that he carried it for protection.

¶ 13 The State introduced a certified document from the Firearm Service Bureau of the Illinois State Police, showing that defendant had never been issued a FOID card. The State also introduced a certified record from the Secretary of State showing that the car in question was registered to and owned by defendant.

¶ 14 At the close of evidence, the court found defendant guilty of aggravated unlawful use of a weapon. In doing so, the court found the officers' testimony credible, and noted that defendant had admitted that he owned the firearm. The court also noted that this was a constructive possession case in which the State showed that defendant had knowledge and immediate and exclusive control over the area where the weapon was found, as evidenced by the proof of his ownership of the car that he was driving at the time of the stop, and that he had not been issued a currently valid FOID card.

¶ 15 Defendant filed a motion for a new trial alleging that the act of driving a motor vehicle with a loaded firearm under the hood was insufficient to prove that he carried a firearm in the vehicle, that because he did not actively employ the firearm in this case, it was not carried, and that the firearm was inaccessible to him because it was in the engine compartment of the vehicle. The court denied the motion, and defendant appealed.

¶ 16 In this court, defendant maintains that his trial counsel was ineffective for failing to argue that the gun recovered during the search should have been suppressed because the impoundment of his vehicle was invalid, and thus, the subsequent inventory search of his car was illegal. Defendant maintains that this suppression argument had a reasonable probability of success and

would have changed the outcome of the trial as the firearm would not have been introduced into evidence.

¶ 17 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and but for that deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). It is not enough that another lawyer, with the benefit of hindsight, would have acted differently than trial counsel. *Rodriguez*, 364 Ill. App. 3d at 312. Defendant must overcome the strong presumption that counsel's inaction or action was the result of sound trial strategy to establish deficient performance. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). It is not the appellate court's function to second guess tactical decisions by trial counsel. *People v. Hawk*, 93 Ill. App. 3d 175, 178 (1981).

¶ 18 In this case, trial counsel filed a motion to suppress on grounds defendant now claims were insufficient. He maintains that counsel should have challenged the validity of the impoundment of his vehicle and the subsequent inventory search and his failure to do so, effectively contributed to his conviction.

¶ 19 Subject to specific exceptions, the fourth amendment guarantee to be free from unreasonable searches and seizures, requires a warrant supported by probable cause. *People v. Sanders*, 2013 IL App (1st) 102696, ¶13. A warrant to search a vehicle need not be obtained, however, where police 1) have probable cause to believe that the vehicle was used in or contains evidence of a crime, 2) obtain a valid consent to search, 3) search the vehicle incident to a lawful arrest, or 4) where the vehicle is lawfully impounded and an inventory search results. *People v. Gaines*, 220 Ill. App. 3d 310, 320 (1991).

¶ 20 Defendant first maintains that his counsel was ineffective for failing to argue that the impoundment was unlawful which would then invalidate the inventory search that followed. The threshold question thus is whether the impoundment was proper since the need and justification for the inventory search arise from the impoundment. *People v. Spencer*, 408 Ill. App. 3d 1, 8 (2011).

¶ 21 Defendant contends that the impoundment of his vehicle was invalid because it was not impeding traffic, threatening public safety, or inconveniencing the public. In support of his contention, defendant cites *Spencer,* 408 Ill. App. 3d at 2-11 and *People v. Clark*, 394 Ill. App. 3d 344, 345-49 (2009) where this court noted that police may lawfully impound a vehicle pursuant to their community caretaking function when the vehicle is impeding traffic, or threatening public safety and convenience. In *Spencer*, after defendant exited his vehicle and was arrested for pandering, police conducted a custodial inventory search of his vehicle and discovered a metal lock box which contained cocaine. *Spencer*, 408 Ill. App. 3d at 2-3. This court held that the policy of the Rolling Meadows Police Department to tow and inventory a car that would be left unattended was insufficient to justify impoundment where there was no evidence that the vehicle was impeding traffic, illegally parked, or threatening public safety and convenience. *Spencer*, 408 Ill. App. 3d at 8-11. Accordingly, we found that the warrantless search of defendant's vehicle could not be justified as an inventory search. *Spencer*, 408 Ill. App. 3d at 8-11.

¶ 22 In *Clark*, police stopped defendant for failing to make a complete stop at a stop sign, and after he could not produce identification, he was arrested, and a custodial inventory search was conducted of his car which revealed cocaine in a rear ashtray of the vehicle. *Clark*, 394 Ill. App. 3d at 345. This court found insufficient evidence to show that the officer was acting pursuant to standarized police procedure in deciding to tow the vehicle or where it was located, leading us to

conclude that there was no cognizable reason for the impoundment to justify the search. *Clark*, 394 Ill. App. 3d at 349.

¶ 23 Here, unlike *Clark* and *Spencer*, police observed narcotics in plain view on the center console of the car thus providing probable cause to believe that the car contained evidence of a crime. *Gaines*, 220 Ill. App. 3d at 320. In addition, the evidence showed that the officers followed standarized police procedure in impounding the vehicle, and subjecting it to an inventory search which required checking under the hood where they found the gun.

¶ 24 Moreover, as the State points out, the impoundment was mandated under section 7-24-225 (Chicago Municipal Code §7-24-225 (amended Dec. 15, 2004)) of the Municipal Code of Chicago (Code). That section provides, in pertinent part, that any motor vehicle that contains any controlled substance or cannabis shall be subject to seizure and impoundment pursuant to this section, and further that:

> (b) Whenever a police officer has probable cause to believe that a vehicle is subject to seizure and impoundment pursuant to this section, the police officer shall provide for the towing of the vehicle to a facility controlled by the city or its agent." Chicago Municipal Code §7-24-225(a), (b) (amended Dec. 15, 2004).

¶ 25 Under the facts of this case, the officers saw the cannabis, providing them probable cause to believe that the vehicle contained evidence of a crime, and thus were required to impound it. The evidence further showed that the search following the lawful impoundment was conducted in good faith pursuant to reasonable standarized procedures and not as a pretext for an investigatory search. *People v. Hundley*, 156 Ill. 2d 135, 138 (1993). Accordingly, counsel cannot be deemed incompetent for failing to challenge the impoundment in the motion to suppress. *Perry*, 224 Ill. 2d at 341-42.

¶ 26 In reaching this conclusion, we find *People v. Nash*, 409 Ill. App. 3d 342 (2011), analogous to the case at bar. In *Nash*, defendant was driving with a suspended license and deemed to be operating an uninsured vehicle, tantamount to a disabled vehicle because it could not be operated under section 6-303(e) (625 ILCS 5/6-303(e) (West 2008)) of the Vehicle Code. Under those circumstances, the reviewing court in *Nash* concluded that the impoundment mandated by section 6-303(e) furthered police community caretaking functions and was reasonable under the fourth amendment. *Nash*, 409 Ill. App. 3d at 350. Here, where the impoundment was required by section 7-24-225 of the Code because the car contained narcotics, and the officers detailed their adherence to the procedures for impounding and inventorying it, we likewise find that the search was reasonable under the fourth amendment. *Nash*, 409 Ill. App. 3d at 358.

¶ 27 Defendant, nonetheless, maintains in his reply brief that police did not have probable cause to believe that the car contained drugs at the time they towed it to sanction the impoundment under section 7-24-225 of the Code. We observe, however, that in his opening brief defendant asserted that the police saw "a marijuana blunt in plain view." This is consistent with the testimony of Officers Peraino and Chernik who testified that they saw in plain view two marijuana burnt cigars on the center console between the passenger's and driver's seats, and based on their experience and training they believed these cigars to contain cannabis. In addition, Officer Peraino smelled cannabis coming from inside the vehicle, and found cannabis on defendant in a sock tied to his shorts. Under these facts, the officers clearly had probable cause to believe that the car contained cannabis (*People v. Damian*, 374 Ill. App. 3d 941, 948 (2007); *People v. Walters*, 256 Ill. App. 3d 231, 238 (1994); *People v. Stout*, 106 Ill. 2d 77, 86-87 (1985)), and thus lawfully impounded it under section 7-24-225 of the Code (Chicago Municipal Code §7-24-225 (amended Dec. 15, 2004)).

¶ 28 Notwithstanding, defendant replies that where a defendant has a privacy expectation in something that is seized, the question is not whether the seizure is authorized by state law, but, rather, whether it was reasonable under the fourth amendment. He further claims that the search of the car was not justified under the police community caretaking function, but was pretextual for a criminal investigatory search, and therefore, was unreasonable. We find no merit in these assertions where, as noted, police had probable cause to believe that the vehicle contained evidence of a crime, *i.e.*, cannabis, and thus did not need a warrant to search it, and the record shows that the inventory search that followed was reasonable under the fourth amendment. *Gaines*, 220 Ill. App. 3d at 320.

¶ 29 In the alternative, defendant claims that even if the impoundment was valid, counsel was ineffective for failing to argue that the inventory search was illegal. He maintains that if counsel had raised this argument, the gun, which was discovered during the inventory search, would have been suppressed, and the State would not have been able to prove him guilty. The State responds that counsel argued this issue at the suppression hearing, and thus his contrary claim will not support his assertion of ineffective assistance of counsel.

¶ 30 The record shows that during the suppression hearing, counsel specifically argued that the inventory exception to the warrant requirement should be a "noncriminal, noninvestigatory inventory of the contents," and not a search. Counsel then stated that:

> "[i]n this case it was more than just an inventory, it was a search. The police were investigating to see if there was evidence in the vehicle, and it's not a true inventory."

Without using the word, "pretext," counsel essentially argued that the police were doing an investigatory, rather than an inventory search which was improper. Thus, his claim to the contrary is belied by the record.

¶ 31 Nonetheless, defendant further replies that even assuming that counsel did make an appropriate argument, this court should review the court's suppression ruling for error. Issues not raised in the opening brief cannot be argued for the first time in a reply brief, and, accordingly, we find that defendant has forfeited this issue for review. *People v. Burney*, 2011 IL App (4th) 100343, ¶78. Furthermore, defendant did not raise this issue in his post-trial motion, and thus, further waived it for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 32 In sum, defendant has failed to present a cognizable clam of ineffective assistance of trial counsel where counsel's failure to include this issue in his motion to suppress was clearly a matter of trial strategy as the police had probable cause that the car contained narcotics thereby requiring its impoundment and subjecting it to an inventory search. *Perry*, 224 Ill. 2d at 341-42.

¶ 33 Lastly, defendant maintains and the State concedes that the fines and fees order should be corrected to properly reflect a total of $665 and not $680. We agree, and therefore correct the order to properly reflect a total of $665. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 34 In light of the foregoing, we affirm the judgment of the circuit court of Cook County, and correct the fines and fees order as indicated.

¶ 35 Affirmed, as modified.