2017 IL App (1st) 150093-U
Order filed: January 26, 2018

FIFTH DIVISION

No. 1-15-0093

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 14 CR 459
	)	
DONOVAN HARMON,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
PRESIDING JUSTICE REYES and JUSTICE LAMPKIN concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's aggravated unlawful use of a weapon conviction, where his motion to suppress was properly denied, the record was inadequate to show that his trial and posttrial counsels provided ineffective assistance, and the trial court correctly admitted a certification showing that he did not have a Firearm Owners Identification card. We corrected the fines and fees order.

¶ 2 Defendant-appellant, Donovan Harmon, was charged with three counts of aggravated unlawful use of a weapon (AUUW) for knowingly carrying in his vehicle (count I), on his person (count II), and on a public street (count III), a handgun without having been issued a valid Firearm Owners Identification (FOID) card. Following a bench trial, the court convicted defendant of all three counts of AUUW, merged counts II and III into count I, and sentenced him to 12 months' probation and imposed $834 in costs. On appeal, defendant contends: (1) the trial

court erred by denying his motion to suppress; (2) his trial counsel and posttrial counsel provided ineffective assistance; (3) the trial court erred in admitting certain evidence; and (4) his costs should be reduced. We affirm defendant's conviction and correct the fines and fees order.

¶ 3 At the hearing on the motion to suppress, Landon Bulluck testified that, shortly before midnight on November 29, 2013, he and defendant were in their apartment at 747 West Irving Park Road in Chicago. Mr. Bulluck's brother and another friend were also in the apartment. They decided to go to the bars in the Wrigleyville neighborhood of Chicago (Wrigleyville), and defendant drove them there in his vehicle.

¶ 4 Defendant parked on a residential street in Wrigleyville, and they all exited the vehicle. A marked police vehicle with a male and female officer drove past them, then reversed and came up next to them. The male officer told them to turn around and place their hands on defendant's vehicle. All four men complied, and they were then searched by the male officer, who did not find anything on them.

¶ 5 The male officer called each of them over to the front of defendant's vehicle and asked them for identification, which they provided. Meanwhile, the female officer was searching defendant's vehicle. Mr. Bulluck heard her say that she had found something. Mr. Bulluck turned around and "saw the gun." Defendant had not told Mr. Bulluck that he had a gun in the vehicle.

¶ 6 On cross-examination, Mr. Bulluck testified that defendant had difficulty parking his vehicle in a first parking spot on the street in Wrigleyville, so he moved the vehicle further down the street and parked there. Soon after, the officers approached, wearing their police uniforms. When the officers first approached, they did not have their guns drawn and did not handcuff Mr. Bulluck or his companions. The male officer did most of the talking, while the female officer

searched defendant's vehicle. Prior to searching the vehicle, both the male and female officers patted them down.

¶ 7 After searching defendant's vehicle, the female officer recovered a gun and a knife and placed them on top of the vehicle. The male officer called for backup, and Mr. Bulluck, defendant, and their two companions were handcuffed and transported to the police station.

¶ 8 Officer Meredith Esposito testified that, on November 30, 2013, she and her partner were in plain clothes, in an unmarked vehicle, assigned to patrol the 19th District, which encompassed Wrigleyville. There had been a recent increase of robberies in the district, in which a vehicle full of young men would drive around Wrigleyville until they found an intoxicated person walking on the street, after which one or two of the men would leave the vehicle while it drove around the corner. The men would rob the intoxicated victim, run back to the corner, enter the vehicle and drive off. These robberies occurred in the evenings, when the bars were open.

¶ 9 At about 12 a.m. on November 30, 2013, Officer Esposito and her partner were driving in the area of 1133 West Cornelia Street in Wrigleyville. They saw a vehicle with four occupants having difficulty parking on Cornelia Street. Defendant was the driver of the vehicle. While the vehicle was attempting to park, it was blocking traffic on the street for about 30 seconds; no other vehicles were able to pass during that time. Officer Esposito acknowledged that defendant's vehicle was not violating any city ordinances when it blocked traffic for 30 seconds while trying to park. Officer Esposito and her partner circled the block, came back, and saw the vehicle parking further up the street. The officers parked their vehicle slightly behind defendant's vehicle and approached the vehicle to see what its occupants "were up to." They did not have their guns drawn.

¶ 10 Officer Esposito was able to see inside defendant's vehicle with her flashlight, and she observed two people in the front seat and two people in the back seat. She also saw a knife tucked in a crevice on the dashboard, near the windshield. Officer Esposito looked at her partner and said: "Let's get these guys out of the [vehicle]," thereby indicating to him that there was a safety issue.

¶ 11 Once all of the occupants were out of the vehicle, the officers immediately handcuffed them and performed protective pat-downs for officer safety. Thereafter, Officer Esposito recovered the knife, which she described as a "standard kitchen steak knife" with a four to five inch blade. Approximately five minutes had elapsed between the time when the occupants exited the vehicle, to when the knife was recovered.

¶ 12 After recovering the knife, Officer Esposito asked defendant whether there was anything else in the vehicle she should know about. Defendant said: "No, I've got nothing" and that he told her to "go ahead and look" inside the vehicle. Officer Esposito then searched the vehicle and found a loaded handgun under the driver's seat. She showed it to her partner, and defendant stated: "Oh, I forgot that was in there." Approximately 10 to 15 minutes had passed since the time when the officers approached the vehicle to when the gun was recovered.

¶ 13 Officer Esposito learned that defendant did not have a valid FOID card. The officers called for backup, and the four men were placed into custody and taken to the police station.

¶ 14 On cross-examination, Officer Esposito testified that the recent robbery pattern in Wrigleyville involved young men in a vehicle robbing intoxicated persons, but that she did not see an intoxicated person in the vicinity of defendant's vehicle. Defendant's vehicle had Wisconsin license plates, but the robbery pattern in the area had not involved out of state offenders.

¶ 15 The knife was on the passenger side of the vehicle, tucked in a crevice in the dashboard near the windshield. Officer Esposito explained that it is a violation of a Chicago ordinance to have a knife on one's person that is longer than three inches, but that the knife here was recovered from defendant's vehicle and not from anyone's person; therefore, the presence of the knife inside the vehicle did not constitute an ordinance violation.

¶ 16 Officer Esposito testified that, although she was not in police uniform, she was wearing a bulletproof vest and had her badge on her belt. Her partner also had his badge prominently displayed and they both had their weapons in their holsters. They identified themselves as Chicago police officers when ordering the four men to exit their vehicle. The men were not free to disobey that order. None of the men made any movement toward the knife before exiting the vehicle.

¶ 17 After exiting the vehicle, the four men were handcuffed and searched.

¶ 18 The State rested. The defense rested in rebuttal without introducing any additional evidence.

¶ 19 The trial court denied defendant's motion to suppress. The court found that the officers had a reasonable, articulable suspicion to make a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and to question the occupants of the vehicle and to have them exit the car, "given the time of night, the number of officers involved, the number of individuals in the car there." The trial court further found that the officers' subsequent conversation with defendant led to a consensual search of the vehicle, and the recovery of the gun.

¶ 20 Defendant filed a motion to reconsider, arguing that the officers had no reasonable suspicion for a *Terry* stop or probable cause to arrest him based on his driving of his vehicle, where his actions did not meet the *modus operandi* of the robbery pattern, where his parking of

the vehicle had not violated any law or city ordinance, and where the knife seen in the vehicle was not on anyone's person. Defendant contended the officers arrested him without probable cause when they ordered him out of the vehicle and handcuffed him, and that the subsequent recovery of the gun should have been suppressed as fruit of the poisonous tree.

¶ 21 The State argued that, given the recent robberies in Wrigleyville at night and the fact that defendant and three other young men were parked on a residential street in Wrigleyville at 12 a.m. with a knife in the car, the officers had a reasonable, articulable suspicion to stop and question defendant. Thereafter, defendant gave the officers consent to search his vehicle, and they recovered the gun.

¶ 22 The trial court denied defendant's motion to reconsider.

¶ 23 At the bench trial, the parties stipulated to Officer Esposito's testimony from the hearing on the motion to suppress. Officer Esposito further testified that, after she recovered the gun from defendant's car, he said: "That's mine. I forgot it was there. It's registered to me in Wisconsin." The gun contained 11 live rounds.

¶ 24 The State then introduced an Illinois State Police certification indicating that defendant was never issued a FOID card. The defense stated that it had no objection, and the trial court admitted the certification into evidence.

¶ 25 The State rested. The defense rested without presenting any evidence. As discussed earlier in this order, the trial court convicted defendant of three counts of AUUW and merged them into count one (which charged him with AUUW for possessing a gun in his vehicle without having a FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012))[1]. The trial court sentenced him to 12 months' probation and imposed $834 in costs. Defendant appeals.

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[1] We note that in *People v. Mosley*, 2015 IL 115872, the Illinois Supreme Court found that

¶ 26 First, defendant contends the trial court erred by denying his motion to suppress the gun. In reviewing the trial court's ruling on a motion to suppress, its findings of historical fact will be upheld on review unless they are against the manifest weight of the evidence. *People v. Lee*, 214 Ill. 2d 476, 483 (2005). We review *de novo* the ultimate question of whether the evidence should be suppressed. *Id*. 484.

¶ 27 The fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution provide people the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6; *People v. Timmsen*, 2016 IL 118181, ¶ 9. "The touchstone of the fourth amendment is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Id*. (quoting *Terry*, 392 U.S. at 19).

¶ 28 A seizure occurs only when an officer, by means of physical force or show of authority, has restrained in some way the liberty of a citizen. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citing *Terry*, 392 U.S. at 19). When a person's movement is hindered, the appropriate test for determining whether a seizure has occurred is "whether a reasonable person in defendant's position would have believed he was free to decline [the officer's] requests or otherwise terminate the encounter." *People v. Luedemann*, 222 Ill. 2d 530, 551 (2006). However, when a person's movement is not restrained, the test is "whether a reasonable innocent person would feel free to leave under the circumstances." *People v. Williams*, 2016 IL App (1st) 132615, ¶ 37. The "analysis requires an objective evaluation of the police officer's conduct, not the subjective perception of the person involved." *Id*.

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the portion of the AUUW statute based on the failure to possess a valid FOID card is constitutional and severable from the portions of the statute found unconstitutional under *People v. Aguilar*, 2013 IL 112116.

¶ 29 In determining whether a seizure occurred, courts consider: (1) the threatening presence of several officers; (2) the officer's display of a weapon; (3) physical touching of the person; and (4) use of language or loud voice compelling the person to comply with the officer's requests. *People v. Almond*, 2015 IL 113817, ¶ 57.

¶ 30 Not every encounter between officers and a private citizen results in a seizure. *Luedemann*, 222 Ill. 2d at 544. For purposes of the fourth amendment right to be free from unreasonable searches and seizures, encounters between officers and citizens are divided into three tiers: (1) arrests that must be supported by probable cause; (2) brief investigative *Terry* stops that must be supported by a reasonable, articulable suspicion of criminal activity; and (3) consensual encounters that involve no coercion or detention and thus do not constitute a seizure. *Id.*

¶ 31 In this case, the State contends the officers' initial encounter with defendant was consensual, where only two officers in plain clothes approached defendant's vehicle on a public street, and they did not flash their oscillating lights, display their weapons, touch defendant, or use coercive language or a loud tone of voice. The State contends that the nature of this consensual encounter was changed when Officer Esposito saw the knife inside the car, which gave the officers a reasonable, articulable suspicion under *Terry* to conduct a brief, investigatory stop.

¶ 32 Under *Terry*, an officer may conduct a brief, investigatory stop of a person when the officer reasonably believes that the person has committed, or is about to commit, a crime. *Timmsen*, 2016 IL 118181, ¶ 9. The officer must have a reasonable, articulable suspicion that criminal activity is afoot, which requires less than probable cause but more than an inchoate or unparticularized suspicion or hunch. *Id.* In reviewing the officer's conduct, we consider the

totality of the circumstances under an objective standard, considering whether all the facts available to the officer at the time of the seizure would cause a person of reasonable caution to believe that the stop was appropriate. *Id*.

¶ 33 Defendant argues that, Officer Esposito's glimpse of the steak knife wedged in the dashboard on the passenger side of the vehicle, failed to provide the justification for a *Terry* stop where the totality of the circumstances show that the officers did not have a reasonable, articulable suspicion that criminal activity was afoot. Specifically, defendant argues that he committed no traffic violations of any kind when his vehicle was first seen by the officers, as he was not speeding or swerving but was simply attempting to lawfully park on a residential street in Wrigleyville. When defendant had difficulty parking in the first parking space, he lawfully moved his vehicle to a second space on the street and successfully parked there, again without committing any traffic violations. Although it was midnight on a Saturday night, defendant and his companions had reason to be in the area, as they were intent on visiting the popular bars in Wrigleyville. Defendant also points out that his conduct did not match that of the offenders who had committed a pattern of robberies in the area. Officer Esposito testified that the robbery pattern involved cars with Illinois residents following intoxicated persons, in which one or more of the car's occupants would get out, rob the victim, and then get back in the vehicle and drive away. Here, by contrast, defendant was driving a vehicle with a Wisconsin plate and he was not following an intoxicated person, nor was there any testimony of an intoxicated person being seen anywhere near defendant's vehicle.

¶ 34 As for the knife with the four or five inch blade found in his car, defendant points out that Officer Esposito testified that since the knife was not on anybody's person, no ordinance was violated. Defendant also notes that under the Criminal Code, possession of a knife is only a

criminal offense (unlawful use of a weapon) when the person with the knife evinces an "intent to use the same unlawfully against another." 720 ILCS 5/24-1(a)(2) (West 2012). Defendant argues that neither he nor his passengers evinced such an intent, where the knife was lodged on the passenger side of the car, in a crevice on the dashboard, near the windshield, and was not immediately accessible to anyone in the vehicle. Defendant also points out that no one in the vehicle threatened the officers with the knife, and the officers were not responding to a report that there was a person with a knife in the area.

¶ 35 Accordingly, defendant argues that under the totality of the circumstances, the officers had no reasonable, articulable suspicion to make a *Terry* stop.

¶ 36 We disagree. Initially, we note that both parties agree that the officers had every right to walk up to defendant's vehicle after it exhibited difficulty parking and to shine a flashlight inside, as such actions were not a seizure in the absence of any show of weapons, or forceful language, or touching, and where the officers were not responding to any type of traffic violation or criminal behavior exhibited by defendant or his companions. The issue is whether, under the totality of the circumstances, the discovery of the knife inside the vehicle changed the initially consensual encounter into one justifying a *Terry* stop.

¶ 37 We find that it did. To recap, the encounter here occurred at about midnight on a Saturday night in Wrigleyville. The officers were in the Wrigleyville area because there had been a pattern of robberies committed there at night by young men in vehicles, who robbed intoxicated victims and then drove away. The two officers here saw a group of young men in a vehicle struggle to park on the street, temporarily blocking traffic, before driving up the street and successfully parking in another spot. When the officers approached the car, Officer Esposito saw two men in the front seat and two men in the back seat, and she also saw a knife with a four

or five inch blade in a crevice on the dashboard next to the passenger side windshield. Although it was not necessarily unusual, and certainly not criminal, for a group of young men to drive and park in Wrigleyville late on a Saturday night so as to visit the bars, a reasonable officer could note the unusualness of the presence of the knife inside the vehicle. A knife is a *per se* dangerous object, as it is an instrument that is used or may be used for the purpose of offense or defense and capable of producing death. *People v. McBride*, 2012 IL App (1st) 100375, ¶¶ 40, 57. Contrary to defendant's argument, there was no testimony that the knife was inaccessible to the occupants of the car, who could have reached over and pulled it out of the crevice in the dashboard (as evidenced by the fact that Officer Esposito pulled the knife out of the crevice after discovering it there). Given the time of night, the pattern of robberies committed at night by young men in vehicles in the area, and the presence of a dangerous weapon inside their vehicle, we find that a person of reasonable caution could believe that defendant and/or his companions had committed or were about to commit a crime, and that a stop was appropriate to check the circumstances as to why they were driving with a knife inside their automobile.

¶ 38 Defendant next argues that even if the *Terry* stop was proper, the stop turned into an illegal arrest without probable cause when he was handcuffed for about 10 minutes, while the officers patted him down, questioned him, and searched the vehicle. We disagree. "[H]andcuffing does not automatically transform a *Terry* stop into an illegal arrest." *People v. Colyar*, 2013 IL 111835, ¶ 46. "[W]hen an officer has a reasonable suspicion during an investigatory stop that the individual may be armed and dangerous, the officer is permitted to take necessary measures to determine whether the person is armed and to neutralize any threat of physical harm." *Id.* ¶ 45. "Ultimately, the propriety of handcuffing during a *Terry* stop depends on the circumstances of each case." *Id.* ¶ 46.

¶ 39 *Colyar* is informative. In *Colyar*, Officer Alcott and Detective Johnson arrived at a motel at about 8:45 p.m. to check for "parties and stuff of that nature" involving minors. *Id.* ¶ 6. The officers had not received reports of criminal or suspicious activity that day. *Id.* When they arrived at the motel, defendant's vehicle was parked in the south entrance to the motel's parking lot, between 50 and 100 feet from the main building entrance. *Id.*

¶ 40 The officers parked and exited their vehicle and walked toward defendant's vehicle to ask him why he was parked in the entrance. *Id.* ¶ 7. They did not draw their weapons. *Id.* Defendant was sitting in the driver's seat with the engine running, and there was a passenger in the vehicle. *Id.* As the officers walked to defendant's vehicle, a third person exited the motel and entered the rear passenger side of the vehicle. *Id.*

¶ 41 Officer Alcott approached the driver's side, while Detective Johnson approached the passenger side. *Id.* ¶ 8. Officer Alcott asked defendant why he was blocking the entrance, and defendant replied that he was picking someone up from the motel. *Id.* Officer Alcott shined his flashlight into the center console and saw in plain view a plastic bag with a bullet "sticking up" inside. *Id.* Officer Alcott then ordered defendant and his two passengers out of the vehicle and handcuffed them. *Id.* ¶ 9. Officer Alcott recovered a plastic bag from the center console containing five live rounds of .454-caliber ammunition. *Id.*

¶ 42 The officers patted down defendant and recovered a bullet from his front pants pocket matching the five .454-caliber bullets. *Id.* ¶ 10. Based on the recovery of the five bullets from the center console and the single bullet from defendant's pocket, Officer Alcott believed that a gun might be inside defendant's vehicle. *Id.* Detective Johnson subsequently found a .454 caliber revolver under the floor mat on the front passenger side. *Id.*

¶ 43 The trial court granted defendant's motion to suppress and the appellate court affirmed, holding that the police subjected defendant to an unlawful search without probable cause because the bullet did not establish evidence of a crime. *Id.* ¶ 2. The supreme court reversed. *Id.*

¶ 44 The supreme court majority noted that defendant conceded that his initial encounter with the officers was proper under *Terry,* and that the issue on appeal was whether *Terry* justified the officers' decision, after seeing the bullet in the center console, to order defendant and his passengers out of the car, handcuff them, search their persons, and then search the vehicle and recover the handgun. *Id.* ¶ 41.

¶ 45 The supreme court held that the officers' actions were justified under *Terry*. *Id.* ¶¶ 42-48. The court stated in pertinent part:

> "*** [T]he record demonstrates that Officer Alcott and Detective Johnson were in a vulnerable situation when they observed the bullet. It was dusk and the officers were on foot in a parking lot away from their vehicle. The two officers, who had not drawn their weapons, were also outnumbered by defendant and his two passengers, who were in a running car. Finally, the officers had only a brief exchange with defendant prior to their observation of the plain-view bullet. In other words, the officers were forced to make a quick decision based on limited information after seeing the bullet.
>
> Reviewing the actions of Officer Alcott and Detective Johnson under an objective standard, we believe that a reasonably cautious individual in a similar situation could reasonably suspect the presence of a gun, thus implicating officer safety, based on the bullet clearly visible in defendant's center console. ***
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> ***

> *** [W]e believe that the handcuffing was reasonable and a necessary measure because the officers were outnumbered, it was dusk, and they could reasonably suspect that one or more of the three individuals in defendant's vehicle possessed a gun or would be able to access a gun inside the vehicle if they were not secured by handcuffs." *Id.* ¶¶ 42- 43, 47.

¶ 46 Similarly, in the present case, the two officers were in a vulnerable position when Officer Esposito observed the knife in defendant's vehicle. It was midnight and the officers were on foot away from their vehicle. They had not drawn their weapons, and they were outnumbered by defendant and his three passengers. The officers had only a brief exchange with defendant prior to the observation of the plain-view knife, and thus were forced to make a quick decision based on limited information after Officer Esposito saw the knife. As discussed, a knife is a dangerous weapon, and Officer Esposito testified that the presence of the knife inside the vehicle implicated officer safety. As in *Colyar*, we believe that the handcuffing was reasonable and necessary because the officers were outnumbered, it was dark, and they could reasonably suspect, given the presence of the knife in the car, that one or more of the four persons in defendant's vehicle might possess another knife or knives or another dangerous weapon which they would be able to access if not secured by handcuffs. See also *People v. Froio*, 198 Ill. App. 3d 116, 122 (1990) ("it is difficult to imagine a more specific and articulable basis for concluding that an individual may be dangerous than the open presence of a dangerous weapon in his automobile"). Accordingly, the handcuffing of defendant and his companions was a reasonably necessary safety measure allowable under *Terry*, and therefore the officers committed no constitutional violation in handcuffing defendant and his companions while one of the officers patted them down and the other officer searched the vehicle with his permission. Further, the 10 to 15 minute duration of

the stop was not so lengthy as to pose *Terry* concerns. See *U.S. v. Sharpe*, 470 U.S. 675 (1985) (20 minute stop was valid under *Terry*).

¶ 47 Also, the pat-down of defendant was justifiable due to the officers' reasonable belief, given the totality of the circumstances described above, that defendant was armed and dangerous. See *People v. Love*, 199 Ill. 2d 269, 275 (2002) ("if the officer reasonably believes that the person questioned may be armed and dangerous, the officer may conduct a limited patdown search for weapons, commonly called a frisk"); 725 ILCS 5/108-1.01 (West 2012) (when a peace officer has made a *Terry* stop "and reasonably suspects that he or another is in danger of attack, he may search the person for weapons.")

¶ 48 Next, defendant argues that the officer's search of his vehicle, which uncovered the gun from under the driver's seat, was not justified under *Terry*, as the stop was illegal. As discussed earlier in this order, though, the *Terry* stop was not illegal, but was validly based on a reasonable, articulable suspicion that defendant and/or his passengers had committed, or were about to commit a crime, with the knife which was in plain view in the automobile. Officer Esposito testified that, after recovering the knife, she asked defendant whether there was anything else in the vehicle she should know about, and he replied: "No, I've got nothing" and to "go ahead and look" inside the vehicle. The trial court found that Officer Esposito's testimony established defendant's consent to the search. Consent to search eliminates the need for probable cause or a warrant. *People v. Starnes*, 374 Ill. App. 3d 329, 336 (2007).

¶ 49 Defendant argues he did not consent, but merely acquiesced to Officer Esposito's authority where he had been handcuffed for several minutes and patted down. See *People v. Anthony*, 198 Ill. 2d 194, 202 (2001) (mere acquiescence to authority is not consent). We need not address defendant's argument as we are not constrained by the trial court's reasoning that he

consented to the search, but may affirm on any basis in the record. *People v. Bennett*, 376 Ill. App. 3d 554, 563 (2007). We note that the United States Supreme Court has held that, in the context of a *Terry* stop of an automobile, where the officers have a reasonable suspicion based on specific and articulable facts to believe that a vehicle occupant may be dangerous, they may conduct a protective search for weapons, not only of defendant's person but, also, of the passenger compartment of the vehicle. See *People v. Sorenson*, 196 Ill. 2d 425, 440-41 (2001) (citing *Michigan v. Long*, 463 U.S. 1032, 1048-49 (1983)). Officer Esposito testified that, after seeing the knife in the vehicle, she effectuated the *Terry* stop and removed defendant and his companions from the vehicle out of a concern for the officers' safety. Regardless of whether defendant consented to the search of his vehicle, the officers' valid concerns that defendant and/or his companions may be dangerous justified Officer Esposito's search of the passenger compartment of the vehicle for other weapons. *Id*. See also *Froio*, 198 Ill. App. 3d at 122 (the presence of a knife inside defendant's vehicle justified a search of the passenger compartment under *Long*).

¶ 50 Defendant argues that the officers failed to *Mirandize* him prior to Officer Esposito questioning him about whether anything else was inside his vehicle. *Miranda* warnings must be given prior to any in-custody interrogation (*Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)), but temporary detention pursuant to *Terry* is not equivalent to custody for purposes of *Miranda*. See *People v. Jeffers*, 365 Ill. App. 3d 422, 429 (2006). Defendant was not yet in custody for purposes of *Miranda* at the time he was questioned by Officer Esposito, but rather was subject to a *Terry* stop. *Miranda* warnings were not required until defendant was arrested, which occurred after the gun was recovered and the officers learned he did not have a FOID card. Accordingly, no *Miranda* violation occurred here at the time he was questioned by Officer Esposito.

¶ 51 Next, defendant argues that his trial counsel and posttrial counsel were ineffective for failing to investigate whether he was a permanent resident of Wisconsin who was not required to have a FOID card under section 2(b)(10) of the FOID Card Act (430 ILCS 65/2(b)(10) (West 2012)). To obtain a reversal of a conviction based on an ineffective assistance of counsel claim, defendant must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that absent the errors, the outcome of the trial would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001).

¶ 52 Section 2(b)(10) provides that a FOID card is not required of "[n]onresidents who are currently licensed or registered to possess a firearm in their resident state." *Id*. Our supreme court has held that if a nonresident is licensed to possess the firearm in his resident state, he cannot be convicted in Illinois for AUUW for possession of a firearm without a FOID card. *People v. Holmes*, 241 Ill. 2d 509 (2011). Defendant notes that Wisconsin does not have a licensure requirement for persons openly carrying guns, but he cites *Mishaga v. Schmitz*, 136 F. Supp. 3d 981 (C.D. Ill. 2015), in which the federal district court held that a nonresident whose resident state does not issue licensing documents is not required to possess a FOID card in Illinois as long as he is legally eligible to possess a firearm in his resident state. *Id*. at 995-96. Defendant argues that his trial counsel and posttrial counsel should have investigated whether he was a resident of Wisconsin who was legally eligible to possess a firearm therein and, if so, they should have argued he was exempt from prosecution in Illinois for AUUW for possession of a firearm without a FOID card.

¶ 53 However, we have recently held that section 2(b)(10)'s provision that a FOID card is not required of nonresidents "currently licensed *** to possess a firearm in their resident state" (430 ILCS 65/2(b)(10) (West 2012)) applies only to nonresidents who have complied with an official state process for licensure in their home state and received an official license from their home state to possess a firearm. *People v. Wiggins*, 2016 IL App (1st) 153163, ¶ 43. In so holding, we explicitly rejected the federal district court's holding in *Mishaga* that section 2(b)(10) also excepts nonresidents of Illinois from complying with the FOID card requirement where their resident state authorized gun possession *without* a formal licensure or registration requirement. *Id.*

¶ 54 Accordingly, to be excepted from the FOID card requirement, and exempted from prosecution here for AUUW, defendant had to have been a Wisconsin resident who was licensed there to possess the gun in question.

¶ 55 Defendant argues that his trial counsel and posttrial counsel were ineffective for failing to investigate whether he fell within the non-residence exception to the FOID Card Act and was exempt from prosecution for AUUW. In order to address defendant's claim of ineffective assistance, we need to know whether defendant's trial counsel and/or posttrial counsel investigated the non-residence exception to the FOID Card Act and, if so, whether or not such an investigation revealed that defendant was a Wisconsin resident with a license to possess the gun. In other words, we need evidence as to these issues, which does not exist in the appellate record on direct appeal. Therefore, we are unable to address defendant's claim of ineffective assistance of counsel.

¶ 56 Where, as here, the record is incomplete or inadequate for resolving an ineffective assistance claim, such a claim is better suited to collateral proceedings where the record may be developed. See *People v. Veach*, 2017 IL 120649, ¶ 46.

¶ 57 Next, defendant contends the trial court violated his sixth amendment right to confront the witnesses against him when it admitted an Illinois State Police certification showing that he had never been issued a valid FOID card, where the State did not call a representative from the Firearm Services Bureau of the Illinois State Police to authenticate the document or to testify to its contents. Defendant concedes he forfeited review by failing to object at trial (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues for review under the plain error rule. The plain error doctrine allows the reviewing court to address unpreserved claims of error where either "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 58 We rejected a similar sixth amendment argument in *People v. Cox*, 2017 IL App (1st) 151536. In *Cox*, the defendant, Jesse Cox, was convicted of AUUW, based on his failure to possess a FOID card. *Id.* ¶ 1. On appeal, he argued that the trial court violated his sixth amendment confrontation right when it admitted a certification from the Illinois State Police, which stated that a search of the State's records revealed he did not possess a FOID card. *Id.* ¶ 2. Defendant did not object at trial, but argued for plain error review on appeal. *Id.* ¶ 4.

¶ 59 The appellate court found that there was no error by the trial court in admitting the certification, and thus no plain error, because defense counsel acquiesced to its admission.

Id. ¶¶ 71-76, ¶ 87. Specifically, the trial court asked defense counsel three separate times during trial whether defendant had any objection to the certification, and each time counsel asserted that defendant had no objection. *Id.* ¶ 74. The appellate court noted that under the invited error doctrine, defendant cannot acquiesce to the manner in which the trial court proceeds and then argue on appeal that the trial court's actions constituted error. *Id.* ¶ 73. The appellate court held that "[i]f the defense had objected at any point during trial, when it was given multiple opportunities to do so by the trial court, the State could have easily remedied the problem by simply calling the State employee to the stand. *** When the defense invited the trial court to admit the certificate by affirmatively responding to the trial court's questions that it had no objection to its admission, we cannot find any error by the trial court." *Id.* ¶¶ 75-76.

¶ 60 Similarly, in the present case, defense counsel specifically stated that defendant had "no objection" to the admission of the Illinois State Police certification showing he had never been issued a valid FOID card. Had defendant objected, the State could have remedied any problem by simply calling the representative from the Firearm Services Bureau to authenticate the document or testify to its contents. Instead, defendant invited the trial court to admit the certificate. Accordingly, pursuant to *Cox*, we find no error, plain or otherwise.

¶ 61 Defendant argues his trial counsel was ineffective for failing to object to the admission of the certification. A similar argument was rejected in *Cox*, which held that "the only way that defense counsel's decision not to object to the certification could *possibly* be ineffective assistance was if defendant actually had a FOID card and the certification was in error." (Emphasis in original.) *Id.* ¶ 88. The appellate court held that there was no ineffective assistance where no evidence was presented showing that defendant actually had a FOID card and that the

certification was in error, and where defense counsel's strategy was not to show that he had a FOID card, but rather to contest whether he possessed a gun. *Id.*

¶ 62 As in *Cox*, there is nothing in the record before us indicating that defendant actually had a FOID card and that the certification was in error, and defense counsel's strategy was not to show that defendant had a FOID card, but rather to suppress the gun on fourth amendment grounds. Accordingly, we reject defendant's claim of ineffective assistance based on his counsel's failure to object to the admission of the certification.

¶ 63 Defendant argues that *People v. Diggins*, 2016 IL App (1st) 142088, compels a different result. In *Diggins*, the defendant, Shawan Diggins, was convicted of AUUW and he argued on appeal that the trial court erred in admitting a certified letter from the Firearm Services Bureau stating he did not have a FOID card. *Id.* ¶¶ 1, 11. The appellate court held that the admission of the certified letter violated defendant's sixth amendment confrontation right. *Id.* ¶ 16. However, in *Diggins*, the defendant made an objection to the admission of the certification letter, and thus did not invite the trial court to admit the certificate. *Id.* ¶ 7. Accordingly, *Diggins* is inapposite. See *Cox*, 2017 IL App (1st) 151536, ¶¶ 82-84 (distinguishing *Diggins* on the same grounds).

¶ 64 Next, defendant argues for a reduction in the fines and fees assessed against him. Initially, we note that defendant did not raise these challenges at trial. Generally, to preserve a sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required, or the issue is forfeited. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, our supreme court has held that, the issue of proper monetary credit for presentence incarceration cannot be forfeited and may be raised for the first time on appeal. See *People v. Caballero*, 228 Ill. 2d 79, 83 (2008). Also, where, as here, the State fails to argue forfeiture, it forfeits any claim that the issue has been forfeited. *People v. Bridgeforth*, 2017 IL App (1st)

143637, ¶ 46. We review *de novo* the propriety of a court-ordered fine or fee. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 65 First, defendant argues, the State concedes, and we agree that defendant's $20 Violent Crime Victim Assistance fine, $100 Trauma Fund fine, and $5 Electronic Citation fee should be vacated. Specifically, defendant was improperly assessed a $20 Crime Victim Assistance fine under a prior version of section 10 of the Violent Crime Victims Assistance Act (725 ILCS 240/10(c)(1) (West 2012)), which was no longer in effect at the time of defendant's trial or sentencing hearing. Defendant was improperly assessed a $100 Trauma Fund fine pursuant to section 5-9-1.10 of the Unified Code of Corrections (730 ILCS 5/5-9-1.10 (West 2012)), which only applies to specified firearm offenses that do not include the section under which defendant was convicted. Defendant was improperly assessed a $5 electronic citation fee pursuant to section 27.3e of the Clerks of Courts Act (705 ILCS 105/27.3e (West 2012)), which only applies to traffic, misdemeanor, municipal ordinance, and conservation violations, and does not apply to defendant's felony conviction for AUUW. Accordingly, we vacate each of those assessments and we direct the clerk of the circuit court to modify the fines and fees order accordingly.

¶ 66 Defendant argues that the $20 Probable Cause Hearing fee imposed pursuant to section 4-2002.1(a) of the Counties Code (55 ILCS 5/4-2002.1(a) (West 2012)), should be vacated. Section 4-2002.1(a) provides that State's Attorneys are entitled to a $20 fee for a preliminary examination for each defendant held to bail or recognizance. *Id.* Defendant argues that the State indicted him without a probable cause hearing, and therefore that the Probable Cause Hearing fee must be vacated. However, the record shows that defendant was charged by information, and that there was a probable cause hearing in this case. Therefore, we affirm the $20 Probable Cause Hearing fee.

¶ 67 Next, defendant argues that several of the fees imposed against him are actually fines subject to be offset by his presentence incarceration credit. A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of $5 for each day of presentence custody. 725 ILCS 5/110-14(a) (West 2012). The presentence incarceration credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A fine is punitive in nature and is imposed as part of a sentence for a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A fee, in contrast, seeks to recoup expenses incurred by the State or to compensate the State for expenditures incurred in the prosecution of the defendant. *Id*. "The legislature's label is strong evidence, but it cannot overcome the actual attributes of the charge at issue." *Jones*, 223 Ill. 2d at 599.

¶ 68 Defendant spent 156 days in custody before sentencing and, accordingly, is entitled to a $780 credit (156 x $5) toward his eligible fines.

¶ 69 Defendant contends, the State concedes, and we agree that the $50 Court System fee, the $10 Mental Health Court fee, the $5 Youth Diversion/Peer Court fee, the $5 Drug Court fee, and the $30 Children's Advocacy Center fee, are actually fines and should be completely offset by his presentence incarceration credit. See *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 ("the $50 Court System fee ***is a fine"); *People v. Price*, 375 Ill. App. 3d 684, 700-01 (2007) (finding both the $10 Mental Health Court fee and the $5 Youth Diversion/Peer Court fee are fines); *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 67 (finding that both the $30 Children's Advocacy Center fee and the $5 Drug Court fee are fines). Accordingly, we direct the clerk of the circuit court to modify the fines and fees order to reflect this credit.

¶ 70 Defendant also argues that he is entitled to presentence incarceration credit toward the $2 State's Attorney Records Automation fee and the $2 Public Defender Records Automation fee

because both "fees" are actually fines. We disagree. Numerous cases have held that these assessments are fees. See *People v. Brown*, 2017 IL App (1st) 142877, ¶¶ 76-78 (and the cases cited therein).

¶ 71 We recognize that a contrary result was reached in *People v. Camacho*, 2016 IL App (1st) 140604, which held that the State's Attorney and Public Defender Records Automation assessments were fines subject to presentence incarceration credit. However, we follow the weight of authority that holds that the State's Attorney and Public Defender Records Automation assessments are fees. As such, defendant may not offset those charges with presentence custody credit.

¶ 72 Affirmed; fines and fees order corrected.