No. 125954

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DAVID CARTER, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-0803. There on appeal from the Circuit Court of Cook County, Illinois, No. 16 CR 4639. Honorable Arthur F. Hill, Jr., Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

SEAN COLLINS-STAPLETON
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

E-FILED
4/29/2021 8:23 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

REPLY BRIEF FOR PETITIONER-APPELLANT

This Court granted David Carter's petition for leave to appeal to decide whether the State's predicate felony evidence supported his armed habitual criminal conviction, and whether the trial court erred by denying his motion to quash arrest and suppress evidence. The State's response brief agrees that this Court should reverse outright the armed habitual criminal conviction and remand the case for resentencing because the predicate aggravated battery convictions were neither enumerated offenses nor forcible felonies required to satisfy the armed habitual criminal statute. (St. Br. 19, 22). The parties disagree about the resolution of the claim that Carter's seizure was not supported by reasonable suspicion. (St. Br. 6; Def. Br. 26).

I. This Court should reverse David Carter's armed habitual criminal conviction because the State's evidence did not affirmatively show that the predicate aggravated battery convictions were either enumerated offenses under the armed habitual criminal statute or forcible felonies required to support the charge.

The parties agree that Carter's prior aggravated battery convictions cannot support the armed habitual criminal count. (St. Br. 19; Def. Br. 12). The armed habitual criminal statute requires the State to prove that the defendant unlawfully possessed a firearm and had two or more qualifying prior convictions. 720 ILCS 5/24-1.7(a) (West 2016); *People v. White*, 2015 IL App (1st) 131111, ¶ 28. These qualifying prior convictions must be either enumerated in the armed habitual criminal statute or "forcible felonies" defined by 720 ILCS 5/2-8 (West 2016). 720 ILCS 5/24-1.7(a)(1), (2), (3) (West 2016); *White*, 2015 IL App (1st) 131111, ¶ 28. When the State relies on a defendant's prior aggravated battery conviction to support a charge of armed habitual criminal, the conviction must be

for aggravated battery of a child or aggravated battery with a firearm or fit the definition of a forcible felony, which means the prior aggravated battery caused "great bodily harm or permanent disability or disfigurement." 720 ILCS 5/2-8 (West 2016) (definition of an aggravated battery that qualifies as a forcible felony); 720 ILCS 5/24-1.7(a)(1), (2) (West 2016).

Carter's prior aggravated battery convictions do not support the armed habitual criminal count because no trial evidence showed they involved a child, a firearm, great bodily harm, or permanent disability or disfigurement. (R. 39-40; E. 4-6). The certified copy of Carter's aggravated battery convictions in Will County case number 09-CF-2251, the sole trial evidence regarding these convictions, showed only: (1) Carter was indicted on two counts of Class 3 aggravated battery on October 8, 2009; (2) Carter pled guilty to the two counts of aggravated battery and was sentenced to 24 months of probation on December 18, 2009; and (3) the probation was revoked and Carter was sentenced on count 1 to three years of imprisonment on July 27, 2010. (R. 45-46; E. 5-6). Therefore, the State's evidence failed to show that Carter had at least two qualifying prior convictions required to support the armed habitual criminal count. *People v. Ephraim*, 2018 IL App (1st) 161009, ¶ 19 (reversing the defendant's armed habitual criminal conviction where the defendant's prior aggravated battery conviction was not an enumerated offense and there was no proof that the underlying battery "resulted in great bodily harm or permanent disability or disfigurement" so as to qualify as a forcible felony); *People v. Crosby*, 2017 IL App (1st) 121645, ¶ 13 (defendant's prior conviction for aggravated battery was not a forcible felony and thus was not a qualifying predicate offense for armed habitual criminal).

For these reasons, this Court should reverse outright Carter's armed habitual criminal conviction. Further, his case should be remanded to the trial court for resentencing on the two counts of unlawful use of a weapon by a felon for possessing a firearm and a single bullet. (C. 31, 32, 85). Under the one-act, one-crime rule, the four counts of aggravated unlawful use of a weapon, all of which relate to a single firearm, should be merged into count 2, the unlawful use of a weapon by a felon count involving the same firearm. *People v. King*, 66 Ill.2d 551, 566 (1977); *People v. Grant*, 2017 IL App (1st) 142956, ¶ 33 (vacating surplus gun possession conviction when the defendant possessed a single firearm); (C. 31, 32, 35-38, 85-86; R. 36, 46; Def. Br. 34-35).

II. David Carter's convictions should be reversed because the trial court erred by denying his motion to suppress evidence obtained as the fruit of a *Terry* stop not supported by reasonable suspicion in violation of the Fourth Amendment.

The trial court erred by denying David Carter's motion to quash arrest and suppress evidence, specifically, the handgun, bullet, and inculpatory statement that support the convictions for armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. (C. 62, 85-86; R. 36-37, 46). The anonymous 911 caller's tip was not sufficiently reliable to provide Officer Luzadder with reasonable suspicion that Carter was engaged in criminal activity because: (1) the information provided by the anonymous caller did not provide either the basis of the caller's knowledge or predictive assertions that would allow the police to test the caller's credibility; (2) a significant portion of the tip–a man assaulted two women–was not corroborated by the police investigation, which called into question the reliability of the tip's assertion the man also was armed with a firearm; and (3) Carter's act of walking with his hand on his waist

did not sufficiently corroborate the tip to justify the seizure. (Def. Br. 32-37). Before Officer Luzadder ordered Carter to place his hands on the squad car–thereby seizing Carter–he should have informed Carter that an individual had accused him of being armed with a firearm, asked Carter if he was armed, and, if so, whether he was licensed to carry a firearm. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (a seizure occurs when a reasonable person would have believed that they were not free to terminate the encounter with the police); 430 ILCS 66/1 *et seq*. (West 2016) (Firearm Concealed Carry Act); (SUP R. 10, 12, 17-18). If Carter denied possessing a firearm, Officer Luzadder could have asked Carter to consent to a frisk or watched for suspicious conduct on Carter's part that would have provided reasonable suspicion for a *Terry* stop and frisk. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

The State argues that Carter's seizure was supported by reasonable suspicion, first, because the anonymous caller "provided accurate information regarding the physical description and location of defendant." (St. Br. 10). The State notes that the caller informed an operator at the Office the Office of Emergency Management and Communications (OEMC) that Carter was walking with two women, and, in a second call, stated the group was two blocks away from the initial location. (St. Br. 10). The caller also stated that Carter was in possession of a gun and was swinging at the two women. (St. Br. 10). However, "[a]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal

activity." *Florida v. J.L.*, 529 U.S. 266, 272 (2000). The mere fact that the responding officers found a man matching Carter's description under these circumstances does not support a finding of reasonable suspicion to support a seizure. *J.L.*, 529 U.S. at 272; *People v. Holmes*, 2019 IL App (1st) 160987, ¶ 58; *People v. Rhinehart*, 2011 IL App (1st) 100683, ¶ 18; *People v. Carlson*, 313 Ill.App.3d 447, 449 (1st Dist. 2000); (Def. Br. 35-36).

Next, the State argues that Officer Luzadder corroborated the caller's accusation because Carter was "walking with his hand on his waistband, which he knew from his experience as a police officer is a sign that defendant might have been trying to conceal a firearm." (St. Br. 10). The State cites *People v. Richardson*, 2017 IL App (1st) 130203-B, ¶¶ 6, 27, *State v. Privott*, 999 A.2d 415, 422 (N.J. 2010), *United States v. Goddard*, 491 F.3d 457, 462 (D.C. Cir. 2007), and *State v. Murray*, 213 A.3d 571, 579 (Del. 2019), to support its argument that Carter appeared to be carrying a firearm. (St. Br. 10-11).

These cases are distinguishable because their facts supporting reasonable suspicion are much stronger than in Carter's case. For example, in *Richardson*, 2017 IL App (1st) 130203-B, ¶ 27, police officers stopped a suspected stolen car, and "the defendant reached toward the center console with one hand and used his other hand to put something into his waistband"–that item turned out to be a handgun. In *Privott*, 999 A.2d at 422, the defendant partially matched the description given by an anonymous informant regarding a man with a handgun, a police officer saw the defendant and recognized him from prior narcotic arrests, the officer knew the defendant was associated with gangs involved in recent shootings in the area, the defendant appeared nervous and moved one hand to his

waistband, and the officer stopped the defendant and found a gun in his waistband. In *Goddard*, 491 F.3d at 459, police officers were looking for a stolen car, the officers approached a group of men, they overheard the defendant say to another man that he had a gun, and they found a gun in the defendant's waistband. Finally, in *Murray*, 213 A.3d at 574-75, a police officer saw the defendant walking with another man, the officer saw the defendant "swinging his left arm naturally while holding his right arm close to his body, behavior which he explained was consistent with an armed individual," the defendant noticed the officer and "stopped and began positioning himself behind" his companion, and the officer stopped the defendant and found a gun in his waistband. The circumstances and conduct described in *Richardson*, *Privott*, *Goddard*, and *Murray* are substantially more suspicious than Carter's act of simply walking in public with his hand on his waist. (SUP R. 14; (Def. Br. 37-38).

Notably, the State's brief does not mention Officer Luzadder's testimony that he had encountered individuals carrying innocent items in their waistbands. (SUP R. 19). Indeed, Carter is at a disadvantage because appellate cases are not created when police officers search individuals and find innocent items in their waistbands because such individuals obviously are not arrested and prosecuted. However, as noted in his opening brief, the fact that Carter was walking with his hand on his waist, coupled with the information provided by the anonymous caller, did not provide Officer Luzadder with reasonable suspicion to seize him. (Def. Br. 37-38). At the moment Officers Luzadder and Brown arrived at the second location, the credibility of the anonymous caller was already questionable because the officers did not encounter the two female victims of the alleged assault. (SUP

R. 13-16). The questionable telephone tip led Officer Luzadder to Carter, and Officer's Luzadder's assertion that Carter's act of walking with his hand on his waist was indicative of criminal activity was essentially a hunch, as Officer Luzadder himself admitted that the very same conduct could be completely innocent. (SUP R. 14, 19). "That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for . . ." believing Carter was committing a crime. *J.L.*, 529 U.S. at 271. The anonymous caller's tip did not provide Officer Luzadder with reasonable suspicion that Carter was engaged in criminal activity, and the police investigation did not sufficiently corroborate the tip to justify a *Terry* stop. *J.L.*, 529 U.S. at 271.

Next, the State argues that Officer Luzadder had reasonable suspicion to seize Carter because the anonymous caller "provided information from which one can reasonably infer first-hand knowledge." (St. Br. 12). The State notes that the caller stated that a man matching Carter's description was walking with two women, he was swinging at them, he was armed with a firearm, and the group changed locations. (St. Br. 12). Once again, this information allowed the officers to identify Carter. However, the information did not corroborate the caller's accusations of criminal activity because the officers, notably, never encountered the two female victims of the alleged assault, and the caller, like the caller in *J.L.*, 529 U.S. at 271, did not explain how they knew Carter was in possession of a firearm. (R SUP. 12). The caller simply said there was a "person with a gun" and "he has a gun on him." (SUP R. 12). The caller did not describe the firearm, which again called into question the caller's basis of knowledge. *J.L.*, 529 U.S. at 271.

The caller also provided no predictions about Carter's future conduct that the officers could use to assess the tip's reliability. *J.L.*, 529 U.S. at 271.

The State also argues that Carter's seizure was supported by reasonable suspicion because the anonymous caller's reports were contemporaneous with the reported criminal activity. (St. Br. 13; SUP R. 13-17). The short duration of time allowed the responding officers to find Carter, as the caller wanted, but it does not support reasonable suspicion for his seizure. Again, the officers did not see the women described by the caller despite the contemporaneous calls, and, if a tipster is not credible about some things, they may not be telling the truth about "the claim that the object of the tip is engaged in criminal activity." *Alabama v. White*, 496 U.S. 325, 331 (1990); (SUP R. 14).

Finally, the State argues that reasonable suspicion for the seizure was supported by the fact that the caller contacted OEMC. (St. Br. 14). The State asserts that "modern technology allows emergency response systems to trace and record 911 calls, even an anonymous tipster places himself at risk of being identified." (St. Br. 14). Yet, as noted in Carter's opening brief, no published Illinois cases involve the prosecution of an individual who anonymously made a false 911 call. *See People v. Klepper*, 234 Ill.2d 337, 341 (2009); *People v. Steger*, 2018 IL App (2d) 151197, ¶ 13; *People v. Billups*, 384 Ill.App.3d 844, 845 (1st Dist. 2008); (Def. Br. 34). In a footnote, the State also suggests that 911 systems are not impacted by the use of a prepaid mobile telephone that has no subscriber data or a "spoofing" application that conceals the caller's telephone number or provides a false telephone number. (St. Br. 14 n.6). However, if the 911 system receives a call from a phone with no subscriber data or a false phone number, the caller cannot

be readily traced or identified. (Def. Br. 33-34). The caller in this case informed OEMC that they wished to remain anonymous. (SUP R. 12). Officer Luzadder did not attempt to contact the caller using the telephone number recorded by OEMC. (SUP R. 20). Thus, it is not know whether the caller, in addition to requesting anonymity, employed additional techniques to further their goal, such as by using a cellular phone without subscriber data or a false telephone number. At any rate, the caller's use of the 911 system in this case is largely irrelevant because the caller's information itself was patently questionable: the women who had allegedly been assaulted were not observed by the responding officers; the caller provided no predictions about Carter's future conduct that the officers could use to assess the tip's reliability; and the caller did not describe the firearm, which called into question the caller's basis of knowledge about the criminal activity. *J.L.*, 529 U.S. at 271.

For these reasons, this Court should hold that the trial court erred by denying the motion to quash arrest and suppress evidence. This Court should suppress the handgun, bullet, and Carter's statement, and reverse outright Carter's convictions for armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon because, without this evidence, the State cannot prove that he possessed the firearm and bullet.

CONCLUSION

For the foregoing reasons, David Carter, petitioner-appellant, respectfully requests that this Court reverse his armed habitual criminal conviction and remand his case for resentencing (Issue I) or reverse outright his convictions for armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon (Issue II).

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

SEAN COLLINS-STAPLETON
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 10 pages.

/s/Sean Collins-Stapleton
SEAN COLLINS-STAPLETON
Assistant Appellate Defender

No. 125954

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DAVID CARTER, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-0803. There on appeal from the Circuit Court of Cook County, Illinois , No. 16 CR 4639. Honorable Arthur F. Hill, Jr., Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. David Carter, Register No. M15433, Illinois River Correctional Center, P.O. Box 999, Canton, IL 61520

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 29, 2021, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Kelly Kuhtic
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us