No. 1-09-1257

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FIRST DIVISION
February 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 20235
	)	
DEVONNE REED,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.

JUSTICES Hoffman and Rochford concurred in the judgment.

O R D E R

Held: Defendant was properly found guilty of armed violence because he committed felony drug possession while carrying a handgun on or about his person and thereby posed a threat to individuals to whom he delivered drugs. Defendant's armed violence and drug convictions violated the one-act, one-crime rule because they arose from the same act of possessing drugs. Defendant's armed violence and UUW convictions did not violate the one-act, one-crime rule because armed violence required the additional act of possession of drugs and UUW required the additional element of status as a felon. We affirmed the defendant's armed violence and UUW convictions and vacated his drug conviction, as it was the less serious offense.

Following a bench trial, defendant Devonne (a.k.a. Devon) Reed was found guilty of armed violence, possession of cocaine with intent to deliver, and unlawful use of a weapon by a felon (UUW). The trial court sentenced defendant to 15 years' imprisonment. On appeal, defendant contends the State failed to prove him guilty of armed violence because he did not have immediate access to or timely control over the recovered handgun and, as such, was not "otherwise armed" with a dangerous weapon. In the alternative, defendant contends that his armed violence and drug convictions violate the one-act, one-crime rule because they arise from the same act of possessing cocaine. He also contends that his armed violence and UUW convictions violate the one-act, one-crime rule because they arise from the same act of possessing a handgun. We affirm defendant's armed violence and UUW convictions. We vacate his drug conviction.

Defendant was arrested and charged with the above-stated offenses after Chicago police officers, while conducting surveillance, observed him engage in narcotics transactions with a handgun in his possession.

Officer Todd Olsen testified that defendant exited an apartment building, then removed a holstered handgun from his waistband and placed it in the front passenger area of a nearby car. On three separate occasions, individuals approached defendant and tendered him money. Defendant then walked to the

car, looked around, opened the passenger door, and removed an item from the gun holster. He returned to the individual and tendered the item.

Following the third transaction, and at the radio command of Officer Olsen, enforcement officers detained defendant as he stood near an alley about 15 feet from the car. From the car's passenger-side floorboard, Officer Frank Sarabia recovered the holstered handgun, loaded with three live rounds of ammunition, and from the recess of the holster, cocaine.

At that point, defendant pushed the detaining officer and ran away. Officers gave chase and eventually found defendant hiding inside an abandoned vehicle and with his handcuffs in front of him. Defendant continued to fight as officers handcuffed him once again.

The parties stipulated that the substance found in the holster tested positive for cocaine and also that, for the purposes of the UUW charge, defendant previously was convicted of aggravated unlawful use of a weapon.

Defendant did not present any evidence.

In closing, defense counsel argued, in relevant part, that the State failed to prove him guilty of armed violence because there was no evidence that defendant had "timely access and immediate control of the weapon" when the police arrived at the scene. The State responded that the evidence showed defendant

possessed the handgun, and this was sufficient to satisfy the elements of armed violence.

The trial court found the officers testified credibly and the evidence was sufficient to sustain the charges of armed violence, possession of cocaine with intent to deliver, and unlawful use of a weapon by a felon. With respect to the armed violence charge, the court noted that "this is the classic definition of armed violence *** [d]rugs, a gun in a holster together enabling you to sell narcotics and maintain a handgun for the protection of your goods, so to speak ***." Following the court's finding, defendant filed a *pro se* motion for a new trial, which was denied. The court sentenced defendant to concurrent terms of 15 years for armed violence, 8 years for possession of cocaine with intent to deliver, and 9 years for UUW. Defendant appealed.

Defendant first challenges his armed violence conviction under the relevant statute. He argues that, as the facts are undisputed, we may review his claim *de novo*. The State responds that reasonable doubt is the appropriate standard of review here.

We agree with defendant that a *de novo* standard of review applies in this case. Such a standard has been applied not just to questions of statutory construction, but also where, as here, a defendant questions whether the undisputed facts satisfied the statutory elements of the armed violence statute. See *People v.*

Smith, 191 Ill. 2d 408, 411 (2000); *People v. Anderson*, 364 Ill. App. 3d 528, 532 (2006).

That statute provides, in pertinent part, that a person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law. 720 ILCS 5/33A-2(a) (West 2008). A person is armed with a dangerous weapon when he "carries on or about his *** person or is otherwise armed" with a handgun. 720 ILCS 5/33A-1(c) (West 2008). Our supreme court has further refined the definition of "otherwise armed" to mean "having immediate access to or timely control" over the weapon. *People v. Harre*, 155 Ill. 2d 392, 396 (1993).

Defendant does not dispute that, on the evidence, he committed possession of cocaine, which served as the predicate felony offense for the armed violence statute. Nor does he dispute that he stood about 15 feet from the vehicle in which the holstered gun was located when apprehended by the police.

Rather, he contends that on these facts, he was not "otherwise armed" with the handgun and the State therefore failed to prove an element of the offense.

Defendant relies primarily on *Smith*. There, as police approached the defendant's apartment building, where they later discovered narcotics, they saw him drop a handgun out of the apartment window. The unloaded handgun dropped to the ground, where police recovered it. Our supreme court held that those

facts were insufficient to satisfy the "otherwise armed" element of the armed violence statute because the defendant did not have immediate access to or timely control over the weapon when the police entered. The court concluded that a finding of guilty would frustrate the statute's purpose, which is to deter felons from using dangerous weapons.

The State responds that *Smith* is irrelevant where the facts in this case show that defendant carried the handgun on or about his person while committing the narcotics offense, which is also an element of armed violence. The State argues that this case is more analogous to *Harre*.

In *Harre*, police confronted the unarmed defendant as he stood next to the closed door of a car and its slightly more than half-opened window. Police discovered two loaded guns in the front seat of the car and two garbage bags of cannabis in the car's trunk. Our supreme court found the evidence sufficient to sustain the defendant's conviction of armed violence for two reasons. First, the court determined that the defendant had direct access to a dangerous weapon. Second, and more important for the purposes of this appeal, the court found that circumstantial evidence "clearly supported the inference that defendant had moments before his apprehension been riding in the car on his way to a drug delivery with a weapon inches from his grasp." *Harre*, 155 Ill. 2d at 400. The court thus found the

evidence supported a finding that the defendant had about his person a dangerous weapon and also was otherwise armed while committing the felony.

We agree with the State that this case is more like *Harre* than *Smith*. Here, police observed defendant carrying a handgun and holster in which he had stowed cocaine for delivery. Although the evidence does not support a finding that defendant had direct access to the handgun upon apprehension by police, and thus was not "otherwise armed," the evidence does support a finding that defendant carried the handgun on or about his person while committing the narcotics offense. This case is therefore distinguishable from *Smith*, where there was no evidence that the defendant used, displayed or possessed a weapon during the underlying felony. See *People v. Brown*, 362 Ill. App. 3d 374, 381 (armed violence conviction upheld where defendant had loaded handgun while fleeing or attempting to elude police, even though weapon ejected from car before defendant was apprehended); See also *People v. Condon*, 148 Ill. 2d 96, 110 (1992) (holding, *in dicta*, that armed violence committed where defendant uses, displays, or carries on his person the weapon while committing felony). We find these facts supported defendant's conviction of armed violence.

Relying on *People v. Neylon*, 327 Ill. App. 3d 300, 309-310 (2002), defendant nevertheless argues that under *Smith*, the

determination of whether a defendant is armed must be made at the moment of arrest. In so arguing, defendant suggests that *Smith sub silentio* overruled *Harre's* conclusion to the contrary. See *Smith*, 191 Ill. 2d at 419-420 (McMorrow, J., concurring in part and dissenting in part, joined by Miller and Freeman, JJ.). We disagree.

In *Anderson*, this court observed that "[t]he determinative point for *Smith* is not the moment of arrest *per se*, but the moment when the defendant no longer poses the kind of threat that the armed violence law was designed to prevent." *Anderson*, 364 Ill. App. 3d at 541. And, that, the *Anderson* court stated, is entirely consistent with *Harre*: "[w]hereas the defendant in *Smith* surrendered his gun voluntarily, before the police gave any commands, the defendant in *Harre* did not relinquish his access to a weapon until the police ordered him away from the car with guns drawn." *Anderson*, 364 Ill. App. 3d at 542. As such, a defendant is guilty of armed violence if he possesses a weapon at a time when there is the immediate potential for violence, such as during a drug transaction or an escalating encounter with police. *Anderson*, 364 Ill. App. 3d at 542. Such was the case here. Merely because defendant did not possess the handgun when apprehended does not mitigate the fact that it was within his possession during the course of the underlying felony. At that time, he could have discharged the gun on any of the three

narcotics buyers, and the armed violence conviction was therefore proper.

Defendant next challenges the validity of his convictions under the one-act, one-crime rule. Although defendant did not raise this claim below, thus forfeiting it, our supreme court has held that "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Accordingly, we proceed in our review.

It is well-established that multiple convictions are improper if they are based on precisely the same physical act. *Nunez*, 236 Ill. 2d at 494. However, multiple convictions and concurrent sentences are allowed where a defendant has committed several acts, despite the interrelationship of those acts. *Nunez*, 236 Ill. 2d at 494. An "act" means any overt or outward manifestation which will support a different offense. *Nunez*, 236 Ill. 2d at 494.

Defendant first contends that his armed violence and drug convictions violate the one-act, one-crime rule because they arise from the same act of possessing cocaine.

The State concedes, and we agree, that these multiple convictions based on the same act are improper. *People v. Garcia*, 296 Ill. App. 3d 769, 784 (1998). The cocaine defendant

delivered was discovered in a singular location, the holster of his gun, and there was no evidence that defendant segregated any cocaine for personal use. Defendant's act of possessing the cocaine, which served as the predicate offense for the armed violence conviction, therefore was the same act which also supported his conviction of possession of cocaine with intent to deliver. *Garcia*, 296 Ill. App. 3d at 784. Because judgment must be entered, and sentence imposed, on the more serious offense, we vacate defendant's drug conviction. *Garcia*, 296 Ill. App. 3d at 784.

Defendant next contends that his armed violence and UUW convictions violate the one-act, one-crime rule because they arise from the same act of possessing a handgun. He relies on *People v. Williams*, 302 Ill. App. 3d 975 (1999), wherein this court held that the defendant's convictions of armed violence, based on possession of a controlled substance, and UUW, violated the one-act, one-crime rule. The court concluded, "the common act is a felon possessing a gun and drugs simultaneously." *Williams*, 302 Ill. App. 3d at 978.

The State argues that *Williams* was wrongly decided and urges this court to follow *People v. White*, 311 Ill. App. 3d 374 (2000). *White* addressed the exact same one-act, one-crime issue, but came to the opposite conclusion, that the convictions of armed violence and UUW were based on separate acts. The court

reasoned that "[a]lthough both offenses shared the common act of possession of a weapon, armed violence required the additional act of possession of the drugs, and unlawful possession of a weapon by a felon required the additional element of status as a felon." *White*, 311 Ill. App. 3d at 386.

We find the reasoning in *White* more persuasive and, accordingly, hold that defendant's convictions of armed violence and UUW were based upon separate acts.

We further note that defendant does not argue that one offense is lesser-included of the other, and our review of the charging instruments and relevant statutes does not reveal that to be the case. See *White*, 311 Ill. App.3d at 386-87.

Based on the foregoing, we affirm defendant's convictions of armed violence and UUW. We vacate defendant's conviction of possession of cocaine with intent to deliver. We order the clerk of the circuit court to correct the mittimus accordingly.

Affirmed in part; vacated in part; mittimus corrected.