2017 IL App (1st) 150908-U

SIXTH DIVISION
Order filed: November 9, 2017

No. 1-15-0908

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.	)	Nos. 14 CR 9305 and
	)	14 CR 12419
CEDRIC SANDERS,	)	
	)	Honorable
Defendant-Appellant.	)	James B. Linn,
	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the defendant's convictions for violating the Sex Offender Registration Act (Act) (730 ILCS 150/1 *et seq.* (West 2014)) and unlawful use or possession of a weapon by a felon where: (1) the State proved beyond a reasonable doubt that he had a duty to register, and failed to register, during the period alleged in the indictment; and (2) he failed to establish a claim of ineffective assistance of counsel as to either conviction.

¶ 2 In December 2014, the trial court found the defendant, Cedric Sanders, guilty of violating section 3(a) of the Sex Offender Registration Act (Act) (730 ILCS 150/3(a) (West 2014)) and

unlawful use or possession of a weapon by a felon in violation of section 24-1.1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.1(a) (West 2014)), and sentenced him to concurrent terms of 42 months' imprisonment. On appeal, he contends that: (1) the State failed to prove beyond a reasonable doubt that he had a duty to register, and failed to register, during the period alleged in the indictment; (2) trial counsel was ineffective for not challenging the admissibility of a detective's testimony that the defendant failed to register; and (3) trial counsel was ineffective for not filing a motion to suppress the defendant's inculpatory statement regarding his possession of a firearm. For the reasons that follow, we affirm the defendant's convictions for both offenses.

¶ 3 Due to an incident occurring on May 4, 2014, the defendant was charged by indictment in case No. 14 CR 12419 with one count of violating section 3(a)(1) of the Act (730 ILCS 150/3(a)(1) (West 2014)) in that, "having been previously convicted of rape in concert by force *** under the laws of the state of California, [he] knowingly failed to register, in person, as a sex offender with the Chicago Police Department within 3 days *** [of] establishing a residence or temporary domicile in the City of Chicago[ ] ***." The indictment alleged that the defendant failed to register between October 3, 2011, and May 4, 2014. Based on the same incident, the defendant was also charged by information in case No. 14 CR 9305 with two counts of unlawful use or possession of a weapon by a felon in violation of section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2014)). The information alleged that he "knowingly possessed on or about his person" a handgun (Count I) and bullets (Count II) "after having been previously convicted of the felony offense of rape[ ] *** under the laws of the State of California[ ] ***."

¶ 4 The trial court conducted a bench trial in both cases, at which the following evidence was adduced.

¶ 5 The State called Officer Mueller, who testified that, on May 4, 2014, near 430 West 81st Street in Chicago, he and his partner, Officer Neberieza (collectively, the officers), curbed a vehicle for failure to use a turn signal. Officer Mueller observed two people inside the vehicle: the defendant, who was in the driver's seat, and another person in the front passenger seat. Officer Mueller asked the defendant to produce a driver's license and, when he failed to do so, asked him to exit the vehicle. The defendant complied. Officer Mueller then asked whether he had "anything illegal on his person or in the vehicle," and the defendant stated that "he had a gun in the glove box ***." Officer Mueller recovered a loaded revolver from the glove box, arrested the defendant, and transported him to the Sixth District police station. There, the officers apprised the defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Afterwards, the defendant stated that he found the revolver while cleaning the house of a friend's deceased husband and "kept it for himself." On cross-examination, Officer Mueller stated that he also learned the vehicle the defendant was driving belonged to someone else.

¶ 6 Detective Draz testified that he investigated the defendant following his arrest. In the course of the investigation, he verified the defendant's identity, date of birth, FBI number, California identification number, and Social Security number. Through his investigation, Detective Draz learned that the defendant was subject to a "fugitive warrant" in California for failure to register as a sex offender and never registered in Illinois. In June 2014, Detective Draz met with the defendant in jail and read him a form stating the *Miranda* rights. After signing the form, the defendant stated that he moved to Chicago and lived there with his girlfriend, Karen Jordan, since "some time in 2011." According to Detective Draz, the defendant acknowledged that he was subject to a lifetime registration requirement in California and knew that it was a crime to leave California and not register elsewhere.

¶ 7 Karen testified that the defendant lived at her house in Chicago since 2012. According to Karen, both the defendant and her brother, Claude, drove her vehicle. She did not believe the defendant carried a firearm, and stated that "it has been awhile" since he kept one in a car.

¶ 8 The State introduced three documents from California: (1) a "disposition of arrest and court action" that stated the defendant pled guilty to rape in concert by force on June 20, 1984, and was sentenced to seven years' imprisonment on March 8, 1985; (2) a "notice of registration requirement," signed by the defendant and dated May 10, 1991, which stated that his "responsibility to register as a sex offender is a lifetime requirement" under "[s]ection 290 of the California Penal Code;" and (3) a "notice of sex offender registration requirement," signed by the defendant and dated February 9, 2006, which stated that, if the defendant leaves California, he is "required to register in the new state within ten (10) working days" under "section 290 and 290.01 of the California Penal Code ***."

¶ 9 After the State rested, the defense called a single witness, Tatiana Jordan, Karen's niece, who testified that she occasionally saw the defendant drive Karen's vehicle, but that she did not see him drive it in April or May 2014. She believed that only her uncle, George, drove the vehicle during the previous year, and did not believe the defendant carried a firearm.

¶ 10 Following closing arguments, the trial court found the defendant guilty of failing to register under the Act and unlawful use or possession of a weapon by a felon. In its findings, the trial court stated that "the police officers who testified in all matters *** [were] credible and compelling." The same attorney who represented the defendant at trial filed a single posttrial motion listing both case numbers, which did not raise a claim of ineffective assistance. The trial court denied the defendant's motion as to both cases and, following a sentencing hearing,

imposed concurrent terms of 42 months' imprisonment.[1] The trial court denied the defendant's motions to reconsider sentence as to both offenses, and this appeal followed.

¶ 11 For his first assignment of error, the defendant challenges his conviction for failure to register under the Act on grounds that the State failed to prove beyond a reasonable doubt that he had a duty to register, and failed to register, during the period alleged in the indictment.

¶ 12 The Act is intended to aid law enforcement agencies in monitoring the whereabouts of certain offenders, including individuals classified as "sex offenders" and "sexual predators." *People v. Molnar*, 222 Ill. 2d 495, 499 (2006). Under the Act, a sex offender is defined, in relevant part, as any person who is convicted of an enumerated sex offense under Illinois law or a "substantially similar" law of another state. 730 ILCS 150/2(A)(1)(a), 2(B)(1) (West 2014). Criminal sexual assault, *i.e.*, an act of sexual penetration committed through the use or threat of force (720 ILCS 5/11-1.20(a)(1) (West 2014)), or a substantially similar offense in another state, is a qualifying conviction for classification as a sex offender. 730 ILCS 150/2(B)(1) (West 2014). Relevant to this appeal, a sexual predator is defined, *inter alia*, as any person who is "required to register in another State due to a conviction[ ] *** triggering an obligation to register as a sex offender, sexual predator, or substantially similar status under the laws of that State." 730 ILCS 150/2(E-10) (West 2014).

¶ 13 Section 3(a) of the Act provides that "[a] sex offender, as defined in [s]ection 2 of this Act, or sexual predator" shall register with the appropriate authority in any municipality where he or she resides or is temporarily domiciled "for a period of time of 3 or more days." 730 ILCS 150/3(a)(1) (West 2014). Sex offenders who are not sexually dangerous must register for a

[1] The record does not indicate whether the trial court merged the two counts of unlawful use or possession of a weapon by a felon. The mittimus, however, shows that sentence was imposed only on Count 1 (possession of a handgun).

period of 10 years after parole or discharge from a prison, hospital, or facility, while sexual predators must register for life. 730 ILCS 150/7 (West 2014).

¶ 14 The defendant initially contends that the State failed to prove that he was required to register as a sex offender as alleged in the indictment, where his release from prison occurred more than 10 years before October 3, 2011, the earliest date on which the indictment stated that he failed to register. The State, in response, submits that, due to an obligation to register in California, the defendant qualifies as a sexual predator under section 2(E-10) of the Act and, therefore, has a lifetime duty to register in Illinois. In reply, the defendant maintains that due process precludes this court from affirming his conviction on the basis that he qualifies as a sexual predator because, in the indictment and at trial, the State proceeded under a theory that he was a sex offender—a classification that arises under a different statutory provision and requires different proof than classification as a sexual predator.

¶ 15 Although the defendant purports to challenge the sufficiency of the evidence showing that he was required to register and whether the State, on appeal, has changed its theory of the case, his argument is more properly characterized as an allegation that a fatal variance exists between the indictment and the trial evidence. We therefore consider his argument under the fatal-variance framework. See *People v. Roe*, 2015 IL App (5th) 130410, ¶¶ 6, 8 (finding that the defendant's contention that due process was violated due to his conviction for an uncharged offense was an argument regarding a variance between the charging instrument and the evidence presented, rather than a challenge to the sufficiency of the evidence); *People v. Cohn*, 2014 IL App (3d) 120910, ¶ 13 (finding that the defendant mischaracterized an issue pertaining to the information as a sufficiency of the evidence matter).

¶ 16 A person may not be convicted of a criminal offense in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the offense with which he is charged. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Brown*, 2013 IL 114196, ¶ 48. Due process requires that a charging instrument notify a defendant of the charged offense with sufficient specificity to allow a proper defense. See *People v. Espinoza*, 2015 IL 118218, ¶ 38. In order to be fatal, however, a variance between the charging instrument and the proof pursuant to which a defendant is convicted must be material and of such character that it misleads the accused in making his defense. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). We read the indictment and relevant statute together, and construe each as a whole in order to avoid rendering any part meaningless or superfluous. *Roe*, 2015 IL App (5th) 130410, ¶ 11. The sufficiency of the charging instrument is a question of law and our review is, therefore, *de novo*. *Espinoza*, 2015 IL 118218, ¶ 15.

¶ 17 Here, any variance between the indictment and the evidence presented at trial was not fatal to the defendant's conviction. The indictment alleged that the defendant, in violation of section 3(a)(1) of the Act, failed to register "as a sex offender" between October 3, 2011, and May 4, 2014, after being convicted of rape in concert by force in California. Section 3(a) of the Act, in turn, imposes a registration requirement on both sex offenders and sexual predators. 730 ILCS 150/3(a) (West 2014). The requirement to register, therefore, may arise in one of two ways, but the essential allegation is that the defendant was subject to the registration requirement and did not comply. Thus, the fact that the indictment alleged the defendant's California conviction qualified him as a sex offender, while the trial evidence showed that the conviction, in fact, qualified him as a sexual predator, is immaterial: the key proposition was that the defendant did not register despite being so required. See *People v. DiLorenzo*, 169 Ill. 2d 318, 321 (1996)

(the nature and cause of a criminal prosecution, as included in the indictment, refers to the offense and not the manner in which it was committed); *People v. Nathan*, 282 Ill. App. 3d 608, 611 (1996) (if the essential elements of an offense are properly charged but the manner in which the offense is committed is incorrectly alleged, the error is merely one of form). Consequently, we reject the defendant's contention that a fatal variance existed between the charging instrument and the trial evidence.

¶ 18 The defendant argues, however, that section 2(E-10) of the Act, under which the State maintains that he qualifies as a sexual predator, was not in effect until January 1, 2012, several months after the earliest date on which the indictment alleged that he failed to register in Illinois, and, therefore, would violate *ex post facto* principles if it were applied to him.

¶ 19 The *ex post facto* clauses of the United States and Illinois Constitutions prohibit the retroactive application of any law that "criminalizes an act that was innocent when done, increases the punishment for a previously committed offense, or alters the rules of evidence by making a conviction easier." *People v. Malchow*, 193 Ill. 2d 413, 418 (2000); U.S. Const., art. 1, § 10; Ill. Const. 1970, art 1, § 16. The prohibition against *ex post facto* laws ensures " 'that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' " *People v. Brown*, 2017 IL App (1st) 140508-B, ¶ 12 (quoting *People v. Criss*, 307 Ill. App. 3d 888, 896 (1999)). However, a law is not considered *ex post facto* if it "provides punishment or a penalty for the continued maintenance of certain conditions which prior to the enactment of the statute, were lawful." *People v. Jones*, 329 Ill. App. 503, 506 (1946) (citing *Samuels v. McCurdy*, 267 U.S. 188 (1925)). Whether the retroactive application of a statute constitutes an *ex post facto* violation is a question of law and our review is, therefore, *de novo*. *People v. Davis*, 408 Ill. App. 3d 747, 751 (2011).

¶ 20 In this case, we find no *ex post facto* violation. The defendant was charged with failure to register after residing or being temporarily domiciled in Chicago for three or more days, between October 3, 2011, and May 4, 2014. The statutory provision that defines sexual predators to include individuals who, like the defendant, are alleged to be subject to out-of-state registration requirements—and, therefore, are required to register for life in Illinois under section 7 of the Act—took effect during that time period, on January 1, 2012. See 730 ILCS 150/2(E-10) (West 2014) (added by Pub. Act 97-578 (eff. Jan. 1, 2012)). The trial evidence established that the defendant persisted in failing to register for more than two years after the registration requirement in section 2(E-10) of the Act took effect. Thus, even if his failure to register was not unlawful on October 3, 2011, the earliest date alleged in the indictment, his continuing failure to register even after January 1, 2012, when the new registration requirement took effect, still violated section 2(E-10) of the Act. Under these circumstances, the fact that the indictment alleged that his conduct began prior the enactment of section 2(E-10) of the Act is irrelevant and, therefore, no *ex post facto* violation occurred. See *Jones*, 329 Ill. App. at 506-07 (affirming the defendant's conviction for permitting an abandoned oil well to remain unplugged, in violation of a statute enacted nearly three years after the well was abandoned, as the offense was continuing and the defendant's conviction did not depend on that portion of his conduct that occurred prior to the law taking effect).

¶ 21 The defendant further argues that, even if section 2(E-10) of the Act is applicable in his case, the trial evidence did not establish that he was, in fact, required to register in California.

¶ 22 The standard of review on 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. Belknap*, 2014

IL 117094, ¶ 67. To sustain a conviction, "[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Hall*, 194 Ill. 2d 305, 330 (2000). A defendant's conviction will be reversed only if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 23 In this case, in order to establish that the defendant was obligated to register as a sexual predator in Illinois under section 2(E-10) of the Act, the State was required to prove that he had a duty to register out-of-state. To this end, the State produced: (1) the disposition showing that the defendant pled guilty in California to rape in concert by force and was sentenced to seven years' imprisonment; (2) the "notice of registration requirement," which stated that the defendant was required to register for life in California under "[s]ection 290 of the California Penal Code;" and (3) the "notice of sex offender registration requirement," which stated that, if the defendant leaves California, he is "required to register in the new state within ten (10) working days" under "section 290 and 290.01 of the California Penal Code ***."

¶ 24 Given this evidence, the trial court could find that the State met its burden to establish that the defendant was required to register in California and, therefore, also was required to register as a sexual predator in Illinois. The State's exhibits show that the defendant was convicted of a sex offense in California and identify the statutes that obligated him to register there. Nothing in the record indicates that, as the defendant suggests, those exhibits were introduced for the limited purpose of showing that he was aware of a requirement to register in Illinois. Moreover, although the State did not proffer the text of the California statutes at trial, the trial court was required to take judicial notice thereof pursuant to section 8-1001 of the Code of Civil Procedure (735 ILCS 5/8-1001 (West 2014)), which provides that the court "shall take

judicial notice of *** [a]ll laws of a public nature enacted by any state or territory of the United States." See *People v. Monick*, 51 Ill. App. 3d 783, 789 (1977) (finding that the defendant was not denied due process by the State's failure to introduce at a hearing on a petition to revoke his probation the Indiana statute that he allegedly violated, as that statute was subject to judicial notice). Section 290 of the California Penal Code, which is also subject to judicial notice by this court (735 ILCS 5/8-1002 (West 2014)), provides that a person convicted of rape, like the defendant, must register for life while residing in California. Based on the foregoing, the evidence was sufficient to sustain a finding that the defendant was required to register in California and, therefore, obligated to register as a sexual predator in Illinois.

¶ 25 The defendant contends, however, that the State failed to establish that he did not register in Illinois where the only evidence relating to the issue was inadmissible. More specifically, he argues that: (1) the State provided no foundation for Detective Draz's testimony that the defendant did not register; and (2) given the lack of detail in Detective Draz's testimony regarding his investigation, his statement that the defendant never registered was likely hearsay. The State, in response, maintains that nothing at trial suggested that Detective Draz did not testify based on personal knowledge acquired during his investigation.[2]

¶ 26 The defendant did not challenge the admissibility of Detective Draz's testimony at trial and, therefore, forfeiture applies. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (objection

[2] The State also suggests that Detective Draz could have learned about the defendant's failure to register from a public record that would have been admissible had it been introduced at trial. In support of this position, the State attaches to its brief on appeal a printout from the Illinois State Police website that indicates the defendant "has failed to maintain accurate [sex offender] registration records as required by law." We will not take judicial notice of the printout, as it is offered as evidence not introduced at trial. See *People v. Jones*, 2017 IL App (1st) 143718, ¶¶ 17 n.4, 21 (declining to take judicial notice of records from the Illinois Department of Corrections for purposes of determining whether the defendant's registration period was tolled due to incarceration).

both at trial and in a posttrial motion is required to preserve an issue for appeal). He argues, however, that this court should consider the matter pursuant to either prong of plain-error review, or, alternatively, under the theory that trial counsel was ineffective for failing to object to Detective Draz's testimony.

¶ 27 First, we turn to the defendant's claim for plain error. A reviewing court considers unpreserved error under plain-error review when either: (1) the evidence at trial was so closely balanced that the guilty verdict may have resulted from the error; or (2) the error was so serious that it deprived the defendant of a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009); Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Absent an error, there can be no plain error under either prong. See *People v. Eppinger*, 2013 IL 114121, ¶ 19.

¶ 28 Here, the defendant has not established that an error occurred because he has not demonstrated that Detective Draz's testimony was, in fact, hearsay. "The hearsay rule prohibits the fact finder from considering testimony in court of a statement made out of court, where such statement is offered to show the truth of the matters asserted." *People v. Overton*, 281 Ill. App. 3d 209, 216 (1996). While the defendant hypothesizes that Detective Draz, in his testimony, merely repeated information that he learned from an unidentified, out-of-court source, the record neither proves that this was the case nor disproves that he testified based on personal knowledge. See *People v. Johnson*, 93 Ill. App. 2d 184, 196 (1968) (declining to find that a police officer's testimony was hearsay where there was "no showing of where *** [the officer] got his information or that it was the mere reiteration of another's out of court statement" and, at trial, the defendant "made no inquiry" to determine where the officer obtained his knowledge). The defendant's claim of error regarding the admissibility of Detective Draz's testimony is, therefore, speculative, and the trial court could consider Detective Draz's testimony for its full probative

effect in determining whether the State met its burden to prove that the defendant failed to register under the Act. See *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992) (noting that the "[t]he testimony of a single witness, including that of a law enforcement officer, if positive and credible, is sufficient to convict[ ] ***."). Consequently, the defendant's claim of plain error fails.

¶ 29 Next, we consider the defendant's claim for ineffective assistance of counsel. Claims of ineffectiveness of counsel are judged using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Peterson*, 2017 IL 120331, ¶ 79. Under *Strickland*, the defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688, 694). The defendant's failure to establish either prong of the *Strickland* test precludes a finding that counsel was ineffective. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 30 We find that the defendant cannot establish the second prong of the *Strickland* test. Unlike in *In re Jovan A.*, 2014 IL App (1st) 103835, and *People v. Jura*, 352 Ill. App. 3d 1080 (2004), both relied on by the defendant, this case does not involve a situation where trial counsel failed to object to actual hearsay testimony; to the contrary, the record does not demonstrate that Detective Draz's testimony was hearsay. Because the defendant is unable to establish that Detective Draz's testimony was inadmissible, he cannot establish that he was prejudiced by its admission. As such, the defendant's claim for ineffective assistance fails under the second prong of *Strickland*.

¶ 31 Next, the defendant contends that his conviction for unlawful use or possession of a weapon by a felon must be reversed due to trial counsel's ineffective assistance in not filing a motion to suppress his inculpatory statement to the arresting officers. In support of this position, the defendant relies on an arrest report written by Officer Mueller's partner, Officer Neberieza, which is included in the record but was not introduced at trial. Officer Neberieza's report differs from Officer Mueller's trial testimony in that, per the report, the officers first placed the defendant "in custody" for failing to produce a valid driver's license, then asked whether he was in possession of "anything illegal," and, only later, at the police station, provided him with the *Miranda* warnings. Given this sequence of events, the defendant maintains that he made his inculpatory statement during a custodial interrogation before he received the *Miranda* warnings. Based on the circumstances of his arrest, he further argues that the public safety exception to *Miranda* did not apply, the vehicle was not subject to search incident to his arrest for a traffic violation, and, but for his inculpatory statement, the officers would not have had probable cause to search the glove box and recover the firearm. Therefore, he submits that a reasonable probability exists that, had trial counsel filed a motion to suppress, he would not have been found guilty of unlawful use or possession of a weapon by a felon.

¶ 32 The State, in response, contends that the defendant cannot establish a claim for ineffective assistance of counsel because there is no way to know whether, at a suppression hearing, Officer Neberieza would have testified consistently with the report. Based on Officer Mueller's trial testimony, however, the State maintains that the defendant was not in custody when the officers asked whether he had anything illegal in his possession and, therefore, the *Miranda* warnings were not required.

¶ 33 In reply, the defendant argues that Officer Mueller's trial testimony also would have supported a motion to suppress because, per his account, the defendant was in custody for a traffic violation once the officers learned that he lacked a driver's license and ordered him to exit the vehicle. Additionally, even if the officers discovered the firearm pursuant to a lawful search, the defendant maintains that he would not have been convicted had trial counsel succeeded in suppressing his inculpatory statement.

¶ 34 Under *Strickland*, as we have explained, the defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Manning*, 241 Ill. 2d at 326 (citing *Strickland*, 466 U.S. at 688, 694). As we have also noted, the failure to establish either prong precludes a claim of ineffective assistance. *Henderson*, 2013 IL 114040, ¶ 11.

¶ 35 The decision whether to file a motion to suppress is a matter of trial strategy and, therefore, entitled to great deference. *People v. Bew*, 228 Ill. 2d 122, 128 (2008). Thus, in order to show that, under the first prong of the *Strickland* test, counsel was ineffective for failing to file a motion to suppress, a defendant must overcome the presumption that the decision not to file the motion was "the product of sound trial strategy." (Internal quotation marks omitted.) *Manning*, 241 Ill. 2d at 327. As to the second prong of the *Strickland* test, " '[i]n order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.' " *Bew*, 228 Ill. 2d at 128-29 (quoting *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)).

¶ 36 In *Miranda*, the Supreme Court held that "the prosecution may not use statements,

whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. If police officers fail to both provide the requisite *Miranda* warnings and obtain a voluntary, knowing, and intelligent waiver of those rights, an individual's statements during a custodial interrogation are generally inadmissible. *Id.*

¶ 37 In order invoke the *Miranda* requirements, a defendant must be both subject to interrogation and in custody or its equivalent. See *People v. Peo*, 391 Ill. App. 3d 815, 818 (2009); see also *People v. Villalobos*, 193 Ill. 2d 229, 239 (2000) ("Absent the interplay of custody and interrogation, an individual's privilege against self-incrimination is not threatened."). A person is "interrogated" for *Miranda* purposes when the police ask questions that are "reasonably likely to elicit an incriminating response from the subject." *People v. Olivera*, 164 Ill. 2d 382, 391-92 (1995). The "in custody" determination, in turn, requires consideration of: (1) the circumstances surrounding the interrogation; and (2) whether, under those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *People v. Braggs*, 209 Ill. 2d 492, 505-06 (2003). When examining the circumstances of an interrogation, courts consider the following factors: the location, time, length, mood, and mode of the interrogation; the number of police officers present; the presence or absence of the family and friends of the accused; any indicia of formal arrest; and the age, intelligence and mental makeup of the accused. *Id.* at 506.

¶ 38 In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Supreme Court held that *Miranda* warnings were not required for a motorist detained during a traffic stop, even though the stop resulted in a custodial interrogation. The Court reasoned that *Miranda* warnings were unnecessary because, in that case, the custodial interrogation: (1) took place during a temporary

and brief detention; and (2) was not a situation where the suspect would feel completely at the mercy of the police. *Id.* at 437-48, 440-41. In reaching its conclusion on the second point, the court noted that the stop was: (1) public, and, therefore, diminished the motorist's fears if he did not cooperate; (2) conducted by only one or two police officers; and (3) not in a police-dominated setting, like the police station. *Id*. The Court observed, however, that "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Id.* at 421.

¶ 39 Based on the record before us, we are unable to find that *Miranda* warnings were required when the defendant made his inculpatory statement regarding the firearm. At trial, Officer Mueller testified that the defendant was pulled over for a minor infraction—namely, failing to use a turn signal—and that he was unable to produce a valid driver's license. Officer Mueller then directed the defendant to exit the vehicle and asked him whether he had "anything illegal on his person or in the vehicle." Clearly, this question was reasonably likely to elicit an incriminating response from the defendant and was, therefore, an interrogation. See *Olivera*, 164 Ill. 2d at 391-92. As to the circumstances of the interrogation, however, we observe that, as in *Berkemer*, the traffic stop took place in a public location and nothing suggests the encounter was lengthy or oppressive. Further, although the defendant exited the vehicle, the record does not indicate whether Officer Mueller ever communicated that, at that time, he was under arrest for failing to produce a valid driver's license. Only two police officers were present, and the record is silent as to whether the defendant was handcuffed, placed in the police car, or otherwise separated from the other passenger when Officer Mueller questioned him. *Cf. People v. Rivera*, 304 Ill. App. 3d 124, 128-29 (1999) (finding that *Miranda* warnings were required when six

police officers in four squad cars surrounded the defendant). Given these circumstances, Officer Mueller's testimony does not demonstrate that the defendant was subjected to treatment that required the *Miranda* warnings under the principles set forth in *Berkemer*. Therefore, the trial court could have reasonably concluded that *Miranda* warnings were unnecessary and denied a motion to suppress.

¶ 40 We note, additionally, that we are unable to resolve the defendant's claim that trial counsel was ineffective for not filing a suppression motion based on Officer Neberieza's arrest report. Although the arrest report is included in the common law record, it was not—and could not have been—introduced as evidence at trial. See *People v. Brackett*, 144 Ill. App. 3d 442, 446 (1986) (refusing to consider a police report that appeared in the record on appeal because "police reports are not admissible as substantive evidence" at trial); *People v. Burnside*, 133 Ill. App. 3d 453, 457 (1985) (declining to consider the content of a police report that appeared in the record on appeal as part of pretrial discovery but was not introduced at trial). Thus, to the extent the State and the defendant dispute whether Officer Neberieza's arrest report is equivalent to an affidavit, and whether his statements are indicative of how he might testify at a suppression hearing, both parties' arguments are misplaced. The arrest report was not before the trial court and, therefore, is not properly before this court. Consequently, the defendant's attempt to introduce the arrest report in his direct appeal is improper, and it will not be considered here. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988) (on direct appeal, a party may not introduce evidence that was not before the trier of fact).

¶ 41 Based on the above reasoning, we find that the defendant has not met his burden of establishing that a motion to suppress would have been granted. Because of this conclusion, we cannot find that trial counsel was ineffective. See *People v. Brannon*, 2013 IL App (2d)

111084, ¶ 49.

¶ 42 For all the foregoing reasons, we affirm the defendant's convictions and sentences for violation of the Act in case No. 14 CR 12419, and for unlawful use or possession of a weapon by a felon in case No. 14 CR 9305.

¶ 43 Case No. 14 CR 12419, affirmed.

¶ 44 Case No. 14 CR 9305, affirmed.