2017 IL App (1st) 150467-U

SIXTH DIVISION
August 11, 2017

No. 1-15-0467

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TEWOND COLE, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 11894 Honorable Nicholas R. Ford, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** Trial counsel was not ineffective for failing to ask the trial court to reconsider its ruling on defendant's pretrial motion to suppress evidence. Defendant is not entitled to a new sentencing hearing under amended section 5-4.5-105(a) of the Unified Code of Corrections. Defendant's sentence is not unconstitutional. Amended section 5-130(1)(a) of the Juvenile Court Act does not require defendant's case be remanded for the State to request a transfer to criminal court. The preamendment version of section 5-120 of the Juvenile Court Act does not violate defendant's equal protection rights. Affirmed.

¶ 2 Following a bench trial, defendant Tewond Cole was convicted of armed robbery with a firearm and sentenced to 21 years' imprisonment. On appeal, defendant contends that: (1) his trial counsel was ineffective for failing to ask the trial court to reconsider its ruling on

defendant's pretrial motion to quash arrest and suppress evidence; (2) he is entitled to a new sentencing hearing pursuant to section 5-4.5-105 of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-105 (West 2016)); (3) his sentence violates the eighth amendment to the federal constitution and the proportionate penalties clause of the Illinois constitution; (4) amended section 5-130(1)(a) of the Juvenile Court Act (Act) (705 ILCS 405/5-130(1)(a) (West 2016)) requires that defendant's case be remanded for the State to request a transfer to adult criminal court; and (5) the preamendment version of section 5-120 of the Act violates the equal protection clauses of the federal and Illinois constitutions. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by superseding indictment with, *inter alia*, one count of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)).[1] The trial court initially appointed an assistant public defender to represent defendant. Court-appointed counsel filed a pretrial motion to quash arrest and suppress evidence, and the following evidence was adduced at the hearing on the motion.

¶ 5 Chicago police officer Lenell Aubert testified that, on May 29, 2012, he responded to a report of an armed robbery in the back of a building located at 8336 South Cottage Grove in Chicago. He arrived about two minutes after the call and spoke to the victim, Christopher Smith. Aubert learned that Smith had been robbed. Aubert said he "receive[d] information about the perpetrators," and when defense counsel asked if he "hear[d] where they had gone to," Aubert responded "Yes" and said the address was "8342 South Cottage Grove, One South."

[1] Codefendant Jeremiah Gates was also indicted in connection with this incident, but the trial court granted defendant's motion to sever the two cases. Gates is not a party to this appeal.

¶ 6 Aubert proceeded to that location, which only took him "30 seconds," with about ten other officers. They first walked up to the apartment door, but Aubert did not see anyone inside. He confirmed, however, that he later observed four people running around in the apartment. Aubert said that he went into the apartment through the bedroom window, and he then saw the individuals lying down on couches. Aubert said that other officers recovered a handgun, a red "hoodie" (*i.e.*, hooded sweatshirt), a wallet containing the victim's identification, cigarettes, and "some of the proceeds" from the robbery.

¶ 7 On cross-examination, Aubert agreed that his police report did not indicate that there were four people in the apartment, but Aubert explained that he only listed "the offenders" in the report. Aubert further agreed that Smith never told him that the offenders ran into the "One South" apartment, and that no one provided a description of the offenders other than the red hoodie. Aubert also conceded that his police report described the kitchen window as "open," but he said that he only meant that he could see through the window "[o]penly, like clearly."

¶ 8 Aubert also testified that Smith described the offenders as "young male blacks," one of whom had a handgun and was wearing a red hoodie. In addition, Smith told Aubert the "direction of where they had just left." Aubert further stated that a woman who got his attention from a window above where he was going told him that "she witnessed the robbery and she saw the offenders run into 8342 South Cottage [Grove], One South." Aubert confirmed that the woman gave him the specific apartment. Aubert further stated that, after knocking on the door to the apartment, there was no response, but he could hear a "commotion of people moving around." Aubert then "leaned over" and looked through an opening in the kitchen window, and saw people "scurrying around," as if they were "looking for a place to hide." Aubert went to look through the bedroom window and saw a red hoodie hanging on the bedroom door. Aubert

decided to enter the apartment because the crime involved an armed assailant and he did not know the relationship, if any, between the offender and the residents in the apartment. Aubert could see through the blinds of the bedroom window. After entering the apartment, he saw a handgun in the bedroom, which another officer recovered, as well as other items belonging to Smith that were on the living room table.

¶ 9 On redirect examination, Aubert admitted that he did not know the relationship between the armed offender and the other people in the apartment, he did not see anyone injured, he did not hear any cries for help, and he was unaware of any calls to 9-1-1 from the apartment.

¶ 10 Jeremiah Gates testified that, on the date in question, he lived in an apartment at 8342 South Cottage Grove Avenue. Defendant had been an overnight guest but left sometime that morning with another individual, Kwan Stokes. At around 10 or 11 a.m., Gates heard the "buzzer" indicating that someone wanted to enter the building. Gates went downstairs and let defendant and Stokes back in, and the three of them returned to the apartment. Gates then testified that, "[l]ess than 30 seconds" later, he heard knocking at the front door and then at the back door. Gates said that he saw police "coming in through the window" of his bedroom before he had a chance to answer either the front or back door. Gates further agreed that the blinds over the bedroom window were "always closed" before the officers' entry. Gates also stated that, after the police entered his apartment, they placed him under arrest but they had neither an arrest warrant nor a search warrant.

¶ 11 On cross-examination, Gates described defendant as being "like a brother" to him and Stokes as a good friend of his. Gates also said that, when defendant and Stokes returned, neither of them had any items, such as a wallet or cigarettes, with them. Although Gates said that, when defendant and Stokes returned from outside, the three of them went back into Gates's bedroom,

Gates further testified that, when the police knocked on the doors and entered the apartment, the three of them were in the living room. Gates said they did not answer the door when they heard the knocking or even see who was knocking. Gates conceded that there was a gun in the apartment, but he did not know whose gun it was, and he did not see where the police found it. Gates denied that the gun was his or defendant's. Gates further denied that there was a pack of Newport cigarettes, a black wallet with the name of "Christopher Smith," or an "unidentified" wallet in the living room. Gates also testified that he did not know who owned the red hoodie that was recovered or where it was located, but he said it was probably with his clothes.

¶ 12 Following arguments, the trial court denied defendant's motion to suppress. The court found Aubert "extremely credible," and noted exigent circumstances existed that justified entry, namely, the recency of an armed robbery that a "good neighbor" had seen, the presence of a red hoodie that one of the offenders had been wearing inside the "specific apartment" that the neighbor identified, and individuals "running frantically" inside that same apartment.

¶ 13 The trial court subsequently allowed defendant's appointed assistant public defender to withdraw. Defendant, represented by private counsel, waived his right to a jury trial.

¶ 14 At trial, Smith testified that, at around 11 a.m. on May 29, 2012, he was working as a cable technician for DirecTV and was in the process of installing satellite television service for an apartment at 8342 South Cottage Grove. He parked his van in the back of the apartment building, near 8336 South Cottage Grove. He was gathering some equipment from the back of his van when he heard someone call to him to get his attention. Smith turned around and saw defendant, who was wearing a red hoodie, blue jeans and "Tim[b]erland boots." Smith remembered defendant's face, and added that defendant was also pointing a silver, black, and chrome handgun in Smith's face. Defendant told Smith to turn around, so Smith turned back

toward the back of his van, at which point Smith felt two sets of hands going through his pockets. Smith, however, did not see the second individual. Smith said that the individuals took his wallet, cell phone, and "Newport Light 100s" cigarettes. After taking those items, they told Smith not to turn around, and then they ran away.

¶ 15 After they left, Smith retrieved another phone from his van and called the police. The police arrived in about two or three minutes, spoke to Smith, and then began their investigation. Smith told the customer that another technician would complete the installation, and when he later went back outside, he saw that the police had detained three individuals. Smith identified defendant as the gunman. Smith said the officers recovered his wallet, cell phone, and cigarettes. Smith also saw an officer carrying a red hoodie that appeared to be the same one that defendant had been wearing.

¶ 16 On cross-examination, Smith stated that the entire incident took place within 15 to 20 seconds, and that he had "maybe" 5 seconds to observe the face of the armed individual. Smith further conceded that he did not provide the offender's height, weight, age, or facial characteristics. Smith also admitted that he only provided a description of one individual. On cross-examination by co-defendant's counsel, Smith agreed that, after the robbery, he told the 9-1-1 operator that the two individuals fled "in an unknown direction."

¶ 17 Loraine Ross then testified that, at the time of the robbery, she lived in a third-floor apartment on Cottage Grove Avenue. Ross said she was looking out of her window and had a clear view of "the cable guy" next to his company van with his hands up in the air. Ross, however, could not see whether there was anyone near him. After seeing this, Ross then looked out of her front living room window and saw two younger males walking. Ross said they were walking from the "corner side," *i.e.*, the back (where the van was parked), to the building at 8342

South Cottage Grove. They walked in the front door, and Ross did not see anything further after that point. Ross said that one of the individuals walking was co-defendant Gates. After the police arrived, Ross told them what she had witnessed. That evening, she went to the police station to view a lineup. She identified "two guys" in the lineup, one of whom was Gates.

¶ 18 On cross-examination, Ross said that she did see defendant walking on the day of the crime, but not by the truck. Ross, however, conceded that she never identified defendant in the lineup. Ross also could not remember if either of the two individuals was wearing a hooded sweatshirt. Ross further could not recall telling an investigator, Wayne Bunch, that she did not see the two individuals' faces.

¶ 19 On redirect examination, however, Ross testified that, when she spoke to Bunch, she said that she did not see the individuals' faces when Smith was at his van with his hands up. Ross then reiterated that she did see their faces when they were walking from the area of the van. Ross added that defendant, "the person in the tan [clothing]," was one of the two individuals she identified at the police station. On recross-examination, Ross said she did not recall seeing either individual wearing a hoodie.

¶ 20 Aubert testified that he responded to a call of an armed robbery. Aubert and his partner, Officer Anthony, met with Smith at the scene. Aubert said that Smith provided them with descriptions of the items taken as well as the offenders. Aubert also added that they "received some information that they [the offenders] *** went into the address of 8342 [Cottage Grove], Apartment One South." A maintenance person let them in the front door, and they went to the front door of One South. Aubert saw the movement of feet going back and forth, so he knocked "very loudly," and was "yelling" his office, but there was no response.

¶ 21 Aubert then went to the rear of the building and looked through the block-glass kitchen window. Although he could not see clearly through, Aubert said he could see multiple "black shadows" moving around inside the apartment. Aubert signaled for another officer to park a squad car on the grass so that Aubert could go through the bedroom window. Aubert said the bedroom window was slightly ajar, and he could see clearly through it. Aubert then went into the apartment through the bedroom window.

¶ 22 Aubert waited for another officer to enter, and then they went to "clear" the apartment of suspects. Aubert saw four people in the living room, including defendant and co-defendant. Three of the four were lying down on a couch, and a fourth was in a chair. All of them had their eyes closed, appearing to be asleep. Aubert said that a handgun was recovered from the bedroom floor, and a red hoodie with Smith's cell phone in one of the pockets was recovered from the bedroom closet. In addition, Aubert testified that a black wallet with Smith's identification was found inside a bag hanging on the kitchen door, and a pack of Newport cigarettes was on a living room table. Aubert said Smith identified defendant at the scene as the person who "placed the gun to [Smith's] forehead and demanded money," and who was wearing the red hoodie.

¶ 23 On cross-examination, Aubert said that the only description of the offender he received was a "[m]ale black with a red hoodie," and there was no information as to the offender's age, weight, or complexion. Aubert further conceded that there were no fingerprints taken from the gun, and that defendant's identification was not found inside the apartment.

¶ 24 Chicago police detective Morad Haleem then testified that, at around 7:15 p.m. on May 29, 2012, he met with Ross at the 6th District police station so that she could view a physical lineup. According to Haleem, Ross identified both defendant and co-defendant. On cross-examination, Haleem said that Ross stated that defendant and co-defendant were wearing

hoodies. Haleem, however, denied that Ross said that she could not see their faces. Haleem, however, agreed that Ross said that she knew both individuals from the neighborhood.

¶ 25 At the close of the State's evidence, the parties stipulated that the recovered handgun had eight live rounds, and that there were no fingerprints recovered from the gun that were suitable for comparison. Defendant then elected not to testify, and the defense rested.

¶ 26 The cause then proceeded to closing arguments. Defendant's privately-retained counsel highlighted the inconsistencies in the State's evidence. Counsel noted that Smith stated that he only saw the person who was pointing a gun in his face, but: (1) Ross stated there were two people, both of whom were wearing hoodies; and (2) Aubert testified that there were four people in the apartment. Counsel further argued that, although Smith identified defendant, Smith could not provide any description of the offender other than a "male black with a red hoodie." Counsel also argued that Smith's ability to observe and recall was undermined based upon the fact that there was a gun pointed at him and that the entire incident transpired in only 15 to 20 seconds. With respect to Ross, counsel reminded the trial court that she testified that she saw both individuals wearing hoodies, but she did not testify that either one was red and failed to identify defendant. Finally, counsel stated that no fingerprints were recovered from the gun, and although the red hoodie and proceeds of the robbery were recovered from the apartment, defendant did not live in that apartment and there were three other individuals there.

¶ 27 Following closing arguments, the trial court found defendant guilty. The court noted that Smith identified defendant at the scene and "more specifically" as the person who was wearing the red hoodie and holding the gun during the robbery. The trial court added that the hoodie had Smith's cell phone in it, and defendant was found "in proximity" to the handgun within a short period of time after the incident. The trial court characterized Ross's testimony as "harmed"

because Ross was "very scared" while testifying in court, although the trial court noted that Ross nonetheless offered "some real assistance" to the police at the time of the robbery.

¶ 28 At sentencing, defendant's presentence investigation report (PSI) showed that defendant, who was born on January 30, 1995, had two findings of juvenile delinquency involving the possession of a stolen automobile, resulting in a three-year term of probation, and an aggravated robbery delinquency finding, resulting in a five-year term of probation. In response to the trial court's question, defense counsel indicated to the trial court that there were no "corrections, deletions or anything like that." In aggravation, the State noted that two of defendant's delinquency findings were "serious," including the one robbery. The State asked for a sentence "over the minimum." Defense counsel argued for a minimum term, noting that defendant was a young man and that an extended time of incarceration would result in "no hope for him having a future." Following argument, the trial court sentenced defendant to 21 years' incarceration, consisting of a six-year sentence and a fifteen-year enhancement. This appeal follows.

¶ 29 ANALYSIS

¶ 30 *Ineffective Assistance of Counsel*

¶ 31 Defendant first contends that his trial counsel was ineffective for failing to ask the trial court to reconsider its denial of the pretrial motion to suppress evidence because the evidence "raised a reasonable probability that the trial court would have granted the motion upon reconsideration." Defendant argues that the trial court heard a "far different version of events at trial" compared to various aspects of Aubert's pretrial testimony on the motion to dismiss. Defendant asserts that counsel's failure to relitigate the motion to suppress warrants a new trial.

¶ 32 Claims of ineffective assistance of counsel are governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v.*

Albanese, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish ineffective assistance, a defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *Id.* Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice is found where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 496-97. The failure to establish either prong of the *Strickland* test is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (citing *Strickland*, 466 U.S. at 697).

¶ 33 Although claims of ineffective assistance of counsel regarding motions to suppress commonly involve an attorney's failure to initially file such a motion, the claim here concerns counsel's ineffectiveness for *failure to renew* a previously denied motion to suppress. Nonetheless, we analyze the claim in this case using the same principles that would control an ineffectiveness claim for failure to file a suppression motion. See *People v. Causey*, 341 Ill. App. 3d 759, 766-67 (2003).

¶ 34 Under the first prong of the *Strickland* test, the decision whether to file a motion to quash evidence and suppress evidence is traditionally viewed as trial strategy, and trial counsel thus "benefits from a strong presumption that his failure to challenge the validity of the accused's arrest or to seek the exclusion of certain evidence was proper." *People v. Little*, 322 Ill. App. 3d 607, 611 (2001). Matters of trial strategy are generally immune from claims of ineffective assistance of counsel except where the trial strategy results in no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). It is well established that counsel is not ineffective for failing to file a fruitless motion. See *People v. Lewis*, 88 Ill. 2d 129, 156 (1981) ("Counsel is not required to make losing objections in order to provide effective representation.")

(citing *People v. Johnson*, 45 Ill. 2d 501 (1970)). Moreover, the fact that a given trial strategy proved ultimately unsuccessful does not constitute proof of ineffective assistance. *People v. Medrano*, 271 Ill. App. 3d 97, 101 (1995).

¶ 35 Under the second prong of *Strickland*, a defendant asserting ineffectiveness for failure to renew a motion to suppress must show that (1) the trial court would have granted the renewed motion and (2) there is a reasonable probability that the result of his trial would have been different. *Causey*, 341 Ill. App. 3d at 767; see also *Henderson*, 2013 IL 114040, ¶ 15 (holding that, to show prejudice under *Strickland* for claims of ineffectiveness for failure to file a motion to suppress, the defendant must show that "the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different").

¶ 36 Whether a defendant received ineffective assistance of counsel presents is a mixed question of fact and law. *Strickland*, 466 U.S. at 698. We thus defer to any findings of fact, but review *de novo* the ultimate legal issue of whether counsel's purported omission supports an ineffective assistance claim. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004).

¶ 37 Defendant's claim of ineffectiveness fails because he cannot meet both prongs of *Strickland*. Court-appointed trial counsel fully litigated the motion to suppress before trial. At trial, privately-retained counsel thoroughly cross-examined the State's witnesses, elicited contradictory statements from Ross and Aubert, and admissions from Smith that he provided no description of the second offender and only had perhaps five seconds to view the armed individual. In addition, trial counsel's closing arguments focused on the unreliability of the State's evidence, including the contradictory witness testimony and the absence of any physical evidence. On this basis, we cannot hold that counsel's strategy provided "no meaningful adversarial testing" (*West*, 187 Ill. 2d at 432-33), and although this strategy apparently was

unsuccessful, that fact alone does not demonstrate proof of ineffective assistance. *Medrano*, 271 Ill. App. 3d at 101. Finally, counsel can not be ineffective for failing to file a fruitless motion (*Lewis*, 88 Ill. 2d at 156), and as we next discuss, any renewed motion would not have changed the result of defendant's trial.

¶ 38 Defendant also cannot meet the prejudice prong of *Strickland*, because even if private counsel had renewed the motion to suppress, the trial court would not have granted the motion and there is no reasonable probability that the result of defendant's trial would have been different. Here, the court found that Aubert's warrantless entry into the apartment was justified by exigent circumstances. The fourth amendment, applicable to the states through the fourteenth amendment, prohibits the police from entering private property without a warrant, unless there are exigent circumstances and probable cause to arrest. See *People v. James*, 163 Ill. 2d 302, 310-12 (1994).

¶ 39 Exigent circumstances include engaging in the hot pursuit of a fleeing suspect, preventing the imminent destruction of evidence, or responding to emergencies. *People v. Wear*, 229 Ill. 2d 545, 563 (2008). Factors used to a determine the presence of exigent circumstances include whether: (1) the crime under investigation was recently committed; (2) there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) a grave offense was involved, particularly a crime of violence; (4) there was reasonable belief that the suspect was armed; (5) the police officers were acting on a clear showing of probable cause; (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) there was strong reason to believe the suspect was in the premises; and (8) the police entry was made peaceably, albeit nonconsensually. *People v. McNeal*, 175 Ill. 2d 335, 345 (1997). Here, exigent circumstances were clearly present. A grave crime, armed robbery, had recently been

committed, and there was no delay on the part of the police. In addition, there was a reasonable belief that the suspect was armed (indeed, the gun was found in the apartment), and there was strong reason to believe the suspect was in the premises. Finally, as discussed below, the police were acting on a clear showing of probable cause. Therefore, even if, as defendant claims, there was no likelihood that defendant would have escaped and that the police entry was not made peaceably, the remaining factors in favor of a finding of exigent circumstances substantially outweigh the factors indicating a lack of exigent circumstances.

¶ 40 Finally, there was probable cause to arrest defendant because the officer had a reasonable belief that defendant had engaged in criminal activity. "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *Wear*, 229 Ill. 2d at 563. Probable cause is not synonymous with proof beyond a reasonable doubt, nor does it even require that the belief that the arrestee has committed a crime be more likely true than false. *Id.* at 564. In this case, Aubert spoke to Smith and learned that Smith had been robbed of his phone, wallet, and other items minutes before at gunpoint. Aubert received information that the suspects fled to 8342 South Cottage Grove, apartment "One South." At the building, Aubert knocked loudly on the apartment door, but there was no response, despite the fact that he could see movement inside the apartment. Aubert saw shadowy figures moving quickly through the kitchen window, and when he looked through the bedroom window, he saw a red hoodie hanging from the bedroom door. These facts were more than sufficient to lead a reasonably cautious person to suspect that the occupants had committed a crime, thereby establishing probable cause. See *id.* at 563.

¶ 41 Defendant argues, however, that there were numerous contradictions and inconsistencies between Aubert's pretrial testimony and the trial testimony, which fatally weakened the trial

court's findings of exigent circumstances and probable cause. We disagree. First, defendant claims that Aubert testified at the pretrial hearing that Smith (the victim) told him the "exact address and apartment," but the record refutes that claim: Aubert testified that he "heard" where the offenders had fled, but he was not asked who gave him that information. Defendant also points to the following purported inconsistencies: (1) Aubert testified at trial, but not at the pretrial hearing, that a maintenance man let him into the building; (2) Aubert testified pretrial that he saw a red hoodie through the bedroom window, but at trial did not testify to this fact and added that another officer "found" the hoodie; (3) Aubert testified pretrial that he saw "clearly" through the kitchen window, but admitted at trial that the window was made of glass block, and he could only see shadows; (4) Aubert testified pretrial that Smith provided the direction that the offenders fled, but Smith testified that he had indicated to the police that the offenders fled in an "unknown" direction; and (5) Aubert testified pretrial that Ross told him that she saw the robbery and gave him the address and apartment, but Ross testified at trial that she did not see the robbery (only Smith holding his hands up) and never testified that she saw the apartment. None of these points, however, advance defendant's claim.

¶ 42 The first two points are neither inconsistent nor contradictory. Aubert did not testify pretrial whether a maintenance man let him into the building because Aubert was merely asked pretrial what he saw when he "went to the 8342 apartment." Regarding the red hoodie, Aubert was asked at trial "where did you find" the red hoodie, which is not the same question as (when asked at the pretrial hearing) what he saw through the bedroom window prior to entering the apartment through that window.

¶ 43 With respect to the third point, Aubert explained on cross-examination during the pretrial hearing that, consistent with his written police report indicating the window was "open," he

could see "clearly" (or "[o]penly") through the kitchen window because it was unobstructed, or in Aubert's words, "like I can see through it." This is not inconsistent with his trial testimony that, although the window was not obscured by window coverings, he could nonetheless discern only shadowy figures of people moving around very quickly because the window was constructed of glass block.

¶ 44 Defendant's fourth alleged point concerns Smith's testimony as to the direction that the offenders fled after the robbery. Defendant argues that Smith testified that they fled in an unknown direction, but we note that Smith confirmed on cross-examination that he made that statement to *the 9-1-1 operator*, not to Aubert. Aubert was not the 9-1-1 operator; he was the responding officer on the scene. As such, Aubert's testimony that Smith told him the offenders fled in a certain direction was not necessarily contradicted with Smith's testimony as to what he told another individual.

¶ 45 Turning to defendant's last point, Aubert testified pretrial that Ross told him that she saw the robbery and gave him the address and apartment. Ross, however, testified at trial that, although she saw Smith holding his hands up, she did not see the robbery, *i.e.*, anyone committing the offense. Defendant further notes that Ross did not testify that she saw the specific apartment that defendant and co-defendant fled to. This final point is meritless. Assuming that Ross's trial testimony was accurate, Aubert's testimony that Ross saw the robbery was not contradicted; rather, it was a reasonable inference that Smith was holding his hands in the air because he was in the course of being robbed. Finally, although Ross stated that she only saw the offenders "enter the building," even if that statement refutes Aubert's testimony that Ross provided him with the specific address and apartment number, it is for the trial court to resolve discrepancies in the trial testimony. See *People v. Smith*, 2016 IL 119659, ¶ 43 (citing

People v. Luedemann, 222 Ill. 2d 530, 542 (2006)) ("A reviewing court gives great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence."). In this case, the trial court apparently found Aubert more credible than Ross on this point, whom the trial court described as "very scared" during her testimony. As such, the minor inconsistencies that defendant cites are insignificant and unrelated to the substance of Aubert's and Ross's testimony supporting the trial court's finding of exigent circumstances. Accordingly, defendant has failed to meet his burden under either prong of *Strickland*, and his contention of error on this point is without merit.

¶ 46 *Whether Defendant Is Entitled To a New Sentencing Hearing*

¶ 47 Next, defendant contends that he is entitled to a new sentencing hearing pursuant to section 5-4.5-105 of the Code. Defendant notes that, after his October 2014 sentencing, the legislature enacted a law (effective January 1, 2016) adding section 5-4.5-105 to the Code. Pub. Act 99-69 § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105). This new law requires trial courts to take into account certain factors when sentencing an individual who was under 18 at the time of the offenses, but that the trial court failed to do so. Defendant concludes that, since his case is currently on direct appeal, his conviction and sentence are not yet final, and he is entitled to resentencing under this new law. The State argues that section 5-4.5-105, although procedural in nature, only operates prospectively because the trial court must consider the various factors "[o]n or after the effective date" of the amendment.

¶ 48 The question presented to us is one of statutory interpretation. The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, "the surest and most reliable indicator of which is the statutory language statute itself, given its plain and ordinary meaning." *People v. Perry*, 224 Ill. 2d 312, 323 (2007). If the statutory language is

clear and unambiguous, we must apply it as written without using extrinsic aids to statutory construction. *Id.* We may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the expressed intent. *Id.* at 323-24. Since all provisions of a statutory enactment are viewed as a whole, we do not construe words and phrases in isolation; instead, they are interpreted in light of other relevant portions of the statute. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 507-08 (2003). We further presume that the General Assembly did not intend absurdity, inconvenience or injustice. *Id.* at 508. We review the construction of a statute *de novo. Perry*, 224 Ill. 2d at 324.

¶ 49 Our supreme court has explained that the retroactive application of a statute is determined under the test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). *Hayashi v. v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 23. Under the first part of the test, "if the legislature has clearly prescribed the temporal reach of the statute, the legislative intent must be given effect absent a constitutional prohibition." *Id.* The second part of the test provides that if the new law contains no "express provision regarding the temporal reach, the court must determine whether applying the statute would have a 'retroactive' or 'retrospective' impact; that is, 'whether it would *impair rights a party possessed* when he acted.' " (Emphasis added.) *Id*. (quoting *Landgraf*, 511 U.S. at 280). If "applying the statute would have a retroactive impact, then the court must presume that the legislature did not intend that it be so applied." *Id.* (citing *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 38 (2001)); see also *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30 (applying same analysis).

¶ 50 Illinois courts, however, will "rarely, if ever," need to go beyond step one of the *Landgraf* analysis because of section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2014)).

Einoder, 2015 IL 117193, ¶ 31 (citing *Caveney v. Bower*, 207 Ill.2d 82, 94 (2003)). Section 4 is a general savings clause that the court has interpreted to mean that procedural changes to statutes are applied retroactively, while substantive changes are applied prospectively only. *Caveney*, 207 Ill. 2d at 92. In essence, the legislature has clearly set forth the temporal reach of *every* amended statute: either expressly in the amendment itself, or by default in section 4. *Id.* at 95.

¶ 51 Section 5-4.5-105 of the Code, as amended, provides in pertinent part:

> "(a) On or after the effective date of this amendatory Act ***, 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 ***, shall consider the following additional factors in mitigation in determining the appropriate sentence * * * [.]
>
> (b) Except as provided in subsection (c), the court *** may, in its discretion, decline to impose any otherwise applicable sentencing enhancement based upon firearm possession, ***." 730 ILCS 5/5-4.5-105 (West 2016).

Amended section 5-4.5-105(a) also sets forth various mitigating factors, including the person's age, impetuosity, and level of maturity at the time of the offense; the presence of negative influences, such as peer or familial pressure; and the juvenile's potential for rehabilitation. 730 ILCS 5/5-4.5-105(a) (West 2016).

¶ 52 Turning first to subsection (a), this court has repeatedly held that the language of the amendment to section 5-4.5-105(a) indicates that the legislature intended that the amended provisions apply prospectively only. In *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 44,

appeal allowed, No. 121306 (Nov. 23, 2016), this court held that the amendment to section 5-4.5-105(a) begins with the phrase "on or after the effective date," and therefore the provisions apply to sentencing hearings taking place on or after the effective date of January 1, 2016. Accord *People v. Morris*, 2017 IL App (1st) 141117, ¶ 43. In *People v. Wilson*, 2016 IL App (1st) 141500, ¶¶ 15-16, *appeal allowed*, No. 121345 (Nov. 23, 2016) (consolidated appeal with *Hunter*), another division of this court also held that the provisions apply prospectively for offenses occurring on or after the effective date.

¶ 53 Nonetheless, defendant argues that the legislature intended that section 5-4.5-105(b) apply retroactively. Specifically, defendant argues that, although section 5-4.5-105(a) contains the prefatory phrase, "[o]n or after the effective date ***," section 5-4.5-105(b) does not have that language.[2] Under defendant's reading, however, subsection (a) (directing the trial court to consider various mitigating factors associated with youth) would not be retroactive, but subsection (b) (removing the mandatory imposition of firearm add-ons) would. We cannot conceive of a justification for the legislature to provide this distinction, and defendant offers none. Since we may neither construe statutory language in isolation (but rather in light of other relevant portions of the statute) nor presume that the legislature intended an absurd result (*Carver*, 203 Ill. 2d at 507-08), we hold that both subsection (b) and subsection (a) should be applied prospectively. We further note that both subsections center on functions of "the court" at sentencing, which supports our holding that the "[o]n or after the effective date" clause applies to both subsections (a) and (b).

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[2] The issue framed in the petition for leave to appeal in *Hunter* concerns in part the retroactivity of subsection (b). We may take judicial notice of public documents included in the records of other courts. See *Metropolitan Life Insurance Co. v. American National Bank and Trust Co.*, 288 Ill. App. 3d 760, 764 (1997).

¶ 54 In sum, we agree with the holdings in *Hunter*, *Wilson*, and *Morris*. We note that *Hunter* indicated that the amendment applies to sentencing hearings on or after the effective date, whereas *Wilson* held that the amendment applies to offenses committed on or after that date. Here, however, both the offense and defendant's sentencing hearing occurred prior to the amendment's effective date of January 1, 2016. Accordingly, defendant is not entitled to a sentencing hearing under the new provision.

¶ 55 *Whether Petitioner's Sentence is Unconstitutional*

¶ 56 Defendant also contends that the 15-year mandatory add-on to his 6-year sentence is unconstitutional under both the proportionate penalties clause of the Illinois constitution and the eighth amendment to the federal constitution. He asks that we vacate his sentence and remand this cause for resentencing. We review *de novo* whether a sentence is constitutional. *People v. Taylor*, 2015 IL 117267, ¶ 11.

¶ 57 The eighth amendment, applicable to the states through the fourteenth amendment, (*Robinson v. California*, 370 U.S. 660 (1962)), prohibits, *inter alia*, the imposition of "cruel and unusual punishments" (U.S. Const., amends. VIII, XIV), which include those that are disproportionate to the offense (*Graham v. Florida*, 560 U.S. 48, 59 (2010)). With respect to juveniles, the United States Supreme Court has held that the eighth amendment prohibits imposing on juvenile offenders sentences of death (*Roper v. Simmons*, 543 U.S. 551 (2005)), sentences of life without parole for nonhomicide offenses (*Graham*, 560 U.S. 48 (2010)), and also life in prison without the possibility of parole (*Miller v. Alabama*, 567 U.S. 460, ——, 132 S. Ct. 2455, 2469 (2012)). The *Miller* Court based its holding on the "great difficulty *** distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable

corruption.' " *Id.* (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at ___, 130 S. Ct. at 2026-27). In *People v. Reyes*, 2016 IL 119271, our supreme court interpreted *Miller* as further prohibiting mandatory term-of-years sentences imposed on juveniles that cannot be served in one lifetime, *i.e.*, "*de facto*" life sentences. *Id.* ¶¶ 9-10. The *Reyes* court, however, stated that a juvenile's 32-year sentence does not constitute a *de facto* life sentence. *Id.* ¶ 12.

¶ 58 Here, although defendant received a 21-year sentence for the armed robbery of Smith, this comprised the minimum 6-year sentence prior to the 15 years added on to his sentence. See 720 ILCS 5/18-2(b) (West 2014) (armed robbery while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment); 730 ILCS 5/5-4.5-25(a) (West 2014) (Class X sentencing range is not less than 6 years and not more than 30 years). In addition, defendant is eligible to receive day-for-day good conduct credit. See 730 ILCS 5/3-6-3(a)(2.1) (West 2014). Therefore, defendant must serve a minimum of 10½ years of his sentence, and he will have served this sentence by age 28. Although the court sentenced defendant to a mandatory minimum 21-year aggregate term, he cannot reasonably claim that this is a *de facto* life sentence. See *Reyes*, 2016 IL 119271, ¶ 12.

¶ 59 Defendant also argues his sentence violates the proportionate penalties clause of the Illinois constitution. Specifically, defendant claims that his sentence "is shocking to moral standards" because it "expressly discounted consideration" of both his juvenile status and his "demonstrated rehabilitation" while incarcerated.

¶ 60 The proportionate penalties clause of the Illinois Constitution, provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A sentence violates the proportionate penalties clause if it is "cruel, degrading, or so wholly

disproportionate to the offense as to shock the moral sense of the community." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005) (citing *People v. Moss*, 206 Ill. 2d 503, 522 (2003)). We may determine whether a sentence shocks the moral sense of the community by considering both objective evidence and also "the community's changing standard of moral decency." *People v. Hernandez*, 382 Ill. App. 3d 726, 727 (2008).

¶ 61 Here, the evidence revealed that defendant pointed a loaded handgun in the victim's face, ordered the victim to turn around, and robbed the victim of a pack of cigarettes, his cell phone, and wallet. Defendant had five prior juvenile delinquency findings, including one for possession of a stolen automobile (with three years' probation) and another for aggravated robbery (with five years' probation). On these facts and even in light of defendant's argument about the "evolution of principles with regard to juvenile sentencing," we cannot hold that defendant's 21-year sentence, which he may complete after only 10½ years, shocks the moral sense of the community. Petitioner's contention of error is therefore unavailing.

¶ 62 Furthermore, defendant's reliance upon *People v. Gipson*, 2015 IL App (1st) 122451, *appeal allowed*, No. 119594 (Nov. 23, 2016), is unavailing because that case involved a 52-year sentence for attempted murder, which would result in the 15-year-old defendant being released from prison no earlier than the age of "59 or 60." *Id.* ¶¶ 23, 66. Here, defendant would be eligible for release as early as age 28. *Gipson* is thus distinguishable.

¶ 63 *Whether Defendant is Entitled to Retrial Before the Juvenile Court*

¶ 64 Defendant next contends that we must remand this matter for proceedings before the juvenile court. Specifically, defendant argues that, although juveniles charged with armed robbery with a firearm used to be automatically excluded from juvenile court jurisdiction, a 2015 amendment (effective January 1, 2016) to section 5-130 of the Act (705 ILCS 450/5-130 (West

2016)) (the "automatic transfer statute") gave the juvenile court jurisdiction over *all* minors charged with armed robbery with a firearm. According to defendant, the amendment also requires the State to file a petition seeking a transfer from juvenile court to criminal court. Defendant further argues that this amendment is procedural, and thus retroactive, and he asks that we remand this cause so that "the State can request transfer under the discretionary transfer provision." The State responds that section 5-130 has no application to defendant because section 5-130 provides an exception to section 5-120's definition of a delinquent minor, and section 5-120 "barred application of [the Act's] provisions to defendant" based upon the alleged offense and defendant's age at the time of the alleged offense. We agree with the State.

¶ 65 At the time of the offense, section 5-120 of the Act provided in relevant part that, except as provided in section 5-130, "[p]roceedings may be instituted" under the Act concerning any minor who has either (1) violated "any *** State law" prior to the minor's 17th birthday or (2) violated any State law classified as a misdemeanor prior to his 18th birthday. 705 ILCS 405/5-120 (West 2012). At the time of the offense, section 5-130(1)(a)(iv) provided that the "definition of delinquent minor under Section 5-120 [*sic*]"[3] of the Act does not apply to any minor who was at least 15 years old at the time of the offense and was charged with, *inter alia*, armed robbery while armed with a firearm. 705 ILCS 405/5-130(1)(a)(iv) (West 2012). Defendant was 17 years old at the time of the armed robbery in question. Therefore, section

[3] Section 5-120 does not define (or even include) the term "delinquent minor." That term is defined in section 5-105(3) of the Act (705 ILCS 405/5-105(3) (West 2012)). We note, however, that section 5-120 incorporates nearly verbatim the full definition of delinquent minor (rather than the defined term) in the first full sentence where it lists the types of minors against whom proceedings under the Act may be instituted. Compare 705 ILCS 405/5-120 (West 2012) with 705 ILCS 405/5-105(3) (West 2012).

5-120 plainly would not apply to him, and therefore section 5-130 (which enumerates certain exceptions to section 5-120) becomes inoperative. Defendant's contention is thus without merit.

¶ 66 Defendant acknowledges in his reply brief that the State "correctly notes" that defendant could not have been charged as a juvenile because of the version of section 5-120 in effect at the time of the offense. We accept this concession. Nonetheless, he argues that he would still be entitled to relief should we hold that section 5-120 (in effect at the time of the robbery) violates equal protection. We allowed defendant to submit this issue in a supplemental brief.

¶ 67 *Whether the Preamended Version of Section 5-120 of the Act is Unconstitutional*

¶ 68 Finally, defendant contends that the version of section 5-120 of the Act in effect at the time of this offense (705 ILCS 405/5-120 (West 2012)), violated the equal protection clauses of the federal and state constitutions.[4] Defendant explains that, at the time of his offense, 17-year-old minors who were charged with felonies were prosecuted in criminal court, whereas minors under the age of 17 remained in juvenile court unless the nature of the offense subjected them to transfer. Defendant thus argues that, since 17-year-old minors and minors under 17 "exhibit the same characteristics of youth that warrant diversion to the juvenile justice system," there is no rational basis to treat 17-year-old minors differently from minors under 17, which therefore violates equal protection. Defendant asks that we remand this cause so that the State may seek a transfer to the criminal court pursuant to section 5-130 of the Act.

¶ 69 "Statutes are presumed constitutional and the party challenging a statute's validity bears the burden of demonstrating a clear constitutional violation." *People v. Richardson*, 2015 IL

[4] Defendant notes that section 5-120 was amended effective January 1, 2014, to expand the jurisdiction of the juvenile court to minors charged with felonies who were under 18 at the time of the offense (but subject to certain exceptions not relevant here). See 705 ILCS 405/5-120 (West 2014).

118255, ¶ 8. In addition, we must uphold the constitutionality of a statute if it is reasonable to do so. *Id.* We review a statute's constitutionality *de novo. Id.*

¶ 70 Defendant claims the 2012 version of section 5-120 violated the constitutional right to equal protection. That right requires a government to treat "similarly situated persons in the same manner." *People v. Mosley*, 2015 IL 115872, ¶ 40. The guarantee of equal protection does not preclude the government from enacting legislation distinguishing between different categories of people, but it does prohibit the state from according unequal treatment to persons who have been placed by a statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation. *Id.* We use the same analysis in assessing equal protection claims under both the state and federal constitutions. *Id.*

¶ 71 Here, the classification neither affects a fundamental right nor discriminates against a suspect class. See *People v. M.A.*, 124 Ill. 2d 135, 140-44 (1988) (noting that age is not a suspect class and denial of treatment under the Juvenile Court Act is not a fundamental right). Accordingly, the standard for judging the statute is the "relatively relaxed" rational basis standard, which merely requires that the classification "reasonably further a legitimate governmental interest." *People v. P.H.*, 145 Ill. 2d 209, 229 (1991). Under this standard, a challenged classification may be invalidated only if it is "arbitrary or bears no reasonable relationship to the pursuit of a legitimate State goal." *Id.*

¶ 72 In this case, defendant's claim is unavailing. The statute in effect at the time of the offense required the 17-year-old defendant (who was charged with a felony) to be tried in criminal court and not juvenile court. 705 ILCS 405/5-120 (West 2012). The legislative purposes of the Act are, *inter alia*, to "protect citizens from juvenile crime" and to "hold each juvenile offender directly accountable for his or her acts." 705 ILCS 405/5-101(1)(a), (b) (West

2012). In addition, the policy goals developed pursuant to the Act include "[h]old[ing] minors accountable for their unlawful behavior and not allow[ing] minors to think that their delinquent acts have no consequence for themselves and others." 705 ILCS 405/5-101(2)(j) (West 2012). In essence, the statute at issue here bears at least a reasonable relationship to those legislative purposes and policies because it reflects a distinction between the ability of older juveniles (namely, those who are within one year of majority) to appreciate the consequences of their acts compared to younger juveniles. Although drawing the line at 17 can generate objections of the type presented here, it is well-established that the guarantee of equal protection does not "deny a State the power to draw lines that treat different classes of persons differently." *People v. Reed*, 148 Ill. 2d 1, 7 (1992); see also *People v. Mathey*, 99 Ill. 2d 292, 300 (1983) ("It is not *** for this court to prescribe what the dividing lines should be in distinguishing offenses. That obviously is a legislative function."). The court's function is only to decide whether the enactment is irrational. *Id.* Since the preamended version of section 5-120 was not arbitrary and bore some reasonable relationship to the pursuit of a legitimate state interest, defendant's final contention of error necessarily fails.

¶ 73 CONCLUSION

¶ 74 For these reasons, we affirm the judgment of the trial court.

¶ 75 Affirmed.