

No. 1-14-1456

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 8824
	)	
ANTHONY SCOTT,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ELLIS delivered the judgment of the court.  
Presiding Justice Burke and Justice Howse concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant’s conviction and sentence for aggravated robbery affirmed where record insufficient for appellate court to decide claim of ineffective assistance of counsel, and where amendment to automatic-transfer statute did not apply retroactively to case pending on direct appeal. Defendant’s conviction for unlawful restraint vacated pursuant to one-act, one-crime doctrine

¶ 2 Defendant Anthony Scott, along with his codefendant Keith Lucious, were charged with armed robbery, aggravated robbery, and aggravated unlawful restraint for accosting a woman in an alley and taking two backpacks from her. Defendant was 16 years old at the time of the offense, and codefendant was 15 years old. Defendant and codefendant were tried at a joint bench trial and convicted of aggravated robbery and unlawful restraint.

¶ 3 In this appeal, defendant alleges that his trial attorney was ineffective for failing to file a motion to quash his arrest and suppress evidence obtained from him, where the description relayed to the police officers was too vague to support the officer's detention of defendant and codefendant in the area. For the reasons stated below, we decline to reach this question because the record is insufficient to fully assess whether the police had a reasonable, articulable suspicion sufficient to support the officers' investigatory stop. We thus affirm defendant's conviction for aggravated robbery.

¶ 4 We agree with defendant's claim that his unlawful-restraint conviction must be vacated pursuant to the one-act, one-crime doctrine.

¶ 5 We reject defendant's claim that an amendment to the automatic transfer provision of the Juvenile Court Act of 1987, which excluded the offense of armed robbery from the list of offenses requiring automatic transfer of a juvenile to adult court, applied retroactively to his case. In our original opinion in this case, we held that the amendment did apply retroactively; thus, we vacated defendant's aggravated-robbery sentence and remanded the case to the juvenile court for resentencing. *People v. Scott*, 2016 IL App (1st) 141456 (December 15, 2016). We vacated that judgment on February 28, 2018, pursuant to the Supreme Court's order to reconsider this issue in light of *People v. Hunter*, 2017 IL 121306. We now conclude that, pursuant to *Hunter*, the amendment does not apply retroactively to defendant's case. We therefore affirm his sentence for aggravated robbery.

¶ 6

## I. BACKGROUND

¶ 7 The State charged defendant with armed robbery predicated on his and codefendant's being armed with a firearm during the robbery, aggravated robbery, and aggravated unlawful restraint. The aggravated robbery charge alleged that, on April 5, 2013, defendant and

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codefendant committed a robbery “while indicating verbally, or by their actions \*\*\* that they were presently armed with a firearm or other dangerous weapon.”

¶ 8 At the time of defendant’s trial, armed robbery committed with a firearm by an offender who was at least 15 years old was an offense requiring defendant’s case to be transferred to adult court without a hearing. 705 ILCS 405/5-130(1)(a) (West 2012). Both defendant and codefendant elected to have bench trials.

¶ 9 Naritza Castellanos testified that, at 10:30 a.m. on April 5, 2013, she was distributing fliers in an alley near 4251 West Haddon Avenue in Chicago. Castellanos was carrying two backpacks with her. The backpacks contained fliers, keys, a cell phone, and \$20 in cash.

¶ 10 She testified that two young men, whom she identified as defendant and codefendant, approached her and asked her for money. She said she did not have any, and codefendant hit her in her face and stomach. Defendant and codefendant threw Castellanos to the ground, took her backpacks, and fled. Castellanos also testified that codefendant pressed a gun to her right temple while she was on the ground.

¶ 11 Castellanos testified that defendant had red hair and that codefendant wore “like braids or bows” in his hair. Castellanos said that codefendant wore a black and brown checkered jacket, and defendant wore a black jacket.

¶ 12 Shortly after defendant and codefendant fled, a passerby loaned his cell phone to Castellanos so that she could call the police. She testified that, a few minutes after she called the police, she saw defendant again in the same area, but he had changed into a white jacket with red lettering on the back. Some time later, the police brought defendant and codefendant to Castellanos in a squad car, and Castellanos identified them as the boys who had robbed her.

¶ 13 Officer Michna testified that he and his partner responded to a call of a robbery near Thomas Street and Kildare Avenue. The prosecutor asked Michna if he was given “a description

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of any sort regarding the robbery,” and Michna replied, “Just it was armed robbery and two male black teens.” The court interjected, “I think she means the description of the individuals involved,” and Michna said, “Two male black teens.”

¶ 14 Michna saw two black teenagers about two blocks from the scene of the incident, whom he identified as defendant and codefendant, and approached them in his car. Michna said that one of them “had braids and the other one had orangish-red hair.” Michna asked where they were coming from, and defendant and codefendant “gave conflicting stories.” Michna testified that he and his partner put defendant and codefendant into their squad car and drove them back to Castellanos’s location to conduct a showup. Castellanos identified defendant and codefendant as the robbers.

¶ 15 After Castellanos identified defendant and codefendant, they were placed under arrest and searched. The police recovered a set of keys from defendant, which Castellanos identified as her keys. Defendant and codefendant did not have a cell phone or any money on them. Michna testified that no firearm was recovered in connection with the robbery.

¶ 16 On cross-examination, defendant’s counsel asked Michna if he stopped defendant and codefendant simply because of their proximity to the site of the robbery, and Michna replied, “No, based on the red hair. They were male teens, black teens.” He also testified that he saw them less than two blocks from the reported site of the robbery.

¶ 17 Detective Suzanne Chevalier testified that she, an assistant State’s Attorney (ASA), and a youth officer questioned defendant about the robbery. Defendant said that he and codefendant skipped school that day to go shoe shopping. They saw Castellanos in an alley and decided to take her backpacks.

¶ 18 Chevalier testified that defendant admitted that he and codefendant approached Castellanos, threw her to the ground, and took her backpacks. Defendant added that “he told the

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victim, don't make [codefendant] shoot you." Defendant also said that he did not know why he said, "don't make him shoot you," because codefendant "only had a cell phone with him." Defendant said that he found keys in one of the backpacks, and that, after the robbery, he and codefendant walked around the neighborhood looking for Castellanos's car "so that they could take it."

¶ 19 After Detective Chevalier testified, the State rested. Defendant moved for a directed finding on the armed robbery count, which the court granted.

¶ 20 Neither defendant nor codefendant elected to testify or present any evidence.

¶ 21 The trial court found defendant guilty of aggravated robbery and unlawful restraint. Defense counsel filed a motion for a new trial, which the trial court denied.

¶ 22 Because defendant had been acquitted of the offense that led to his being tried in adult court (*i.e.*, armed robbery with a firearm), the State moved to have defendant sentenced as an adult, noting that he was 16 years old and was on juvenile probation. See 705 ILCS 405/5-130(1)(c)(ii) (West 2012) (permitting State to move for adult sentencing when juvenile charged with automatic-transfer offense is acquitted of automatic-transfer offense and convicted of another, non-automatic-transfer offense). Defense counsel argued that defendant was a "follower," that it was not his idea to rob Castellanos, and that defendant had been in special education classes in school. The court granted the State's motion, citing defendant's criminal history and the fact that this offense involved violence.

¶ 23 The court sentenced defendant to five years' incarceration for aggravated robbery. Defendant's mittimus also reflects a three-year sentence for "aggravated unlawful restraint." Defendant appeals.

¶ 24

## II. ANALYSIS

¶ 25

### A. Ineffective Assistance of Counsel/Motion to Suppress

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¶ 26 Defendant first contends that his attorney was ineffective for failing to file a motion to quash his arrest and suppress Castellanos's identification of him at the scene of the robbery, the keys found on defendant's person, and defendant's subsequent statement to the police and ASA. Defendant claims that the record shows that the police stopped him without any reasonable suspicion that he had committed a crime, leading to the illegal recovery of that evidence. The State argues that the police had reasonable suspicion based on the description of the robbers given by Castellanos and the inconsistent answers given by defendant and codefendant.

¶ 27 Having reviewed the record, we decline to reach the merits of defendant's ineffectiveness argument because the record is insufficient to fully assess the merits of a possible motion to suppress. Our supreme court has stated that "where \*\*\* the defendant's claim of ineffectiveness is based on counsel's failure to file a suppression motion, the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *People v. Henderson*, 2013 IL 114040, ¶ 22; see also *People v. Bew*, 228 Ill. 2d 122, 133-35 (2008) (declining to reach issue of counsel's ineffectiveness for failing to file motion to suppress); *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34 ("After reviewing the record here, we decline to consider defendant's claim of ineffective assistance of trial counsel because the record is devoid of evidence that would allow this court to adjudicate whether trial counsel's decision to not file a motion to suppress was strategic, whether the motion would have been granted, or whether [the police] acted lawfully under the circumstances.").

¶ 28 At trial, Officer Michna did not recount the specifics of the call he received that led him to search for the robbery suspects. He testified that codefendant's red hair stood out to him, but he did not say whether the dispatch included a description of the suspect as having red hair. Nor did Michna testify to the content of defendant and codefendant's inconsistent responses to his questions, which was his reason for putting the boys in the squad car. All of these facts would be

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relevant to determining whether Michna was justified in apprehending defendant, but the record does not reveal them. Moreover, there was very little testimony about the circumstances between defendant's arrest and his confession, which would be relevant to determining whether his statement was sufficiently attenuated from any illegal detention to justify its admission.

¶ 29 Our conclusion is supported by the decision in *People v. Millsap*, 374 Ill. App. 3d 857, 863 (2007), where this court declined to reach the issue of counsel's ineffectiveness for failing to file a motion to suppress where "[t]he circumstances leading up to the stop of the [defendant's] vehicle were only briefly described at the preliminary hearing and trial." The operative issue in *Millsap*, as in this case, would have been whether the police lacked a reasonable, articulable suspicion to stop the defendant. *Id.* at 862-63. And, like this case, the record did not show the full description of the suspect given to the police, making a full analysis of that question impossible. *Id.* at 860.

¶ 30 Our conclusion is further supported by the nature of the inquiry posed by defendant's claim. An analysis of the existence of a reasonable, articulable suspicion is a fact-intensive inquiry requiring us to consider the totality of the circumstances surrounding the interaction between the police and the defendant. *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *People v. Timmsen*, 2016 IL 118181, ¶ 14. The same is true for the question of attenuation. See *Brown v. Illinois*, 422 U.S. 590, 603 (1975) (attenuation must be decided "on the facts of each case," and "[n]o single fact is dispositive"). Only with a sufficient factual picture could we determine whether Michna had enough information to justify his detention of defendant or whether the recovery of the keys and defendant's confession were sufficiently attenuated from any illegality. Here, there are simply too many unanswered questions to make either of those determinations.

¶ 31 Because the record does not fully disclose the possible reasons for the police's actions in this case, we cannot address defendant's claim that his attorney was ineffective for filing a motion to suppress.

¶ 32 B. Mittimus Correction & One-Act, One-Crime

¶ 33 Next, defendant contends that his conviction for unlawful restraint should be vacated under the one-act, one-crime doctrine and that his mittimus should be corrected to reflect a conviction for unlawful restraint rather than aggravated unlawful restraint and to reflect the correct term of mandatory supervised release (MSR) for his unlawful restraint conviction.

¶ 34 We first discuss defendant's one-act, one-crime argument because, if defendant's unlawful restraint conviction violates the one-act, one-crime doctrine, that conviction must be vacated, rendering a correction of the mittimus moot. See *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009) (when one-act, one-crime doctrine violated, less serious conviction should be vacated).

¶ 35 We recently resolved this issue in codefendant's appeal in *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 58. There, as in this case, the parties agreed that codefendant's unlawful restraint conviction had to be vacated under the one-act, one-crime doctrine because it involved the same conduct constituting the aggravated robbery. *Id.* For the same reasons we stated in *Lucious*, we agree with the parties that defendant's unlawful restraint conviction must be vacated pursuant to the one-act, one-crime doctrine.

¶ 36 Having vacated his conviction for unlawful restraint, we need not decide whether the mittimus needs to be corrected. We direct the clerk of the circuit court to issue a new mittimus omitting any reference to the now-vacated unlawful restraint count, including any reference to his MSR term for unlawful restraint.

¶ 37 C. Transfer to Adult Court



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¶ 38 In his opening brief, defendant alleged that section 5-130 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-130 (West 2012)), which required him to be tried as an adult because the State charged him with armed robbery with a firearm, violated the constitutional principles of procedural and substantive due process. In a supplemental brief, defendant contends that the amendments to section 5-130 contained in Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a)), which removed armed robbery with a firearm from the list of offenses requiring automatic-transfer to adult court, apply to his case.

¶ 39 We first address defendant's supplemental brief argument. That is because, if defendant is correct that the amendments to section 5-130 apply to him, he was not eligible for automatic transfer, and we would not need to address the constitutionality of section 5-130 prior to the amendments. See *People v. White*, 2011 IL 109689, ¶ 148 (“[I]t is a fundamental rule of judicial restraint that a court not reach constitutional questions in advance of the necessity of deciding them.” (Emphasis omitted.)). Thus, we turn to the question of whether the amendments to section 5-130 apply to defendant.

¶ 40

1. Public Act 99-258

¶ 41 In Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a)), the General Assembly removed armed robbery committed with a firearm from the list of offenses for which a juvenile must be automatically tried in adult court. At the time of defendant's prosecution, section 5-130 required that all juveniles 15 years old and up be tried as adults when they were charged with armed robbery committed with a firearm. 705 ILCS 405/5-130(1)(a) (West 2012).

¶ 42 In his supplemental brief, defendant contends that Public Act 99-258 applies retroactively to cases, like his, that were pending on direct appeal when it passed. Defendant notes that the amendment to section 5-130 in Public Act 99-258 did not include language limiting it to

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prospective application and that procedural amendments like Public Act 99-258 generally apply retroactively to cases pending on appeal.

¶ 43 The Illinois Supreme Court settled this issue in *People v. Hunter*, 2017 IL 121306. The facts of *Hunter* are indistinguishable from this case. In *Hunter*, the defendant was tried and sentenced as an adult pursuant to the automatic-transfer provision, which was later amended while his direct appeal was pending. *Id.* ¶¶ 4-8. If the amendment applied retroactively to his case, it would have placed him outside the reach of the automatic-transfer provision. See *id.* ¶ 17. But the supreme court held that it did not. *Id.* ¶ 43.

¶ 44 The supreme court reiterated in *Hunter* that it applies the United States Supreme Court's test from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), when addressing the retroactivity of legislation. *Hunter*, 2017 IL 121306, ¶ 20. When applying the *Landgraf* test, a court should first look to whether the legislature clearly indicated the temporal reach of the amended statute. *Id.* If it did, then the legislature's expression of its intent controls, absent some constitutional problem. *Id.* If the legislature did not signal its intent, then the court looks to whether application of the statute would have "a retroactive impact." *Id.*

¶ 45 But, the supreme court noted, "Illinois courts need never go beyond the first step of the *Landgraf* analysis" because the legislature has clearly set forth the temporal reach of every amended statute. *Id.* ¶ 21. The General Assembly did so in section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2014)), a "general savings clause" that has been interpreted "as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." *Hunter*, 2017 IL 121306, ¶ 22 (quoting *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 20). In other words, if the statutory amendment itself does not indicate its temporal reach, it is "provided by default in section 4." *Id.*

¶ 46 The supreme court applied that version of the test to the amendment to section 5-130. *Id.* ¶¶ 23-36. The amendment is procedural. *Id.* ¶ 23. And as to procedural amendments, the court explained, section 4 “requires that ‘the proceedings *thereafter*’—after the adoption of the new procedural statute—‘shall conform, so far as practicable, to the laws in force at the time of such proceeding.’” *Id.* ¶ 31 (quoting 5 ILCS 70/4)). Section 4 thus “contemplates the existence of proceedings after the new or amended statute is effective to which the new procedure could apply.” *Id.* But, the court concluded, only trial-court proceedings are “capable of conform[ing] to the amended statute.” *Id.* ¶¶ 27-28, 32-33. Hence, if the trial-court proceedings were complete at the time the amendment took effect, and the appellate court does not find reversible error that requires a remand to the trial court anyway, there are no further proceedings in the case to which the amendment could retroactively apply. *Id.* ¶¶ 32-33. To hold that the amended statute applied retroactively, as it were, on direct appeal—or in other words, that it created an independent basis for a remand—would “effectively creat[e] new proceedings for the sole purpose of applying a procedural statute that postdates [the defendant’s] trial and sentence.” *Id.* ¶ 33. The supreme court rejected this result as inconsistent with the language of section 4, and also noted its “grave concerns” about the “waste of judicial resources” it would cause. *Id.* ¶¶ 33, 36.

¶ 47 Lastly, the supreme court reconciled this holding with its decision in *Howard*, 2016 IL 120729, in which the court had held that the amendment applied retroactively to “ongoing proceedings” in “pending case[s].” *Hunter*, 2017 IL 121306, ¶ 30; *Howard*, 2016 IL 120729, ¶¶ 28, 31. The court clarified that by a “pending case,” it had meant “a case in which the trial court proceedings had begun under the old statute [*i.e.*, before the amendment in Public Act 99-258 took effect] but had not yet concluded.” *Hunter*, 2017 IL 121306, ¶ 30. And by “ongoing proceedings,” it had meant “proceedings thereafter,” within the meaning of section 4, in which the new procedure could be applied—in a word, further proceedings in the trial court. *Id.*

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¶ 48 Here, *Howard*, not *Hunter*, is directly on point. As in *Howard*, defendant's direct appeal was already pending when the automatic-transfer provision at issue was amended, and we have found no independent basis to remand the case to the trial court for further proceedings. Because the amended automatic-transfer provision does not apply retroactively to defendant's case, he was properly tried and sentenced in adult court.

¶ 49 2. Constitutionality of Automatic Transfer

¶ 50 Finally, defendant contends that section 5-130, which required him to be automatically transferred to adult court at the time of his trial, violates the procedural and substantive due process clauses of the United States and Illinois Constitutions. The Illinois Supreme Court rejected identical due-process challenges in *People v. Patterson*, 2014 IL 115102, ¶¶ 93-98. Because *Patterson* is binding precedent, we have no authority to hold, as defendant argues, that it was wrongly decided. *People v. Artis*, 232 Ill.2d 156, 164 (2009). Thus, we need not discuss defendant's arguments any further.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm defendant's conviction and sentence for aggravated robbery, and vacate his conviction for unlawful restraint pursuant to the one-act, one-crime doctrine.

¶ 53 Affirmed in part, vacated in part.