2019 IL App (1st) 163405-U

No. 1-16-3405

Order filed September 5, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 14 CR 17494
	)	
GLENN LEWIS,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for aggravated unlawful use of a weapon, one based on not having an Illinois concealed carry license and the other based on not having an Illinois Firearm Owner's Identification card, are affirmed where there was sufficient evidence that he did not have a concealed carry license and the record was not sufficiently developed to address his allegation of ineffective assistance of counsel related to his conviction for not having a concealed carry license, and where we lack jurisdiction to address his challenges to his conviction for not having a Firearm Owner's Identification card.

¶ 2 Following a bench trial, defendant Glenn Lewis was convicted of two counts of aggravated unlawful use of a weapon, one based on not having an Illinois concealed carry license and the other based on not having an Illinois Firearm Owner's Identification card. After the trial court merged the latter conviction into the former conviction, it sentenced defendant to 12 months' imprisonment on a single count of aggravated unlawful use of a weapon. On appeal, defendant contends that: (1) his conviction for aggravated unlawful use of a weapon based on not having a Firearm Owner's Identification card was unconstitutional; (2) the State failed to sufficiently prove him guilty of aggravated unlawful use of a weapon based on not having a Firearm Owner's Identification card; and (3) the State failed to sufficiently prove him guilty of aggravated unlawful use of a weapon based on not having a concealed carry license. For the foregoing reasons, we affirm defendant's convictions.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with one count of armed violence and four counts of aggravated unlawful use of a weapon (AUUW). Relevant to this appeal are Counts 4 and 5. In Count 4, the State alleged that defendant committed AUUW by knowingly carrying or possessing an uncased, loaded and immediately accessible handgun, pistol or revolver on a public street without having a currently valid license under the Firearm Concealed Carry Act (Concealed Carry Act) (430 ILCS 66/1 *et seq.* (West 2014)). 720 ILCS 5/24-1.6(a)(2), (a)(3)(A-5) (West 2014). In Count 5, the State alleged that defendant committed AUUW by knowingly carrying or possessing a handgun, pistol or revolver on a public street without having been issued a currently valid Firearm Owner's Identification (FOID) card. 720 ILCS 5/24-1.6(a)(2), (a)(3)(C) (West 2014).

¶ 5 As the case proceeded to trial, defendant filed a motion to quash his arrest and suppress the evidence therefrom. He subsequently waived his right to a jury trial, and the case proceeded to a simultaneous bench trial and hearing on his motion to suppress.

¶ 6 In the State's case, Chicago Police Officer Arshad Sayeed testified that, in the evening of September 20, 2014, he was in a police vehicle with multiple officers when he observed a mini-van drive the wrong way on a one-way street in Chicago. As a result, the officers pulled the mini-van over to the curb. Officer Sayeed exited the police vehicle and approached the passenger side of the mini-van while Officer Alfarah, whose first name is not included in the record, approached the driver's side. Once Officer Sayeed reached the passenger side, he observed two occupants in the mini-van, including defendant, who was sitting on the front passenger seat. Officer Alfarah asked defendant and the driver for their identifications, which they provided.

¶ 7 At some point during the traffic stop, Officer Sayeed observed suspect cannabis in the center console of the mini-van. Officer Sayeed asked the driver to hand him the suspect cannabis, which the driver did. After taking possession of the suspect cannabis, Officer Sayeed observed defendant acting nervous and moving his right hand inside and outside his right pant pocket. When Officer Sayeed asked defendant to step out of the vehicle, defendant took a black firearm out of his right pant packet and pointed it at Officer Sayeed's face. Officer Sayeed was able to redirect the muzzle of the firearm and removed it from defendant's hand. Another officer came to Officer Sayeed's aid and took defendant into custody. After gaining possession of the firearm, Officer Sayeed observed that it was a loaded Taurus semi-automatic handgun. The driver was also taken into custody. According to Officer Sayeed, at no point during the encounter did defendant produce a FOID card or concealed carry license. But he acknowledged not asking defendant for either.

¶ 8 Officer Alfarah testified that, during the traffic stop, defendant gave her a Tennessee state identification card and she memorialized his date of birth on an arrest report by using the date of birth listed on his identification card.

¶ 9 Bob Radnacher, a supervisor in the firearm services bureau of the Illinois State Police, testified that, in Illinois, an individual cannot have a concealed carry license unless he has a FOID card. Radnacher stated that he was provided defendant's name and date of birth, and searched them in a state database to determine if defendant had obtained a FOID card. Radnacher's was unable to find any record of defendant being issued a FOID card.

¶ 10 Following the State's case, the trial court denied defendant's motion to quash his arrest and suppress the evidence therefrom.

¶ 11 In the defense's case, defendant testified that he lived in Nashville, Tennessee, and although he admitted that there was cannabis in the mini-van, he denied ever pointing a handgun at Officer Sayeed or possessing one on the night of September 20, 2014. Defendant also acknowledged that, on September 20, 2014, he did not possess a FOID card.

¶ 12 Following the defense's case, the parties proceeded to closing argument, where the State waived its initial argument. In defendant's argument, he principally contended that the State failed to prove beyond a reasonable doubt that he possessed a firearm. Additionally, defendant asserted that there was "no testimony as to whether [he] was asked if he had an [*sic*] FOID card[,] whether it was for Illinois or for Tennessee[,] whether Tennessee exception [*sic*] is allowed under the FOID statute." Defendant then noted "[t]here's several other exceptions," and proceeded to reiterate that the State failed to prove beyond a reasonable doubt that he possessed a firearm. In rebuttal, along with arguing that the State proved defendant possessed a firearm and

pointed it at Officer Sayeed, the State asserted that "in order to receive a conceal carry [*sic*], you need to have a FOID card," which defendant admitted he did not have.

¶ 13 The trial court ultimately found defendant guilty of Counts 4 and 5, but not guilty of the remaining counts. In doing so, the court stated that Officer Sayeed's testimony was credible while defendant's testimony was not. The court also noted Radnacher's testimony that defendant did not have a FOID card, which it found sufficient to prove beyond a reasonable doubt that defendant did not have one. But the court added that defendant corroborated this fact by acknowledging that he did not have a FOID card. The court did not address defendant's lack of a concealed carry license.

¶ 14 Defendant unsuccessfully moved for a new trial, arguing that the State failed to sufficiently prove he possessed a firearm. At defendant's sentencing hearing, the trial court sentenced him to 12 months' imprisonment. While not mentioned during the hearing, defendant's mittimus shows that the court merged Count 5 into Count 4 and sentenced him to 12 months' imprisonment on only Count 4. The trial court's memorandum of orders also reflects the merger of the two counts.

¶ 15 Defendant subsequently appealed. In his notice of appeal, it stated that he intended to appeal from: "Judgment: Guilty of Aggravated Unlawful Use of Weapon w/ no FOID."

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant raises several contentions of error related to his two convictions for AUUW based on not having a concealed carry license (Count 4) and not having a FOID card (Count 5), including a challenge to the sufficiency of the evidence of both convictions and an as-applied constitutional challenge to the AUUW statute based on not having a FOID card.

¶ 18 A. Appellate Jurisdiction

¶ 19 However, before reviewing defendant's contentions, we must consider our jurisdiction in this appeal. Although neither party has raised an issue related to appellate jurisdiction, we have a duty to independently consider our jurisdiction, regardless of whether the parties have raised the issue. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). And this case presents two issues related to our jurisdiction.

¶ 20 1. Defendant's Notice of Appeal

¶ 21 We begin with defendant's notice of appeal. "[A] notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal." *Id.* The appellate court has no jurisdiction to review convictions not specified in the notice of appeal. See *People v. Olaska*, 2017 IL App (2d) 150567, ¶ 115 (finding that it lacked jurisdiction to review the defendant's contentions of error related to his convictions for felony murder because his notice of appeal stated he was only challenging his convictions for first-degree murder).

¶ 22 Defendant's notice of appeal stated that his appeal was being taken from "Judgment: Guilty of Aggravated Unlawful Use of Weapon w/ no FOID." As noted, defendant was convicted of two counts of AUUW, one for not having a concealed carry license (Count 4) and one for not having a FOID card (Count 5). Under a strict reading of his notice of appeal, defendant appealed only his conviction for AUUW based on not having a FOID card. But we must liberally construe a notice of appeal (*Smith*, 228 Ill. 2d at 104), and the notice will be " 'deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal.' " *People v. Decaluwe*, 405 Ill. App. 3d 256, 263 (2010) (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991)).

¶ 23 Under these principles, we conclude defendant intended to appeal both AUUW convictions, despite only specifically referring to his conviction for AUUW based on not having a FOID card. Unlike in *Olaska*, 2017 IL App (2d) 150567, ¶ 115, where this court deemed the defendant's notice of appeal insufficient to review his convictions for felony murder and sufficient only to review his convictions for first-degree murder, defendant here was convicted of two counts of the same offense that differed only based on one element of the offense, *i.e.*, the lack of a concealed carry license versus the lack of a FOID card. Under a liberal construction of defendant's notice of appeal, the notice sufficiently indicated his desire to appeal both convictions. Furthermore, nothing about his notice of appeal has prejudiced the State. See *Decaluwe*, 405 Ill. App. 3d at 264 (finding although "the defendant did not specifically list his conviction for attempted aggravated criminal sexual assault on the notice of appeal form *** it cannot be said that the State did not have sufficient notice of the issue, nor was the State prejudiced in any way"). Therefore, we find defendant's notice of appeal sufficient to confer our jurisdiction to review both Counts 4 and 5.

¶ 24 2. Defendant's Unsentenced Conviction

¶ 25 Our second jurisdictional issue pertains to defendant only being sentenced on one of his two convictions. As noted, the trial court found defendant guilty of Counts 4 and 5, but before sentencing him, it merged Count 5 into Count 4. And thus, when the court imposed a sentence, it did so only on Count 4, the AUUW count based on defendant not having a concealed carry license. Our jurisdiction extends only to final judgments (Ill. Const. 1970, art. VI, § 6), and "there is no final judgment in a criminal case until the imposition of sentence." *People v. Flores*, 128 Ill. 2d 66, 95 (1989). "[A]nd, in the absence of a final judgment, an appeal cannot be entertained." *Id.*; see also *People v. Relerford*, 2017 IL 121094, ¶ 71 (observing that the appellate

court correctly remarked that "its jurisdiction extends only to final judgments and that there is no final judgment in a criminal case unless sentence has been imposed"). Illinois Supreme Court Rule 604 (eff. July 1, 2017) provides limited exceptions to this rule (*People v. Goodwin*, 2018 IL App (1st) 152045, ¶ 58), but none of those are applicable to this case.

¶ 26 Even without a final judgment, this court may still have jurisdiction, as exemplified by our supreme court's decision in *People v. Dixon*, 91 Ill. 2d 346 (1982). In *Dixon*, the trial court incorrectly merged a defendant's less serious convictions into his two more serious convictions and sentenced him only on the more serious offenses. *Id.* at 349. On appeal, the appellate court reversed one of the defendant's sentenced convictions and affirmed the other, but rejected the State's request for a remand to impose sentences on the less serious offenses. *Id.* Subsequently, our supreme court reversed the appellate court and held that the appellate court was authorized to remand for the imposition of a sentence on the previously merged convictions under the "anomalous" fact pattern presented. *Id.* at 353-54. While no final judgments were entered on the defendant's less serious offenses because the trial court did not impose sentences on them, all of the offenses "arose from a series of separate but closely related acts." *Id.* at 353. Because of this, our supreme court found that the appellate court had jurisdiction to remand for sentencing on the less serious, unsentenced convictions. *Id.* at 353-54.

¶ 27 In *Relerford*, 2017 IL 121094, ¶¶ 74-76, our supreme court re-examined *Dixon* and determined that the decision had been applied too broadly by later courts. As such, our supreme court limited the scope of *Dixon* in two manners. *Id.* First, the court remarked that "*Dixon* must be understood to be limited to the type of factual situation presented in that case," where the trial court determined incorrectly that lesser offenses had to merge into more serious offenses. *Id.* ¶ 74. And second, our supreme court determined a close reading of Dixon revealed "that, to the

extent the appellate court had any jurisdiction to address the non-final convictions, that jurisdiction was limited to ordering remand for imposition of sentences on the lesser convictions." *Id.* ¶ 75. Thus, if appellate jurisdiction exists to review an unsentenced conviction, that jurisdiction is limited only to remanding the case for the imposition of a sentence on the unsentenced conviction. *Id.*

¶ 28 In accordance with *Releford*, the only jurisdiction we could have in this appeal to review defendant's non-final judgment and unsentenced conviction for AUUW based on not having a FOID card would be to remand the matter for the imposition of a sentence on this conviction. In other words, we have no jurisdiction to review the merits of defendant's challenge to this conviction. See *People v. Fort*, 2019 IL App (1st) 170644, ¶ 37 (declining to review the defendant's challenge to the sufficiency of the evidence on a conviction for forgery because the trial court merged that conviction into another conviction and thus, did not sentence him on the forgery conviction); *People v. Jamison*, 2018 IL App (1st) 160409, ¶ 37 (holding that, "[i]n accordance with *Relerford*, we lack jurisdiction to review the merits of defendant's unsentenced conviction"). Moreover, even though defendant challenged this conviction as unconstitutional as applied to him, that does not confer jurisdiction to this court because as-applied challenges are subject to forfeiture and other procedural restraints. See *In re N.G.*, 2018 IL 121939, ¶ 43; *People v. Thompson*, 2015 IL 118151, ¶ 39. Consequently, because we lack the jurisdiction to review defendant's unsentenced conviction for AUUW based on not having a FOID card, we will not entertain the merits of his challenges to that conviction.

¶ 29 B. AUUW Lack of a Concealed Carry License

¶ 30 With those jurisdictional issues resolved, we have only defendant's contention related to his conviction for AUUW based on not having a concealed carry license left to address, where he contends that the State failed to present sufficient evidence to prove him guilty of the offense.

¶ 31 When a defendant challenges the sufficiency of the evidence, the reviewing court must determine if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35. Under this standard of review, all reasonable inferences from the evidence must be made in the State's favor. *People v. Hardman*, 2017 IL 121453, ¶ 37. Defendant here, however, argues that we should review his challenge to the sufficiency of the evidence *de novo* because his challenge does not involve any contested facts or issues regarding witness credibility. See *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004). We disagree, as defendant's challenge does concern a contested fact, namely whether the State sufficiently proved that defendant did not have a concealed carry license. The any-rational-trier-of-fact standard applies to this appeal. This standard of review is highly deferential to the trier of fact, but despite this deference, the reviewing court must ensure that the State met its burden of proving each element of the offense beyond a reasonable doubt. *Gray*, 2017 IL 120958, ¶ 35. We will not reverse a conviction unless the evidence was "so unreasonable, improbable, or unsatisfactory" that there remains a reasonable doubt of the defendant's guilt. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 32 To convict defendant of Count 4, the State was required to prove that defendant knowingly (1) carried or possessed a pistol, revolver or handgun on him (2) on a public street within Chicago (3) while the firearm was uncased, loaded and immediately accessible (4) without being issued a currently valid license under the Concealed Carry Act (430 ILCS 66/1 *et seq.* (West 2014)). 720 ILCS 5/24-1.6(a)(2), (a)(3)(A-5) (West 2014). Defendant only challenges

the sufficiency of the evidence with respect to the final element and argues that the State failed to prove he did not have a concealed carry license because the State presented no evidence that he lacked an Illinois non-resident concealed carry license pursuant to section 40(c) of the Concealed Carry Act (430 ILCS 66/40(c) (West 2014)). According to defendant, at trial, the State merely relied on an inference that, because he did not have a valid Illinois FOID card, he could not obtain an Illinois concealed carry license. However, defendant argues that such an inference is inapplicable to non-residents such as himself because section 40(c) of the Concealed Carry Act *(id.*) provides a method for non-residents to obtain an Illinois concealed carry license without obtaining an Illinois FOID card.

¶ 33 Defendant's argument regarding an Illinois concealed carry license necessitates an overview of the concealed carry licensing statute. The Concealed Carry Act was enacted on July 9, 2013, to provide a licensing scheme for individuals to carry concealed firearms in Illinois, but only if they are qualified. Pub. Act 98-63 (eff. July 9, 2013) (adding 430 ILCS 66/1 *et seq.*) One of the requisite qualifications for a concealed carry license is that the individual has a currently valid FOID card (430 ILCS 66/10(a)(1), 25(2) (West 2014)), which only a resident of Illinois may obtain. 430 ILCS 65/4(a)(2)(xiv) (West 2014). The Concealed Carry Act also has a section dedicated to non-residents of Illinois. See 430 ILCS 66/40 (West 2014). A non-resident, defined by the Concealed Carry Act as someone who has not resided in Illinois for more than 30 days and resides in another state, may apply for an Illinois concealed carry license, but only if his state has "laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain a license under [the Concealed Carry Act]." 430 ILCS 66/40(a), (b) (West 2014). Or, in other words, states that regulate the concealed carry of firearms in a manner substantially similar to Illinois. 20 Ill. Adm. Code 1231.110(c). What it means to have

"substantially similar" standards is defined by the Illinois Administrative Code and ultimately determined by the Illinois State Police, who posts the list of such states on its website. 20 Ill. Adm. Code 1231.10; 1231.110. Currently, only four states have substantially similar licensing standards to Illinois: Arkansas, Mississippi, Texas, and Virginia. See Frequently Asked Questions, Illinois State Police Firearm Services Bureau, https://www.ispfsb.com/Public/Faq.aspx (last accessed Aug. 1, 2019) ("Currently, the only states considered to be substantially similar are Arkansas, Mississippi, Texas and Virginia."); *People v. Contursi*, 2019 IL App (1st) 162894, ¶ 34 (taking judicial notice of information from the Illinois State Police); see also *Culp v. Raoul*, 921 F.3d 646, 651 (7th Cir. 2019) (noting that Arkansas, Mississippi, Texas and Virginia have been deemed to have substantially similar standards to Illinois). Prior to those states being deemed substantially similar, the Illinois State Police had concluded that Hawaii, New Mexico, South Carolina and Virginia were substantially similar. See *Culp*, 921 F.3d at 659 (Manion, J., dissenting); see also Frequently Asked Questions, Illinois State Police Firearm Services Bureau, https://web.archive.org/web/20150714033528/https:/www.ispfsb.com/Public/Faq.aspx (dated July 14, 2015) ("Currently, the only states considered to be substantially similar are Hawaii, New Mexico, South Carolina and Virginia."). In order for a non-resident to apply for an Illinois concealed carry license, he must also meet all of the qualifications required for Illinois residents "except for the Illinois residency requirement in item (xiv) of paragraph (2) of subsection (a) of Section 4 of the Firearm Owners Identification Card Act." 430 ILCS 66/40(c) (West 2014).

¶ 34 However, non-residents, including those not from Arkansas, Mississippi, Texas, and Virginia, are not precluded from carrying concealed firearms in Illinois, as the Concealed Carry Act provides an exception for non-residents to transport concealed firearms in their vehicles. See

430 ILCS 66/40(e) (West 2014). A non-resident may do so as long as the firearm remains in "his or her vehicle" and he or she is: (1) not prohibited from owning or possessing a firearm under federal law; (2) "eligible to carry a firearm in public under the laws of his or her state or territory of residence, as evidenced by the possession of a concealed carry license or permit issued by his or her state of residence, if applicable"; and (3) not in possession of a license under the Concealed Carry Act. *Id.* Additionally, the Concealed Carry Act requires an individual with an Illinois concealed carry license that is carrying a concealed firearm to inform a police officer of this fact if requested by the officer during a traffic stop. 430 ILCS 66/10(h) (West 2014). The licensee must produce that license if further requested by the officer. *Id.* Similarly, the Concealed Carry Act requires an individual eligible to carry a firearm in public under the laws of another state who is carrying a concealed firearm to inform a police officer of this fact if requested by the officer during a traffic stop. *Id.* The non-resident must produce evidence of his eligibility if further requested by the officer. *Id.*

¶ 35 What the foregoing demonstrates is that there are two categories of licensees under the Concealed Carry Act. First, there are Illinois residents who can obtain a concealed carry license, but must first have a currently valid FOID card. See 430 ILCS 66/10(a)(1), 25(2) (West 2014). And second, there are non-residents from select states who can obtain a concealed carry license, but do not need to, and cannot, obtain a FOID card. See 430 ILCS 66/40(a), (b) (West 2014); see also 20 Ill. Adm. Code 1231.90(b) ("[Firearms Concealed Carry License] applicants who are Illinois residents must have a valid FOID Card."). And then, there are non-residents who may carry concealed firearms in their vehicles under certain conditions without having an Illinois concealed carry license. 430 ILCS 66/40(e) (West 2014).

¶ 36 Turning back to the elements of defendant's AUUW offense, it is undisputed that, in order for the State to have convicted him, the State had to prove beyond a reasonable doubt that he had not been issued a currently valid license under the Concealed Carry Act. 720 ILCS 5/24-1.6(a)(2), (a)(3)(A-5) (West 2014). As discussed, an Illinois resident who does not have a currently valid FOID card cannot obtain a concealed carry license. See 430 ILCS 66/10(a)(1), 25(2) (West 2014); 20 Ill. Adm. Code 1231.90(b). A reasonable inference therefore can be made that, if a defendant did not have a currently valid FOID card, he could not have a currently valid concealed carry license. But this inference is reasonable *only* if the defendant is an Illinois resident because certain non-residents are eligible to obtain an Illinois concealed carry license without first obtaining a FOID card. See 430 ILCS 66/40 (West 2014); 20 Ill. Adm. Code 1231.90(b).

¶ 37 In the present case, when the State attempted to prove at trial that defendant did not have a currently valid concealed carry license, it used the aforementioned inference. The assistant State's Attorney asked Bob Radnacher, a supervisor in the firearm services bureau of the Illinois State Police, if "it would be fair to say that an individual cannot have conceal carry [*sic*] unless they had a [FOID] card?" Radnacher replied, "[y]es, that's correct." But defendant was not an Illinois resident. During trial, Officer Alfarah testified that defendant handed her a Tennessee state identification card, and defendant himself testified that he lived in Nashville, Tennessee. Thus, it was not reasonable to infer from defendant's lack of a FOID card that he did not have a concealed carry license. But because defendant was a resident of Tennessee, a state which has never been recognized by the Illinois State Police as a state having substantial similar standards to Illinois in regulating the concealed carry of firearms, it was reasonable to infer that defendant did not have a non-resident concealed carry license. Therefore, when viewing all of the evidence

in the light most favorable to the State with all reasonable inferences in its favor, a rational trier of fact could have found that defendant had not been issued a currently valid license under the Concealed Carry Act and was guilty of AUUW.

¶ 38 Nevertheless, despite the fact that the State may have proven sufficiently that defendant did not have a currently valid license under the Concealed Carry Act, he highlights the Concealed Carry Act's provision that allows non-residents to possess a concealed firearm in their vehicles without an Illinois concealed carry license. See 430 ILCS 66/40(e) (West 2014). And defendant argues that the provision shows the Illinois legislature intended to exclude non-residents like him from being prosecuted for AUUW. While this provision of the Concealed Carry Act undoubtedly evinces a legislative intent to immunize from prosecution certain non-residents who carry a concealed firearm in their vehicles under certain circumstances, defendant goes too far to suggest that this provision applied to him. Most notably, defendant did not merely have a concealed firearm in his vehicle, but rather unconcealed the firearm and pointed it directly at a police officer. Furthermore, this provision is clearly an exception that he must have raised at trial. See *People v. Tolbert*, 2016 IL 117846, ¶¶ 14-17 (observing that "[e]xceptions are generally mere matters of defense" that the defendant must raise and prove at trial) (Internal quotations marks omitted.) Defendant acknowledges this fact by arguing that his defense counsel was ineffective for failing to argue at trial that he was exempt from prosecution under this provision.

¶ 39 A criminal defendant has the constitutional right to the effective assistance of counsel. *People v. Veach*, 2017 IL 120649, ¶ 29 (citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8). A challenge to the effective assistance of counsel is governed by the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Veach*, 2017 IL 120649, ¶ 29. In

order for the defendant to prevail on such a challenge, he "must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36. Or more specifically, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). The defendant must satisfy both prongs of the *Strickland* test, and his failure to do so precludes a finding that his counsel was ineffective. *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 40 But in addressing an allegation of ineffective assistance of counsel, it is critical that the record is sufficiently developed to resolve the claim. See *Veach*, 2017 IL 120649, ¶ 46. And here, the record is devoid of the factual basis necessary to resolve defendant's allegation of ineffective assistance of counsel because no facts were developed below about whether defendant possessed a license or permit to carry a handgun in public in Tennessee. According to Tennessee's Constitution, its citizens "have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const., art. I, § 26. And the Tennessee legislature has exercised that regulatory power. See T.C.A. §§ 39-17-1301 *et seq.* (West 2014). Broadly, under Tennessee law, it is a crime for a person to carry "with the intent to go armed" a firearm. T.C.A. § 39-17-1307(a)(1) (West 2014). But several exceptions apply. For one, a Tennessee resident may carry a firearm in his vehicle as long as "the person *** [i]s in lawful possession of the motor vehicle" and not prohibited by federal from possessing a firearm or from purchasing a firearm according to state law. T.C.A. § 39-17-1307(e)(1) (West 2014). Additionally, an individual is legally allowed to carry or possess a firearm in several circumstances, including when the firearm is

unconcealed, unloaded and the ammunition is not in the immediate vicinity of the individual, when he is in his place of residence or business, when incident to hunting-related activities, when incident to protecting livestock, and after being granted a permit under section 39-17-1351 of the Tennessee Code (T.C.A. § 39-17-1351 (West 2014)). T.C.A. § 39-17-1308 (West 2014). Section 39-17-1351 of the Tennessee Code provides for the application of handgun permits by Tennessee residents as long as they meet certain qualifications. See T.C.A. § 39-17-1351 (West 2014) (stating "any resident of Tennessee who is a United States citizen or lawful permanent resident *** may apply to the department of safety for a handgun carry permit"). In light of these exceptions, at the time of defendant's offense, Tennessee law allowed for the ownership of a firearm without a license. See T.C.A. §§ 39-17-1307; 39-17-1308 (West 2014). But, in order to carry a concealed, loaded and immediately accessible handgun in public in Tennessee, generally, that individual must have a handgun permit. See *id.*

¶ 41 And in Illinois, in order for a non-resident to carry a concealed firearm without obtaining an Illinois concealed carry permit, he must possess the firearm in his vehicle and, among other things, be "eligible to carry a firearm in public under the laws of his or her state or territory of residence, as evidenced by the possession of a concealed carry license or permit issued by his or her state of residence, if applicable." 430 ILCS 66/40(e) (West 2014). That is to say, to fall under this exception of the Concealed Carry Act, defendant must have been issued a handgun permit in Tennessee pursuant to section 39-17-1351 of the Tennessee Code (T.C.A. § 39-17-1351 (West 2014)). Part of defendant's allegation of ineffective assistance of counsel is dependent on whether he had been issued this permit under Tennessee law, a fact that is not part of the record on appeal. "[W]hen the record is incomplete or inadequate for resolving" an ineffective assistance of counsel claim, the claim is "better suited to collateral proceedings." *Veach,* 2017 IL

120649, ¶ 46. Because the resolution of defendant's claim of ineffective assistance of counsel is in large part dependent on a fact not in the record on appeal, we decline to address it. See *id.*

¶ 42 Although the record is devoid of this critical fact and precludes our review of defendant's allegation of ineffective assistance of counsel, we briefly observe that is it unlikely that he was prejudiced by counsel's failure to argue that the exception applied to him. Notably, during the trial court's pronouncement of guilt, it found that Officer Sayeed testified in a "very, very credible fashion" while finding that defendant's version of events was "incredible." Although the court found defendant not guilty of Count 1—a charge of armed violence which alleged that, while he was armed with a dangerous weapon, he committed an aggravated assault of a police officer, *i.e.*, pointing the weapon at Officer Sayeed—the court was not clear as to why it found defendant not guilty of this offense.[1] But critically, during the court's findings in which it remarked that Officer Sayeed testified credibly, the court never casted doubt over his testimony that defendant pointed the firearm at him. Because of this and because the exception in section 40(e) of the Concealed Carry Act (430 ILCS 66/40(e) (West 2014)) requires the individual to keep the concealed firearm in his vehicle, it is unlikely that the court would have found this exception applicable to defendant's conduct, where he did not merely keep a concealed firearm in his vehicle, but rather unconcealed the weapon and pointed it directly at a police officer. It is therefore doubtful that defendant's conduct would afford him the protection of the exception found in section 40(e) of the Concealed Carry Act (*id.*).

¶ 43 We also briefly note that, in defendant's as-applied constitutional challenge to his conviction for AUUW based on not having a FOID card, he relatedly argued that, because his

[1] The majority of the trial court's discussion of the armed violence charge centered on whether there was an impermissible double enhancement regarding the State's use of the firearm in the charge.

conviction for AUUW based on not having a FOID card was unconstitutional and the State presented no independent evidence of his lack of a concealed carry license, his conviction for AUUW based on not having a concealed carry license must also be reversed. However, as previously discussed, we have no jurisdiction to entertain defendant's as-applied constitutional challenge to his conviction for AUUW based on not having a FOID card and we have found a reasonable inference from his residence in Tennessee that he did not have an Illinois concealed carry license. We therefore must also reject this argument concerning the reversal of his conviction for AUUW based on not having a concealed carry license.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.