2017 IL App (1st) 140834-U
Nos. 1-14-0834 and 1-14-1920 (Cons.)
April 11, 2017

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 12 CR 3290
	)	
JESSIE WILLIAMS,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated vehicular hijacking with a firearm is affirmed in appeal No. 1-14-0834 where the evidence showed that he committed the offense while armed with a firearm. Motion to reconsider sentence was untimely and thus this court improvidently allowed defendant to file a late notice of appeal in appeal No. 1-14-1920 from the dismissal of the motion. We have no jurisdiction to consider the merits of appeal No. 1-14-1920 and therefore do not consider the *Krankel* issues raised therein.

¶ 2 Defendant's sentence is vacated and the case is remanded to the Juvenile Court for sentencing. The automatic transfer provision of the Juvenile Court Act is constitutional and resentencing cannot take place under the new sentencing provisions contained in Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), because they do not apply retroactively to defendant's case.

> However, remand for resentencing in juvenile court is warranted under the amended provisions of Pub. Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805), which do apply retroactively to defendant's case. Mittimus corrected to reflect one conviction for aggravated vehicular hijacking with a firearm.

¶ 3 Following a bench trial, Jesse Williams, a juvenile defendant, was convicted of two counts of aggravated vehicular hijacking, one based on use of a firearm and the other based on the victim being 60 years of age or older (720 ILCS 5/18-4(a)(4), (a)(1) (West 2012), and the offenses were committed when he was 15 years old. The court sentenced him to concurrent terms of 21 years' imprisonment, which included a 15-year firearm enhancement. 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2012). Defendant appealed his conviction and sentence (No. 1-14-0834). When the trial court dismissed defendant's motion to reconsider sentence as untimely, he filed a second appeal (No. 1-14-1920). We consolidated the appeals.

¶ 4 On appeal, defendant contends: (1) the evidence was insufficient to sustain his conviction for aggravated vehicular hijacking with a firearm ; (2) the court erred in dismissing his motion to reconsider sentence as untimely and in failing to conduct a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984); (3) the automatic transfer provision of the Juvenile Court Act (Act) section 5-130(1) (705 ILCS 405/5-130(1) (West 2012)) is unconstitutional; (4) his case should be remanded for resentencing under new provisions contained in Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), which took effect during the pendency of his appeal; (5) his case should be remanded for resentencing in the juvenile court under Pub. Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805 (West 2014)), which also took effect during the pendency of his appeal; and (6) the mittimus

should be corrected to reflect only one conviction for aggravated vehicular hijacking. We affirm defendant's conviction, vacate his sentence, remand to the Juvenile Court for sentencing and order the mittimus corrected.

¶ 5 BACKGROUND

¶ 6 Defendant was 15 years old when he was charged as an adult with two counts of aggravated vehicular hijacking, four counts of aggravated unlawful use of a weapon and one count each of unlawful possession of a firearm and possession of a stolen motor vehicle.

¶ 7 At trial, Norvel Holmes testified that, on January 16, 2012, he got into his car, a 1993 Buick Roadmaster, near 8551 South Hermitage Avenue in Chicago. As he placed the keys in the ignition, defendant opened the door to the car, pointed a gun at Holmes and told him to exit. Holmes complied with defendant's demand. Defendant then drove away with Holmes' car. Holmes called the police, and went to the police station where he viewed a lineup and identified defendant as the offender. The police also showed Holmes a gun, which he identified as the gun defendant used during the offense.

¶ 8 Holmes identified defendant in court as the offender. He testified that the gun defendant had been holding was silver, but could not identify the type of gun. He further testified that he was 66 years old at the time of the incident and used to own a gun, but it had been 40 years since he handled one.

¶ 9 Andre Henderson testified that on January 16, 2012, he was arrested for possession of a stolen motor vehicle and pleaded guilty and received probation. He did not recall if he agreed to testify in defendant's case as part of the probation deal. On January 16, 2012, he was at his house

playing cards with family members and friends when defendant joined them. Defendant and Henderson went to his room to smoke marijuana. Defendant showed Henderson his "little" gun. Defendant recorded a video of Henderson with the gun. Henderson's sister told them police were looking at a car parked at the back of the house. Defendant gave Henderson the keys to the car, told him he had gotten it "somewhere far" and asked him to park the car in front of the house. Henderson then drove the car to his nearby girlfriend's house and parked it. The police arrived and arrested him.

¶ 10 Henderson gave a statement to police and an assistant State's attorney (ASA) in which he told them that defendant's gun was silver, small and had black tape around the handle. At trial, Henderson testified that he did not recall making the statement. He identified a photograph which depicted defendant holding the same gun that Henderson held in the video recorded by defendant.

¶ 11 Officer Marco Gonzalez testified that on January 16, 2012, at 2:45 p.m., he was on patrol with his partner Officer Puchillo when he noticed defendant driving a vehicle that matched the description of a vehicle that had been reported stolen. When defendant had parked and exited the vehicle, Gonzalez looked at the license plate, confirmed that it was the stolen vehicle and set up surveillance. He observed Henderson enter the car and drive away. The officers followed the car. When it stopped and Henderson exited the car, the officers approached. Henderson attempted to flee but was shortly arrested.

¶ 12 Henderson told the officers that he got the car keys from "Black," and pointed to defendant, who was standing 20 feet away on the sidewalk. Officer Gonzalez recognized

defendant as the first person he saw in the stolen vehicle. The officers started to approach defendant but he walked away. They caught sight of him again in an alley. Gonzalez saw defendant holding a "chrome revolver," and then throwing the gun over a fence into one of the neighboring properties.

¶ 13 Officer File recovered the gun, which was inventoried. Officer Gonzalez testified the gun File recovered was the same gun he saw defendant holding. Defendant went inside a nearby house. Shortly thereafter, he was arrested.

¶ 14 Detective Gorman testified that he interviewed Henderson, who told him that defendant had a small, silver gun with black tape around the handle. Gorman testified that Henderson had a photograph on his cellular phone of defendant holding a "silver revolver."

¶ 15 Kirkland Tompkins, defendant's brother, testified that at 2:45 p.m. on January 16, 2012, he was in the area of 66th Street and Winchester Avenue sitting in a car when he saw defendant across the street. He then saw Henderson exit the car in question, and police arrived from "everywhere." Kirkland testified that he did not see defendant with a gun.

¶ 16 Jimmy Tompkins testified that defendant was his nephew's brother. In the afternoon of January 16, 2012, Jimmy was at Henderson's house when defendant walked in. Defendant did not have a gun and Jimmy never saw him with a gun. Jimmy heard a commotion, left the house with defendant, and saw Henderson when he was tazered by police. Jimmy told defendant to go home. When defendant walked towards the back of Henderson's house, Jimmy did not see him with a gun or throw a gun. Police then arrested defendant.

¶ 17 At the close of evidence, the court found defendant guilty of two counts of aggravated vehicular hijacking, one based on use of a firearm and the other based on the victim being 60 years old or older. 720 ILCS 5/18-4(a)(4), (a)(1) (West 2012). In doing so, the court found that Holmes was "very credible," and his testimony "in and of itself" was enough to find defendant guilty.

¶ 18 Motion For New Trial

¶ 19 Counsel filed a motion for a new trial. At the proceeding on the motion, counsel argued that defendant was never seen with a gun by police officers or any civilian other than the complaining witness, who only had a short period of time to observe defendant and the alleged gun. Counsel asked the court to find there was a reasonable doubt as to whether or not defendant possessed a gun.

¶ 20 On March 4, 2014, the trial court denied the motion, finding that Holmes testified "clearly and persuasively" that defendant pointed a gun at him. The court noted that the gun was also recovered and Holmes identified this gun as the one defendant used on him. The court then sentenced defendant to 2 concurrent terms of 6 years' imprisonment plus the 15-year firearm enhancement because the State proved beyond a reasonable doubt that a firearm was used in this incident. Defendant filed a notice of appeal on the same day (No. 1-14-0834), March 4, 2014.

¶ 21 Motion to Reconsider Sentence

¶ 22 On April 7, 2014, the clerk of the court received defendant's *pro se* "motion to reconsider sentence" alleging, in relevant part, that he received ineffective assistance of trial counsel where counsel disregarded his rights, failed to challenge the serious violations and played on his

ignorance of the law and undeveloped mind. He further alleged counsel was ineffective for failing to ask for a fitness hearing and to file a motion to quash arrest and suppress evidence. Defendant also argued the 15-year firearm enhancement was unconstitutional and would "ruin his young life."

¶ 23 On May 2, 2014, the circuit court denied the motion to reconsider sentence, finding it was untimely because it was filed more than 30 days after the date of sentencing. Defendant filed a motion for leave to file a late notice of appeal, which was granted by this court on July 9, 2014 (No. 1-14-1920). The two appeals were consolidated by this court on August 26, 2014.

¶ 24 ANALYSIS

¶ 25 I. Jurisdiction

¶ 26 The threshold issue an appellate court must determine is whether it has jurisdiction over an appeal, even if the issue is not raised by the parties. *Village of Mundelein v. Aaron*, 112 Ill. App. 3d 134, 135. We note that another panel of this court granted a late notice of appeal. Nevertheless, the panel that hears the appeal has an independent duty to determine whether it has jurisdiction and to dismiss the appeal it if lacks jurisdiction. *In re Estate of Giagliardo*, 395 Ill. App. 3d 343, 349 (2009). Therefore, before we address the issues raised by the defendant, we must determine it we have jurisdiction over appeal nos. 1-14-0839 and 1-14-1920. *Relig v. Illinois Department of Revenue*, 152 Ill. 2d 504, 508 (1992).

¶ 27 Illinois Supreme Court Rule 606(b) (eff. Feb. 6, 2013) provides that a notice of appeal must be filed with the clerk of the circuit court within 30 days after entry of the final judgment appealed from or, if a timely post-trial motion directed against the judgment is filed, within 30

days after entry of the order disposing of the last pending post-judgment motion directed against that final judgment. When a timely posttrial or postsentencing motion directed against the judgment has been filed, any notice of appeal filed before entry of the order disposing of all pending postjudgment motions "shall have no effect and shall be stricken by the trial court." Ill. S.Ct. R. 606(b) (eff. Feb. 6, 2013). A new notice of appeal must then be filed within 30 days of the entry of the order disposing of all timely postjudgment motions. Ill. S.Ct. R. 606(b) (eff. Feb. 6, 2013).

¶ 28 Here, the trial court sentenced defendant on March 4, 2014, and defendant filed a notice of appeal challenging his conviction and sentence on the same day, appeal No. 1-14-0834. The entry of a sentence is the final judgment in a case for purposes of appeal. *People v. Salem*, 2016 IL 118693, ¶ 12. Therefore, because defendant's notice of appeal in appeal no. 1-14-10834 was filed on the same day as the entry of his sentence, it was timely filed. Ill. S.Ct. R. 606(b).

¶ 29 Defendant contends that the court erred in dismissing his motion to reconsider sentence as untimely and in failing to conduct a preliminary inquiry pursuant to *Krankel* based on his allegations in the motion. He raises these issues in appeal No. 1-14-1920. The State argues that we have no jurisdiction to review these issues.

¶ 30 Ordinarily, when a notice of appeal is filed, the trial court is divested of jurisdiction and is no longer empowered to enter another order in the cause and appellate jurisdiction attaches *instanter*. *People v. Rowe*, 291 Ill. App. 3d 1018, 1020 (1997). However, some weeks after filing his notice of appeal, defendant filed a *pro se* motion to reconsider sentence, in which he also raised claims of ineffective assistance of counsel. When the trial court dismissed the motion as

untimely, defendant filed a second (late) notice of appeal by leave of court, appeal No. 1-14-1920. We must, therefore, consider the effect of defendant's second notice of appeal.

¶ 31 When a defendant files a timely postsentencing motion after having filed a notice of appeal, the appeal is deemed premature. *People v. Everage*, 303 Ill. App. 3d 1082, 1086 (1999). The motion operates as an implicit motion to dismiss the notice of appeal and renders the notice of appeal ineffective because a final judgment has yet to be entered for purposes of appeal. *Rowe*, 291 Ill. App. 3d at 1020-21. Therefore, if defendant's motion to reconsider was timely filed, his first notice of appeal, No. 1-14-0834, would be negated, the trial court revested with jurisdiction and the running of the time period to appeal would be tolled until the court ruled on the motion. *Id* at 1021. We would then proceed on only defendant's second appeal, No. 1-14-1920.

¶ 32 But defendant's motion to reconsider sentence was not timely filed. A motion to reconsider must be filed within 30 days after sentencing. 725 ILCS 5/116-1 (West 2012). Here, defendant was sentenced on March 4, 2014. As defendant concedes, his postsentencing motion was due on April 3, 2014. It was received by the clerk of the circuit court on April 7, 2014, more than 30 days after sentencing. The date on which a motion is received by the clerk of the circuit court is held to be the filing date of the motion. *People v. Liner*, 2015 IL App (3d) 140167, ¶16. Therefore, because the defendant filed his motion more than 30 days after the date of sentencing, his motion was untimely filed and the trial court did not have jurisdiction to consider the motion and properly dismissed it. Finally, because defendant’s motion to reconsider his sentence was untimely, the motion did not divest the appellate court of jurisdiction or invalidate the earlier

filed March 4, 2014, notice of appeal, No. 1-14-0890. *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 40.

¶ 33 Crucially, as the motion to reconsider sentence was untimely filed, we have no jurisdiction to consider defendant's appeal from the dismissal of that motion and the issues therein (appeal No. 1-14-1920). *People v. Salem*, 2016 IL 118693, ¶¶14-15, 25. Rule 606(b) requires that an appeal be filed within 30 days of the filing of a *timely* postsentencing motion. Ill. S.Ct. R. 606(b). The appellate court has no discretion to forgive a defendant's failure to comply with the timing requirements of Rule 606(b). *Salem*, 2016 IL 118693, ¶19. Therefore, because defendant's postsentencing motion was untimely, we have no jurisdiction to consider appeal No. 1-14-1920, the appeal from the dismissal of the untimely motion. Accordingly, we hold that leave to file the late notice of appeal was improvidently granted and we vacate the order granting the defendant permission to file a late notice of appeal.

¶ 34 Defendant acknowledges that his *pro se* motion to reconsider sentence was received by the circuit court more than 30 days after entry of sentence but nevertheless claims the motion, filed while he was incarcerated, was timely. He asserts a motion is deemed timely filed on the day that it is put in the prison mail by an incarcerated inmate and the proof of service in his motion establishes that he put the motion in the prison mail on March 23, 2014, less than 30 days after the sentencing judgment. He also argues that, since the court received his motion on April 7, 2014, and the two days prior thereto were a Saturday and Sunday, he must have put it in the mail by April 3, 2014, *i.e.* within the requisite 30-day window, or the court would not have received the motion on April 7, 2014.

¶ 35 Pursuant to the date of mailing rule, a court will consider an incarcerated defendant's postsentencing motion timely filed if he placed it in the prison mail system within the requisite 30-day period, regardless of the date on which the clerk's office received or file stamped it. *People v. Blalock*, 2012 IL App (4th) 110041, ¶6. However, "[t]o rely on the date of mailing as the filing date, a defendant must provide proof of mailing by filing a certificate of service that complies with the requirements of Illinois Supreme Court Rule 12(b)(3) (eff. December 9, 2009)." *People v. Shines*, 2015 IL App (1st) 121070, ¶33. At the time defendant filed his motion to reconsider sentence, Rule 12(b)(3) provided that service by mail is proved:

> "by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail or delivered the document to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid."[1] Ill. S.Ct. R. 12(b)(3) (eff. Dec. 9, 2009).

¶ 36 The proof of service in defendant's motion to reconsider sentence was neither notarized

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[1] Effective September 19, 2014, Rule 12 was amended to add the following provision:

> "in case of service by mail by a *pro se* petitioner from a correctional institution, [service is proved] by affidavit, or by certification as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)) of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered." Ill. S.Ct. R. 12(b)(4) (eff. Sept. 19, 2014).

There is no indication in the rule that our supreme court intended it to be retroactive. Accordingly, we apply the rule in effect at the time of defendant's sentencing. Further, assuming *arguendo* that the amended rule did apply retroactively, the proof of service in defendant's postsentencing motion did not comply with the very specific certification requirements of section 1-109 of the Code and was, therefore, insufficient to prove timely mailing.

nor sworn to by a person of authority. Accordingly, the proof of service does not meet the requirements of Rule 12(b)(3) and the date of mailing rule does not apply here. *People v. Tlatenchi*, 391 Ill. App. 3d 705, 710-16 (2009); *Shines*, 2015 IL App (1st) 121070, ¶33; Ill. S. Ct. Rule 12(b)(3) (eff. Jan. 1, 2016). The trial court was therefore correct in finding defendant's motion to reconsider sentence was untimely because it was filed more than 30 days after the entry of the March 4, 2014, sentencing order.

¶ 37 The fact that the court received the motion on April 7, 2014, does not lead to an inference that the motion must have been mailed by April 3, 2014, as the mailbox rule "does not allow for an inference." *Shines*, 2015 IL App (1st) 121070, ¶32. Accordingly, the postsentencing motion was untimely and we cannot consider an appeal based on the dismissal of that motion.

¶ 38 Defendant also contends that we can review his *Krankel* issue, the allegations of ineffective assistance of counsel raised in the motion to reconsider sentence. However, once a notice of appeal has been filed, the trial court loses jurisdiction of the case and may not entertain a *Krankel* motion raising a *pro se* claim of ineffective assistance of counsel. *People v. Patrick*, 2011 IL 111666, ¶39. Defendant filed his *Krankel* claims *after* he filed his first notice of appeal (No. 1-14-0834). As held above, the first notice of appeal stands because the motion to reconsider sentence filed after the first notice of appeal was untimely. Therefore, since the defendant’s *Krankel* claims were filed after the first notice of appeal, the trial court had lost jurisdiction and could not consider the *Krankel* issue. *Patrick*, 2011 IL 111666, ¶39. As our supreme court noted, a *Krankel* motion is not a substitute for a post-conviction petition. *Id.* The trial court lost jurisdiction to consider defendant's *Krankel* claims raised in the motion to

reconsider sentence and we, therefore, have no authority to address the substantive merits of that motion. *People v. Bailey*, 2014 IL 115459, ¶¶ 28-29.

¶ 39 II. Sufficiency of the Evidence

¶ 40 In appeal No. 1-14-0834, defendant first contends that the evidence was insufficient to sustain his conviction for aggravated vehicular hijacking with a firearm. He contends that the State failed to prove that the weapon used was a firearm because there was no evidence introduced to distinguish it from a toy or replica, or prove the gun was not in a state of disrepair. He maintains there was insufficient evidence to prove that the gun was a "firearm" as defined in the Criminal Code (720 ILCS 5/2-7.5 (West 2012)).

¶ 41 The standard of review where there is a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶12. The reviewing court will not substitute its judgment for that of the trier of fact, here the trial court, on questions involving the credibility of witnesses or the weight of the evidence. *Id*. We will reverse a defendant's conviction only if the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id*.

¶ 42 In order to prove defendant guilty of aggravated vehicular hijacking with a firearm, the State had to prove that defendant knowingly took a motor vehicle from a person or the immediate presence of the person by using force or by threatening the imminent use of force and he carried on or about his person or was otherwise armed with a firearm. 720 ILCS 5/18-4(a)(4)

(West 2012). Defendant contests only whether the evidence establishes that he was armed with a firearm during the offense.

¶ 43 "Firearm" under the Criminal Code is defined with reference to the definition in section 1.1 of the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/1.1 (West 2010)). 720 ILCS 5/2-7.5 (West 2010). As relevant here, section 1.1 of the FOID Act defines a "firearm" as "any device *** which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2010). Section 1.1 specifically excludes pneumatic guns, spring guns, paint ball guns, certain B-B guns and signal guns from the definition. 430 ILCS 65/1.1 (West 2010) However, the fact that a defendant possessed a firearm, as defined under the FOID Act, need not be established by " 'direct or physical evidence' because the 'unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed [with a firearm]' " during the commission of an offense. *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36).

¶ 44 Defendant here contends that the State failed to prove that the item he carried during the incident was a firearm because the State did not prove the make and model or technical size of gun or whether it was operable, the recovered gun was never admitted into evidence, and the witnesses' subjective beliefs were insufficient to prove that he possessed a real firearm. However, the victim was familiar with guns from previously owning one and categorically identified the firearm used by defendant during the hijacking as a silver gun. The court found the victim "very credible" and his testimony standing alone, sufficient to find defendant guilty. We will not disturb the court's credibility finding on review. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

Further, Officer Gonzalez saw defendant holding a chrome revolver and both Gonzalez and the victim identified the gun recovered and inventoried by Officer File as the same gun they saw defendant holding.

¶ 45 Viewing this evidence in the light most favorable to the State, we find it sufficient to establish beyond a reasonable doubt that defendant committed the offense of vehicular hijacking while armed with a firearm. Given the victim's credible testimony, the absence of physical evidence does not render the court's determination unreasonable. *Fields*, 2014 IL App (1st) 110311, ¶ 36 (unequivocal testimony of a witness that defendant held a gun is circumstantial evidence sufficient to establish that defendant is armed with a gun during a robbery)).

¶ 46 Defendant also maintains that the gun could have been a BB or toy gun which is excluded from the statutory definition of firearm. The trial court was not required to discount the victim's testimony that defendant used a gun or speculate on whether the gun was something other than a firearm as defined by statute. *Campbell*, 146 Ill. 2d at 380 (trier of fact need not search out explanations consistent with the defendant's innocence and raise them to reasonable doubt)). Further, no evidence at trial suggested that defendant's gun fell within the statutory exception to the statutory definition of a firearm.

¶ 47 Defendant provides a photograph in his brief of a BB revolver air pistol as an example of a revolver that is not a gun by the definition of the FOID Act. This photograph was not submitted to the trial court and, if we were to consider it for the first time on appeal, this "would amount to a trial *de novo* on an essential element of the charges." *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990)). Accordingly, we decline to consider this newly introduced photograph. *Id.*

¶ 48 In this case, the victim's testimony was more than sufficient for the trial court to conclude that defendant was armed with a firearm. The victim testified that he saw defendant holding a silver gun and he used to own a gun. In addition, the police officers testified that they recovered a chrome or silver revolver, which they saw defendant throw over a fence. The victim identified the gun recovered by police as the same gun he saw defendant holding. No evidence was presented that could lead the trial court to any other conclusion but that the gun was a firearm. Viewing the evidence in the light most favorable to the State, a reasonable trier of fact could conclude that defendant was armed with a firearm when he committed the offense.

¶ 49 III. Constitutionality of Automatic Transfer Provision

¶ 50 Defendant next contends that the automatic transfer provision of the Juvenile Court Act, which automatically transfers 15 and 16 year olds charged with aggravated vehicular hijacking with a firearm to criminal court and subjects them to mandatory adult sentencing, violates the eighth amendment, the proportionate penalties clause of the Illinois Constitution, and due process. Defendant contends that the watershed decisions of *Roper v. Simmons*, 543 US 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), comprise a line of cases holding that minors are entitled to additional sentencing protections by virtue of their rehabilitative potential and the fundamental differences between juvenile and adult minds.

¶ 51 We observe that the automatic transfer provision was upheld as constitutional in *People v. Patterson*, 2014 IL 115102 (petition for writ of *certiorari* denied Nov. 2, 2015), based on the same arguments raised here by defendant. We are bound by the decision of the supreme court.

People v. Artis, 232 Ill. 2d 156, 164 (2009). Accordingly, following *Patterson*, we find the automatic transfer provision constitutional.

¶ 52 IV. Resentencing

¶ 53 In supplemental briefing, defendant argues his case must be remanded for resentencing under new sentencing provisions contained in Pub. Act 99-69, section 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105) and Public Act 99-258, section 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805).[2] Both the enactment of section 5-4.5-105 of the Code and the amendments to sections 5-130 and 5-805 of the Act took effect on January 1, 2016 (*People v. Patterson*, 2016 IL App (1st) 101573-B, ¶ 13; *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 23), while defendant's case was pending on direct appeal. Defendant contends that these statutory amendments apply retroactively to him. The State responds that these amendments apply prospectively.

¶ 54 Following *Hunter*, 2016 IL App (1st) 141904, we find newly enacted section 5-4.5-105 of the Code applies only prospectively. Following *People v. Howard*, 2016 IL 120729, we find amended section 5-130 of the Act applies retroactively to defendant, whose case was pending on direct appeal when the amendment took effect. See also *Patterson*, 2016 IL App (1st) 101573-B, ¶ 17; *Ortiz*, 2016 IL App (1st) 133294, ¶ 35.

¶ 55 1. Section 5-4.5-105 of the Code

[2] These provisions will be referred to, respectively, as "section 5-4.5-105 of the Unified Code of Corrections ("Code")" and "sections 5-130 and 5-805 of the Juvenile Court Act of 1987 ("Act")".

¶ 56 At the time defendant committed the aggravated vehicular hijacking offenses in 2012, he was 15 years old. Newly enacted section 5-4.5-105 of the Code, effective January 1, 2016, provides:

> "(a) *On or after the effective date of this amendatory Act* of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence[.]" (Emphasis added.) Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105).

¶ 57 Section 5-4.5-105 sets forth several factors that the court must consider in mitigation, such as the offender's " 'age, impetuosity, and level of maturity at the time of the offense,' his or her 'family, home environment, educational and social background, including any history of parental neglect,' and his or her 'potential for rehabilitation.' " *Hunter*, 2016 IL App (1st) 141904, ¶ 42 (quoting Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105)). Further, in sections 5-4.5-105(b) and (c), the statute provides that, except where the offender has been convicted of certain homicide offenses, the trial court " 'may, in its discretion, decline to impose any otherwise applicable sentencing enhancement based upon firearm possession.' " *Id*. (quoting Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105)). "Prior to the enactment of section 5-4.5-105, a 15-year firearm enhancement was mandatory for all offenders convicted of committing aggravated vehicular hijacking while armed with a firearm." *Id*. (citing 720 ILCS 5/18-4(a)(4) (West 2012)).

¶ 58 In *Hunter*, the court held that section 5-4.5-105 of the Code, requiring the sentencing court to consider mitigating factors surrounding the defendant's age and permitting the court to decline to impose the firearm enhancement, did not apply retroactively to the defendant whose case was pending on appeal when the statute took effect. *Hunter*, 2016 IL App (1st) 141904, ¶ 48. The statute specifically provides that its provisions only apply to "sentencing hearings held '[o]n or after the effective date' of Public Act 99-69, *i.e.*, January 1, 2016," thus clearly setting forth its proper temporal reach. *Id.* ¶ 43 (quoting Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105)). Further, nothing in the statute suggests that it applies retroactively to cases where sentencing occurred prior to the effective date of the statute. *Id.* The court in *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 23, held similarly, finding section 5-4.5-105 "applicable to offenses committed on or after the effective date" of January 1, 2016.

¶ 59 *Hunter* further held that, although the defendant's 21 to 45 year sentence, which included a 15-year firearm enhancement, was substantial, it did not violate the eighth amendment (U.S. Const, amend. VIII) prohibition against cruel and unusual punishment, as the trial court received a detailed presentence investigation report and was presented with and considered mitigating factors, including the defendant's youth, before imposing the sentence. *Hunter*, 2016 IL App (1st) 141904, ¶¶ 54-56. The defendant's sentence did not violate the state constitution's proportionate penalties clause (Ill. Const. 1970, art. I, §11) because the mandatory firearm enhancement did not preclude the trial court from considering the defendant's age as mitigation in its determination of the defendant's sentence. *Id.* ¶59. The court therefore rejected the defendant's retroactivity and constitutionality arguments with respect to section 5-4.5-105.

Following *Hunter* and *Ortiz*, we conclude that the statutory provisions in section 5-4.5-105 do not apply retroactively to defendant.

¶ 60 2. Section 5-130(1)(a) of the Act

¶ 61 However, as recently determined by our supreme court in *Howard*, 2016 IL 120729, the automatic transfer provision in amended section 5-130 of the Act does apply retroactively. See also *Patterson*, 2016 IL App (1st) 101573-B, ¶ 17; *Ortiz*, 2016 IL App (1st) 133294, ¶ 35.

¶ 62 At the time 15-year old defendant committed the aggravated vehicular hijacking offenses, section 5-130(1)(a) provided that minors age 15 or older who were charged with aggravated vehicular hijacking were expressly excluded from the jurisdiction of the juvenile court. 705 ILCS 405/5-130(1)(a) (West 2012)). Defendant was, therefore, charged as an adult. The amended version of section 5-130(1)(a), effective January 1, 2016, under Public Act 99-258, states, in relevant part:

> "(1)(a) The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 16 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961 or the Criminal Code of 2012.

> These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State." Pub. Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130 (West 2014)).

¶ 63 The amended statute raised the age for automatic adult prosecution for the enumerated offenses from 15 to 16 and reduced the number of offenses that qualified for automatic transfer. *Howard*, 2016 IL 120729, ¶ 5. Thus, the amendment extended the jurisdiction of the juvenile court to minors such as defendant, who was 15 years old at the time of the offense and charged with aggravated vehicular hijacking.

¶ 64 Public Act 99-258 also amended section 5-805 of the Act. Pub. Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-805 (West 2014). "As amended, the section provides that if the State files a motion for a transfer to criminal court of a case against a minor at least 13 years old, and the juvenile court finds that the prosecution of the minor under criminal law would best serve the interests of the public, the court may transfer the case to the criminal courts." *Patterson*, 2016 IL App (1st) 101573-B, ¶ 13 (citing 705 ILCS 405/5-805(3)(a) (West 2014)).

¶ 65 In *Patterson*, 2016 IL App (1st) 101573-B, ¶¶ 14-17, and *Ortiz*, 2016 IL App (1st) 133294, ¶¶ 26-35, we held that, under section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2012)), the procedural amendment to section 5-130 of the Act applies retroactively. We acknowledge the court in *Hunter*, 2016 IL App (1st) 141904, reached the opposite conclusion, finding *inter alia*, that the amendment should not be applied retroactively to the defendant as it would have a "retroactive impact" on the case. *Hunter*, 2016 IL App (1st) 141904, ¶¶ 72-3 (applying the second step in the *Landgraf v. USI Film Products*, 511 U.S. 244 (1994),

retroactivity analysis). However, as set forth in *Patterson* and *Ortiz*, courts need not conduct a retroactive impact analysis to determine the temporal reach of a statutory amendment when, as here, the legislature has not set forth the amendment's effective date. *Patterson*, 2016 IL App (1st) 101573-B, ¶ 29 (citing *Ortiz*, 2016 IL App (1st) 133294, ¶¶ 29-33).

¶ 66 Our supreme court confirmed that the amendment to section 5-130 of the Act was procedural and thus, pursuant to section 4 of the Statute of Statutes, applies retroactively. *Howard*, 2016 IL 120729, ¶ 28. In *Howard*, 2016 IL 120729, while the charges against the defendant were pending in criminal court, Public Act 99-258 went into effect. *Id*. ¶ 5. The defendant, who was 15 years old at the time of the offense, moved to transfer the case to juvenile court for a transfer hearing. *Id*. ¶¶ 4, 5. The trial court granted the motion and the State filed for a writ of *mandamus* or prohibition directing the trial court to rescind its order. *Id*. ¶¶ 7, 9, 10. The supreme court denied the writ, finding the trial court did not err in transferring the case from criminal court to juvenile court as the amendment is retroactive to pending cases. *Id*. ¶¶ 28, 35.

¶ 67 The *Howard* court explained that, in section 4 of the Statute of Statutes, the legislature clearly set forth the temporal reach of every amended statute and therefore Illinois courts need "never" go the retroactive impact step of the *Landgraf* analysis. *Id*. ¶¶ 20, 29. Instead, under the first *Landgraf* step, the court must determine whether the legislature clearly indicated the temporal reach of the amended statute. *Id*. ¶ 19. Absent a constitutional prohibition, this expression of legislative intent must be given effect. *Id*. "If the temporal reach of the amendment is not set forth in the amendment itself, then it is provided by default in section 4." *Id*. ¶ 20.

¶ 68 The *Howard* court found that the amendment to section 5-130 of the Act did not specify whether it should apply retroactively or prospectively and, therefore, the default provisions of section 4 apply. *Id*. ¶ 28. Under section 4, procedural changes to statutes are applied retroactively and substantive changes are applied prospectively. *Id*. ¶¶ 20, 28. As the amendment to section 5-130 was procedural and there was no constitutional impediment to retroactive application, the supreme court found the "amendment applies to pending cases." *Id*. ¶ 28. The *Howard* court held that "defendant's case belongs in juvenile court, unless and until it is transferred to criminal court pursuant to a discretionary transfer hearing. *Id*. ¶ 35. Accordingly, "we vacate the sentence imposed on [defendant] and remand to the juvenile court, where the State may exercise its discretion to decide whether to file a petition to transfer the case to criminal court for sentencing." *Patterson*, 2016 IL App (1st) 101573-B, ¶ 32; see also *Ortiz*, 2016 IL App (1st) 133294, ¶¶ 36, 40.

¶ 69 5. Mittimus

¶ 70 Finally, defendant contends, and the State correctly concedes, that this court should correct the mittimus to reflect only one conviction for aggravated vehicular hijacking because only one car was hijacked. He contends that the conviction for aggravated vehicular hijacking with a firearm (Count 1) is more serious than the conviction for aggravated vehicular hijacking of a person age 60 or older (Count 2), and Count 2 should, therefore, be vacated.

¶ 71 Under the one-act, one-crime doctrine, only one offense may be based on any single physical act. *People v. Almond*, 2015 IL 113817, ¶ 47 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). Here, the two counts in question were based on the same physical act, taking the

victim's vehicle by the use of force or by threatening imminent use of force. Consequently, only one conviction may stand. *Artis*, 232 Ill. 2d at 165.

¶ 72 The conviction and sentence should be entered on the most serious offense (*Id.* at 170) and the remaining offenses should be merged (*People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007)). To determine the most serious offense, we look at the plain language of the statutes, as common sense dictates that the legislature would prescribe greater punishment for the offense it deems the more serious; if the punishments are identical, we are instructed to consider which offense has the more culpable mental state. *In re Samantha V.*, 234 Ill. 2d at 379. Both offenses defendant was convicted of are Class X offenses, but the aggravated vehicular hijacking with a firearm comes with a mandatory 15-year firearm enhancement. 720 ILCS 5/18-4(b) (West 2012). Accordingly, it is the more serious offense. We, therefore, merge Count 2 into Count 1. *Gordon*, 378 Ill. App. 3d at 642.

¶ 73 CONCLUSION

¶ 74 For the foregoing reasons, we affirm defendant's convictions, vacate his sentence, remand to the juvenile court and order the mittimus corrected.

¶ 75 Affirmed in part; vacated and remanded in part; mittimus corrected.