2017 IL App (4th) 150003-U

NO. 4-15-0003

FILED
May 9, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
KEITH SMITH,	)	No. 13CF137
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions, finding the trial court did not err in requiring him to wear leg shackles and denying his renewed request for a motion to suppress. This court also found defendant's conviction for being an armed habitual criminal should not be vacated. This court vacated defendant's sentences and remanded for a new sentencing hearing, finding the trial court erred in not appointing counsel at sentencing.

¶ 2 Following a stipulated bench trial in June 2014, the trial court found defendant, Keith Smith, guilty of being an armed habitual criminal, unlawful possession of a weapon by a felon, aggravated unlawful use of a weapon, unlawful possession with intent to deliver a controlled substance, and unlawful possession of a controlled substance. In December 2014, the court sentenced defendant to prison.

¶ 3 On appeal, defendant argues (1) the trial court erred in denying his request to revoke his waiver of counsel, (2) the court erred in requiring him to wear leg shackles, (3) the

court erred in denying his renewed request for a motion to suppress, and (4) his conviction for the offense of being an armed habitual criminal should be vacated. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In June 2013, the State charged defendant by information with the following offenses: (1) being an armed habitual criminal (count I) (720 ILCS 5/24-1.7 (West 2012)); (2) unlawful possession of a weapon by a felon (count II) (720 ILCS 5/24-1.1(a) (West 2012)); (3) aggravated unlawful use of a weapon (count III) (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)); (4) unlawful possession with intent to deliver a controlled substance (count IV) (720 ILCS 570/401(c)(1) (West 2012)); and (5) unlawful possession of a controlled substance (count V) (720 ILCS 570/402(c) (West 2012)). The trial court appointed the public defender to represent defendant.

¶ 6 On July 1, 2013, Judge Jennifer H. Bauknecht conducted the preliminary hearing, and defendant appeared with the public defender. The State called Dwight police officer Mark Scott to testify regarding a traffic stop involving defendant that precipitated the charges against him. After defense counsel asked several questions of Officer Scott, the trial court found probable cause that an offense had been committed. After the court admonished defendant regarding the charges and his trial rights, defendant indicated he wanted to proceed *pro se*. Defendant stated he was 30 years old, had obtained his general equivalency diploma, and could read and write. The court admonished defendant on the perils of representing himself and stated he would not receive any special consideration in terms of additional resources or preparation time. The court told defendant he may not get an attorney if he requested one on the morning of trial and also stated as follows:

> "It is within the Court's discretion to consider whether or not to appoint standby counsel for specific issues, including not only the nature and gravity of the charges, the legal complexity of the proceedings and the factual issues in the case as well as the abilities and experiences of the defendant.
>
> In this case, they are very serious charges, but from a factual standpoint, it is not that complicated. And from a legal standpoint, at this point it does not appear overly complicated. So at this point based on information I have before me, it is very unlikely that I would appoint standby counsel to represent you."

Defendant indicated he understood the admonishments and still wished to represent himself. The court granted his request.

¶ 7 On July 1, 2013, defendant filed a *pro se* motion to preserve evidence and a motion for a bill of particulars. On July 23, 2013, the trial court conducted a hearing on the motions. The State indicated it had tendered everything it had in discovery, including police reports, criminal history, and a digital video disc (DVD) of the stop. The State later clarified it did not provide a video of the stop, and the DVD provided to defendant contained photographs.

¶ 8 On August 6, 2013, the trial court held a status hearing. After discussion, the court continued the case for a pretrial hearing to allow defendant more time to prepare. The court also asked the State if it had turned over all the evidence to defendant. The State indicated it had, except for the deoxyribonucleic acid and fingerprint results. The State then added there were "no videos from any other squad cars that might have shown up," and defendant "has everything we have."

¶ 9 At a pretrial hearing on September 11, 2013, defendant complained he had been transferred from the Livingston County jail to the Illinois Department of Corrections and was not allowed to take his legal work with him. Defendant asked for a 90-day continuance. The trial court granted a 60-day continuance.

¶ 10 On November 12, 2013, the trial court held a pretrial hearing. Defendant stated he no longer had possession of discovery materials because of his transfer to prison. The court asked the State to resend the materials to defendant.

¶ 11 In December 2013, defendant filed a motion to suppress evidence, arguing, *inter alia*, officers lacked probable cause to justify the traffic stop. On February 18, 2014, Judge Robert M. Travers held a hearing on the motion to suppress. Defendant had subpoenaed Livingston County sheriff's deputy Ryan Donovan and the DVD of the traffic stop for the hearing. The State indicated it had obtained a copy of the DVD, but prison policies would not allow defendant access to it. The trial court continued the hearing. Defendant also requested an opportunity to view the DVD, and the State indicated it would provide a laptop to view it.

¶ 12 On March 5, 2014, the trial court conducted a hearing on the motion to suppress. Deputy Donovan testified he arrived on the scene after Officer Scott made the traffic stop. Defendant consented to a search of his vehicle, and Donovan smelled the odor of burnt cannabis. During the search, Donovan found a gun and suspected controlled substances. Donovan stated his vehicle had video-recording capabilities but not the ability to record audio. He did not turn the video-recording of the stop into evidence near the start of the case because there was no audio. He also stated he did not turn in the video "because it would have been a nice, crystal-clear view of the back of Officer Scott's squad car."

¶ 13 Officer Scott testified he was performing patrol on June 4, 2013, in an unmarked

car, which did not have video or audio equipment. While driving on the interstate, Scott came up behind a vehicle traveling at 55 miles per hour in the left-hand lane. After following the vehicle, Scott twice observed the vehicle cross the centerline. Scott then engaged his emergency lights. Upon making contact with defendant, Scott smelled the odor of burnt cannabis. Scott asked defendant if he had anything illegal in the vehicle, and defendant said no. After obtaining consent, Scott searched the vehicle and found cannabis.

¶ 14 On March 26, 2014, the trial court resumed the suppression hearing. Defendant argued the propriety of the stop came down to Officer Scott's credibility due to the lack of video or audio equipment in Scott's vehicle. Defendant also claimed the officers' testimonies contradicted each other, as well as the testimony given at the preliminary hearing. The court found the officers were credible and any impeachment was "minor." The court also found a valid stop and voluntary consent to search. Thus, the court denied the motion to suppress.

¶ 15 After the trial court denied the motion, the State indicated it was ready for trial. Defendant stated he was not ready due to inadequate library time and lack of resources to prepare for trial. He also asked the court to provide him a lawyer, stating "there is no possible way or form or fashion that I am competent enough to even go through a trial." The court denied the request for an attorney, noting defendant waived his right to an attorney in July 2013, and that waiver remained effective. The court set a pretrial hearing for April 14, 2014, and stated if defendant was going to hire an attorney, he would have to find one by that date.

¶ 16 On April 14, 2014, defendant told the trial court he had written to several attorneys but had not secured representation. Defendant also filed a motion for funds to retain experts and forensic lab testing and a motion for standby counsel. The court denied the motion for funds and tabled the motion for standby counsel.

¶ 17 On April 23, 2014, the trial court held a hearing on the State's motion to quash several subpoenas issued by defendant to police officers. In quashing the subpoenas, the court concluded defendant was "rehashing" his position from the motion to suppress and engaging in a "fishing expedition." Defendant asked the court to continue the trial set to begin the following day. He also asked for the appointment of standby counsel "so that I can actually know exactly what I'm doing and come to trial for, at least to be able to try to put up an effective defense on my behalf." The court stated it was not inclined to appoint standby counsel, believing "it would unduly complicate this situation" and be "a nightmare" for the attorney. The court granted defendant's request for a continuance.

¶ 18 On May 6, 2014, the trial court held a hearing on motions filed by defendant. In his motion to strike his prior convictions that relied on *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, defendant asked to strike his prior conviction for aggravated unlawful use of a weapon and prohibit the State from using the conviction to support the charge of being an armed habitual criminal. The court denied the motion, finding no basis in law for the relief requested.

¶ 19 On June 24, 2014, the trial court held a motion hearing prior to trial. At the start of the hearing, defendant asked that his hand and leg restraints be removed, saying he needed to be able to sift through his paperwork and approach the podium during questioning. The court told defendant he would not be allowed to approach the podium and would remain at the table. After hearing defendant's criminal history from the prosecutor, the court had defendant's hand restraints removed. The court declined to have defendant's leg restraints removed because of his history of violent crimes and because he was young, healthy, "a big guy," and the court had "verbal problems" with him.

¶ 20 After the trial court denied his request to remove his leg restraints, defendant

asked "if it was possible that the officers won't be swarming and surrounding me the whole time during the trial." Defendant asked that the officers be seated behind the wooden bench. The court stated the officers would "be fine where they are," stating they were "three or four feet away" from defendant and "don't appear to be imposing."

¶ 21 Defendant stated he was able to review the physical evidence and the entire DVD of the traffic stop. Defendant alleged the State excluded the beginning of the video during a previous showing. He alleged the beginning of the video showed he had not committed any traffic violations prior to the stop. Defendant asked the trial court to grant him a new suppression hearing based on newly discovered evidence the State had withheld from him. Upon hearing from the State, the court noted "[i]f there is additional DVD material, and the Court does not accept that, it has been viewed now."

¶ 22 The trial court then considered defendant's motion *in limine*, in which he sought to prohibit the State from using illegally seized evidence at trial due to its willful suppression of the traffic stop video. Defendant also filed a motion to dismiss. During a recess, the court viewed the DVD and the segments at issue. After watching the video, defendant argued it directly contradicted Scott's testimony from the suppression hearing. The court noted the video segments were "simply about five to ten seconds of additional views of Scott's car in the left-hand lane following the defendant" in which "nothing happens." As to Scott's testimony, the court found he "wasn't nailed down as to when he made his observations" on reaching defendant's car. The court denied the motion to dismiss.

¶ 23 Prior to the start of jury selection, defendant indicated his desire to talk with the State about a possible plea. Following a recess, the State informed the trial court that defendant wanted to waive his right to a jury trial and proceed to a stipulated bench trial with a sentencing

cap of 20 years in prison. The court found the waiver knowing and voluntary. Based on the stipulated facts, the court found defendant guilty on all five counts.

¶ 24 On August 7, 2014, defendant filed a motion for the appointment of counsel at his sentencing hearing. On August 19, 2014, defendant filed a posttrial motion. On August 26, 2014, the trial court was prepared to conduct the sentencing hearing, but the State asked for a continuance based on defendant's "lengthy" posttrial motions. The court granted the State's motion to continue. The court denied defendant's motion for the appointment of counsel, finding "a waiver once made properly with proper admonishments is effective until an appeal is necessary."

¶ 25 On November 4, 2014, the trial court held a hearing on defendant's posttrial motions. In his motion for a new trial, defendant argued, *inter alia*, the court erred in (1) not appointing standby counsel; (2) denying his motion to suppress; (3) not hearing his renewed motion to suppress; and (4) not appointing counsel for his sentencing hearing. In his posttrial motion, defendant raised additional issues, including the court's requirement that his legs be restrained. Defendant claimed this was "highly prejudicial" and forced him into a stipulated bench trial. The court denied the motions.

¶ 26 On December 30, 2014, the trial court sentenced defendant to concurrent terms of 20 years in prison on counts I, II, III, and IV and six years on count V. The court also ruled count II merged with count I and count V merged with count IV. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 A. Waiver of Counsel

¶ 29 Defendant argues the trial court abused its discretion in denying his request to revoke his waiver of counsel. A defendant has the constitutional right to the assistance of

counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. The right to counsel applies at all critical stages of the criminal proceedings, including sentencing and other posttrial matters. *People v. Vernon*, 396 Ill. App. 3d 145, 153, 919 N.E.2d 966, 975 (2009). A defendant also has the constitutional right to represent himself. *People v. Baez*, 241 Ill. 2d 44, 115, 946 N.E.2d 359, 402 (2011).

¶ 30 Under the continuing waiver rule, a valid waiver of counsel generally continues to be valid throughout subsequent proceedings, including posttrial proceedings. *People v. Baker*, 92 Ill. 2d 85, 91-92, 440 N.E.2d 856, 859 (1982). There are two exceptions, however: (1) if, after the initial waiver, the defendant requests counsel; or (2) the circumstances of the initial waiver suggest it was limited to a particular stage of proceedings. *Baker*, 92 Ill. 2d at 91-92, 440 N.E.2d at 859; see also *People v. Palmer*, 382 Ill. App. 3d 1151, 1162, 889 N.E.2d 244, 253 (2008). "Thus, even when a defendant executes a competent waiver of counsel at some earlier stage of the proceedings, this waiver may end if defendant alters his or her stand and requests counsel at a later stage." *People v. Cleveland*, 393 Ill. App. 3d 700, 705, 913 N.E.2d 646, 651 (2009), *overruled on other grounds, People v. Jackson*, 2011 IL 110615, ¶ 16, 955 N.E.2d 1164.

¶ 31 In this case, defendant does not dispute he made a knowing and voluntary waiver of counsel following the preliminary hearing on July 1, 2013. He also does not challenge the trial court's admonishments on proceeding *pro se*. However, defendant argues the court erred in denying his later requests for counsel.

¶ 32 On December 17, 2013, the trial court informed defendant that all pretrial motions, with the exception of motions *in limine*, were to be filed on or before January 6, 2014. On March 26, 2014, the court denied defendant's motion to suppress and then asked the parties if they were prepared to proceed to trial. Defendant indicated he was not and asked the court to

appoint an attorney because he "didn't know exactly what [he was] doing" and was not "competent enough to even go through a trial." The court reminded defendant of the July 1, 2013, admonishments, stated his waiver was still effective, and denied his request for an attorney. The court set the case for a pretrial hearing on April 14, 2014, and stated defendant could hire an attorney by that date.

¶ 33 On April 14, 2014, defendant told the trial court he had been contacting attorneys but was still waiting for their responses. He asked for a three-week continuance. The court stated "this case is a year old, this is an important trial," "and this is not something that you can come in at the last minute on and simply say, well, you know, I'm not ready or I changed my mind or I would like to do something." The court denied the motion to continue but stated it would reconsider a similar motion if defendant was successful in obtaining counsel. On the same day, defendant filed a motion for the appointment of standby counsel.

¶ 34 At a hearing on April 23, 2014, the day before the scheduled trial, the trial court held a hearing to address the State's motion to quash defendant's subpoenas. The court noted the untimeliness of many of defendant's motions and declined to appoint standby counsel. The court reasoned doing so "would unduly complicate this situation" and would be "a nightmare" for counsel. The court granted defendant another continuance, and the case proceeded to a stipulated bench trial on June 24, 2014.

¶ 35 Here, the trial court admonished defendant about proceeding *pro se*, and we find the court did not err in holding defendant to that decision even though he changed his mind thereafter. The court set a deadline for pretrial motions, and defendant could not reasonably expect that a motion to withdraw his waiver of counsel or motion for the appointment of standby counsel would be considered more than three months after the court's deadline. We note

defendant filed numerous motions in this case, some even past the deadline, and the court patiently allowed him to argue those motions before ruling on them. The court's statements indicate defendant's requests were late in the game, over a year after the initial waiver, and the court could justly conclude the importance of judicial administration required holding defendant to his decision to represent himself. Granting defendant's requests for an attorney would have caused further delays in the proceedings. We find the court did not abuse its discretion in denying defendant's requests to revoke his waiver of counsel during the pretrial and trial proceedings.

¶ 36 The same cannot be said about the trial court's decision to reject defendant's request for counsel at the sentencing hearing. In one of his posttrial motions, defendant asked the court to appoint counsel for the sentencing hearing because he was "not knowledgeable of sentencing procedures." At the first sentencing hearing on August 26, 2014, defendant argued he should be appointed counsel. The court denied the motion, stating the continuing waiver rule of this court's jurisprudence applies until a defendant appeals, and he was "stuck" with his earlier decision. The court did, however, grant the State a continuance to consider defendant's posttrial motions.

¶ 37 The sentencing phase constituted a new stage of the proceedings, and it "constituted a clean slate for the trial court's consideration of the issue" of defendant's waiver of counsel. *Palmer*, 382 Ill. App. 3d at 1163, 889 N.E.2d at 254. Here, other than defendant's actions during the pretrial and trial proceedings, nothing indicates his request for the appointment of counsel to represent him at sentencing suggests an abuse of the system or an attempt to delay the proceedings. Given that the court allowed the State's motion to continue and set the matter for sentencing on November 4, 2014, we find defendant's change of mind required the

appointment of counsel. Accordingly, although we affirm defendant's convictions, we vacate his sentences and remand for the appointment of counsel and a new sentencing hearing.

¶ 38 B. Leg Restraints

¶ 39 Defendant argues the trial court abused its discretion in determining he would be required to wear leg restraints at his trial. We disagree.

¶ 40 Our supreme court has stated "shackling is generally disfavored because (1) it tends to prejudice the jury against the accused; (2) it restricts the defendant's ability to assist counsel during trial; and (3) it offends the dignity of the judicial process." *People v. Urdiales*, 225 Ill. 2d 354, 415, 871 N.E.2d 669, 705 (2007) (citing *People v. Boose*, 66 Ill. 2d 261, 265, 362 N.E.2d 303, 305 (1977)). A defendant may be restrained, however, where the trial court believes (1) the defendant may try to escape, (2) the defendant may pose a threat to the safety of those in the courtroom, or (3) restraint is necessary to maintain order during the trial. *Boose*, 66 Ill. 2d at 266, 362 N.E.2d at 305; see also Ill. S. Ct. R. 430 (eff. July 1, 2010).

¶ 41 In determining whether to restrain a defendant, the trial court is to hold proceedings outside the jury's presence. *People v. Strickland*, 363 Ill. App. 3d 598, 602, 843 N.E.2d 897, 901 (2006). Therein, defense counsel should be given the opportunity to present reasons why the defendant should not be restrained, and the court should state for the record the reasons for shackling the defendant in the courtroom. *Strickland*, 363 Ill. App. 3d at 602, 843 N.E.2d at 901.

¶ 42 In determining whether a defendant should be restrained, the trial court should consider the following factors:

> " '[T]he seriousness of the present charge against the defendant;
>
> defendant's temperament and character; his age and physical

> attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.' " *Boose*, 66 Ill. 2d at 266-67, 362 N.E.2d at 305-06 (quoting *State v. Tolley*, 226 S.E.2d 353, 368 (N.C. 1976)).

The decision whether to restrain a defendant falls within the court's discretion, and that decision will not be overturned on appeal absent an abuse of that discretion. *Urdiales*, 225 Ill. 2d at 416, 871 N.E.2d at 705. " 'Illinois courts have found no abuse of discretion in shackling a defendant when the circuit court has expressed more than a single reason for shackling a defendant.' " *Urdiales*, 225 Ill. 2d at 416, 871 N.E.2d at 705-06 (quoting *People v. Buss*, 187 Ill. 2d 144, 216, 718 N.E.2d 1, 41 (1999)).

¶ 43 In the case *sub judice*, the trial court conducted a hearing outside the presence of prospective jurors on the day of trial. The first matter addressed involved defendant's restraints. The court asked defendant if he was asking that any or all of his restraints be removed, and defendant stated he wanted all of them removed. The court then asked a correctional officer about defendant's behavior, and the officer replied, "Just fine." The court asked the officer if he would have any problem imposing order if defendant's hand restraints were removed, and the officer stated it would not be a problem. Defendant stated he wanted his leg restraints removed for trial to sift through his paperwork and "approach the podium during questioning and things of

such nature." The court stated defendant would not be allowed to approach the podium during questioning and everything had to be done from the table, "based upon [defendant's] record as known to the Court." The court then asked the prosecutor about defendant's criminal history, and the prosecutor noted convictions for delivery of a controlled substance (2008), armed violence (2007), delivery of a controlled substance (2007), aggravated unlawful use of a weapon (2007), unlawful possession of a controlled substance (2004), and delivery of a controlled substance (2003). Defendant disputed the armed-violence conviction but stated he had a weapons offense in his background.

¶ 44 The trial court concluded it was "going to stick with the restraints right now." When the court asked defendant if there was anything else regarding restraints, defendant asked that the prosecutor not be allowed to move around and approach the jury box if he was "going to be confined" to his chair. The court declined to impose any limitations on the prosecutor. The court ordered the removal of defendant's hand restraints but not the leg restraints. The court noted the jury would not see the leg restraints. The court also stated defendant's "history does contain crimes of violence," found him to be "young," "healthy," "a big guy," and noted it "had verbal problems" with him.

¶ 45 As the trial court attempted to address other pretrial matters, defendant also asked that the officers not "be swarming and surrounding [him] the whole time during trial." He asked that they be seated behind the wooden bench. The court stated the officers were "fine right where they're at," noting they were three to four feet away and did not "appear to be imposing."

¶ 46 After arguments were made regarding other motions, defendant indicated a desire to talk with the prosecutor about a possible plea deal. After a couple of recesses, defendant indicated he wanted to waive his right to a jury trial and proceed by way of a stipulated bench

trial.

¶ 47 In his posttrial motion, defendant argued the leg restraints were "highly prejudicial" and forced him into a stipulated bench trial. At the hearing on the motion, defendant stated he would not have been able to present a "proper defense" if he had to remain in his seat during the trial.

¶ 48 Here, we find the trial court, outside the presence of any jurors, gave adequate consideration of the *Boose* factors in making its decision on defendant's restraints. The court allowed defendant's hands to remain free. In considering the leg restraints, the court noted defendant's age, size, criminal history, and previous courtroom behavior. The court gave defendant an opportunity to state his reasons why he should not be restrained. This was not a case where the court restrained defendant simply as a matter of practice. See *People v. Williams*, 2016 IL App (3d) 130901, ¶ 33, 53 N.E.3d 1019 (finding the trial court did not consider any *Boose* factors in shackling the defendant and doing so suggested a blanket court policy). Moreover, had the case gone before the jury, the court noted defendant's leg restraints would not be seen. Defendant's claim he could not have put on a proper defense with his legs restrained is pure speculation. Nothing in the record indicates defendant could not adequately ask questions of, or have exhibits handed to, witnesses from his seat at the table. We find the court did not abuse its discretion in requiring defendant to wear leg restraints. We also find no abuse of discretion in the court's decision not to move the officers seated behind defendant.

¶ 49 C. Motion To Suppress

¶ 50 Defendant argues the trial court erred in denying his renewed request for a motion to suppress, where new evidence relevant to the suppression issue was discovered. We disagree.

¶ 51 In his brief on appeal, defendant notes the doctrine of collateral estoppel generally

bars relitigation of a motion to suppress in the same proceeding. *People v. Gilliam*, 172 Ill. 2d 484, 505, 670 N.E.2d 606, 616 (1996). In this case, however, the trial court did not rely on collateral estoppel in making its ruling on defendant's renewed request.

¶ 52 On review of a motion to suppress, this court is presented with mixed questions of law and fact. *People v. McQuown*, 407 Ill. App. 3d 1138, 1143, 943 N.E.2d 1242, 1246 (2011).

> "In reviewing a trial court's ruling on a motion to suppress, the trial court's findings of historical fact are reviewed only for clear error, giving due weight to any inferences drawn from those facts by the fact finder, and reversal is warranted only when those findings are against the manifest weight of the evidence. [Citation.] However, a reviewing court remains free to undertake its own assessment of the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted. [Citation.] A trial court's ultimate legal ruling as to whether suppression is warranted is subject to *de novo* review. [Citations.]" *People v. Hackett*, 2012 IL 111781, ¶ 18, 971 N.E.2d 1058.

A reviewing court may affirm the trial court's decision on a motion to suppress on any basis in the record. *People v. Gonzalez-Carrera*, 2014 IL App (2d) 130968, ¶ 15, 18 N.E.3d 129.

¶ 53 On July 23, 2013, the State indicated it had tendered to defendant everything it had in discovery. It did not provide a video of the traffic stop. On February 18, 2014, the trial court conducted a hearing on defendant's motion to suppress, and the State indicated it had obtained a DVD of the traffic stop. The State also indicated it would provide a laptop so

defendant could view the DVD. On March 5, 2014, the court heard testimony on the motion to suppress. Officer Scott testified he was performing patrol on the interstate in an unmarked vehicle that did not have video or audio equipment. Scott stated he observed defendant's vehicle in the left-hand lane traveling at a speed of 55 miles per hour. After observing the vehicle twice cross the centerline, Scott activated his emergency lights and initiated the traffic stop. The court found Scott's testimony was credible.

¶ 54 Prior to the scheduled start of the June 24, 2014, trial, defendant informed the trial court that he had been provided an opportunity to examine the evidence again, including new footage of the stop. Defendant claimed the new footage showed he did not cross the centerline prior to the stop. Defendant asked the court for a new suppression hearing "due to this newly discovered evidence." In denying the renewed motion to suppress, the court stated if there was additional DVD material, defendant had viewed it.

¶ 55 Thereafter, defendant moved *in limine* to prohibit the State from using illegally seized evidence at trial due to the State's willful suppression of the traffic stop video. He also filed a motion to dismiss. The trial court stated it would view the DVD. The State indicated segments one and two consisted of the same footage, and segments three and four consisted of their own material. Defendant stated he had not previously been able to view segments one and two. After watching segments one and two, defendant argued the footage contradicts Scott's testimony from the motion to suppress hearing because it does not show defendant crossing the centerline.

¶ 56 The trial court then read the transcripts from the suppression hearing. The court stated segments one and two "are simply about five to ten seconds of additional views of Scott's car in the left-hand lane following the defendant." Moreover, the court found "nothing happens"

and "it doesn't make any difference." The court added Scott "wasn't nailed down as to when he made his observations," and defendant's argument related to the impeachment of Scott. The court denied the motion to dismiss.

¶ 57 On appeal, defendant does not claim a discovery violation in this case. Instead, he argues the "newly discovered evidence" should have afforded him a hearing on a renewed motion to suppress. Defendant claims the evidence "directly contradicts Scott's testimony and there is sufficient probative weight for a different result based on the evidence."

¶ 58 Here, segments one and two are videos, approximately 29 seconds in length, taken from Deputy Donovan's car, which is traveling in the right-hand lane of the divided interstate. The footage begins at a slight curve to the right before the road straightens. In the left-hand lane, Officer Scott is traveling ahead of Donovan's car and behind defendant's vehicle at a distance of several car lengths. It is dark out, and the headlights of the vehicles reflect off the white lane markings. Bright lights from the traffic proceeding in the opposite direction on the interstate at times obscure the view of defendant's car and the lane markings. Immediately before Scott activated his emergency lights, it appears defendant's brake lights illuminate.

¶ 59 A review of the footage is inconclusive as to whether defendant crossed the centerline. Given the darkness, the bend in the road, and the bright lights, it is possible that he did. Given that, we find the evidence does not offer a direct contradiction of Scott's testimony or require a different result. Thus, the trial court did not err in denying defendant's request for a renewed motion to suppress.

¶ 60 D. Defendant's Armed Habitual Criminal Conviction

¶ 61 Defendant argues his conviction for the offense of being an armed habitual criminal should be vacated, where one of the predicate felonies, a conviction for aggravated

unlawful use of a weapon, is unconstitutional and void *ab initio*. We disagree.

¶ 62 In this case, the trial court found defendant guilty of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2012)) based on his possession of a firearm after having been convicted of the offenses of delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (West 2012)).

¶ 63 In *Aguilar*, 2013 IL 112116, ¶ 1, 2 N.E.3d 321, our supreme court held the Class 4 form of the aggravated unlawful use of weapons statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)) violated the second amendment to the United States Constitution. In *People v. McFadden*, 2016 IL 117424, ¶ 1, 61 N.E.3d 74, the defendant appealed his conviction for unlawful use of a weapon by a felon based on his possession of a firearm when he had a previous conviction for aggravated unlawful use of a weapon. The appellate court vacated the defendant's conviction for unlawful use of a weapon by a felon based on *Aguilar*. *McFadden*, 2016 IL 117424, ¶ 1, 61 N.E.3d 74 (citing *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 43, 8 N.E.3d 429). The supreme court reversed, stating, in part, as follows:

> "It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 [aggravated unlawful use of a weapon] conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the [unlawful use of a weapon] by a felon offense,

> defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms."
>
> *McFadden*, 2016 IL 117424, ¶ 31, 61 N.E.3d 74.

¶ 64 Since *McFadden*, appellate courts have applied its analysis to cases involving an armed habitual criminal conviction. In *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 7, 63 N.E.3d 207, the First District followed *McFadden* and found that since the defendant's "prior convictions had not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction." In *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 15, the First District again followed *McFadden* and found the defendant's aggravated unlawful use of a weapon conviction could serve as a predicate conviction for the armed habitual criminal conviction. We agree with the holdings in these cases and decline to distinguish *McFadden*.

¶ 65 Defendant argues that even if this court applies *McFadden*, his conviction must be vacated based on the United States Supreme Court precedent of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Ex parte Siebold*, 100 U.S. 371 (1879). However, the courts in *Perkins* and *Faulkner* rejected similar arguments. *Perkins*, 2016 IL App (1st) 150889, ¶¶ 8-9, 63 N.E.3d 207; *Faulkner*, 2017 IL App (1st) 132884, ¶¶ 29-33. Until such time as our supreme court or the United States Supreme Court holds otherwise, we find no authority to vacate defendant's conviction for being an armed habitual criminal.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm defendant's convictions but vacate his sentences and remand for the appointment of counsel and a new sentencing hearing. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this

appeal.

¶ 68 Affirmed in part and vacated in part; cause remanded with directions.