Illinois Official Reports

Appellate Court

People v. Sims, 2022 IL App (2d) 200391

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KARL C. SIMS, Defendant-Appellant.
District & No.	Second District No. 2-20-0391
Filed Rehearing denied	March 31, 2022 May 4, 2022
Decision Under Review	Appeal from the Circuit Court of Boone County, No. 18-CF-152; the Hon. Robert C. Tobin III, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, and Kelly Anne Burden, of State Appellate Defender's Office, of Chicago, for appellant. Tricia L. Smith, State's Attorney, of Belvidere (Patrick Delfino, Edward R. Psenicka, and Katrina M. Kuhn, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE JORGENSEN delivered the judgment of the court, with opinion. Justices Hutchinson and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Following a traffic stop on Interstate 90 (I-90) in Boone County, defendant, Karl C. Sims, was charged with one count of possession of between 30 and 500 grams of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2018)) and one count of possession of between 100 and 500 grams of cannabis (*id.* § 4(d)). Prior to trial, defendant moved to quash his arrest and suppress evidence. The trial court denied the motion. After a stipulated bench trial, defendant was convicted of possession of between 30 and 500 grams of cannabis with intent to deliver, a Class 3 felony (*id.* § 5(d)), and sentenced to six years' imprisonment. The court denied his motion to reconsider his sentence.

¶ 2 Defendant appeals, raising four arguments. First, defendant raises a fourth amendment challenge, arguing that the trial court erred in denying his motion to quash his arrest and suppress evidence, where the Illinois State Police (ISP) trooper who conducted the traffic stop, Gregory Melzer, unlawfully prolonged the stop and where his testimony that he smelled raw cannabis was incredible. Alternatively, defendant asserts that the odor of raw cannabis did not give rise to probable cause to search his vehicle. Second, defendant raises a fourteenth amendment equal protection argument. He maintains that the trial court erred in denying his motion for discovery, asserting that he presented some evidence tending to show the existence of his selective enforcement claim that the stop was racially motivated. Third, defendant argues that his right to effective assistance of counsel was violated when defense counsel failed to move to suppress defendant's statements to Melzer after the trooper conducted a custodial interrogation before giving defendant his *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Fourth, defendant argues in the alternative that the court erred in sentencing him to six years' imprisonment based on its determination that imposition of an extended-term sentence was warranted and where it failed to adequately consider the mitigating effects of defendant's nonviolent criminal background and personal history. We affirm.

¶ 3 ### I. BACKGROUND

¶ 4 #### A. Trooper's Probable Cause Affidavit

¶ 5 As related in his probable cause affidavit, on April 21, 2018, at 4:48 p.m., Melzer observed a silver Dodge Charger with a Wisconsin registration traveling westbound on I-90 in Boone County in lane two (*i.e.*, the center lane). The vehicle made a sudden lane change into lane three, which was occupied by a pickup truck, causing the truck to take evasive action and change lanes into lane two to avoid being struck. The Charger continued onto the ramp to the Belvidere Oasis, where Melzer activated his overhead lights. The vehicle stopped at the gas pumps, and the trooper drove his squad car behind it.

¶ 6 Melzer approached the vehicle from the driver's side, and defendant provided a Wisconsin driver's license. While speaking with defendant, Melzer noticed the odor of raw cannabis emanating from the vehicle. (In a separate field report, Melzer added that he observed at least four air fresheners throughout the front of defendant's vehicle.) Defendant was apologetic for the moving violation and accompanied Melzer to his squad car while Melzer "completed enforcement." When he questioned defendant about the cannabis odor, defendant stated that there was nothing in the vehicle and that the smell may have come from a person who smoked before getting into his car. (In the field report, Melzer wrote that he searched defendant for

weapons and contraband, placed him in the rear of the squad car, and then moved both vehicles away from the gas pumps.)

¶ 7 Melzer searched defendant's vehicle and found in the center console a small maroon bag that contained two smaller knotted plastic bags that, in turn, contained suspected cannabis. The maroon bag also contained a scale with green leafy residue on it. While searching the trunk, Melzer found a white plastic Walmart bag that contained a heat-sealed package with a large amount of suspected cannabis. Melzer arrested defendant and transported him to the ISP office.

¶ 8 After defendant was Mirandized, he informed Melzer that the large package contained one pound of cannabis, which he initially alleged he received for free. Later, defendant stated that he obtained it for his personal use. Defendant had $420 in small bills in his front pocket, which were seized.

¶ 9 The suspected cannabis was weighed and field-tested. The two smaller bags weighed 3.5 and 3.6 grams, and the large, heat-sealed package weighed 490.9 grams. All substances field-tested positive for the probable presence of cannabis.

¶ 10 B. Squad Car Video

¶ 11 A video from Melzer's dash cameras begins when Melzer activated his lights, after he began following defendant's vehicle onto the exit ramp. Defendant stopped at the gas pump, and Melzer approached. Melzer informed defendant that there was someone in his blind spot who had to brake hard as defendant maneuvered to exit the highway and that Melzer was going to write up a warning. After defendant handed Melzer his driver's license and vehicle registration, Melzer asked defendant if he would come to his squad car so that he could write up the warning and in case he had questions for him. Defendant followed, and Melzer directed him to sit in the front passenger seat.

¶ 12 Melzer engaged in conversation with defendant, who stated that he was headed to Wisconsin and had been in Indiana for the day. His cousin was about to graduate from Chicago State and ran track. Melzer again mentioned that he intended to write up a warning. Defendant stated that he was making a day trip to Indiana and related that his cousin was a fast runner. Defendant also related that the vehicle belonged to his girlfriend. Melzer warned defendant that something might be obstructing his rear license plate but noted that he was not going to write it up. Defendant stated that his girlfriend had recently purchased the vehicle.

¶ 13 About five minutes after defendant went to Melzer's squad car, Melzer asked, "When's the last time someone smoked weed in [defendant's vehicle]?" Melzer explained that, when he stood next to the vehicle, he smelled that someone had smoked cannabis in it. "I'm not saying you did right now or that you are currently." Defendant replied that he had not smoked "weed" in a couple of days and that he had the flu. He agreed that someone likely smoked weed and then got into the car. Melzer asked if there was any weed or drug paraphernalia in the car, and defendant denied that there was. He also denied carrying any bags for anyone. Melzer then repeated that he was just writing a warning.

¶ 14 Melzer next commented that defendant's chest appeared to be pounding and asked defendant if he was feeling well and not having a panic attack. Defendant responded that he was just sick. They engaged in more conversation. Defendant stated that his cousin lived in Chicago but that defendant went to Indiana to see his mother. He then confirmed that he was born in Indiana. Melzer patted down defendant, and defendant confirmed that he did not have

any weapons in his vehicle. Melzer instructed defendant to sit in the back seat of the squad car. The trooper then moved the vehicles away from the gas pumps.

¶ 15 Melzer searched defendant's vehicle. (At this point, the video recorded only defendant sitting in the rear of the squad car.) Melzer returned to defendant and asked him why he did not tell him that there was "a little weed" in the vehicle and a scale. Defendant replied that he thought that his cousin took it with him. Melzer handcuffed defendant.

¶ 16 C. Motion to Quash

¶ 17 On August 24, 2018, defendant moved to quash his arrest and suppress evidence, arguing that Melzer unreasonably prolonged his detention after the traffic stop was completed, by searching the vehicle without probable cause and without a warrant. Defendant alleged that Melzer repeatedly told him that he was writing up a warning but then asked about defendant's whereabouts. He also asked defendant whether he had smoked cannabis in the vehicle because Melzer smelled it. After conversation about other matters, Melzer returned to the issue of the cannabis.

¶ 18 Defendant asserted that Melzer wrote in his report that he smelled the odor of "raw" cannabis, whereas the video reflects that he told defendant that he smelled the odor of burnt cannabis. Defendant argued that Melzer did not smell either raw or burnt cannabis but, rather, used it as a subterfuge to search his vehicle after the stop's purpose was complete. The trooper's actions unreasonably prolonged the detention, and thus, the search/seizure violated the constitution.

¶ 19 At the hearing on defendant's motion, the court noted that it had viewed the DVD of the stop, which was made part of the record. Defendant examined Melzer.

¶ 20 Melzer testified that he has been an ISP trooper for nine years. He can tell the difference between the odors of raw and burnt cannabis. He stopped defendant's car because of improper lane usage. When he approached the vehicle, Melzer smelled the odor of raw cannabis emanating from the vehicle. Melzer testified that, during 95% of traffic stops he makes, he has the driver come back with him to his squad car. When he ran defendant's license, it came back valid, and the license plate was not stolen. When asked about the conversation he engaged in with defendant concerning where defendant had been that day, Melzer replied that his criminal patrol unit interdicts criminal matters on the highways, including drugs, and, thus, he interacts in that manner with all persons he stops. Defendant was not in custody, but he was not free to leave, because he was being detained for a traffic stop. He could have opened the door or stood outside the vehicle.

¶ 21 According to Melzer, it took one to two minutes to verify that defendant's license was valid. The registration check took another minute. Ordinarily, writing a warning takes 7 to 12 minutes for an Illinois-plated vehicle because the computer fields auto-populate, but the process takes longer for out-of-state license plates because he must manually type in every field. Melzer further testified that he asked defendant when someone last "smoked in [the] car." Melzer explained that raw cannabis smells different from burnt cannabis. He smelled the odor of raw cannabis coming from the vehicle. He did not tell defendant that he smelled the odor of raw cannabis coming from the car; he only asked if defendant had been smoking pot.

¶ 22 Defendant sat in the back seat of the squad car while Melzer moved defendant's vehicle and the squad car away from the gas pumps. He was not handcuffed, but he was not able to get

out. Melzer searched defendant's vehicle after he moved both cars. Melzer switched from camera 1 to camera 2 when he started searching defendant's vehicle. Camera 1 faces forward from the squad car, and camera 2 faces the back seat. There is no video of the search. About 13 minutes passed from the time Melzer approached defendant to the time he decided to pat him down. Nineteen minutes elapsed from the time Melzer first approached defendant's car to the time he completed the search.

¶ 23 The parties stipulated that Melzer had training and experience to identify raw cannabis.

¶ 24 On cross-examination by the State, Melzer testified that, upon smelling the odor of raw cannabis in his initial approach of defendant's vehicle, he did not mention the cannabis odor to defendant because he has had people flee from traffic stops. He finds it easier to ask in the controlled environment of his squad car if the person has smoked cannabis. He eases into the questioning. When asked if there were other warning signs that raised his suspicion, Melzer testified that defendant's vehicle contained four air fresheners that appeared to be freshly opened. He could both see them and smell them. In his training and experience, he knew that people involved in criminal activity use air fresheners to attempt to cover up the odor of narcotics or drugs.

¶ 25 Melzer further testified that he noted multiple times to defendant that he was going to issue him a warning ticket because defendant appeared to be "extremely nervous" and Melzer was attempting to calm his nerves. However, it did not appear to alleviate defendant's anxiety. On redirect examination, Melzer stated that he was able to smell the odor of raw cannabis over and above the air freshener smell.

¶ 26 During arguments, defense counsel noted that, if the court found credible Melzer's testimony that he smelled the odor of raw cannabis emanating from the vehicle when he approached the driver's side, then it would follow that he had the right to search the car. Counsel, however, argued that the stop was unreasonably prolonged because Melzer did not state right away that he smelled the cannabis odor and then search the vehicle. Nor did he immediately put defendant, who could have been armed and dangerous, into the back seat of his squad car. Instead, Melzer spent time on processing the warning ticket and "talking about burnt marijuana." Defense counsel argued that Melzer did not smell the odor of raw cannabis and instead was "fishing." The stop should have taken 2 minutes instead of 10 to 12 minutes. The State agreed that the central issue was Melzer's credibility and argued that the stop's duration was not unreasonable, as evidenced by the testimony concerning the risk that a driver may flee.

¶ 27 On October 11, 2018, in a memorandum of decision, the trial court denied defendant's motion, finding that, upon his initial approach, Melzer smelled the odor of raw cannabis and, thus, he had probable cause to search defendant's vehicle. Relying on Melzer's testimony that he was trained to detect the odor of raw cannabis, that he identified such odor coming from defendant's vehicle upon approach, and that he observed four air fresheners in the vehicle (which provided additional support for probable cause, in that a reasonable inference was that the driver was attempting to conceal the smell of contraband), the court determined that, after the initial approach to defendant's vehicle, Melzer had probable cause to search the vehicle. The court rejected defendant's argument that Melzer's testimony that he smelled the odor of raw cannabis was incredible. The court noted that this testimony was corroborated after the fact, when the trooper found raw cannabis in the vehicle. "There was nothing about his testimony or the surrounding circumstances to call the trooper's drug detection observation

into question."

¶ 28 D. Motion for Discovery

¶ 29 On June 11, 2019, defendant moved for discovery. He claimed that he had "credible threshold evidence" of racial profiling tactics used by Melzer and was therefore entitled to further discovery of stop-and-search data. Defendant argued that Melzer smelled neither raw nor burnt cannabis and that his claim and further detainment of defendant were acts of targeted enforcement based on defendant being African American, in violation of the federal and state constitutions. Defendant noted that he had requested stop-and-search data from the ISP through an open records request pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2018)) but that his request was denied (see *id.* § 7.5(k)).

¶ 30 He attached to his motion a copy of his request to the ISP FOIA officer of data compiled pursuant to section 11-212 of the Illinois Vehicle Code, titled "Traffic and pedestrian stop statistical study" (625 ILCS 5/11-212 (West 2018)). Specifically, he sought traffic stop data for all stops in Boone County from January 1, 2013, through January 1, 2018, including raw data by race of driver; reasons for the stop; whether a search was conducted; whether contraband was found and, if so, the type of contraband; and the outcome of the search (*e.g.*, warning given, ticket issued, arrest made). Defendant also requested the name and race of the officer conducting the stop, the police agency, the date of the stop, and the gender of the driver. If the data could not be provided about the officers, defendant noted, he requested that all data regarding Melzer be clearly identified in the data set.

¶ 31 Defendant also attached to his motion a copy of a letter from the Attorney General's office, noting that the ISP had denied defendant's request (see 5 ILCS 140/7.5(k) (West 2018)) and that defendant had sought review of the denial. The Attorney General's office determined that no further inquiry was warranted in the matter because section 7.5(k) of FOIA exempted from inspection and copying law enforcement officer identification information compiled by a law enforcement agency pursuant to section 11-212(f) of the Vehicle Code, which, in turn, prohibited disclosure of such information (625 ILCS 5/11-212(f) (West 2018)).

¶ 32 Defendant asked the trial court to grant him discovery of the following traffic stop data for all stops conducted in Boone County from January 1, 2013, through January 1, 2018: (1) race, gender, and date of birth of driver; (2) reason for stop (*e.g.*, investigatory stop, externally generated stop, motor vehicle equipment issue, etc.); (3) whether a search was conducted and, if so, the reason for and type of the search; (4) whether contraband was found subsequent to a search and, if so, the type of contraband found; (5) the outcome of the search (*e.g.*, warning given, ticket issued, arrest made); and (6) the badge number and race of the officer conducting the stop, the policing agency, and the date of the traffic stop. Unconstitutional racial profiling, defendant noted, was a selective enforcement tactic, and statistical data could establish the discriminatory-effect element (*i.e.*, the first element of a selective enforcement claim).

¶ 33 Relying on an affidavit from his expert, Stephanie Seguino—an economics professor at the University of Vermont with a PhD in economics—who had studied data obtained by an organization called Injustice Watch, defendant asserted that, between 2016 and 2018, 78.1% of Melzer's total arrests after traffic stops were of African Americans, where African Americans make up only 3% of the Boone County population. Further, 19.6% of total arrests after traffic stops by other officers in Boone County were of African Americans. Thus, defendant argued, Melzer arrested African Americans at a rate four times higher than the

average officer. Seguino opined that Melzer's arrest rate of African Americans, which was four standard deviations higher than the mean, showed that the discrepancy was not a coincidence. This data, defendant argued, was credible threshold evidence showing a discriminatory effect *and*, logically, a discriminatory purpose/intent (*i.e.*, the second element of a selective enforcement claim) on Melzer's part, thereby entitling defendant to further discovery.

¶ 34 In the affidavit, Seguino averred that she had reviewed raw data of all arrests in Boone County from January 1, 2016, through October 30, 2018. The data was compiled by the ISP and provided to Injustice Watch, pursuant to a FOIA request. Injustice Watch "shared the data directly with [Seguino] *without alteration*." (Emphasis added.) Seguino opined that, based on her analysis of the data for arrests after traffic stops, the race of individuals influenced Melzer's policing practices during the period in question. Specifically, 78.1% of the individuals he arrested were African Americans; the second highest African American share of arrestees by an officer in Boone County was 47.2%. About 3% of Boone County residents are African American, and 3.5% of Belvidere residents are African American (based on census data). The average African American share for all officers was 19.6% (for officers who arrested more than 25 people). Melzer's arrest pattern of African Americans as compared to other officers was statistically significant, and the differences in Melzer's and other officers' percentages of arrestees who were African American was not random.

¶ 35 Defendant also attached to his motion a copy of an ISP press release, dated July 17, 2013, which noted that the Drug Interdiction Task Force's objective is to "combat organized crime *** in pre-determined areas of known criminal and drug activity."

¶ 36 At the hearing on defendant's discovery motion, Seguino testified that all her published research consists of statistical analysis and that, during the last 10 years, she has analyzed traffic stop data in Vermont, looking at racial disparities in traffic policing. She reviewed Boone County arrest data for 2016 through 2018, which included about 6000 arrests by all law enforcement agencies and a variety of officers and troopers, including Melzer. She looked at the racial proportion of arrests to ascertain whether arrests of African Americans were disproportionate relative to some benchmark. Specifically, one benchmark was Melzer's arrest rate of African Americans compared to those of other officers or troopers in the data set, to determine whether his practices were similar to, different from, or substantially different from the other troopers.

¶ 37 According to Seguino, the African American share of Melzer's arrestees, after eliminating duplicates from the entire data set and including only officers who had arrested 25 or more people over the period,[1] was 78.1% of total arrestees (*i.e.*, arrests after traffic stops). (Seguino noted that the second highest rate for an officer was 47.2% and the third highest was 46.2%.) Melzer had 32 arrests (after traffic stops) over the period.[2] Reviewing census data, she

[1]She explained that the 25-person minimum was used because "you need a large enough sample size to be able to draw conclusions with some reliability so smaller numbers of arrest rates aren't really—don't really give us very good information. It's not reliable information." Seguino further explained that, in some studies, the cutoff is 50 arrests, but she wanted to preserve as much of the data set as possible here.

[2]Seguino stated that the statistical standard is that an event should occur at least 20 times to be able to obtain reliable data.

determined that 3% of the population of Boone County is African American, and 3.5% of the population of Belvidere is African American. Of the total arrests in Boone County after traffic stops, 19% were of African American drivers. Of ISP trooper-only arrests, the African American share was 24%.

¶ 38 Seguino opined that Melzer's arrest record of African Americans was an outlier compared to all other officers in the data set. Melzer's 78% is four standard deviations higher than the overall rate of 19%, which means that such a difference is a rare event and is not coincidence. Even compared only to other ISP troopers, whose arrest rate of African Americans was 24%, Melzer's rate is three times higher. "So it very much stands out as an outlier and [is] highly unusual."

¶ 39 Seguino further testified that she did not have data on officers' search rates, hit rates (*i.e.*, percentage of searches yielding contraband), traffic stop rates (by race, gender, date of birth, and driver), reasons for stop, whether contraband was found, what happened as a result of the searches, and Melzer's information as compared to other officers/troopers. This information would assist in determining whether Melzer engaged in racial profiling. The State, she noted, collects this data because it is widely reported in a number of studies, and the State itself posts annual reports. Seguino opined that the data she had reviewed appeared to show some *prima facie* evidence of racial profiling.

¶ 40 On cross-examination, Seguino testified that she obtained the Boone County arrest (from traffic stops) data she analyzed from Injustice Watch, which had made an open records request for it. When asked about the accuracy of the data she obtained, she replied, "If it's FOIA'd data from a government agency, I would have no reason to doubt it." When asked how she knew that the data turned over to her was the complete set Injustice Watch received from the government, Seguino stated that she "did not have that."

¶ 41 She agreed with a hypothetical that, if she had data showing that information from a drug enforcement agency led to 28 of Melzer's 32 arrests, that would possibly change her analysis. If Seguino had all the data, she would exclude externally generated stops and focus only on stops that were related to officer discretion. Detailed data sets, she explained, would provide the reasons for the searches, and then one could analyze search rates and arrests subsequent to the stops. Seguino testified that, if Boone County has a very small share of African Americans but a large transit population, this would be a benchmark against which one would measure, and the findings of excessive arrests, stops, or searches might change.

¶ 42 On redirect examination, she testified that, while the stop is one factor to consider, it is possible that, prior to making the stop, the officer did not see the driver's race, so a key part might be what happens *after* a stop. The focus in the analysis is the poststop outcomes. About 60% of Melzer's arrests were drug related.

¶ 43 The court asked Seguino if she was aware that I-90 is a tollway, and she replied that she was. The court asked whether she considered that the people who do business in Boone County might not be the same people typically traveling on the interstate and whether that factored into the analysis. Seguino replied that there are no good estimates of the driving population. For example, looking at Chicago (the highest nearby African American population), which would influence driving patterns on I-90, the African American share of Chicago's population is 30%. "So even that, comparing that to Trooper Melzer's arrest shares—," Seguino stated, at which point the court interrupted and asked another question.

¶ 44 The broader data set, she noted, included sheriff's deputies who did not patrol the highway and troopers who do patrol it. Seguino explained that, for this reason, she also looked at trooper-only data, and their African American share of arrests was 24% (*i.e.*, all the troopers who made arrests in Boone County over the period; she did not have data distinguishing who the troopers were or what units they worked in). The percentages used from the census data were of people living in Boone County. She agreed that "[i]t's approximate" and "not necessarily people that would" drive on the tollway.

¶ 45 Defendant argued that the State had not presented any specific evidence to rebut Seguino's testimony. He argued that the State's suggestion, that Boone County's population of African Americans may not be relevant because it does not account for the African Americans who drive though the county on their way to work, did not rebut Seguino's data, because it merely called to attention "potential flaws in unmeasured variables," which was insufficient to rebut a *prima facie* case of selective enforcement.

¶ 46 On December 4, 2019, the trial court denied defendant's motion for discovery, finding that defendant had failed to produce some evidence that similarly situated defendants of other races could have been prosecuted but were not. The data, the court determined, was "not very reliable" and did not rise to the requisite level. Specifically, the court noted that the data included only arrests that arose from traffic stops and not arrests for non-traffic-related reasons. Moreover, the court determined that the data consisted only of persons arrested and not those "who were stopped and allowed to go on their way." Also, Seguino presumed that all persons who were arrested had their vehicle searched prior to arrest, a questionable presumption to the court.

¶ 47 Next, the court took issue with the definition of an "event," where a stop resulting in the arrest of a driver of a vehicle with no passengers was characterized as one event but a stop resulting in the arrests of not just the driver of a vehicle but also of two passengers in the vehicle was characterized as three events. This approach, the court noted, would skew the results of such a small database. The court also took issue with the 25-event cutoff for reliability, as the use of arrests of multiple occupants as individual events was problematic. The court calculated that Melzer's "events" totaled 22, not 32, if an "event" were defined as the search itself rather than the number of individuals arrested. Additionally, the court found problematic Seguino's use of census data, noting that it did not identify the percentage of African Americans, as compared to non-African Americans, driving on Illinois interstate highways. Instead, the data consisted of the people who live in Boone County, who may or may not ever travel on I-90.

¶ 48 E. Stipulated Bench Trial

¶ 49 The stipulated bench trial on count I occurred on January 27, 2020. (Count II was dismissed.) The court noted to defendant that possession with intent to deliver between 30 and 500 grams of cannabis was a Class 3 felony punishable by a maximum sentence of 2 to 10 years' imprisonment followed by mandatory supervised release, plus fines and costs. The court also noted that defendant was stipulating to the facts in order to preserve both his suppression and discovery motions for purposes of appeal.

¶ 50 Defendant agreed to stipulate that, on April 21, 2018, Melzer was stationed at milepost 25.7 on I-90, watching westbound traffic. He observed in lane 3 a silver Dodge Charger with a Wisconsin registration pass his location. The driver was not visible. The trooper entered

westbound traffic and noted that the vehicle was now in lane 2. As he caught up to the vehicle, it made an abrupt lane change. At the time of the lane change, a pickup truck had to take evasive action so as not to strike the Charger. The Charger then exited to the Belvidere Oasis ramp, at which time Melzer conducted a traffic stop and made contact with the driver at the gas pumps of the Mobile gas station. The driver was defendant.

¶ 51 While speaking to defendant, Melzer smelled the odor of raw cannabis emanating from the vehicle. He explained to defendant the reason for the stop, and defendant related that he had exited there to get gas. Melzer noted that there remained more than one-half tank of gas in the vehicle. He also noted that there were four visible air fresheners throughout the front of the vehicle. Defendant agreed to accompany Melzer to his squad car.

¶ 52 During his conversation with Melzer, defendant showed several signs of nervousness. Ultimately, Melzer informed defendant about the odor of cannabis in the vehicle and asked if anyone had smoked in it. Defendant stated that he had not smoked in a few days, since he was sick, but he continued that the car may have smelled because somebody else smoked and then got in the car.

¶ 53 Melzer had defendant sit in the back of his squad car, and he performed a search of defendant's vehicle. He located two small bags of suspected cannabis in the center console, as well as a black scale with suspected cannabis residue on it.

¶ 54 Melzer found a heat-sealed oblong package in the trunk. It weighed about one pound, and he believed that it was cannabis. He arrested defendant, and defendant was Mirandized and questioned. When asked how much was in the packaging, defendant responded that it was one pound.

¶ 55 Melzer would testify that, based on his training and experience, the quantity was more than that for personal use. Per the ISP crime laboratory, the total for the three bags was 444.8 grams, and it was positive for cannabis. The incident took place in Boone County.

¶ 56 The trial court found defendant guilty of possession with intent to deliver between 30 and 500 grams of cannabis.

¶ 57 F. Sentencing

¶ 58 At the sentencing hearing on June 2, 2020, defendant stated in allocution that he is 38 years old and has four children. He was present in their lives every day. He picked up his six-year-old son from school and helped him with homework. He apologized to the court, stating that he had been on pretrial probation for two years and had not gotten into trouble. He was taking seriously his sobriety and had been attending all his meetings and doing well. Defendant further stated that he wished to move on with his life and knew that he made a mistake and did not want one day to define him. He wanted to make changes going forward.

¶ 59 The State argued that, while the case was pending, defendant had an incident in Wisconsin involving drug paraphernalia. Defendant also had a history of criminality, and he had opportunities to address problems in his life but failed at probation several times. The State noted that it had not received any formal documentation since April 8, 2019, concerning defendant's alleged treatment (although the court noted that an e-mail from a treatment provider had been submitted). Thus, it argued that probation would not be appropriate. The State also noted that an extended-term sentence applied in this case and recommended that defendant be sentenced to six years' imprisonment.

¶ 60 Defense counsel acknowledged that, one month before he was arrested in this case, defendant was charged in Wisconsin with possession of THC and drug paraphernalia, but he added that it was not a criminal matter. Defense counsel argued that defendant's criminal history did not involve violence and that he had a history of cocaine and cannabis use when he was 20 years old, whereas he was now 38 years old. Defendant also has glaucoma. Defendant did sell some cannabis to pay for the cannabis that he smoked. Defense counsel argued that probation would be the proper sentence in this case but acknowledged the possibility of a term of 6, 8, or 10 years' imprisonment.

¶ 61 The trial court sentenced defendant to an extended term of six years' imprisonment. It found in aggravation that defendant had a significant criminal history and that the sentence was necessary to deter others. The court found in mitigation that defendant's conduct did not cause physical harm and that he is the parent of a child whose well-being will be negatively affected by his absence. The court determined that defendant's addiction cut both ways. "In mitigation at least explaining why he does stuff, but in aggravation also showing that he's very likely to reoffend while that's going on." Reviewing his criminal history, the court noted that defendant had no "period of law abiding." In 2010, he was "unsuccessful at" probation, and he committed driving with a revoked license while on probation. Defendant went to prison for a few years, was released, and then got his fourth conviction of driving under the influence (DUI). He went on probation for three years and again drove with a revoked license. His probation ended around March 2017, and one year later, he was dealing again, "which is the case at hand." The court also noted that, while out on bond in this case, defendant committed a misdemeanor cannabis offense related to an incident that occurred prior to this case. "[H]e just has a tough time living by the law and I don't know why. I assume it's the addiction." The court found that defendant posed a significant risk to the community, whether because of substance abuse or that he did not like to follow the law, "I don't know." The risk to the community, the court further found, outweighed the risk of harm from his removal from his family members and children.

¶ 62 G. Posttrial Motions

¶ 63 On June 29, 2020, defendant moved to reconsider the court's orders concerning (1) additional discovery to determine if Melzer engaged in racial profiling and (2) the motion to quash his arrest and suppress evidence. As to the discovery motion, defendant argued that the trial court's concern that the data did not include arrests that arose from non-traffic-related offenses was of no import because the data regarding the traffic-related stops reflected poorly on Melzer and it was significant that the African American populations of Boone County and the State of Illinois were very small, 2.8% and 14.6%, respectively. "Clearly, the percentage of the [African American] population in Boone County or in the State of Illinois is small compared to the percentage of [African American] people he arrested." Defendant also addressed the court's concern about stops resulting in arrests of more than one person in the vehicle, arguing that this was not a significant consideration because the number of African Americans arrested by Melzer was statistically disproportionate when compared to the percentage of African Americans in Boone County or the State.

¶ 64 Defendant also took issue with the court's finding that Seguino did not have data that allowed her to distinguish between different types of stops. He argued that this is the very data that he sought. "She wanted hit rates for Trooper Melzer by race to see if he was over searching

[African American] drivers," and Seguino indicated that the State collects such data. Finally, defendant addressed the court's concern that the data did not identify the number of African Americans driving on the interstate. He asserted that this was not significant, because the African American population in the state is 14.6%. It would be impossible, he urged, to conclude that more African Americans drove on this part of the interstate than Caucasians.

¶ 65 Turning to the suppression motion, defendant argued that the sealed bag in the trunk of defendant's car called into question Melzer's ability to smell what he claimed he did. The court, defendant argued, "ignored the fact that the odor [Melzer] smelled coming from the defendant while he was seated in the squad car was burnt cannabis, not raw [cannabis]." He also asserted that the case was about the stop's duration and that it was improbable that a trooper would take14 minutes to issue a warning ticket.

¶ 66 On July 1, 2020, the court denied defendant's motion to reconsider.

¶ 67 Defendant also had moved, on June 24, 2020, for reconsideration of his sentence, arguing that probation was appropriate, where he had been crime-free for about six years before the present offense, he was steadily employed, and character letters reflected that he was a good employee. He also noted that he completed a relapse prevention program in March 2018 and noted that he has glaucoma and smokes cannabis to ease the pain. He never denied that he smoked it but denied that he sold cannabis. Defendant asserted that he purchased it for himself, while also delivering some to friends to lower his costs, and did not make a profit. Defendant also noted that he has four children, whom he saw daily. He picked some of them up from school and paid child support. Finally, he noted that he did not have a violent criminal history.

¶ 68 The trial court also denied this motion on July 1, 2020. Defendant appeals.

¶ 69 II. ANALYSIS

¶ 70 A. Motion to Suppress

¶ 71 Defendant argues first that the trial court erred in denying his motion to quash his arrest and suppress evidence. He contends that (1) Melzer unlawfully prolonged the traffic stop, (2) his testimony that he smelled raw cannabis was incredible, and, (3) alternatively, the odor of raw cannabis did not give rise to probable cause to search the vehicle. For the following reasons, we reject defendant's claim.

¶ 72 In reviewing the trial court's ruling on a motion to quash arrest and suppress evidence, reviewing courts apply a two-part standard of review. *People v. Timmsen*, 2016 IL 118181, ¶ 11. First, we defer to the trial court's findings of fact and will reverse those findings only if they are against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence when it is unreasonable. *People v. Relwani*, 2019 IL 123385, ¶ 18. Second, we review *de novo* the trial court's ultimate determination on whether the evidence should be suppressed. *Timmsen*, 2016 IL 118181, ¶ 11.

¶ 73 Both the fourth amendment to the United States Constitution and article I, section 6, of the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. Under the fourth amendment, the temporary detention of a motorist during a traffic stop is a "seizure," which is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Whren v. United States*, 517 U.S. 806, 809-10 (1996). A traffic stop is reasonable when the police have probable cause or reasonable suspicion to believe that the motorist violated a traffic

law. See *Prado Navarette v. California*, 572 U.S. 393, 401-02 (2014); *Whren*, 517 U.S. at 809-10. An officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

¶ 74 Here, it is undisputed that Melzer had probable cause to initiate a stop of defendant's car after defendant's improper lane usage. The question is whether, after this point, the trooper had the authority to conduct a search of the vehicle. *People v. Jones*, 215 Ill. 2d 261, 271 (2005).

> "To establish probable cause, it must be shown that the totality of the facts and circumstances known to the officer at the time of the search would justify a reasonable person in believing that the automobile contains contraband or evidence of criminal activity. *People v. Smith*, 95 Ill. 2d 412, 419 (1983). It is a pragmatic, nontechnical analysis of 'everyday life on which reasonable and prudent persons—not legal technicians—act.' *Jones*, 215 Ill. 2d at 274; accord *People v. Blitz*, 68 Ill. 2d 287, 292 (1977). In determining whether probable cause exists, officers may rely on their law-enforcement training and experience to make inferences that might evade an untrained civilian. *Jones*, 215 Ill. 2d at 274. Accordingly, a reviewing court makes this determination through the standpoint of an objectively reasonable officer. *Id.*
>
> Probable cause deals with probabilities, not certainties. *Illinois v. Gates*, 462 U.S. 213, 231-32 (1982). It is a flexible, commonsense standard that 'does not demand any showing that such a belief be correct or more likely true than false.' *Texas v. Brown*, 460 U.S. 730, 742 (1983). Therefore, probable cause does not require an officer to rule out any innocent explanations for suspicious facts. *District of Columbia v. Wesby*, 583 U.S. ___, ___, 138 S. Ct. 577, 588 (2018). Instead, it requires only that the facts available to the officer—including the plausibility of an innocent explanation—would warrant a reasonable [person] to believe there is a reasonable probability 'that certain items may be contraband or stolen property or useful as evidence of a crime.' *Brown*, 460 U.S. at 742; accord *Wesby*, 583 U.S. at ___, 138 S. Ct. at 588." *People v. Hill*, 2020 IL 124595, ¶¶ 23-24.

¶ 75 Here, finding Melzer credible, the trial court determined that, upon his initial approach of defendant's vehicle, Melzer smelled the odor of raw cannabis and, thus, he had probable cause to search the vehicle. The court noted that Melzer was trained to detect the odor of raw cannabis. As additional support to find probable cause, the court noted Melzer's testimony that he observed four air fresheners in the vehicle, which indicated that defendant was attempting to conceal the smell of contraband.

¶ 76 Defendant asserts that, despite telling defendant multiple times during the stop that he was merely being issued a traffic warning, Melzer had defendant get out of his car and sit in the front of the squad car, where Melzer questioned him for 12 minutes on matters outside his stated mission. By improperly prolonging the stop, Melzer, defendant contends, violated defendant's fourth amendment rights. Also, Melzer's testimony that he detected the odor of raw cannabis was incredible in light of his action after he approached the vehicle and his subsequent questioning of defendant about smelling burnt cannabis. He also asserts that Melzer's testimony that he smelled raw cannabis emanating from the vehicle was incredible in light of the video and audio evidence and that Melzer's credibility was diminished when he testified that he switched the dash camera so that the video would show only defendant sitting in the back of the squad car while Melzer searched defendant's vehicle.

¶ 77 Defendant further argues that, because Melzer's testimony provided the sole basis for finding probable cause in this case, the trial court again erred in declining to reconsider its ruling on the motion to quash when subsequent evidence was presented that supported the conclusion that Melzer had a history of targeting African Americans in traffic stops.

¶ 78 In *People v. Stout*, 106 Ill. 2d 77, 81 (1985), a traffic stop was initiated after an illegal right turn, and the defendant provided his driver's license outside his vehicle. At that time, the officer observed two passengers in the car and, intending to check on the passengers for his own safety, approached the car and detected the odor of burning cannabis near the driver's door, which had a window that was nearly all the way down. *Id.* A subsequent search produced a vial of cocaine and several codeine capsules. *Id.* The trial court granted the defendant's motion to suppress the substances. *Id.* at 82. The issue before the supreme court was whether the detection of the odor of cannabis emanating from the defendant's vehicle gave the officer probable cause to conduct a warrantless search, and the court held that it did and reversed the grant of the suppression motion. *Id.* at 82-88. The officer testified that he detected the odor and that his detection was based on his training and experience, which supported the trial court's finding that the officer was credible. *Id.* at 87. Based on these facts, the court held that probable cause existed to justify the warrantless search. *Id.* Additional corroboration, the court noted, was not required "where a trained and experienced police officer detects the odor of cannabis emanating from a defendant's vehicle." *Id.* at 88.

¶ 79 Since *Stout*, Illinois courts have repeatedly recognized that the smell of burnt or raw cannabis emanating from a vehicle provides officers familiar with and trained in the detection of controlled substances with probable cause to search a vehicle. See *People v. Rice*, 2019 IL App (3d) 170134, ¶¶ 19, 25 (holding that the smell of burnt cannabis provides officers trained in the detection of controlled substances with probable cause to search a vehicle); *People v. Smith*, 2012 IL App (2d) 120307, ¶¶ 16, 19 (holding that the search of a vehicle as provided for in *Stout* also applies based on the odor of raw cannabis); see also *People v. Burns*, 2020 IL App (3d) 170103, ¶ 37 (reviewing case law and concluding that "there is no distinction between the odor of raw versus burnt cannabis as the basis of probable cause supporting a lawful vehicle and passenger search").

¶ 80 We conclude that the trial court did not err in finding credible Melzer's testimony that he smelled raw cannabis emanating from defendant's vehicle, and we further conclude that the odor of raw cannabis emanating from the vehicle when Melzer first approached gave rise to probable cause to search the vehicle. Thus, we need not reach defendant's argument that Melzer unreasonably prolonged the stop.

¶ 81 We disagree that Melzer's conduct showed that he did not smell an odor of raw cannabis. Melzer explained that his custom of having drivers sit in his squad car while he processes tickets is to ensure that suspects do not attempt to flee. "[I]t is well established that following a lawful traffic stop, police may, as a matter of course, order the driver and any passengers out of the vehicle pending completion of the stop without violating the protections of the fourth amendment." *People v. Sorenson*, 196 Ill. 2d 425, 433 (2001).

¶ 82 We also disagree with defendant that the video evidence established that Melzer was incredible. In *People v. Litwin*, 2015 IL App (3d) 140429, ¶ 44, upon which defendant relies, the reviewing court held that the trial court erred in denying the defendant's motion to quash arrest and suppress evidence. In that case, a police officer initiated a traffic stop for improper lane usage. While speaking to the defendant, the officer smelled cannabis emanating from the

vehicle, but he did not say anything about the odor until after he asked for the defendant's consent to search the vehicle. *Id.* ¶ 4. The defendant refused to consent, and the officer asked the defendant if anyone had smoked or had cannabis in the vehicle, although his report stated that he asked only if anyone had smoked cannabis. *Id.* ¶ 5. About 10 minutes after the officer had stopped the defendant, an ISP trooper pulled up with his K-9. The K-9 was distracted by the officer's dog and did not alert during a sniff around the defendant's vehicle. The trooper did not smell any odor of cannabis. *Id.* ¶¶ 6-7. The first issue was whether the officer unreasonably prolonged the duration of the stop, and the court, noting that there were significant discrepancies in the testimony, determined that the officer took at least 10 minutes to run the defendant's information, which was unreasonably long. *Id.* ¶ 37. Next, as relevant here, it assessed whether the officer's actions were *separately* justified under the fourth amendment, specifically, whether the officer was credible in testifying that he smelled cannabis emanating from the vehicle upon his initial approach. *Id.* ¶ 38. The court concluded that the officer's testimony that he smelled it upon his approach was "questionable"; he still asked the defendant for consent to search the vehicle, which "belie[d] common sense." *Id.* ¶ 40. The court noted that it was well settled that the smell of cannabis emanating from a vehicle is sufficient to give probable cause to search it. *Id.* However, other issues with the officer's testimony also undermined his credibility, including whether he asked if anyone had smoked cannabis in the vehicle versus whether anyone had smoked or had cannabis in the vehicle. *Id.* ¶ 41. The court also noted that the trooper and his K-9 did not smell/alert to cannabis, and there was evidence about potential tampering with the video. *Id.* ¶¶ 42-43. Accordingly, the *Litwin* court held that the officer was not credible with regard to whether he smelled cannabis emanating from the vehicle and, absent a separate fourth amendment justification, he was not justified in prolonging the duration of the stop for improper lane usage. *Id.* ¶ 44. The trial court had erred in denying the defendant's suppression motion. *Id.*

¶ 83 Here, defendant contends that Melzer's conduct does not support his assertion that he actually smelled the odor of raw cannabis. Had he done so, according to defendant, he would have immediately searched the vehicle. At the very least, he would have called for drug sniff dogs. He did neither and, instead, questioned defendant in his squad car for 12 minutes before searching the vehicle. Defendant contends that Melzer's explanation—that he did not immediately tell defendant about the cannabis because, in the past, people had fled on foot or in their vehicles when asked about it—was illogical. Once defendant was in the squad car (where he could not flee), defendant argues, Melzer did not immediately question defendant about cannabis or give any indication that he had smelled cannabis. In fact, Melzer told defendant multiple times that he was just issuing him a warning ticket for unsafe lane usage and that, after he issued it, defendant could leave. Defendant urges that, had Melzer smelled cannabis emanating from the vehicle as he claimed, he would have immediately either searched the vehicle or questioned defendant about whether he had smoked cannabis in the vehicle. Instead, Melzer asked defendant questions about a myriad of unrelated topics. Defendant maintains that this calls into question his testimony that he smelled the odor of raw cannabis. We disagree.

¶ 84 The circumstances in this case are very different from those in *Litwin*. There was nothing inherently incredible about Melzer's explanation concerning his practice of having suspects sit in the front seat of his squad car, and no other circumstances of the encounter reasonably called his credibility into doubt. Although the *Litwin* court questioned the officer's failure to

immediately question the defendant about the odor of cannabis, its holding was based on the totality of the circumstances in that case, including additional factors that undermined the officer's credibility, such as the fact that the trooper did not smell the odor of cannabis, the officer's conflicting testimony as to whether he had asked about both raw and burnt cannabis versus smoked cannabis, and the questions concerning the recording equipment. Those factors are not present in this case, and therefore, *Litwin* does not support defendant's claim. Again, Melzer reasonably explained why he did not immediately announce to defendant that he smelled the odor of cannabis and then search the vehicle.

¶ 85 Defendant notes that, when Melzer first mentioned the cannabis, in the squad car, he referenced burnt cannabis, not raw cannabis. Defendant also contends that the small amount of cannabis—seven grams—found initially in the small bags in the center console made it unlikely that Melzer could have detected the odor of raw cannabis. It is also dubious, he contends, that Melzer could have smelled such odor in the trunk over the smell of the air fresheners in the car. We disagree with defendant.

¶ 86 Defendant ignores *Smith*. In that case, this court reversed the trial court's grant of the defendant's motion to suppress evidence, holding that the odor of raw cannabis, even slight, that an officer detects from a vehicle establishes probable cause to search the vehicle, where there is a sufficient foundation as to the officer's expertise. *Smith*, 2012 IL App (2d) 120307, ¶¶ 11-20. In *Smith*, the officer had stopped the defendant's car because of a cracked windshield, and as he approached the defendant's car, he smelled the slight odor of fresh cannabis coming from inside. The officer obtained the defendant's identification and proof of insurance, and he then returned to his squad car to run checks. When he returned, he had the defendant exit the car and explained to him that he had smelled fresh cannabis and asked the defendant to consent to a search. The defendant refused, and the officer stated that he would call a K-9 unit to conduct a sniff and would be issuing traffic citations. He had the defendant return to his vehicle and commenced processing the citations. While he was still processing them, the K-9 unit arrived. The dog alerted to the driver's side, and the officer searched the car and found a bottle containing a green leafy substance that smelled of fresh cannabis and a pipe that smelled of burnt cannabis. At the hearing, the officer testified that, through his training and experience, he recognized the smell of fresh and burnt cannabis. Thirty-eight minutes elapsed from the time the officer stopped the defendant's car to the time the K-9 unit began the drug sniff. *Id.* ¶¶ 2-6. Relying on *Stout*, which involved burnt cannabis, this court held that the odor of raw cannabis, even slight, that an officer detects from a vehicle establishes probable cause to search the vehicle, where there is a sufficient foundation as to the officer's expertise. *Id.* ¶¶ 11-20.

¶ 87 The evidence here similarly reflected that Melzer had sufficient expertise to detect the odor of raw and burnt cannabis. The bags Melzer found in the center console were not heat-sealed like the package found in the trunk. Further, Melzer found a scale in the console that contained green leafy residue. The scale was also not sealed. Thus, it was not unreasonable to find that Melzer could detect the odor of raw cannabis from the placement of this evidence. The age and potency of the fragrance emanating from the air fresheners is unknown. Melzer testified that they appeared to be freshly opened but also that he was able to smell the odor of cannabis over them. Thus, we cannot conclude that it would have been unreasonable to determine that their presence completely masked the odor of raw cannabis. Finally, defendant does not explain how a trooper trained in the detection of cannabis would be unable to detect the odor of seven grams of the substance. Melzer testified that he worked for the ISP for nine years, was part of a

criminal patrol unit that interdicts criminal matters on the highways, including those involving drugs, and was familiar with the smell of both raw and burnt cannabis. Also, the parties stipulated that Melzer had training and experience to identify raw cannabis.

¶ 88 We also find unavailing defendant's assertion that Melzer's credibility was undermined because Melzer never told defendant that he smelled the odor of raw cannabis. Instead, he asked him only if someone had smoked cannabis in the car. We do not find this problematic, as Melzer was not precluded from asking defendant general questions about cannabis.

¶ 89 Defendant also takes issue with the fact that Melzer switched the dash camera so it recorded only defendant sitting in the back of the squad car while Melzer searched defendant's vehicle. He notes that Melzer gave no reason for switching the camera's viewpoint. We conclude that this is of no import, because, as the State notes, defendant provides no authority that requires video evidence of a search. Also, defendant does not argue that Melzer planted the cannabis in the vehicle.

¶ 90 Next, defendant refers to his separate selective enforcement claim to support his argument concerning Melzer's credibility, arguing that racial profiling data would have further attacked the trooper's credibility. This argument is also unavailing because it depends on Melzer's subjective intent, which does not factor into our analysis of the suppression motion. See *Whren*, 517 U.S. at 813 (officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

¶ 91 Having determined that Melzer credibly testified that he smelled the odor of raw cannabis when he first approached defendant's car, we next address defendant's argument that the odor of raw cannabis by itself did not give rise to probable cause to search the vehicle. At the time of the stop—2018—cannabis was not inherently "contraband," defendant contends, and thus, the mere odor of raw cannabis could not give rise to probable cause. We reject defendant's argument.

¶ 92 Defendant notes that, in 2016, the legislature decriminalized possession of less than 10 grams of cannabis for any purpose, even nonmedical purposes, and defined such possession as a "civil law violation." See Pub. Act 99-697, § 40 (eff. July 29, 2016) (amending 720 ILCS 550/4) (decriminalizing the possession of not more than 10 grams of cannabis by categorizing it as a "civil law violation" punishable by a fine ranging from $100 to $200); 720 ILCS 550/4 (West 2018). Melzer claimed that he searched the car solely based on the odor of raw cannabis. At that time in 2018, however, possession of cannabis was not an inherently criminal act, defendant argues. Therefore, he further suggests, the mere smell of it alone could not justify a warrantless search of a car.

¶ 93 Defendant fails to acknowledge that, in 2018, possession of any amount of cannabis remained illegal. See 720 ILCS 550/4 (West 2018) ("It is unlawful for any person knowingly to possess cannabis."). " '[D]ecriminalization is not synonymous with legalization.' " *Rice*, 2019 IL App (3d) 170134, ¶ 24 (quoting *In re O.S.*, 2018 IL App (1st) 171765, ¶ 29 (further recognizing the continued viability of case law holding that the odor of cannabis is indicative of criminal activity, notwithstanding recent decriminalization of possession of not more than 10 grams of cannabis)). The odor of cannabis was indicative of criminal activity, "notwithstanding the legislature's decriminalization of the possession of a small amount of marijuana." *Id.* ¶ 25 (further concluding that, once the officer identified the odor of burnt cannabis, there was probable cause for the search).

¶ 94 In summary, having concluded that the trial court did not err in finding Melzer credible or in determining that he had probable cause to search defendant's vehicle upon smelling the odor of raw cannabis, we hold that the trial court did not err in denying defendant's motion to quash his arrest and suppress evidence.

¶ 95 B. Motion for Discovery—Selective Enforcement Claim

¶ 96 Next, defendant argues that the trial court erred in denying his motion for discovery. He asserts that he made the threshold showing for discovery in support of his potential racial profiling/selective enforcement claim. Defendant contends that he presented credible and reliable statistical evidence showing that Melzer engaged in racial profiling tactics and that race influenced his policing practices. He argues that (1) he was entitled to the discovery, (2) pursuant to Illinois Supreme Court Rule 412(h) (eff. Mar. 1, 2001) (addressing discretionary disclosures), the trial court should have granted his motion, and (3) the error was not harmless. He asks that we reverse his conviction, remand for a new trial, and instruct the trial court to authorize the State to present the requested discovery. For the following reasons, we reject defendant's claim.

¶ 97 In a criminal case, the denial of a discovery motion is reviewed for an abuse of discretion. *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002); see also *People v. Clark*, 2013 IL App (2d) 120034, ¶ 24 (noting "uncontroversial rule that, in general, a trial court's decision 'on a discovery violation' is reviewed only for an abuse of discretion" (emphasis omitted) (quoting *People v. Chavez*, 327 Ill. App. 3d 18, 32-33 (2001))). An abuse of discretion occurs when the trial court's ruling is unreasonable. *People v. Lerma*, 2016 IL 118496, ¶ 23. Whether a court applies a correct discovery standard is a legal question, which we review *de novo*. *United States v. Sellers*, 906 F.3d 848, 851 (9th Cir. 2018); *United States v. Washington*, 869 F.3d 193, 213 (3d Cir. 2017).

¶ 98 1. *The Appropriate Standard to Obtain Discovery*

¶ 99 Defendant sought discovery to attempt to assert a selective enforcement claim. Selective enforcement refers to the actions of law enforcement and those affiliated with law-enforcement personnel, whereas selective prosecution refers to the actions of prosecutors. *Washington*, 869 F.3d at 214; *Conley v. United States*, 5 F.4th 781, 789 (7th Cir. 2021) ("Selective enforcement occurs when police investigate people of one race but not similarly-situated people of a different race.").

¶ 100 "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren*, 517 U.S. at 813. The "constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.*; U.S. Const., amend. XIV, § 1.[3] "[A] traffic stop motivated by race is unconstitutional, even if the officer also was motivated by the legitimate purpose of enforcing the traffic laws." *Commonwealth v. Long*, 152 N.E.3d 725, 739 (Mass. 2020).

¶ 101 "Substantive claims of selective prosecution and selective enforcement are generally evaluated under the same two-part test, which is derived from a line of seminal Supreme Court cases about the collision between equal protection principles and the criminal justice system."

[3]At the federal level, the protections apply to the federal government via the fifth amendment due process clause's equal protection component. *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985).

(Emphasis omitted.) *Washington*, 869 F.3d at 214 (citing *Whren*, 517 U.S. at 813, and *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Generally, in a selective prosecution or selective enforcement case, a defendant must provide evidence of discriminatory effect and discriminatory intent/purpose. *Id.* "Meeting this standard generally requires evidence that similarly situated individuals of a difference race or classification were not prosecuted, arrested, or otherwise investigated." *Id.*[4]

¶ 102 Selective prosecution claims must be proven by "clear evidence." (Internal quotation marks omitted.) *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Recently, the Seventh Circuit has adopted the preponderance-of-the-evidence standard in substantive selective enforcement cases. See *Conley*, 5 F.4th at 789 (*habeas* sting-house case; holding that substantive racially selective enforcement claims must be proved by a preponderance of the evidence; heightened "clear evidence" standard, which was rooted in presumption-of-regularity deference doctrine and based on separation-of-powers concerns in the selective prosecution context, does not apply to selective enforcement claims).

¶ 103 For criminal defendants seeking *discovery*, the key Supreme Court decision is *Armstrong*, which, unlike here, was a selective prosecution case. The Court noted that a selective prosecution claim is not a defense to a criminal charge but is "an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Armstrong*, 517 U.S. at 463. A selective prosecution claim "asks a court to exercise judicial power over a 'special province' of the Executive." *Id.* at 464 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). Prosecutors have broad discretion to enforce criminal laws and, as a result, there is a presumption that they have properly discharged their duties. *Id.* at 464.

¶ 104 The *Armstrong* court addressed the requirements to obtain *discovery* in a selective *prosecution* case, holding that a "rigorous standard" applied because discovery imposes costs on the government, diverts prosecutor's resources, and may disclose government strategy. *Id.* at 468. Instead of "clear evidence," courts require "*some evidence*" and a showing that similarly situated persons were not prosecuted. (Emphasis added and internal quotation marks omitted.)

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[4]Courts are divided concerning the remedy for an equal protection selective enforcement violation (in the absence of a fourth amendment violation). See, *e.g.*, *Long*, 152 N.E.3d at 736 ("[b]ecause the discriminatory enforcement of traffic laws is more closely tied to the evidence obtained as a result of the stop, rather than the decision to bring criminal charges based on that evidence, we conclude that suppression was the correct remedy for a traffic stop"); *State v. Soto*, 734 A.2d 350, 361 (N.J. Super. Ct. Law Div. 1996) (granting consolidated suppression motions by 17 defendants establishing that their traffic law stops violated equal protection); *United States v. Benitez*, 613 F. Supp. 2d 1099, 1101 & n.3 (S.D. Iowa 2009) (noting that "[o]ther courts have equivocated on this issue" and it need not be answered in the case before it, but that "exclusion would seem to be the proper remedy as it is highly doubtful that civil remedies would adequately deter police agencies from engaging in this unconstitutional and blatantly reprehensible behavior" of racial profiling in making traffic stops); *United States v. Nichols*, 512 F.3d 789, 794 (6th Cir. 2008) (noting that proper remedy is a 42 U.S.C. § 1983 action), *overruled on other grounds by United States v. Ward*, 756 F. App'x 560 (6th Cir. 2018); see also 1 Wayne R. LaFave, Criminal Procedure § 1.5(j) n.326.20 (4th ed. 2021). Here, defendant is not entirely clear concerning the ultimate remedy he seeks, but we need not reach the issue for purposes of reviewing the trial court's ruling on his discovery motion.

Id. at 468-69;[5] see also *United States v. Bass*, 536 U.S. 862, 863-64 (2002) (*per curiam*) (involving claim of selective prosecution in seeking the death penalty).

¶ 105 *Armstrong* presents a significant hurdle for defendants seeking discovery. See, *e.g.*, 1 Wayne R. LaFave, Search and Seizure § 1.4(f) (6th ed. 2021) (following *Armstrong*, "the defendant's chances of even obtaining discovery are slight"); see also *Washington*, 869 F.3d at 215 (noting that *Armstrong* proved "to be a demanding gatekeeper").

¶ 106 The Seventh Circuit subsequently determined that *Armstrong* does not apply to discovery in selective *enforcement* cases. In *United States v. Davis*, 793 F.3d 712, 720-22 (7th Cir. 2015) (*en banc*), the court reversed the dismissal of an indictment in a government stash-house sting case. It determined that limited discovery was warranted, where law enforcement had recruited targets to participate in the sting operation and that, of 20 stings the government had prosecuted since 2006, 75 of the defendants were African American, 13 were Hispanic, and only 6 were Caucasian. *Id.* at 714-15, 720-22. All seven of the *Davis* defendants were African American. *Id.* at 715. As relevant here, the defendants sought information concerning how they and others were targeted by the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). *Id.* The court noted that the considerations that led to the *Armstrong* court's decision did not apply in a selective enforcement case involving allegations that FBI or ATF agents engaged in racial discrimination when selecting targets for sting operations or when deciding which suspects to refer for prosecution. *Id.* at 721. Agents, unlike prosecutors, "are not protected by a powerful privilege or covered by a presumption of constitutional behavior." *Id.* at 720. The order before it, however, was an abuse of discretion, because it was overbroad, including discovery that concerned the exercise of prosecutorial discretion or matters blocked by executive privilege. *Id.* at 722-23 (reversing dismissal of indictment and remanding). Without articulating a precise standard, the court directed the lower court to "proceed in measured steps" and start with "limited inquiries" to determine whether "forbidden selectivity occurred or plausibly could have occurred." *Id.*

¶ 107 The Ninth and Third Circuits, also in government-sting cases, agree with the Seventh Circuit.[6] See *Sellers*, 906 F.3d at 855 (stash-house reverse-sting context; the court "join[ed] the Third and Seventh Circuits and [held] that *Armstrong*'s rigorous discovery standard for selective prosecution cases does not apply strictly to discovery requests in selective enforcement claims"; "[A] defendant need not proffer evidence that similarly-situated individuals of a different race were not investigated or arrested to receive discovery on his [or her] selective enforcement claim in a stash house reverse-sting operation case. While a defendant must have *something* more than mere speculation to be entitled to discovery, what that *something* looks like will vary from case to case. The district court should use its discretion—as it does for all discovery matters—to allow limited or broad discovery based on the reliability and strength of the defendant's showing."; remanding for district court to apply correct standard (emphases in original)); *Washington*, 869 F.3d at 197-222 (appeal from denial of pretrial discovery on ATF's operations and enforcement statistics; holding that *Davis*'s proposed distinction, which was also in a sting-house case, was "well taken" and noting that

[5]Elsewhere in the opinion, the Supreme Court used the phrase "credible showing" to mean "some evidence." See *Armstrong*, 517 U.S. at 470.

[6]*Davis* has been applied outside the government-sting context. See, *e.g.*, *Lewis v. United States*, No. 17-cr-10004-JES, 2021 WL 5230870, at *4-6 (C.D. Ill. Nov. 9, 2021) (*habeas* case).

"the law supports greater flexibility when the discretionary decisions of law enforcement, rather than those of prosecutors, are targeted by a defendant's request for discovery" and further holding that "a district court may exercise its discretion to grant limited discovery, or otherwise to conduct *in camera* analysis of government data before deciding whether limited discovery is warranted" and it "may do so even if a defendant seeking discovery on a selective enforcement claim has not otherwise met his or her full burden under *Armstrong/Bass*"; court noted it was "in agreement with the core rationale of *Davis*: the special solicitude shown to prosecutorial discretion, which animated the Supreme Court's reasoning in *Armstrong* and *Bass*—and our own reasoning in our pre-*Armstrong*/*Bass* case law on the same subject—does not inevitably flow to the actions of law enforcement, or even to prosecutors acting in an investigative capacity. Prosecutors are ordinarily shielded by absolute immunity for their prosecutorial acts, but police officers and federal agents enjoy no such categorical protection"; further noting *Davis*'s observation that officers and agents are expected to testify in criminal cases, with their credibility open to challenge; thus, finding *Armstrong/Bass* factually distinguishable).[7] In their briefs to this court, neither defendant nor the State acknowledge this recent case law, although, in the trial court, defendant cited *Washington* in his motion to reconsider the court's order on his discovery motion, where he noted the Third Circuit's lower standard and argued that, at the very least, the trial court here should have conducted limited inquiries of witnesses and *in camera* analysis of the documentary evidence.[8]

¶ 108 In *Washington*, the Third Circuit did not "mandate a precise system or order" for the district court to follow, but it emphasized its broad discretion and ability to "react to the particular circumstances of a case." *Washington*, 869 F.3d at 220. It determined that, in selective enforcement actions, the standard was different:

> "The proffer must contain *reliable statistical evidence, or its equivalent*, and may be based in part on patterns of prosecutorial decisions *** *even if* the underlying challenge is to law enforcement decisions. *** [A] defendant need not, at the initial stage, provide 'some evidence' of discriminatory intent, or show that (on the effect prong) similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement. However, the proffer must be strong enough to support a reasonable inference of discriminatory intent and non-enforcement." (Emphasis added and in original.) *Id.* at 221.

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[7]We have found only one Illinois case addressing a selective enforcement racial profiling equal protection challenge in the context of a felony traffic stop. See *People v. Clemons*, 46 Ill. App. 3d 159, 161-62 (1977) (pre-*Armstrong* case affirming denial of suppression motion where the defendant had argued that he was stopped because he was African American; offered evidence of racial composition of arrestees at Grundy County jail and another defendant arrested by the same officer; held that evidence concerning arrestees brought to the jail did not provide basis to infer that officer stopped a higher proportion of African Americans than Caucasians on the highway and that there was no evidence concerning his arrests or stops where arrestees were not brought to the jail).

[8]We note that the Fourth, Tenth, and Eighth Circuits apply the *Armstrong* standard to selective enforcement claims. See *United States v. Mason*, 774 F.3d 824, 829-30 (4th Cir. 2014) (traffic stop case; selective enforcement issue raised in ineffective-assistance context); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264, 1266 (10th Cir. 2006) (affirming denial of discovery in traffic stop case); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003) (42 U.S.C. § 1983 case). The cases do not consider whether a lower standard applies.

In *Sellers*, the Ninth Circuit noted that evidence of discriminatory intent alone may be sufficient to warrant discovery. *Sellers*, 906 F.3d at 856.

¶ 109 In summary, the Third Circuit's new selective enforcement discovery standard requires that a defendant present "some evidence" of discriminatory effect (*i.e.*, "reliable statistical evidence, or its equivalent," and it may be based, in part, on prosecutorial decision patterns) and need *not* present evidence of similarly situated individuals or of discriminatory intent. *Washington*, 869 F.3d at 220-21. The Ninth Circuit requires a defendant to meet only one of the two prongs, and it eliminated the similarly situated requirement, requiring only "*something* more than mere speculation" to show discriminatory effect. (Emphasis in original.) *Sellers*, 906 F.3d at 855-56. The Seventh Circuit did not specify a discovery standard.

¶ 110 2. *The Present Case*

¶ 111 Turning to the case before us, defendant argues that the trial court erred in denying his motion for discovery, where he met the minimum threshold of presenting some relevant and reliable evidence tending to support his selective enforcement racial profiling claim. He contends that Seguino's analysis showed that Melzer's arrest pattern as it pertains to African Americans was distinctly higher than all other officers' arrest patterns that she had examined and that the difference was statistically significant and not random. Defendant notes that Melzer's testimony was the only evidence that he smelled raw cannabis and that defendant knowingly possessed cannabis. Thus, his credibility was central to the State's case. Further, he argues, because the discovery of this information would have been critical to attacking Melzer's credibility at trial and at the hearing on the motion to suppress, he was prejudiced by the trial court's error and, thus, a new trial is required. The trial court, defendant also contends, should have granted discovery pursuant to Rule 412(h) because the additional discovery was material to the preparation of his defense. Ill. S. Ct. R. 412(h) (eff. Mar. 1, 2001) ("Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court, in its discretion, may require disclosure to defense counsel of relevant material and information not covered by this rule."). He further asserts that, as the error was not harmless, we should reverse his conviction and remand for a new trial and instruct the trial court to authorize the State to present the requested discovery.

¶ 112 In denying defendant's discovery motion, the trial court found that the data was not reliable and did not rise to the requisite level (under *Armstrong*) to show "some evidence" that similarly situated defendants of other races could have been prosecuted but were not. The court determined that the data consisted only of persons arrested and not those who were stopped and not arrested. It also noted that Seguino's analysis assumed that all persons who were arrested had their vehicles searched prior to their arrests, which it found questionable. The court also took issue with the definition of an "event," which was based on the number of occupants arrested during a stop as opposed to the number of stops and, thus, skewed the results in the small database and was problematic given the 25-event cutoff. Finally, the trial court found problematic Seguino's use of census data, which it noted did not identify the percentage of African Americans (as compared to other races) driving on Illinois interstate highways. Instead, the court noted, the data consisted of Boone County resident data, *i.e.*, persons who may or may not ever travel on I-90.

¶ 113 The trial court relied on *Barlow*, 310 F.3d 1007, a case that predates *Davis* by 13 years. In *Barlow*, the defendant claimed that Drug Enforcement Agency (DEA) agents had engaged in

racial profiling. At Chicago's Union Station, the defendant had purchased tickets on Amtrak's Southwest Chief for himself and for his friend. In the waiting area, two undercover DEA agents observed the defendant and his friend, who kept glancing over their shoulders and whispering to one another. Each man carried a garment bag. *Id.* at 1008. The agents followed the men to the boarding area, asked to speak to them, identified themselves as law enforcement agents, and received consent to search their bags. They located cocaine base and loaded guns in the bags and placed the defendant and his friend under arrest. *Id.* at 1008-09. The defendant moved for discovery, arguing that he had been pursued, stopped, interviewed, and investigated by the agents based on his race. He sought the names and races of all individuals stopped by all agents and officers in the DEA transportation task force between 1995 and 2000, including date and time of the stop, length of the stop, reason for the stop, location of the stop, outcome of the stop, and the names of the agents or officers involved in the stop. The defendant also submitted the affidavit of his expert, who supervised a field study of law enforcement activity at Union Station for 10 days to determine whether race played a role in law enforcement decisions to approach or stop travelers. His analysis counted the number of passengers who entered the departure gate for the Southwest Chief and the subset of African Americans in that group. It also recorded the race of those individuals from the total number of travelers who were approached by law enforcement agents. The study revealed only one incident of law enforcement stopping or interviewing anyone—when an Amtrak porter pointed out an African American couple to an Amtrak police officer. Officers escorted the couple away from the waiting area. *Id.* at 1009. The expert opined that the fact that the only individuals approached by law enforcement—the couple and the defendant and his friend—were African American suggested that the agents could be engaging in racial profiling when approaching and stopping travelers. *Id.* at 1009-10. The trial court denied the defendant's motion, finding " 'statistically indefensible' " the expert's inclusion of the defendant and his friend in the data pool for the 10-day study. *Id.* at 1010.

¶ 114 The Seventh Circuit applied the *Armstrong* standard and affirmed the district court's denial of the defendant's discovery motion, concluding that the expert's statistics were not sufficiently relevant and reliable to establish discriminatory effect. *Id.* at 1010-11. The defendant, the court noted, had to present evidence that the agents chose *not* to approach Caucasians to whom he was similarly situated. *Id.* at 1010. A finding that they did not approach Caucasians who rode the Southwest Chief as frequently as African Americans would not automatically establish that their investigatory tactics were discriminatory. *Id.* Also, observations of *Amtrak's* law enforcement activities were irrelevant to the defendant's claim that the DEA engaged in racial profiling, and there was no information as to why the Amtrak officer approached the couple. *Id.* at 1011. The court also took issue with the expert's methodology, concluding that his inclusion of the defendant and his friend in the data pool was problematic because the incident involving them did not occur within the 10-day period and did not account for the travelers that day whom the agents did not approach or their races. *Id.* Next, the Seventh Circuit determined that, even if the expert's conclusions were statistically valid, the defendant had presented no evidence that he received less favorable treatment than similarly situated Caucasian travelers. *Id.* at 1012. Finally, the court concluded that the defendant did not show that the agents acted with discriminatory intent/purpose when they approached him. *Id.* The court noted that the agents made no racial comments during their

encounter with the defendant and that there was no evidence of a DEA task force policy encouraging racial profiling. *Id.*

¶ 115 Defendant points to Seguino's analysis of about 6000 arrests in Boone County between 2016 and 2018, the source of which was data compiled by the ISP, which was, he notes, reliable and credible. See 625 ILCS 5/11-212 (West 2018) ("Traffic and pedestrian stop statistical study"; requiring law enforcement officers to gather statistical information on drivers stopped or cited and requiring Department of Transportation to analyze data and assess practices that resemble racial profiling). He notes that Seguino testified that the data showed that 78.1% of Melzer's total arrests were of African Americans and the officer with the second highest percentage of arrests of African Americans was only 47.2%. The average percentage for all officers was 19.6%. She opined that Melzer's arrest pattern of African Americans was an outlier as compared with other officers in the data set and that this difference was statistically significant and not random. She also opined that the race of individuals influenced Melzer's policing practices during the period.

¶ 116 Defendant contends that, because section 11-212 of the Vehicle Code requires law enforcement to document the type of information that defendant requested, there was no justification for the trial court to deny his motion. The information, he asserts, was readily available (although not without a court order) and could have been used at trial to attack Melzer's credibility. According to defendant, because the legislature requires the State to record the type of information he sought, it cannot be burdensome for the State to produce the same information.

¶ 117 The State responds that the trial court correctly denied defendant's discovery motion, because he failed to meet the minimum threshold of evidence to support his selective enforcement claim. First, as to discriminatory effect, the State argues that defendant did not provide credible evidence of being treated differently from similarly situated travelers. Seguino's analysis, the State contends, involved data from an unknown source and did not allow consideration of individuals who were similarly situated to defendant. It takes issue with the use of Boone County population statistics, arguing that not all motorists traveling on I-90 are residents of that county and that not all residents of Boone County travel on the interstate. Thus, the State reasons, the racial makeup of Boone County has no relation to the racial composition of motorists that Melzer encountered on the highway and could have stopped for a traffic violation. The data, the State argues, also did not show that Melzer arrested African American motorists at a rate that was disproportionate to the ratio of African Americans versus Caucasian motorists that he observed over the subject period. Furthermore, the data provided information concerning only arrests following stops, not arrests that arose from other non-traffic-related offenses, as the trial court observed. Nor did it provide, the State notes, information about how often Melzer initiated traffic stops of drivers of a particular race. Thus, Seguino could not speak to whether Melzer initiated stops of African American motorists at a higher rate than stops of Caucasian motorists or whether he more frequently allowed Caucasian motorists to go on their way after a stop but detained African American motorists after stopping them.

¶ 118 Next, addressing discriminatory intent, the State notes that Seguino described the data that would be relevant to a racial profiling finding, such as the rate at which Melzer searched the vehicles of African American drivers compared to those of other races and the percentage of searches that yielded contraband. However, the State argues, such data would not show that

Melzer targeted African American motorists in the absence of reasonable suspicion or probable cause, because the data also would not encompass the motorists who were stopped, searched, and arrested compared with the motorists who were stopped and not searched or stopped and searched but not arrested.

¶ 119 The State summarizes that *Armstrong*'s standard would be eliminated if its burden "was met by the mere fact of the compilation of evidence by a government entity." The initial stop and the subsequent discovery of contraband, the State contends, were based on objective facts and observations relating to criminal activity and defendant has offered no proof that the trooper's actions were racially motivated that would have satisfied the high burden to obtain discovery on his selective enforcement claim.

¶ 120 In reply, defendant argues that he presented more than sufficient evidence to meet his burden under *Armstrong* and that his unrebutted evidence established that race was a factor that influenced Melzer's policing practices. The State, he notes, presented no evidence at the hearing. Defendant also notes that the State never questioned Seguino's qualifications as an expert in data analysis and racial disparities in traffic policing, nor did it address the fact that defendant presented strong evidence showing that race influenced the trooper's practices. Instead, defendant argues, the State attacks the reliability of the data that Seguino analyzed. The data, he asserts, showed that Melzer was an outlier, and he takes issue with the State's assertion that it was not credible and reliable. Defendant maintains that the information Seguino relied upon was data collected pursuant to section 11-212 of the Vehicle Code. He argues that the State's position, specifically that the data that the State itself collects for the purpose of analyzing race as it pertains to search and seizure by law enforcement officers is not reliable and credible, is "untenable."

¶ 121 Defendant also contends that the State failed to address that the data established discriminatory effect because Melzer disproportionately arrested African Americans. Moreover, the statistical evidence on which Seguino relied is vastly different than from the 10-day study conducted in *Barlow*, which the Seventh Circuit found to be insufficient. Finally, defendant argues that the State did not respond to his argument that, at the very least, the trial court should have ordered discovery pursuant to Rule 412(h), because Melzer's credibility and policing practices were at issue.

¶ 122 Here, after his unsuccessful attempt to obtain traffic stop data from the ISP, defendant had his expert analyze data from Injustice Watch, an organization that had somehow obtained it via a FOIA request. The data consisted of all arrests in Boone County from January 1, 2016, through October 30, 2018, about 6000 arrests (by all law enforcement agencies). In an affidavit, she averred that the organization provided the data "without alteration," although, at the hearing, when asked how she knew that the data was a complete set that the organization received from the government, she testified that she "did not have that." Seguino testified that Melzer's arrest rate of African Americans (after traffic stops) was 78.1% over the period, whereas African Americans make up only 3% of Boone County's population. The average arrest rates for other officers was 19.6%. Thus, Melzer's rate, which was four standard deviations higher than the mean, showed that the discrepancy was not a coincidence and was a credible threshold showing of both discriminatory effect and discriminatory intent. The second highest rate for an officer was 47.2%, and the third highest was 46.25%.

¶ 123 Of ISP-trooper-only arrests, the African American share was 24%. Seguino opined that, even compared only to other ISP troopers, Melzer's arrest rate of African Americans was three times higher and is an "outlier" and "highly unusual."

¶ 124 "As a general matter, statistics can be 'a useful tool' that can establish discriminatory effect and provide powerful evidence of discriminatory intent if race can be isolated from other confounding variables." *Conley*, 5 F.4th at 796-97 (citing *Barlow*, 310 F.3d at 1011); see, *e.g.*, *State v. Soto*, 734 A.2d 350, 352-54, 360-61 (N.J. Super. Ct. Law Div. 1996) (*substantive* selective enforcement case in which 17 defendants alleged racial profiling by state police on New Jersey Turnpike; court found they established *prima facie* case that the government had failed to rebut; court granted suppression of seized contraband and evidence; database consisted of all stops and arrests over a 3-year period for 35 random days between certain exits on turnpike, including data on separate law enforcement units and the extent of discretion each used in effecting stops; benchmark data consisted of defense-conducted traffic survey and violator survey, where defense teams recorded vehicles on highway and compared percentage of those with black occupants to census figures for the 11 states from where almost 90% of observed vehicles were registered). However, as this case makes clear, data is not always readily available. See *Long*, 152 N.E.3d at 737-41 (adopting a revised test in selective enforcement cases because "data regarding the traffic stops *** and the demographics of the individuals stopped" is not "readily available to defendants"; although defendants could still use statistical data to raise reasonable inference of racial profiling, court determined they could also use evidence of the totality of the circumstances of the stop; reasonable inference means "evidence upon which a reasonable person could rely to infer that the officer discriminated on the basis of the defendant's race or membership in another protected class. Conclusive evidence is not needed"; also noting that a defendant was entitled to "reasonable discovery," which could include the officer's recent stops and field reports and, where relevant and material, discovery would also include information regarding the law enforcement unit's policies and procedures and the officer's duties and responsibilities).

¶ 125 Here, a benchmark [9] Seguino used was Melzer's arrest rate of African Americans compared to those of other officers/troopers. Addressing the possibility that the racial makeup of people driving on I-90 through Boone County may be different than the racial makeup of residents of the county, Seguino explained that there were no good estimates of the driving population.

¶ 126 We conclude that, under either discovery standard, the trial court did not abuse its discretion in denying defendant's discovery motion. We begin by assessing the evidence under the *Armstrong* standard. As to the first element—discriminatory effect—the trial court reasonably took issue with Seguino's use of census data for Boone County to assess the arrest data for this case, which concerned a stop on I-90. As the court noted, the racial composition

[9]Generally, in racial profiling cases, statistical data has two components: (1) enforcement data and (2) benchmark data. *Long*, 152 N.E.3d at 745. Enforcement data consists of "information about how the statute was enforced against other drivers of the defendant's race by the officers or department in question, often involving numbers of stops, citations, and FIOs [(*i.e.*, vehicle-based field interrogations and observations reports] for drivers of specific races." *Id.* Benchmark data consists of "statistical data that estimate the demographic distribution of drivers on the roads in the area of the stop." *Id.* The two components are "compared, under the assumption that, absent impermissible discrimination, the enforcement rates should reflect the demographic composition of all drivers." *Id.*

of motorists on the Boone County portion of I-90 cannot be assumed to be the same as the composition of Boone County residents. See *id.* at 733, 746 (substantive selective enforcement claim; finding abuse of discretion in trial court's discounting of census data of urban residential roads; "as opposed to an interstate highway, we have much greater confidence in the accuracy of residential demographics from United States Census data as representative of those making use of residential roads"; also, expert used "sophisticated ways" to account for "possible presence of nonresident drivers" (citing *Commonwealth v. Lora*, 886 N.E.2d 688, 702 (Mass. 2008) (substantive selective enforcement case; "[U]se of census benchmarking to compare the demographics of a small community with citation ratios on a major interstate highway, which happens to pass through it, is unreliable and not accepted in the scientific community. Such benchmarking data do not provide an adequate basis for assessing the racial composition of the drivers encountered by [the trooper] on Route 290 and is inadequate to establish that similarly situated drivers of different races were treated differently."))); see also *Chavez v. Illinois State Police*, 251 F.3d 612, 639-40, 644-45 (7th Cir. 2001) (42 U.S.C. § 1983 case; *Armstrong* does not apply to civil case; similarly situated requirement may be "impossible" to prove in selective enforcement case; however, holding that discriminatory effect was not shown; census data could not be used to measure racial composition of motorists on highways).

¶ 127 Although Seguino's data and analysis were more extensive and rigorous than the study in *Barlow*, other issues with the statistics and analysis supported the court's finding that defendant failed to present "some evidence" of discriminatory effect under *Armstrong*. First, the data did not include information concerning drivers who were stopped but not searched and allowed to "go on their way." Seguino also assumed that each arrest included a vehicle search prior to the arrest. The court also noted that Seguino defined an "event" as essentially an arrest, as opposed to a stop, which skewed the data in the small database, especially with the 25-event cutoff for reliability. For example, the court recalculated Melzer's events as 22 not 32. Furthermore, Seguino could not point to any indicators verifying that the data she received from Injustice Watch constituted the complete data set the organization received pursuant to its FOIA request. The foregoing issues reasonably called into question the reliability of Seguino's statistical analysis.

¶ 128 Next, discriminatory intent must be shown in an *Armstrong* analysis. See *Armstrong*, 517 U.S. at 468. Defendant's argument as to this element also fails. He presented no direct evidence of discriminatory intent, such as any statements by Melzer, or even circumstantial evidence. Instead, he relied on his expert's statistical analysis to show intent. The use of statistics to show discriminatory intent is generally insufficient. See, *e.g.*, *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1161-63 (D. Kan. 2004) (motion for discovery denied; applying *Armstrong*; noting that, although statistics are generally insufficient evidence of intent, "a comparison of an officer's stops with similarly situated officers in his own police department might be evidence of an officer's particular pattern of discriminatory intent or motive"; in case before it, other officers in sheriff's department were not similarly situated because they did not patrol interstate but deputy patrolled it exclusively); *cf. Chavez*, 251 F.3d at 640, 645-48 (42 U.S.C. § 1983 case not applying *Armstrong* but noting that, where the plaintiffs relied on statistics, which allegedly showed discriminatory effect, to show intent, "statistics may not be the sole proof of a constitutional violation").

¶ 129 Defendant points to *United States v. Paxton*, No. 13 CR 103, 2014 WL 1648746, at *6 (N.D. Ill. 2014), an unpublished phony stash-house sting case where the district court granted

the defendants' motion for discovery in support of anticipated racial profiling claims. The court, applying *Armstrong*, determined that, unlike in *Barlow*, the defendants had provided sufficient statistics relevant to their selective enforcement claim: they all related to undercover operations by ATF agents in similar circumstances to the case at hand and appeared to be reliable because they were corroborated, in part, by lists of cases provided by the government ("and there is no assertion that the information collected by [the] defendants as to race is inaccurate"). *Id.* at *5. Accordingly, the court found that, under the "unique circumstances" of the case, the evidence was sufficient to meet the *Armstrong* standard for discriminatory effect. *Id.* (further noting that the government had already produced some of the same discovery in another pending case). The court also determined that the defendants had made a preliminary showing of discriminatory intent, where they demonstrated that no Caucasian defendants had been indicted in the stings since 2009, "despite the diverse makeup of the Northern District of Illinois." *Id.*

¶ 130 Defendant's reliance on *Paxton* is misplaced. The case is easily distinguished from the present case because, in *Paxton*, the government had provided some data to the defendants and had produced similar discovery in another pending case and, thus, the costs of producing the documents the defendant sought were "somewhat mitigated." *Id.* Indeed, the court referenced the case's "unique circumstances." *Id.* Such circumstances are not present in this case.

¶ 131 Having determined that defendant's motion was properly denied when assessed under the *Armstrong* standard, we next consider his arguments under the lower discovery standard. We conclude that, even under a lower standard, the trial court did not abuse its discretion in denying defendant's discovery motion. Again, the first prong—discriminatory effect—may be shown by "reliable statistical evidence, or its equivalent" (*Washington*, 869 F.3d at 221) or "*something* more than mere speculation" (emphasis in original) (*Sellers*, 906 F.3d at 855), but a defendant need not present evidence of similarly situated individuals (*Washington*, 869 F.3d at 221). Also, a defendant need not provide evidence of the second prong—discriminatory intent. *Id.*; *Sellers*, 906 F.3d at 856. Here, at a minimum, defendant cannot overcome two key problems with Seguino's analysis and conclusions. First, Seguino could not verify that the data she received from Injustice Watch constituted the complete data set that the organization itself received pursuant to its FOIA request. This undermined her analysis and conclusions, as it presented a real possibility that the data set may have been incomplete or manipulated. Thus, her conclusions could not reasonably be viewed as anything more than "mere speculation." *Sellers*, 906 F.3d at 855. Second, defendant offered data and analysis about similarly situated individuals, specifically, Seguino's analysis of the census data of the racial makeup of Boone County. However, her analysis was problematic because she lacked relevant data, specifically data concerning the racial composition of motorists on I-90—the location of the stop in this case. Without an appropriate demographic benchmark, her conclusions, again, did not reasonably constitute anything more than "mere speculation." *Id.*

¶ 132 Finally, defendant's argument that discovery should have been granted pursuant to Rule 412(h) also fails. He has failed to cite authority for the proposition that Rule 412(h)'s standard applies to a selective enforcement claim.

¶ 133 In summary, the trial court did not abuse its discretion in denying defendant's motion for discovery.

¶ 134 C. Ineffective Assistance of Counsel

¶ 135 Next, defendant argues that he received ineffective assistance of counsel when defense counsel failed to move to suppress defendant's statements made while seated in Melzer's squad car and before the trooper issued *Miranda* warnings to him. For the following reasons, we reject defendant's claim.

¶ 136 A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010); *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). Under this test, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Ramsey*, 239 Ill. 2d at 433. A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 137 The decision of whether to file a motion to suppress is generally considered a matter of trial strategy that will typically not support a claim of ineffective assistance of counsel. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70. For a defendant to establish that he or she was prejudiced by counsel's failure to file a motion to suppress, the defendant must show a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different if the evidence at issue had been suppressed. *Patterson*, 217 Ill. 2d at 438. An attorney's decision not to file a motion to suppress will not be grounds to find incompetent representation when the motion would have been futile. *Id.* We review *de novo* claims of ineffective assistance of counsel. *People v. Demus*, 2016 IL App (1st) 140420, ¶ 21.

¶ 138 Turning to *Miranda*, "[s]tatements obtained from a person as a result of custodial interrogation are subject to suppression if the person did not receive *Miranda* warnings." *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 18. For *Miranda*'s protections to apply, a defendant must be both (1) in custody and (2) subjected to interrogation. *Miranda*, 384 U.S. at 467-68.

¶ 139 A defendant is "in custody" when there is either "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." (Internal quotation marks omitted.) *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). A court first examines the circumstances surrounding the interrogation to determine whether, given those circumstances, a reasonable person, innocent of any crime, would have felt that he or she was not at liberty to terminate the interrogation and leave. *Tayborn*, 2016 IL App (3d) 130594, ¶ 19. In determining whether police questioning was a custodial interrogation, relevant factors include (1) the time and place, (2) the number of police officers present, (3) the presence or absence of family or friends, (4) indicia of a formal arrest, and (5) the manner by which the individual arrived at the place of interrogation. *Id.* The mere fact that an accused is not free to leave during a traffic stop or an investigation does not mean that a defendant is in custody for *Miranda* purposes. See *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984).

¶ 140 A defendant is subject to "interrogation" not only when expressly questioned by police but when police use words or actions that are "reasonably likely to elicit an incriminating response" from the defendant. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); see also *Tayborn*, 2016 IL App (3d) 130594, ¶ 18. By contrast, "preliminary on-the-scene questions"

do not constitute interrogation and will not trigger *Miranda*'s protections. *People v. Kilfoy*, 122 Ill. App. 3d 276, 288 (1984); see also *Miranda*, 384 U.S. at 477-78 (differentiating between general questioning and the "compelling atmosphere inherent in the process of in-custody interrogation"); *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 42 (*Miranda* not triggered when officers conduct "general investigatory on-the-scene questioning as to the facts surrounding a crime").

¶ 141 Defendant argues that Melzer's questioning in the squad car constituted an impermissible custodial interrogation. Defendant notes that, as soon as Melzer directed him into his squad car, he began questioning defendant in an attempt to elicit inculpatory statements, based upon his belief that he smelled cannabis. He directed defendant to get into the car, in "case he had any questions for him." Melzer then questioned defendant about the last time someone smoked weed in his vehicle, the last time defendant had smoked weed, and whether there were drugs and paraphernalia in the car. Melzer also asked if everything in the vehicle belonged to defendant and if he was carrying bags for anyone. After searching the vehicle, Melzer asked defendant why he had not told him about the cannabis, at which point defendant responded that he thought his cousin had taken it out. Defendant contends that a reasonable person in his position would not have felt at liberty to terminate the interrogation with Melzer and leave. He notes that Melzer testified that, at the point when he directed defendant to get into the front of his squad car, defendant was not free to leave. Also, Melzer acknowledged that he never told defendant that he did not have to sit in the front seat of the squad car. These questions, defendant argues, were akin to Melzer asking defendant whether the cannabis that he suspected and then found in the car belonged to defendant, a question that is intended to elicit an incriminating response. His statements in response, defendant asserts, were the only evidence to establish that defendant knowingly possessed drugs. As such, defense counsel was ineffective for failing to move to suppress the statements. Accordingly, he contends, this court should reverse and remand for a new trial or, alternatively, remand for a suppression hearing.

¶ 142 The State responds that defendant was not in custody when he made statements while seated in the squad car and, thus, defense counsel was not ineffective for failing to seek suppression of the statements. Defendant's detention for a traffic violation and his act of sitting in the front seat of Melzer's vehicle, did not, the State argues, mean he was in custody for *Miranda* purposes; therefore, counsel reasonably elected not to challenge defendant's statements as having been made in a custodial setting. Melzer, the State notes, did not order defendant to sit in the squad car, and he testified that defendant could have opened the door or stood outside the car if he wished. Also, before he made the statements that he now seeks to suppress, defendant was not in a locked squad car or placed in handcuffs, nor was he told that he was under arrest. Although Melzer stated that defendant was being detained for a traffic violation, the State argues that this alone does not mean that defendant was in custody.

¶ 143 We conclude that defendant was not under a custodial interrogation for *Miranda* purposes when he made statements while in the front seat of Melzer's squad car and that, therefore, defense counsel was not ineffective for failing to file a suppression motion concerning those statements. Such a motion would not have succeeded. As reflected in the video of the stop and Melzer's testimony, Melzer explained to defendant after he stopped at the gas pumps that he was going to write up a warning for the lane usage violation. Defendant provided his driver's license and vehicle registration to Melzer, and after Melzer asked him if he would come to his squad car so that he could write up the warning and in case he had any questions, defendant

did so. Melzer did not order defendant to the squad car. Further, at the squad car, Melzer directed defendant to the front passenger seat. See *People v. Buschauer*, 2016 IL App (1st) 142766, ¶ 32 (noting it is "unlikely that any individual 'in custody' would be seated in the front passenger seat next to an officer"). The mere fact of asking defendant to sit in the front seat of the squad car did not constitute a custodial situation.

¶ 144 The question is whether, "at any time between the initial stop and the arrest, [defendant] was subjected to restraints comparable to those associated with a formal arrest." *Berkemer*, 468 U.S. at 441. Once at the squad car, Melzer processed the warning and engaged in conversation with defendant. At one point, he asked defendant when someone last smoked weed in the vehicle and explained that, when he stood by the car, he smelled that someone had smoked cannabis in it. He also stated that he was "not saying you did right now or that you are currently," to which defendant responded that he had not smoked weed in a couple of days and that he had the flu. Defendant also agreed that someone likely smoked weed and then got in the car. Upon questioning, defendant denied that there was any weed or drug paraphernalia in the car or that he was carrying bags for anyone. Furthermore, it was daylight out; Melzer was the lone officer present; there were no indicia of formal arrest such as physical restraints, handcuffs, or show of weapons; and defendant, again, agreed to follow Melzer to the squad car while they were stopped in a public place. The duration from the time of the stop to the trooper's search was about 12 minutes, which was brief. Defendant's assertion that he was not free to leave is not well taken, as the fact that he could not do so during a traffic stop does not, as noted, necessarily mean that he was in custody. See *id.* at 439-40. Indeed, the totality of the circumstances of the stop suggests that defendant was not in custody. See, *e.g.*, *id.* at 441-42 (traffic stop for weaving in and out of a lane; the defendant exited car upon officer's request, and officer noticed the defendant had difficulty standing; officer asked the defendant to perform field sobriety test and then asked whether he had been using intoxicants, to which he responded with slurred speech that he had consumed two beers and smoked cannabis; officer arrested the defendant; held that the defendant was not in custody; only a short period elapsed between stop and arrest, and the defendant was never told his detention would not be temporary; "a single police officer asked [the defendant] a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists"); *People v. Havlin*, 409 Ill. App. 3d 427, 434-35 (2011) (driver who was given warning for obstructed license plate consented to search of vehicle; officer found contraband and pipe and asked three individuals, including the defendant, general question of who the items belonged to, and the defendant replied that the Valium pills belonged to him; held that the defendant was not in custody because he was not in a locked squad car or handcuffed, he was not told he was under arrest, he was not at the police station, there was no display of weapons or physical restraints, driver was given a verbal warning, and the defendant was not separated from his companions when officer asked occupants generally about the contraband); *People v. Briseno*, 343 Ill. App. 3d 953, 958-59 (2003) (DUI roadblock stop around midnight; the defendant was ordered to exit vehicle and escorted to investigation area 10 feet away; officer smelled the odor of cannabis on the defendant's breath and from vehicle and asked the defendant if he had smoked cannabis that evening; the defendant said he smoked in vehicle before driving it, he had trouble performing field sobriety tests, his speech was slurred, and his eyes were dilated; the defendant was arrested; held that he was not in custody, because the stop was brief and public in nature and his car was one of many cars stopped as part of routine roadblock on major

thoroughfare with only two officers in his immediate presence); *cf. People v. Jordan*, 2011 IL App (4th) 100629, ¶¶ 19-23 (stop for seat belt violation; driver informed deputy that he was on parole; deputy approached the defendant passenger and asked her to come to his squad car, where she sat in the rear seat with the door open; after asking general questions, deputy asked whether she smoked cannabis, to which she replied she had in the past; she also stated that she did not know about any contraband, if any were found in the car; questioning lasted four minutes, after which deputy locked the defendant in the back seat of his squad car and lowered window; he then questioned driver; after 15 minutes, during which no contraband was found in vehicle, deputy resumed questioning the defendant and informed her he intended to call canine unit; after eight minutes of questioning, the defendant admitted she had cannabis concealed in her pants and in the vehicle; the defendant was arrested; held that the defendant was in custody during questioning, because she was detained and isolated from driver for 27 minutes before she confessed to possessing cannabis, she was locked in the squad car for 23 minutes, and deputy's statement that he intended to send for the dogs "threatened to extend th[e] detention indefinitely"; questioning, detention in back seat of locked squad car, and presence of twice as many officers as detainees created an atmosphere "suggesting custody and reinforced to [the] defendant that she was targeted by the investigation"); *People v. Patel*, 313 Ill. App. 3d 601, 605-06 (2000) (stop for missing license plates and broken rear window; the defendant passenger was questioned concerning suspected unlawful activity—unlawful consumption of alcohol by a minor—unrelated to the basis for the stop; held that he was in custody where officer did not testify that he suspected the defendant of criminal activity but approached the defendant to ask for his driver's license and became aware of his age and signs of alcohol consumption, and where two police cars were parked behind the stopped vehicle; when officer asked the defendant how much he had to drink, a matter not germane to the initial stop, a reasonable person would not believe he was free to leave).

¶ 145 In summary, defense counsel was not ineffective for failing to file an unmeritorious suppression motion.

¶ 146 D. Sentence

¶ 147 Finally, defendant argues in the alternative that we should reduce his sentence or remand for a new sentencing hearing, because (1) the trial court improperly determined that imposition of an extended-term sentence was warranted and (2) it failed to adequately consider the mitigating effects of his nonviolent criminal background and personal history. For the following reasons, we reject defendant's arguments.

¶ 148 The trial court is vested with broad authority to craft and impose an appropriate sentence. *People v. Britt*, 265 Ill. App. 3d 129, 151 (1994). Its discretion extends to all sentencing decisions, including whether to sentence a defendant to an extended term. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). We will not reverse the court's sentencing determination absent an abuse of discretion. *Britt*, 265 Ill. App. 3d at 151. "[W]hether the trial court has imposed an unauthorized sentence is a question of law which we will review *de novo*." *People v. Smith*, 345 Ill. App. 3d 179, 189 (2004).

¶ 149 The Unified Code of Corrections (Code) (730 ILCS 5/5-4-1 (West 2020)) requires the sentencing court to consider trial evidence, the presentence report, evidence in aggravation and mitigation, arguments of counsel, the defendant's statement on his or her own behalf, and the

impact on the victim. The court is not required to recite each factor. *People v. McDonald*, 322 Ill. App. 3d 244, 251 (2001).

¶ 150 Defendant was convicted of possession of between 30 and 500 grams of cannabis with intent to deliver, which is a Class 3 felony. 720 ILCS 550/5(d) (West 2018). The sentencing term for a Class 3 felony is two to five years' imprisonment. 730 ILCS 5/5-4.5-40(a) (West 2020). The extended term for a Class 3 felony is 5 to 10 years' imprisonment. *Id.* Defendant was sentenced to six years' imprisonment.

¶ 151 Section 5-5-3.2(b) of the Code lists the factors that a court may consider in imposing an extended-term sentence, including:

> "When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts[.]" *Id.* § 5-5-3.2(b)(1).

¶ 152 In sentencing defendant, the trial court found in aggravation that he had a significant criminal history and that the sentence was necessary to deter others. In mitigation, the court found that defendant's conduct did not cause physical harm and that he is the parent of a child whose well-being will be negatively affected by his absence. The court determined that defendant's addiction could be viewed as a mitigating factor, because it explained his conduct, but also as an aggravating factor, because it showed that he was likely to reoffend.

¶ 153 As to defendant's criminal history, the court noted that there was no period of his being law-abiding, specifically noting a 2010 conviction for driving with a revoked license while on probation, a fourth DUI several years later and for which he was on probation for three years before driving again with a revoked license, and, one year after ending probation in March 2017, committing the current offense. Also, while out on bond in this case, he committed a misdemeanor cannabis offense.

¶ 154 Here, defendant concedes that he did not raise the extended-term issue below but asks that we review the issue as second-prong plain error. Alternatively, he argues that defense counsel was ineffective for failing to raise the issue below.

¶ 155 To obtain relief under the plain-error doctrine, a defendant must first show that a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). If the defendant fails to meet this burden, the procedural default will be honored. *Id.* Under the second prong, a defendant must show that the error was "so serious that it affected the fairness of [his or her] trial and challenged the integrity of the judicial process." *People v. Clark*, 2016 IL 118845, ¶ 44. Defendant contends that the misapplication of an extended-term sentence constitutes second-prong plain error. See *People v. Palen*, 2016 IL App (4th) 140228, ¶¶ 74-78.

¶ 156 Defendant asserts that, at the sentencing hearing, the parties and the court were under the mistaken belief that defendant's sentencing range was extendable. The State, he notes, asked for an extended-term sentence of six years without providing a basis for its request. He

contends that defense counsel did not object to the State's representation that the sentence was extendable and that the court simply accepted the State's position without further inquiry. He further argues that, although the trial court did not provide any specific reason for its belief that defendant was eligible for an extended term, "it is reasonable to assume the sentence was due to the defendant's previous convictions." See 730 ILCS 5/5-5-3.2(b) (West 2020). At the hearing, he notes, the State argued that defendant had a lengthy criminal history, and his presentence investigation report (PSI) listed prior convictions from Wisconsin. Further, according to defendant, the facts of this case do not establish that any of the extended-term factors in section 5-5-3.2(b) of the Code would apply. He argues that his prior convictions listed in his PSI failed to establish a Class 3 or greater offense. Specifically, while the PSI listed a Wisconsin conviction of "Manufacture/Deliver Cocaine, Felony G," dated February 22, 2010, it provided no information about the sentencing range or the elements of the offense. Thus, the trial court, defendant asserts, could *not* determine whether his prior convictions were within the "same or similar class felony." *Id.* § 5-5-3.2(b)(1). Defendant concludes that the record affirmatively demonstrates that the trial court imposed an extended term when sentencing him to six years' imprisonment but that the record did not establish defendant's eligibility for an extended term and, therefore, the matter must be remanded for a new sentencing hearing.

¶ 157 The State responds that the court thoroughly discussed defendant's extensive record before announcing his sentence, his record supported the imposition of an extended term, and the sentence was on the low end of the extended range and was justified by the evidence in aggravation. The State notes that defense counsel had acknowledged that the PSI was accurate and the State, after noting defendant's lengthy criminal history, stated that extended-term sentencing applied and recommended a term of six years. Also, the State notes, defense counsel noted defendant's eligibility for a term up to 10 years but asked that he receive probation.

¶ 158 The State also argues that defendant's Wisconsin conviction met the requirement for a conviction of the same or similar or greater class felony as his current Class 3 conviction. It notes that a "Felony G" conviction is subject to up to 10 years' imprisonment in Wisconsin. Wis. Stat. § 939.50(3)(g) (2010). Because the maximum sentence was 10 years, the State argues, the Wisconsin conviction met the requirement for a conviction of the same or similar or greater class felony as defendant's current Class 3 felony. It notes that the PSI stated that defendant initially received four years' probation for the Wisconsin conviction but, after apparently violating the terms of that probation, he was sentenced to two years' imprisonment.

¶ 159 Defendant replies that the record does not support the trial court's imposition of an extended-term sentence, because (1) nowhere therein does the court state the basis for its imposition of the extended term, (2) the PSI did not affirmatively state that any of his prior convictions made him eligible for an extended term (no range or elements were listed for the "Manufacture/Deliver Cocaine, Felony G" conviction), (3) the State provided no such information to the trial court, and (4) a Felony G was not of a "same or similar class felony," because it does not have a minimum term of imprisonment as does a Class 3 felony in Illinois, which has a two-year minimum term, and defendant received probation for the Wisconsin conviction.

¶ 160 We find defendant's argument unavailing. The record supports the trial court's determination that an extended term applied. The court did not err in relying on the PSI. See *People v. Williams*, 149 Ill. 2d 467, 491-93 (1992) (criminal history in PSI is sufficient to

establish a defendant's eligibility for an enhanced sentence; State need not present certified records of the defendant's prior convictions for purposes of showing Class X eligibility). The record clearly shows that the court relied extensively on defendant's criminal history, including the Wisconsin conviction of "Manufacture/Deliver Cocaine, Felony G." To the extent that defendant proposes that the record (or the PSI specifically) should contain a copy of the relevant Wisconsin statute (or the sentencing range for the Wisconsin conviction) or that the trial court was required to explicitly reference it, we reject this outright because he provides no support for this assertion.

¶ 161 As the State correctly notes, the Wisconsin statute provided in 2010 that a Felony G conviction was subject to up to 10 years' imprisonment. Wis. Stat. § 939.50(3)(e) (2010). The court, therefore, correctly concluded that defendant was extended-term eligible. See *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 15 (to determine whether an out-of-state conviction is a "same or similar class felony" as required by the Code, trial courts should consider both the sentencing range and the elements of the out-of-state offense before imposing an extended-term sentence).

¶ 162 We also reject defendant's argument that the fact that the Felony G conviction does not have a mandatory minimum term of imprisonment supports a finding that the offense was not of the "same or similar class felony" as the present Class 3 felony, which has a minimum term of two years' imprisonment. Again, he fails to cite any authority for this proposition, and we cannot discern any rational reason to adopt it in the absence of any explicit statutory language indicating that the legislature intended such a requirement. As there was no error, there can be no plain error or ineffective assistance for failing to raise the unmeritorious issue.

¶ 163 Next, defendant argues that, even if we conclude that an extended term applied, the trial court abused its discretion in imposing a six-year sentence. We reject this claim.

¶ 164 "A reviewing court gives substantial deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 165 Defendant argues that the seriousness of the offense called for a shorter sentence. Cannabis, he notes, has been largely decriminalized in this state. Despite this, the court imposed a sentence four years above the minimum base term. He asks that we either reduce his sentence or remand for a new sentencing hearing because neither the offense nor his criminal history warranted a sentence well over the two-year statutory minimum for possession of cannabis with intent to deliver and one year over the minimum extended-term sentence. He also contends that the court failed to adequately consider his rehabilitative potential and the mitigating factors such as his educational and employment history and the fact that he was participating in treatment at the time of sentencing.

¶ 166 The State responds that the six-year sentence was well within the Class 3 felony extended range of 5 to 10 years in prison and, thus, the sentence carries the presumption of validity. The court, the State argues, did not abuse its discretion, where the seriousness of defendant's offense and his history of delinquency and prior criminal activity warranted the sentence.

Further, the trial court noted the mitigating evidence, including his status as a parent and the fact that no physical harm resulted from defendant's offense. Finally, the court considered his addiction, noting that it "cuts both ways."

¶ 167 We agree with the State. The trial court recited a summary of defendant's extensive criminal history, acknowledged his addiction and the fact that it could be viewed as aggravating and mitigating, and acknowledged his parental status and the fact that no physical harm resulted from his offense. The court also found that the risk to the community outweighed the risk of harm from defendant's removal from his family members and children. As the State notes, the court sentenced defendant to one year above the minimum extended term. We cannot conclude that the sentence was unreasonable.

¶ 168 III. CONCLUSION

¶ 169 For the reasons stated, we affirm the judgment of the circuit court of Boone County.

¶ 170 Affirmed.