No. 126291

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. TODD JOHNSON, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-16-0675 There on Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 15 CF 164 The Honorable John P. Vespa, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
2/24/2021 10:59 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant was convicted of armed robbery and sentenced to 33 years in prison. The appellate court, in a divided opinion, reversed that judgment and ordered a new trial, holding that defendant had received ineffective assistance of counsel. This Court allowed the People's petition for leave to appeal from that judgment.

ISSUE PRESENTED FOR REVIEW

Whether the appellate court erred by ordering a new trial because defendant failed to demonstrate that (1) he was prejudiced by trial counsel's failure to request DNA testing, or (2) counsel was deficient for failing to request testing that may have bolstered the State's case.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted leave to appeal on November 18, 2020. *People v. Johnson*, 159 N.E.3d 964 (Ill. 2020) (Table).

STATEMENT OF FACTS

Defendant was charged with the armed robbery and aggravated robbery of Aaron Ferguson, a gas station attendant. C5-6.[1] The armed robbery charge alleged that defendant took currency from Ferguson "while armed with a firearm." C5 (citing 720 ILCS 5/18-2(a)(2)). The aggravated

[1] "C" refers to the common-law record; "R" refers to the reports of proceedings; "Def. Exh." refers to defendant's exhibits; and "A" refers to the appendix to this brief.

robbery charge alleged that defendant took currency "while indicating by his actions to the victim [that] he was presently armed with a firearm or other dangerous weapon." C6 (citing 720 ILCS 5/18-1(b)(1)).

Jury Trial

At trial, Ferguson testified that on the morning of March 10, 2015, he was working as a clerk at a Marathon gas station in Peoria, when a man "came in with a gun asking for the money." R299-300. Ferguson saw only the gunman's nose and eyes because the gunman wore a white hoodie and a mask. R307. Ferguson opened the cash register and gave the man cash amounting to less than one hundred dollars. R300, R305. They struggled, and the robber used his black gun to strike Ferguson multiple times. R307-08. Ferguson's account was corroborated by footage from a surveillance camera inside the gas station. *See* R300-02, R305-09.

Earl Hensley testified that while parked one block from the Marathon station that morning, he noticed an unattended white Cadillac with its engine running. R313-15. Hensley saw a man in a hoodie run from the direction of the gas station, get into the Cadillac, and drive away. R317-19. Hensley could see the man's face, which was not covered with a mask. R318. Hensley heard police sirens and stopped a police officer to describe what he had seen. R334-35.

Detective Craig Williams learned that an eyewitness had described a white Cadillac that may have been involved in the robbery, and that the

driver's side rear window was covered with cardboard. R352-53. After searching the area around the gas station, Williams travelled to a nearby neighborhood where he had seen a white Cadillac matching the description. *Id*. He found the Cadillac parked on the street and set up surveillance. R356.

Meanwhile, Hensley accompanied Detective Steven Garner to view the white Cadillac and identified it as the car he had seen. R323-24, R358. As Garner and Hensley waited in an alley, defendant exited a house at 1810 New York in Peoria, and Hensley identified defendant as the driver of the Cadillac. R324-25. When Garner approached defendant, he began running, and officers pursued him on foot, tackled him, and took him into custody. R359-60, R377. Officers subsequently determined that the Cadillac was registered to defendant. R400, R427.

Detective Brian Terry helped execute a search of the house at 1810 New York. R386. He interviewed Angel Patterson, who resided at the house, and she told Terry that she had a gun in a dresser drawer, which Terry recovered. R387, R392. Terry also located, above the rafters of the garage, what appeared to be a broken "firearm." R389. On further examination, it turned out to be a BB gun. R391.[2]

---

[2] The prosecution presented evidence of the BB gun at trial and noted in closing arguments that the jury could convict defendant of aggravated robbery if it believed that the BB gun (rather than an actual firearm) was used in the robbery. R475-76.

Crime scene investigator Paul Tuttle recovered the guns, along with a white hoodie and a black ski mask found at the house. R403-04, R410. Tuttle testified that he swabbed the handle of Patterson's gun and the top of the gun "for potential DNA," though he observed nothing that looked "like blood or skin or saliva." R405-06.[3] On cross-examination, defense counsel asked, "Did you ever test the swab you did or send it off for a test?" R415. Tuttle testified that he had not and explained that "[i]t was never requested to be tested." *Id.* Defense counsel asked if "the reason you didn't test it for DNA after doing the swabs was it was just never requested of you?" R416. Tuttle answered, "Correct." *Id.*

During closing arguments, defense counsel argued that the prosecution had not met its burden of proof and faulted the State for failing to test the swab of the gun. R476-92. He argued Patterson's gun could not have been the gun used in the crime because it was not the same color as the one on the video. R481. He asked, "what about [the] forensic connection? Any fingerprints? DNA? This part of the case I find frustrating." R482. He noted that Ferguson was "struck multiple times" in the head and was "bleeding," and that the State's investigator had swabbed the gun for DNA but no one tested the swab, emphasizing "not only is it not the right gun,

[3] It is unclear from Tuttle's testimony whether he used one swab for the entire gun or multiple swabs. *See* R405-06. This brief refers to a single swab, but the argument would be the same if there were instead multiple swabs.

which clearly from the video you can see that, but they didn't do any testing of it." R482-83.

During deliberations, the jury sent a note that asked, "Why wasn't anything tested for DNA?" C172, R515. The court noted that it was "not going to answer that," and instead responded, "The evidence which you are to consider consists of testimony of witnesses and the exhibits offered and received into evidence, including but not limited to the video." C172, R515-17.

The jury deliberations broke for the night and resumed the next morning. R519-21. At that time, defense counsel noted that defendant "did not understand why the Court could not order the DNA . . . swab to be tested," and "wanted to know if the Court could suspend proceedings to have that test done." R526. The court explained that it was too late, the evidence was closed, and it would take at least "a month or two" to get DNA results. R526-27.

The court expressed surprise that the issue of testing was first raised during deliberations. R528. Defense counsel stated, "I was under the impression that there was no DNA sample, and not that it was a DNA sample that wasn't tested." *Id.* The prosecutor noted that "the discovery did show that a DNA swabbing of the gun was done," that "[t]here was no indication that there was any biological material," and that "calling [the swab] a DNA sample" was not "necessarily correct." R531-32. The court

noted that if the swab "was disclosed in discovery," then "strategic decisions were made," and the court was not "going to second-guess anybody." R531-32. After defense counsel further discussed the impracticality of DNA testing with defendant, defendant withdrew the request for testing. R533-34.

Ultimately, the jury returned a verdict convicting defendant of both armed robbery and aggravated robbery. C153-54, R540.

Posttrial Motion and Sentencing

Defendant moved for a new trial. C210-13. He asserted that "the jury heard evidence that DNA exemplars were retrieved from the handgun but" were "never tested for DNA." C211. He suggested that the State failed to disclose evidence, *see* C212 ("[t]hat law enforcement may have had and still possess exculpatory evidence in its possession . . . but without explanation or cause chose not to test it" violated its "obligation to examine and disclose exculpatory as well as inculpatory evidence in its possession in violation of the 'Brady Rule'"), and argued that "the State's failure to test and disclose this critical DNA evidence" violated his right to a fair trial, *id.*

The circuit court denied the motion, C233, and entered judgment on petitioner's armed robbery conviction, sentencing him to 33 years in prison, C228.

Appeal

On appeal, defendant did not claim that the State failed to disclose the existence of the swab. *See* A8 ¶ 31 (listing claims). Rather, defendant claimed that trial counsel was ineffective for failing to request DNA testing because counsel should have known about the swab and failed to act on that information. *See id.* In a divided opinion, the appellate court agreed that counsel was ineffective and granted defendant a new trial. A12 ¶ 42.[4]

All three justices agreed that trial counsel performed deficiently because he failed to request testing as the result of an alleged oversight, rather than based upon an informed strategy. A9 ¶ 36; *see also* A13 ¶ 51 (Schmidt, J., dissenting). In reaching this conclusion, however, the majority acknowledged that "[a] defense attorney's decision to not have a DNA swab tested where, as here, the State has conducted no testing would ordinarily be considered a clear matter of trial strategy," because "[c]ounsel could reasonably decide that the potential of the test results coming back in defendant's favor are outweighed by the risk that the results are actually incriminating." A9 ¶ 35. Here, though, "it appears that counsel was under the misapprehension that no DNA swabs had been taken from the firearm," meaning counsel's failure to request DNA testing "was oversight rather than strategy." A9 ¶ 36.

[4] Defendant raised additional claims of error that the appellate court did not address given its judgment of reversal. *See* A8 ¶ 31, A12 ¶ 44.

The appellate majority also found prejudice, reasoning that counsel would have been entitled to testing under Supreme Court Rule 412 had he requested it before trial. A9 ¶ 37. The majority reasoned that "[a] negative DNA result on testing of the firearm swabs in this case would create a strong probability of a different result at retrial." A10 ¶ 38. It noted that Ferguson had been struck on the head, and "[i]f the gun found in Patterson's drawer was discovered to not contain Ferguson's DNA, this would be convincing evidence that that gun was not the one wielded during the robbery." *Id.*

The majority acknowledged that "[t]o be sure, the possibility exists that testing on the DNA swabs would reveal the presence of Ferguson's DNA" — in which case, defendant, "rather than being prejudiced by counsel's deficient performance, actually benefitted from it." A11 ¶ 41. But it found that "[s]uch speculation is impracticable and inequitable." *Id.* Where "the lack of . . . test results . . . forms the very basis of the claim," requiring defendant to show prejudice in the form of favorable test results "would foreclose the possibility of a defendant *ever* bringing a claim like that raised in this appeal." *Id.* (emphasis in original).

The dissenting justice concluded that defendant could not demonstrate prejudice because "[t]he mere testing of the swabs is not inherently beneficial to defendant's case." A13 ¶ 52. Rather, test results that confirmed the presence of Ferguson's DNA on the gun would have "severely undermin[ed]"

the defense. *Id.* This did not mean that defendant precluded from raising an ineffective assistance claim, however: he could request postconviction DNA testing under 725 ILCS 5/116-3, and, if the results were favorable, pursue a claim of ineffective assistance through a postconviction petition. A14 ¶ 55. But "the majority's new test allows a defendant to assume, for the purposes of establishing ineffective assistance, that any DNA tests will come out in his favor," and "[t]here is no precedential support for allowing such a windfall to a defendant." A14 ¶ 54.

STANDARD OF REVIEW

This Court reviews de novo whether petitioner received ineffective assistance of counsel at trial. *People v. Hale*, 2013 IL 113140, ¶ 15.

ARGUMENT

I. Defendant Is Not Entitled to a New Trial Based on Counsel's Failure to Request DNA Testing Because He Has Not Demonstrated Prejudice.

A defendant seeking a new trial based on the alleged ineffective assistance of counsel must make two showings: (1) counsel's performance was deficient, and (2) counsel's errors prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Patterson*, 2014 IL 115102, ¶ 81. Failure to make either showing is fatal, and where, as here, petitioner was not prejudiced, this Court need not also address counsel's performance. *Patterson*, 2014 IL 115102, ¶ 81.

A. *Strickland* requires any defendant, including one who claims counsel was ineffective for failing to request forensic testing, to affirmatively show prejudice.

The appellate majority impermissibly relieved defendant of his obligation to affirmatively show prejudice and instead adopted a test that presumed that the results of hypothetical testing would be favorable to the defense.

But this ignores that the burden falls on defendant to prove prejudice. *See*, *e.g.*, *Hale*, 2013 IL 113140, ¶¶ 18-19; *People v. Wallace*, 201 Ill. App. 3d 943, 951 (2d Dist. 1990) ("We emphasize that a defendant alleging ineffective assistance of counsel has the burden of showing prejudice from counsel's deficient performance[.]"). And "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008); *see also Patterson*, 2014 IL 115102, ¶ 81 ("Satisfying the prejudice prong necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced."); *People v. Palmer*, 162 Ill. 2d 465, 481 (1994) ("Proof of prejudice[ ] . . . cannot be based on mere conjecture or speculation as to outcome."); *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 46 ("[S]atisfying the prejudice prong of *Strickland* requires a showing of actual prejudice and not simply speculation that the defendant may have been prejudiced[.]").

Thus, for example, a defendant who claims that trial counsel was ineffective for failing to call witnesses must show that the witnesses would

have provided helpful testimony and may not merely speculate that they would have done so. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Similarly, a defendant claiming prejudice from failure to request forensic testing may not speculate that the results of such testing would have been favorable to him. *See People v. Olinger*, 176 Ill. 2d 326, 363 (1997) (defendant could not show prejudice based on speculation that fingerprints could have been linked to alternate suspect; "pure speculation falls far short of the demonstration of actual prejudice required by *Strickland*"); *People v. Scott*, 2011 IL App (1st) 100122, ¶ 31 (defendant could not show prejudice from failure to request DNA testing where results were unknown). The appellate majority's exception for claims in which trial counsel is alleged to be ineffective for failing to request DNA testing violates this long-standing precedent.

To be sure, such claims of ineffective assistance based on counsel's failure to investigate evidence are rarely appropriate on direct appeal. But that does not mean, as the majority concluded below, that requiring defendant to show prejudice in the form of favorable test results "would foreclose the possibility of a defendant *ever* bringing a claim like that raised in this appeal." A11 ¶ 41 (emphasis in original). Instead, because such claims usually require extra-record evidence to show prejudice, they may be pursued in a postconviction proceeding. *See People v. Tate*, 2012 IL 112214, ¶¶ 14-15 (claim based on what counsel "should have done" depends on extra-record evidence, such as affidavits of uncalled witnesses, and may be pursued

in postconviction petition); *see also, e.g., People v. Towns*, 182 Ill. 2d 491, 506-22 (1998) (considering postconviction claim that counsel was ineffective for failing to investigate mitigating evidence where claim was supported by "mitigation report and numerous affidavits"). Indeed, such claims *should* be addressed in the postconviction context, where they can be the subject of an evidentiary hearing. *See People v. Veach*, 2017 IL 120649, ¶ 46 (ineffective assistance claims may "be better suited to collateral proceedings . . . when the record is incomplete or inadequate for resolving the claim"); *People v. Weeks*, 393 Ill. App. 3d 1004, 1011 (4th Dist. 2009) (certain "[c]laims of ineffective assistance of counsel are usually reserved for postconviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim").

And as noted by the dissenting justice, A14 ¶ 55, in the case of DNA testing, Illinois law provides a mechanism for obtaining test results before filing a postconviction petition, for petitioners whose test results could demonstrate innocence. *See* 725 ILCS 5/116-3; *see also People v. LaPointe*, 2018 IL App (2d) 160432, ¶ 56 (noting that DNA testing is available under statute where it has potential to yield probative evidence, regardless of "[w]hether the evidence eventually favors the defendant or the State"). The availability of such postconviction testing should defeat the appellate majority's concern that requiring a defendant to show prejudice from

counsel's decision not to request forensic testing precludes a defendant with a meritorious claim from obtaining relief.

In short, there is no justification for departing from well-established precedent to create an exception for defendants claiming ineffective assistance based on the failure to request forensic testing. Rather, like all defendants claiming ineffective assistance, defendant is required to affirmatively show prejudice.

B. Defendant failed to show that any DNA testing would produce favorable results, much less that the results would create a reasonable probability of acquittal.

On this record, defendant has failed to affirmatively show prejudice as *Strickland* requires. Here, he must demonstrate that, had counsel requested DNA testing, "there is a reasonable probability that[ ] . . . the result of the proceeding would have been different," in that he would have been acquitted of armed robbery. *See Strickland*, 466 U.S. at 694.

Defendant failed to make three necessary showings. First, he failed to show that DNA suitable for testing exists on the swab taken from the gun. Second, he failed to show that DNA testing, if requested, would have produced favorable results. And third, he failed to show that any possible results of DNA testing could produce a reasonable probability of acquittal on the armed robbery charge.

Defendant's claim fails at the outset because he has not demonstrated that DNA evidence exists to be tested. *See Scott*, 2011 IL App (1st) 100122,

¶ 31 (defendant failed to establish prejudice where, among other things, it was unknown if there was "sufficient DNA" on shirt to be tested). DNA left on the surface of the gun would require the presence of bodily fluid containing DNA, and crime scene investigator Tuttle testified that saw no apparent blood or other bodily fluid on the gun. Rather, faced with a choice between preserving DNA evidence or fingerprints, Tuttle swabbed the gun for possible DNA, but he did not testify that he believed DNA was likely to be present. Defendant's claim that there is DNA on the swab thus is speculative.

Moreover, even if DNA exists on the swab that is suitable for testing, he has not shown what the results of any testing would be, much less that those results could create a reasonable probability of a different result.

Presumably, defendant seeks to test the swab for Ferguson's DNA, as he argued in the appellate court.[5] He posits that a test finding the absence of Ferguson's DNA would have been favorable because it would have tended to show that Patterson's gun was not used in the crime. But, as explained, DNA testing instead might have confirmed the presence of Ferguson's blood

---

[5] Before the circuit court, defendant raised alternative arguments that the swab should be tested to determine whether defendant's *own* DNA was present, or else Patterson's DNA. *See* R584. But those arguments were plainly meritless. The absence of defendant's DNA would have done little to aid the defense, given that the gunman was wearing gloves, *see* Def. Exh. 5 (still photograph taken from surveillance video), and there is no reason to believe that he left any bodily fluid containing DNA behind. And the presence of Patterson's DNA would simply confirm the undisputed point that the gun belonged to her.

on Patterson's gun, which would have established that it *was* used in the crime and would have severely undermined the defense. *See* A11 ¶ 41 (acknowledging that if testing found Ferguson's DNA on swab, then defendant, "rather than being prejudiced by counsel's deficient performance, actually benefitted from it").

Furthermore, even assuming that a test of the swab was negative for Ferguson's DNA, this result would have no reasonable probability of affecting the outcome of defendant's trial. At one time, Ferguson's blood may have been on the gun, given that Ferguson was struck repeatedly in the head and suffered bleeding. But the gun could have been wiped down in the ample time between the robbery and the search of Patterson's home.

Moreover, the State's case did not require that the gun found in Patterson's drawer be definitively linked to the robbery. The robbery itself was recounted through Ferguson's testimony and corroborated by the surveillance video. The best evidence demonstrating that defendant committed the robbery was the testimony of Hensley, a disinterested eyewitness who saw defendant run from the gas station to his waiting car — which he had left running — just before police responded to the robbery call. The white hoodie, mask, and firearm found in the house where defendant was located later that day further confirmed that he could have been the robber. But Patterson's gun may not have been used; indeed, defense counsel argued that Patterson's firearm could not have been the same gun

because it was not the same color as the gun on the surveillance video. R481. Thus, the jury may have convicted defendant based on (1) Hensley's identification of defendant leaving the scene, and (2) the video and testimony demonstrating that the robber used a firearm to commit the crime.

In sum, even if there were DNA on the swab to be tested (which defendant has not shown) and even if a test of the swab would have been negative for Ferguson's DNA (which defendant has not established), there is no reasonable probability that defendant would have been acquitted of armed robbery.

Because, on this record, defendant cannot demonstrate prejudice, he was not entitled to a new trial, *People v. Gayden*, 2020 IL 123505, ¶ 50, and this Court should reverse the appellate court's judgment.

II. Defendant Also Failed to Meet His Burden of Showing that Counsel's Performance Was Deficient.

Defendant has also failed to demonstrate deficient performance, as required to prevail on his ineffective assistance claim. Because DNA testing was as likely to be prejudicial as beneficial, trial counsel did not perform deficiently by failing to request it.

"'Counsel's performance is measured by an objective standard of competence under prevailing professional norms,'" and "'the defendant must overcome the strong presumption that the challenged . . . inaction may have been the product of sound trial strategy.'" *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011) (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)).

Defendant cannot overcome that presumption here given that counsel could reasonably decline to seek testing of the swab. Indeed, the appellate majority acknowledged that "ordinarily" such a decision would be a reasonable strategic choice; "[c]ounsel could reasonably decide that the potential of the test results coming back in defendant's favor are outweighed by the risk that the results are actually incriminating." A9 ¶ 35. Additionally, "counsel may find value in attacking the State's failure to conduct the testing, as did counsel here." *Id.* Indeed, counsel's closing argument reflects that his strategy was to hold the State to its burden of proof, and counsel used the absence of forensic evidence against the State. Testing the untested evidence would have undermined this strategy.

Even though it acknowledged that a decision not to request testing would be reasonable, the appellate court found that defense counsel's performance was deficient because he purportedly misapprehended whether potential DNA evidence was on the swab of the gun. A9 ¶ 36; *see also* A13 ¶ 51 (Schmidt, J., dissenting). But this finding was incorrect as a matter of both fact and law.

First, the record does not demonstrate that counsel was mistaken about the swab. Rather, counsel was aware that Tuttle had swabbed the gun and failed to test the swab to determine whether blood or DNA was present, as his questions to Tuttle on cross-examination made clear. R415-16. And counsel's closing argument similarly reflected counsel's awareness

that Tuttle had failed to test the swab and his intent to use this fact against the State. R482-83.

Second, even assuming (contrary to this record) that defense counsel had misapprehended the availability of potential DNA evidence, that did not render his overall performance deficient. *Strickland* asks whether counsel's conduct "fell below an objective standard of reasonableness." 466 U.S. at 688. It does not ask whether counsel's subjective rationale was adequate. *See Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("*Strickland*[ ] . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."); *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). Counsel's general decision to pursue no forensic testing that risked bolstering the State's circumstantial case could be reasonable even if he were uncertain or even mistaken as to whether DNA was specifically on the swab taken of the gun. *See Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002) ("even though counsel's strategy was ill-informed . . . , a court reviewing the record before it might still conclude that counsel performed in an objectively reasonable manner"). And a single error typically does not suffice to demonstrate that counsel's performance was so deficient that it violated the Sixth Amendment. *See Harrington*, 562 U.S. at 111 ("[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' . . .

it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy.") (quoting *Murray v. Carrier,* 477 U.S. 478, 496 (1986)); *Palmer*, 162 Ill. 2d at 476 ("[E]ffective assistance of counsel refers to competent, not perfect, representation[.]").

Here, trial counsel pursued a clear strategy of arguing that the State's failure to offer forensic evidence justified an acquittal. Requesting forensic testing would have undermined that strategy. Thus, counsel's performance in failing to identify and request testing of the swab cannot be deemed deficient. Furthermore, defense counsel could reasonably decline to pursue DNA testing given the risk of harm. Finding that Ferguson's DNA was present on Patterson's gun would have established beyond any doubt that the firearm was used in the robbery and would have bolstered the State's case. Accordingly, requesting forensic testing would have risked a severe negative outcome with no comparable upside, given that the absence of Ferguson's DNA on the gun could be explained by defendant's opportunity to clean the gun. Failure to take this risk was not deficient.

Defendant may argue that this issue is forfeited because, in their brief below and in their PLA, the People relied on defendant's failure to prove prejudice and did not assert that trial counsel's performance was not deficient. *See* A9 n.1 (noting that "the State on appeal does not dispute that defense counsel rendered deficient performance"). But if "the appellate court reverses the judgment of the trial court, and the appellee in that court brings

the case to this court as appellant, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if the issues were not raised before the appellate court." *People v. Artis*, 232 Ill. 2d 156, 164 (2009). And although this Court may deem an argument omitted from a PLA to be forfeited, *see People v. McCarty*, 223 Ill. 2d 109, 122 (2006), it may nevertheless review the question. To obtain relief on his *Strickland* claim, defendant must show deficient performance, and this issue "is inextricably intertwined with other matters properly before the court." *People v. Peterson*, 2017 IL 120331, ¶ 67 (internal quotation marks omitted). Indeed, even if this Court were to construe the PLA to concede deficient performance, a reviewing court is "not bound by a party's concession" and "may affirm the circuit court's judgment on any basis contained in the record." *People v. Horrell*, 235 Ill. 2d 235, 241 (2009); *see also People v. Carter*, 2015 IL 117709, ¶¶ 21-22 (this Court was not bound by State's apparent concession of point in PLA).

Because defendant failed to meet his burden of showing deficient performance, as well as his burden of showing prejudice, the appellate court's judgment ordering a new trial should be reversed.

CONCLUSION

This Court should reverse the judgment of the Illinois Appellate Court, Third District, and remand the case for consideration of the remaining issues that defendant raised on appeal.

February 24, 2021

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 21 pages.

/s Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

APPENDIX

E-FILED
2/24/2021 10:59 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

Table of Contents of Appendix

2020 IL App (3d) 160675

Opinion filed July 13, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TODD L. JOHNSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-16-0675 Circuit No. 15-CF-164 Honorable John P. Vespa, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court, with opinion.
Justice Holdridge concurred in the judgment and opinion.
Justice Schmidt dissented, with opinion.

OPINION

¶ 1 Defendant, Todd L. Johnson, appeals following his conviction for armed robbery. He raises the following six arguments on appeal: (1) defense counsel rendered ineffective assistance by failing to request certain DNA testing, (2) the court erred in striking defendant's motion to quash arrest, (3) the jury's guilty verdicts for both armed robbery and aggravated robbery were legally inconsistent, (4) the court erred in failing to consider defendant's request for DNA testing, (5) the court committed plain error when it conducted a portion of *voir dire* in chambers without defendant present, and (6) the court applied an erroneous procedure in considering

defendant's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). We vacate defendant's conviction and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 The State charged defendant via indictment with armed robbery (720 ILCS 5/18-2(a)(2) (West 2014)) and aggravated robbery (*id.* § 18-1(b)(1)).

¶ 4 Prior to trial, defendant filed a "Motion to Quash Arrest" and, later, an "Amended Motion to Quash Arrest." In the amended motion, defendant alleged that he had been arrested without a warrant and without probable cause. As relief, defendant requested that the court quash his arrest and immediately release him from custody. Defendant also sought "[a]ny and all other relief the Court deems just and equitable under the circumstances."

¶ 5 On March 17, 2016, the State orally moved to strike defendant's motion. The State argued that there was no relief that the court could grant because "the motion to quash arrest is not something that is statutor[ily] available." Defense counsel argued that the search warrant in the case "flow[ed]" from the illegal arrest. The court granted the State's motion to strike, commenting on the motion to quash arrest: "I'm not allowed to grant it by law."

¶ 6 Jury selection in defendant's case commenced on June 27, 2016. During *voir dire*, prospective juror Kimberlea Tillman indicated that she had an issue that might prevent her from serving on the jury. She indicated that she would be more comfortable discussing that issue in the court's chambers than in open court. Accordingly, the court invited Tillman, defense counsel, and the prosecutor into chambers to discuss the issue.

¶ 7 In chambers, Tillman indicated that she had medical appointments scheduled for the following Thursday and Sunday. The court noted that the case was unlikely to go past Wednesday, but the State pointed out that "we never know how long a jury [is] going to

deliberate." The State requested that Tillman be removed for cause. Tillman indicated that the Thursday appointment could "probably" be pushed to Friday if necessary, and could potentially even be combined with the Sunday appointment. The court denied the State's request to remove Tillman for cause. The State indicated that it would exercise a peremptory challenge with respect to Tillman.

¶ 8 In open court, the court excused Tillman. Defense counsel requested a sidebar. After the venire was removed from the courtroom, the court explained that defendant had raised a *Batson* challenge. The court explained for the record that both defendant and Tillman were African American. The court also noted that one African American person had already been seated on the jury, while another remained a potential juror. The court then explained the procedure to be followed:

> "The party making the *Batson* claim must establish a *prima facie* case of purposeful discrimination. Evidence must be produced sufficient to permit the trial judge to draw an inference that discrimination has occurred. Then the burden would shift to the other party to articulate a race-neutral reason, and I will weigh the evidence and make a decision."

¶ 9 Defense counsel argued: "[A]s the court identified on the record, the ethnicity of both the defendant as well as the perspective [*sic*] juror. I would submit that it is being used as a basis to affect the ability to empanel the jury based on race." The court enquired: "And that was it?" Defense counsel responded: "That's it."

¶ 10 The court then asked the State if it had anything to add. The State asserted that *prima facie* evidence required a pattern of race-based strikes. The State pointed out that there had

been no such pattern. The State concluded: "[T]he defendant has not met his burden initially, and we would ask the Court to rule accordingly."

¶ 11 The court then stated: "I am finding that defense [*sic*] has not established a *prima facie* case of purposeful discrimination." The court then opined that it was clear the State was removing Tillman because of her medical appointments, and noted that "[i]t was a tough call" to not remove her for cause.

¶ 12 At trial, Aaron Ferguson testified that he was working as a clerk at a gas station located on West Forrest Hill Avenue in Peoria on the morning of March 10, 2015. Around 8 a.m., a person entered the gas station, carrying a black gun and demanding money. Ferguson described the person as wearing a white track jacket with the hood pulled up. The person was also wearing a mask. Ferguson testified that the person struck him multiple times in the head with the gun.

¶ 13 Surveillance video from the gas station shown at trial depicts an African American male wearing a white, zippered jacket with gray panels on the sides. The man is seen wearing a white hood, which appears to be part of an under layer, rather than attached to the jacket. He appears to be wearing a black stocking cap underneath the hood and mask of sorts covering the lower half of his face. The man is wearing black gloves and is holding what appears to be a black handgun. The gun appears to have a silver or gray ejector port. He is carrying a black, satchel-type bag that he places on the counter when he enters. The man keeps the gun pointed at Ferguson through most of the incident. A struggle between the two men ensues, and Ferguson is struck multiple times with the gun. Exterior footage from after the altercation shows the man moving briskly to Forrest Hill Avenue, then turning in the direction of Wilson Drive.

¶ 14 Earl Hensley testified that he was doing a home repair job one block from the gas station on the morning in question. He was sitting in his van, waiting for his coworkers to arrive, when

he noticed a white Cadillac parked on the side of the road. The Cadillac was running, but no one was inside. Hensley testified that he saw a man running from the direction of Forrest Hill Avenue turn on Wilson Drive. The man ran past Hensley's van and then entered the white Cadillac. Hensley observed that the man was wearing a hooded jacket and a stocking cap. The man drove away.

¶ 15 Later, Hensley rode with a police officer in order to determine if Hensley could make an identification. When they reached their destination, Hensley was able to identify the white Cadillac he had observed earlier. The officer pulled his vehicle into an ally, at which point a man "came out of the house and walked past the front of the squad car." Hensley identified the man as the one who had run past his van earlier. In court, Hensley identified that man as defendant.

¶ 16 Detective Craig Williams responded to the robbery call and received a description of the white Cadillac. Williams believed he was familiar with the vehicle in question and, along with Detective Richard Linthicum, was able to locate the white Cadillac parked in an alley behind a house at 1810 New York Avenue. As Williams and Linthicum surveilled the car, a man exited the house, removed "something black" from the white Cadillac, and began walking to the garage. The man then returned to the house. Williams identified defendant as the man he saw.

¶ 17 Williams testified that he informed Detective Steven Garner that he had located the white Cadillac. After Garner arrived with Hensley, defendant again left the house. When Garner tried to make contact with defendant, defendant ran, but was apprehended by Linthicum after a brief chase. Linthicum testified that while he and Williams were watching the white Cadillac, defendant retrieved a black bag from the car and then entered the garage.

¶ 18 Officer Brian Terry testified that he secured the residence at 1810 New York Avenue while a search warrant was obtained. After the court issued the search warrant, Terry participated

in the search of the house. Terry talked to Angel Patterson, who directed him to the bottom drawer of her dresser, where Terry found a black handgun. Terry described the gun as belonging to Patterson. Terry then searched the garage, where he found a second "firearm." Photographs admitted of the weapon found in the garage show it to be black with exposed silver or gray portions on top where the slide is missing. The handle is wrapped in black tape and a spring is coiled loosely around the top front portion of the weapon.

¶ 19 On cross-examination, Terry confirmed that the weapon found in the garage turned out to be a broken BB gun. Terry agreed that the BB gun was "solid black." Terry agreed that the gun found in Patterson's dresser was in a box underneath some folded clothes.

¶ 20 Paul Tuttle testified that, in addition to the gun, the crime scene unit found in the house a white hooded sweatshirt and a black ski mask. Photographs show the ski mask to have a zippered portion that would cover the chin, mouth, and lower portion of the nose. Tuttle swabbed the gun for potential DNA because he knew Ferguson had been struck with it. No DNA testing was ever requested on those swabs.

¶ 21 Patterson testified that she owned the black firearm found at 1810 New York Avenue. The gun was in the same location—under folded clothes in her bottom dresser drawer—as the last time she had seen it. She testified that no one else in the house knew about the gun.

¶ 22 Alesha List, a secretary from defense counsel's office, made still photographs from the surveillance video. She testified that the photograph appeared to show a gun in the robber's hand. When defense counsel asked List whether "the discharge chamber, where bullets are ejected" was a different color from the rest of the gun, List responded affirmatively, testifying that that area was silver or gray.

¶ 23 In its closing argument, the State repeatedly asserted that defendant had a gun or firearm during the robbery. In reciting the propositions with respect to armed robbery, the State continued to argue that defendant had a firearm during the robbery. After summarizing the propositions with respect to aggravated robbery, the prosecutor declared: "Now, you have two guns that were located. You have a gun, a firearm, and you have a BB gun. And I would submit to you that the aggravated robbery goes towards that BB gun."

¶ 24 In defense counsel's closing, he argued, in part, that no DNA was found in the case. Counsel criticized the investigators for failing to conduct tests for DNA.

¶ 25 During deliberations, the jury sent a written question to the court, asking: "Why wasn't anything tested for DNA?" The court responded only by telling the jury it was to consider the evidence before it.

¶ 26 After the jury began its second day of deliberations, defense counsel brought to the court's attention a question raised by defendant. Counsel proceeded: "[Defendant] doesn't understand why the Court could not order the DNA buccal swab to be tested, because it was collected, as the officer indicated, but it never got tested." The court responded that it would not suspend deliberations and reopen proofs.

¶ 27 The court inquired why such a request was not made weeks or months earlier. Defense counsel replied that Tuttle's testimony had come as a surprise, as discovery had not revealed that a DNA swab had been taken from the gun. The State interjected, pointing out that "the discovery did show that a DNA swabbing of the gun was done," though there was no indication that any biological material was present on the gun. Defense counsel withdrew his request.

¶ 28 The jury found defendant guilty on both counts. In the four months between the return of that verdict and sentencing, defendant sent three letters to the court, requesting that the swabs

from the gun be tested for DNA. At sentencing, defendant continued to profess his innocence and asked the court to have the swabs tested. The court found it was not required to respond to that request.

¶ 29 The court found that the armed robbery and aggravated robbery counts would merge and imposed a sentence of 33 years' imprisonment for armed robbery. That sentence included a 15-year mandatory firearm enhancement.

¶ 30 II. ANALYSIS

¶ 31 Defendant raises the following six arguments on appeal: (1) defense counsel rendered ineffective assistance by failing to request certain DNA testing, (2) the court erred in striking defendant's motion to quash arrest, (3) the jury's guilty verdicts for both armed robbery and aggravated robbery were legally inconsistent, (4) the court erred in failing to consider defendant's request for DNA testing, (5) the court committed plain error when it conducted a portion of *voir dire* in chambers without defendant present, and (6) the court applied an erroneous procedure in considering defendant's *Batson* claim.

¶ 32 A. Ineffective Assistance of Counsel

¶ 33 First, defendant argues that defense counsel rendered ineffective assistance for failing to request testing of the DNA swabs at any point prior to jury deliberations.

¶ 34 A claim of ineffective assistance of counsel is analyzed under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Id.* A strong presumption exists that counsel's conduct was within the wide range of reasonable professional assistance and that all decisions were made in the exercise of reasonable professional judgment. *People v.*

Palmer, 162 Ill. 2d 465, 476 (1994). Matters pertaining to trial strategy will usually not support a claim of ineffective assistance of counsel, even if counsel made a mistake in trial strategy or tactics or made an error in judgment. *People v. Perry*, 224 Ill. 2d 312, 355 (2007). Prejudice is demonstrated where a defendant shows that a reasonable probability exists that, but for counsel's deficient performance, the result of the trial would have been different. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Washington*, 466 U.S. at 694.

¶ 35 A defense attorney's decision to not have a DNA swab tested where, as here, the State has conducted no testing would ordinarily be considered a clear matter of trial strategy. Counsel could reasonably decide that the potential of the test results coming back in defendant's favor are outweighed by the risk that the results are actually incriminating. Moreover, counsel may find value in attacking the State's failure to conduct the testing, as did counsel here.

¶ 36 The presumption of sound trial strategy, however, is rebutted by the record in this case. Counsel did not make the informed choice to forego testing for any of the reasons set forth above. Rather, it appears that counsel was under the misapprehension that no DNA swabs had been taken from the firearm. In fact, the State asserted that counsel had been put on notice of the DNA swabs via discovery. Neither party on appeal disputes that characterization. As the failure to request DNA testing on the swabs was oversight rather than strategy, we find that defense counsel rendered deficient performance.[1]

¶ 37 Turning to the question of prejudice, there is no dispute that testing of the swabs would have been conducted had counsel made the appropriate request. See Ill. S. Ct. R. 412 (eff. Mar. 1, 2001). The State argues, however, that no possible result of that testing could have created a

[1]Notably, the State on appeal does not dispute that defense counsel rendered deficient performance. Rather, it argues only that defendant suffered no prejudice.

probability of a different result at trial. The State continues: "[E]ven if the swabs taken off the gun had been tested and produced no evidence of the presence of the victim's DNA, or if it produced the DNA of some third party, it does not necessarily follow that defendant was innocent of perpetrating the armed robbery."

¶ 38 We disagree with the State's assertion. Initially, the prejudice component of the ineffectiveness test does not require a defendant to establish that the result at a new trial would "necessarily" be different. Rather, defendant must only show a reasonable probability of such a different result. *Enis*, 194 Ill. 2d at 376. A negative DNA result on testing of the firearm swabs in this case would create a strong probability of a different result at retrial. Ferguson testified that the perpetrator struck him repeatedly over the course of the robbery, testimony that was supported by the surveillance footage. If the gun found in Patterson's drawer was discovered to not contain Ferguson's DNA, this would be convincing evidence that that gun was not the one wielded during the robbery.

¶ 39 Such a result would be especially relevant in this case, given that the police found a similarly colored BB gun. Defendant was charged with armed robbery, which requires the carrying of an actual firearm in the commission of a robbery. 720 ILCS 5/18-2(a)(2) (West 2014). A BB gun is generally not considered a firearm for the purposes of the armed robbery statute. 430 ILCS 65/1.1 (West 2014); 720 ILCS 5/2-7.5 (West 2014). Defendant was also charged with aggravated robbery, which is committed where a person merely indicates "to the victim that he or she is presently armed with a firearm or other dangerous weapon." 720 ILCS 5/18-1(b)(1) (West 2014).

¶ 40 In order to find defendant guilty of armed robbery, the jury would have to find that defendant bludgeoned Ferguson with the actual firearm. If defendant carried the BB gun in the

course of the robbery, he would be guilty only of *aggravated* robbery. Thus, DNA testing on the firearm is of even greater importance. If Ferguson's DNA was not found on the firearm, it would tend to cast doubt that defendant was the perpetrator of the robbery. Even if the jury could still conclude that defendant was the perpetrator, the lack of Ferguson's DNA on the firearm would severely undermine the notion that defendant carried the firearm, rather than the BB gun, during the robbery. This would create a strong chance that the jury would conclude that defendant had instead used the BB gun in the robbery. That conclusion would mandate an acquittal on the armed robbery charge and a conviction only on the lesser aggravated robbery charge. It would also dispense with the 15-year firearm enhancement attached to defendant's sentence. *Id.* § 18-2(a)(2), (b).

¶ 41 To be sure, the possibility exists that testing on the DNA swabs would reveal the presence of Ferguson's DNA. It is thus possible that defendant, rather than being prejudiced by counsel's deficient performance, actually benefitted from it. In the strictest sense, then, defendant could only establish prejudice by demonstrating that Ferguson's DNA would not have been found. Such speculation is impracticable and inequitable. Where a defendant claims that counsel was ineffective for failing to request DNA testing, it would be paradoxical to require that the defendant present the results of those tests to support his claim of prejudice. It is the lack of those test results that forms the very basis of the claim. Indeed, such a holding would foreclose the possibility of a defendant *ever* bringing a claim like that raised in this appeal. Where a negative result would so evidently impact the result of the trial, the lack of such testing clearly undermines confidence in the result. *Washington*, 466 U.S. at 694. Accordingly, we find that a defendant need only demonstrate that a negative DNA result would probably change the outcome of the trial in order to establish prejudice in this context.

¶ 42 Defense counsel in the present case rendered deficient performance when he mistakenly failed to request vital DNA testing. That error caused prejudice to defendant, as a negative DNA test would likely have resulted in, at the very least, an acquittal on the armed robbery charge. We therefore find that defendant received ineffective assistance of counsel, vacate defendant's conviction, and remand for a new trial.

¶ 43 B. Remaining Arguments

¶ 44 Our vacatur of defendant's conviction and remand for a new trial obviates the need to discuss the remaining five issues. The issues relating to the jury verdicts and defendant's posttrial motion for DNA testing are necessarily moot as the result of our order for a new trial. Similarly, the two issues relating to jury selection need not be addressed, as defendant's new trial will naturally be preceded by a new jury selection.

¶ 45 Finally, we note that defendant's pretrial "Motion to Quash Arrest" was stricken by the circuit court, rather than ruled upon on the merits. Defendant's argument on appeal makes clear that he sought to have certain items suppressed from evidence. Defense counsel on remand is free to file a motion seeking suppression of that evidence, to be ruled upon for the first time by the circuit court.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we vacate the judgment of the circuit court of Peoria County and remand for a new trial.

¶ 48 Judgment vacated and remanded for a new trial.

¶ 49 JUSTICE SCHMIDT, dissenting:

¶ 50 I. Ineffective Assistance of Counsel

¶ 51 The majority reasons that defense counsel's failure to request DNA testing on the swabs taken from the gun could not have been a matter of trial strategy, as the record shows that counsel was unaware that any swabs were available for testing. I agree.

¶ 52 However, defendant is presently unable to demonstrate that he suffered any prejudice as a result of counsel's mistake. The mere testing of the swabs is not inherently beneficial to defendant's case. After all, the testing could show the presence of Ferguson's DNA, all but confirming that it was the gun used to strike Ferguson, and severely undermining defendant's case. In order to show a reasonable probability that such testing would lead to a different trial outcome, defendant needs to show a reasonable probability that the results of said testing would be helpful—that is, a result that failed to show either defendant's or Ferguson's DNA on the gun. Since no DNA testing has been done on the gun, defendant *cannot* show any prejudice.

¶ 53 In *People v. Scott*, 2011 IL App (1st) 100112, the First District considered this precise issue. The defendant in that case argued that trial counsel had been ineffective for failing to request DNA testing on a shirt. The reviewing court rejected that argument on the grounds that defendant was fundamentally unable to demonstrate prejudice:

> "[A]t this time, defendant cannot establish prejudice under *Strickland*. Any argument regarding exculpatory evidence contained on the blue shirt is speculative. Since no test has been performed, we do not know if sufficient DNA is on the shirt and able to be tested let alone whether the results would be exculpatory. *** *Without test results, we cannot say whether a reasonable probability exists that the result of defendant's trial would have been different such that defendant was prejudiced*. Any

> opinion would be advisory since at this juncture, no exculpatory evidence exists. *** Accordingly, defendant's claim of ineffective assistance of trial counsel for failure to pursue DNA testing lacks merit." (Emphasis added.) *Id.* ¶ 31.

¶ 54 The majority concedes that it is "possible that defendant, rather than being prejudiced by counsel's deficient performance, actually benefitted from it." *Supra* ¶ 41. In an effort to circumvent this obstacle, the majority has a created a new prejudice test to be applied to situations like these. Under this new test, the majority finds that prejudice is established where a defendant can show "that a negative DNA result would probably change the outcome of the trial." *Supra* ¶ 41. In other words, the majority's new test allows a defendant to assume, for the purposes of establishing ineffective assistance, that any DNA tests will come out in his favor. There is no precedential support for allowing such a windfall to a defendant.

¶ 55 The majority bases its new test on notions of fundamental fairness, insisting that a reviewing court should not require DNA test results when a defendant's very claim is premised upon the lack of DNA testing. The majority concludes: "[S]uch a holding would foreclose the possibility of a defendant *ever* bringing a claim like that raised in this appeal." (Emphasis in original.) *Supra* ¶ 41. Wrong! Defendant would still be entitled to seek DNA testing under section 116-3 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/116-3 (West 2014). If the ensuing testing returned results that were beneficial to defendant, he could raise a claim of ineffective assistance of counsel in a postconviction petition.

¶ 56 At the moment, with no DNA testing having been done, it is impossible to say that defendant suffered any prejudice from that lack of testing. This court should not assume that any

such testing will be to defendant's benefit. Without the ability to show prejudice, defendant has failed to establish that defense counsel rendered ineffective assistance.

¶ 57 II. Remaining Arguments

¶ 58 In addition to his ineffectiveness argument, defendant also contends on this appeal that (1) the court erred in striking his "motion to quash arrest," (2) the guilty verdicts for both armed robbery and aggravated robbery were legally inconsistent, (3) the court erred in failing to consider defendant's request for DNA testing, (4) the court erred when it conducted a portion of *voir dire* in chambers without defendant present, and (5) the court applied an erroneous procedure in considering defendant's *Batson* claim. As the majority vacates defendant's conviction on ineffectiveness grounds, it has no need to address those arguments. Because I would find that defense counsel was not ineffective, I will address them.

¶ 59 Many of defendant's additional arguments are meritless on their face and need be discussed only briefly. For instance, guilty verdicts for armed robbery and aggravated robbery are plainly not inconsistent. A person carrying a gun in the course of a robbery can also indicate by his words or actions that he is armed, thus satisfying both statutes. 720 ILCS 5/18-2(a)(2) (West 2014) (armed robbery); *id.* § 18-1(b)(1) (aggravated robbery). Next, defendant's right to be present is only violated where his absence results in the denial of a fair and impartial trial. *People v. Bean*, 137 Ill. 2d 65, 83 (1990). Defendant's absence from a portion of *voir dire* necessarily could not have impacted his trial in any way, as the juror questioned in chambers was ultimately excused. Finally, the court was correct in finding the defendant's posttrial request for DNA testing premature. Under section 116-3 of the Code, such a request must be directed at "the trial court that entered the judgment of conviction in [defendant's] case." 725 ILCS 5/116-3 (West 2014). A judgment of conviction includes, by definition, the pronouncement of sentence;

thus, until defendant was sentenced, he could not bring a motion under section 116-3. See *id.* § 102-14. I would point out that defendant was free to make a section 116-3 testing request from the moment he was actually sentenced through the present, yet he has apparently not done so.

¶ 60 Defendant's argument that the circuit court employed an improper *Batson* procedure also lacks merit. He insists that the court improperly collapsed the first *Batson* step—requiring defendant to make a *prima facie* showing of discrimination—with the second *Batson* step, which requires the State to provide a race-neutral reason for its strike. See *People v. Wiley*, 156 Ill. 2d 464, 475 (1993) (finding error where first two steps of *Batson* procedure are collapsed into one). Here, the court properly outlined the correct *Batson* procedure, making clear at the outset that its initial inquiry would be limited to defendant's *prima facie* showing. See *supra* ¶ 8. After allowing defense counsel to make his case, the court asked the State for its input. While the second step of the *Batson* process calls on the State to provide a race-neutral explanation for its strike, there is no case law indicating that the State is barred from participating at the first step. Indeed, the State properly limited its argument to defendant's ability to make a *prima facie* showing. While the court did, after the fact, suggest a possible race-neutral reason for the strike, it never solicited that reason from the State in the context of the *Batson* process. Accordingly, I would find that the court did not collapse the first two steps of the *Batson* procedure.

¶ 61 Finally, we come to defendant's argument that the circuit court erred in striking his "motion to quash arrest." The court correctly found that defendant's "motion to quash arrest" was not a cognizable motion upon which it could rule.

¶ 62 Section 114-12 of the Code, titled "Motion to Suppress Evidence Illegally Seized," provides that a defendant may move the court for the return of property and suppression of evidence. 725 ILCS 5/114-12(a) (West 2014). The Fourth District has pointed out that, under

section 114-12, "[s]uppressing the evidence obtained by the police as a result of an improper stop is the entirety of the relief to which a defendant is entitled. *** Nothing in that section refers to or deals with purported 'motions to quash arrest.' " *People v. Hansen*, 2012 IL App (4th) 110603, ¶ 63. As a result, the court urged that criminal defendants "should stop filing such motions." *Id.*

¶ 63 In *People v. Ramirez*, 2013 IL App (4th) 121153, ¶¶ 56-61, the court again emphasized that a "motion to quash arrest" is not a cognizable motion. "Throughout this opinion, we have advisedly put the term 'motion to quash arrest' in quotation marks so as to avoid giving any legitimacy to such a motion. In fact, such motions possess none. 'Motions to quash arrest' are nowhere recognized in the Code ***." *Id.* ¶ 56. The court also pointed out that the Code was not the only source lacking any reference to a "motion to quash arrest":

> "[R]egarding the subject of 'motions to quash arrest' generally, we note that the use of such motions has apparently not come to the attention of Professor LaFave despite his more than 50 years on the faculty of the University of Illinois College of Law and his authorship of the nation's definitive treatise on the subject of search and seizure. That treatise is comprised of six volumes containing thousands of pages and is universally recognized as the nation's definitive work on search and seizure law. Indeed, it is frequently cited by the United States Supreme Court whenever that Court is dealing with search and seizure cases. Yet, despite the overall comprehensiveness of Professor LaFave's work, its thousands of pages, and his professorship in the State of Illinois, his treatise on

> search and seizure law contains no mention whatsoever of 'motions to quash arrest.' We conclude this absence is no oversight." *Id.* ¶ 61.

¶ 64 More recently, the Fourth District contemplated what steps a circuit court faced with a "motion to quash arrest" should take:

> "If a trial court receives a 'motion to quash arrest,' it should not accept it for consideration and should point out to counsel the motion is inappropriate for the reasons this court explained in *Hansen* and *Ramirez*. The court should then give the counsel who filed the inappropriate motion the opportunity to file a proper motion to suppress under section 114-12 of the [Code]. *** 'Motion to quash arrest' is an arcane phrase that has a ring of authenticity but is actually meaningless verbiage." *People v. Winchester*, 2016 IL App (4th) 140781, ¶ 30.

¶ 65 This court has never expressly endorsed the reasoning set forth in the line of cases from the Fourth District. In a recent case, we observed that "[t]he Fourth District presents a compelling case that the quashing of an arrest is of no particular import." *People v. Motzko*, 2019 IL App (3d) 180184, ¶ 19. The facts in *Motzko*, however, did not require this court to weigh in on the continued propriety of motions to quash arrest.

¶ 66 The Fourth District got it right. A "motion to quash arrest" is not a motion referenced in the Code. Nor is the actual quashing of an arrest a judicial remedy contemplated anywhere in the Code.

¶ 67 Such a holding would be limited in two important ways. First, it is rather common for a motion to be styled as a "motion to quash the arrest and suppress evidence" or something similar. *E.g.*, *People v. Rice*, 2019 IL App (3d) 170134, ¶ 5. In these instances, the motion to suppress is

a cognizable motion (725 ILCS 5/114-12(a) (West 2014)), and the additional request for quashing of arrest may be deemed harmless surplusage. Furthermore, even where a motion is *only* labeled as a "motion to quash arrest," courts would apply the well-settled doctrine that "it is a motion's substance, not its title, that controls its identity." *People v. Helgesen*, 347 Ill. App. 3d 672, 677 (2004). That is, where a "motion to quash arrest" identifies specific evidence seized, states facts showing said seizure to be unlawful, and requests suppression of that evidence, it is in substance a proper motion to suppress.

¶ 68 It is the latter point that defendant argues in reply. He insists that "[it] is *** apparent" that in his motion to quash arrest, "defendant sought to suppress the evidence recovered from his home based on his unconstitutional arrest."

¶ 69 Under section 114-12 of the Code, a defendant may challenge the legality of a search and seizure conducted pursuant to a warrant on the grounds that "the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed." 725 ILCS 5/114-12(a)(2) (West 2014). The motion must "state facts showing wherein the search and seizure were unlawful." *Id.* § 114-12(b).

¶ 70 Defendant's "amended motion to quash arrest" simply cannot be construed as a motion to suppress evidence. First, defendant never actually requests the suppression of any evidence, either implicitly or explicitly. The only specific relief prayed for by defendant was the quashing of his arrest and his immediate release from custody. Further, while the evidence now in question was seized pursuant to a search warrant, defendant never argues how that warrant was deficient. In fact, he never even mentions that warrant. Defendant's argument that he was arrested without

probable cause is not inherently an argument that there was no probable cause for the issuance of the later search warrant.

¶ 71 In sum, the motion filed by defendant cannot, even through the most liberal construction, be deemed a motion to suppress evidence. As the "motion to quash arrest" had no statutory or other basis under the law, the circuit court properly struck the motion. Finally, I would point out that defendant and counsel were put on notice that the "motion to quash arrest" was not statutorily available and that the court could not by law grant such a motion. Defendant suffered no immediate prejudice from the court's ruling, as his trial would not begin for another three months. Defendant had ample time to file a proper motion to suppress evidence but failed to do so.

IN THE CIRCUIT COURT OF 10TH JUDICIAL CIRCUIT PEORIA COUNTY, ILLINOIS

FILED
ROBERT M. SPEARS
OCT 26 2016
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
) Case No 15CF164
Vs.)
TODD L. JOHNSON)
Defendant)

Date of Sentence 10/26/16
Date of Birth 3/30/70 (Defendant)

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	ARMED ROBBERY	3/10/15	720 ILCS 5/18-2(a)(2)	X	33 Yrs. ___ Mos.	3 Yrs.
___	___	___	___	___	___ Yrs. ___ Mos.	___ Yrs.
___	___	___	___	___	___ Yrs. ___ Mos.	___ Yrs.

To run (concurrent with) (consecutively to) count(s) ___ and served at (50%), ~~75%~~, ~~85%~~, ~~100%~~ pursuant to 730 ILCS 5/3-6-3

To run (concurrent with) (consecutively to) count(s) ___ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

To run (concurrent with) (consecutively to) count(s) ___ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

This Court finds that the defendant is:

___ Convicted of a class ___ offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-4.5-95(b) on count(s) ___.

The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of ___ days as of the date of this order) from (specify dates) 3/10/15 - 10/26/16. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

✓ The defendant remained in continuous custody from the date of this order.

___ The defendant did not remain in continuous custody from the date of this order (less ___ days from a release date of ___ to a surrender date of ___).

___ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts ___ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

___ The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a)).

___ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a)).

___ The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ___ Educational/Vocational ___ Substance Abuse ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible and shall be awarded additional sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4) for ___ total number of days of program participation, if not previously awarded.

___ The defendant passed the high school level test for General Education and Development (GED) on ___ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

___ IT IS FURTHER ORDERED the sentence(s) imposed on count(s) ___ be (concurrent with) (consecutive to) the sentence imposed in case number ___ in the Circuit Court of ___ County.

___ ~~IT IS FURTHER ORDERED that~~ Sentence includes 15 year statutory enhancement;

The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (✓ effective immediately) (___ stayed until ___).

DATE: 10/26/16 ENTER: [signature]

JOHN VESPA
(PLEASE PRINT JUDGE'S NAME HERE)

Approved by Conference of Chief Judges 6/20/14 (rev. 10/23/2015) A21

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

The People of the State of Illinois,)
Appellee,)
)
VS.) No. 15 CF 164
Todd Johnson)
Appellant,)

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken:

APPELLATE COURT THIRD DISTRICT OTTAWA, ILLINOIS

(2) Name of appellant and address to which notices shall be sent.
Name: Todd Johnson (TEMP)
Peoria County Jail
301 N Maxwell Rd
Peoria, Il 61604

(3) Name and address of appellant's attorney on appeal.
Name: PETER A. CARUSONA
Address: THIRD DISTRICT APPELLATE COURT
1100 COLUMBUS
OTTAWA, ILLINOIS 61350

(4) Date of judgment or order: 10/26/2016
(5) Offense(s): 720 ILCS 5/18-2(a)(2)
Sentence: Illinois Department of Corrections: 35 years

Robert M Spears
CLERK OF THE CIRCUIT COURT
BY: Pamela Spencer
Deputy

C736

TABLE OF CONTENTS OF RECORD ON APPEAL

People v. Johnson, No. 15 CF 164 (Peoria County)

Common Law Record

Reports of Proceedings: Hearings
Volume I (R1-250)

Volume II (R251-500)

Volume III (R501-632)

Supplemental Volume

Reports of Proceedings: Witnesses

Vol. I (R1-250)

	DX	CX	RDX	RCX
Steven Garner	R60	R81		
Earl Hensley	R83	R90	R92	

Vol. II (R251-500)

	DX	CX	RDX	RCX
Tangela Taylor	R292	R296		
Aaron Ferguson	R299	R309		
Earl Hensley	R313	R326	R332	
Fred May	R337	R342		
Craig Williams	R351	R360	R365 R367	R367
Richard Linthicum	R369	R378	R384	
Brian Terry	R385	R390		
Paul Tuttle	R396	R411		
Paul Burns	R436			
Alesha List	R441	R444	R446	R447
Angel Patterson	R449	R453		

CERTIFICATE OF FILING AND SERVICE

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 February 24, 2021, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system; and (2) served on below-named counsel by transmitting a copy from my e-mail address to the following e-mail addresses:

Thomas A. Karalis
Deputy Defender
Office of the State Appellate Defender,
Third Judicial District
770 East Etna Road
Ottawa, Illinois 61350
3rddistrict.eserve@osad.state.il.us

Jodi Hoos
State's Attorney of Peoria County
Peoria County Courthouse
Peoria, Illinois 61602
jhoos@peoriacounty.org

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

E-FILED
2/24/2021 10:59 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK