

No. 1-10-1501

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**SIXTH DIVISION
JUNE 24, 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. 09 CR 15911
)	
ABDUL JONES,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

ORDER

HELD: When a defendant is found in an apartment with keys to the apartment in his clothes, and where he tells the police where a gun is hidden, and there is no other evidence as to who lives in the apartment, there is a reasonable inference that defendant had constructive possession of the weapon.

Following a bench trial, defendant, Abdul Jones, was convicted of two counts of unlawful use of a weapon by a felon and one count under the armed habitual criminal statute. After hearing aggravation and mitigation, the trial court sentenced defendant to seven years in the Illinois Department of Corrections. Defendant argues on appeal that: (1) the State failed to

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prove beyond a reasonable doubt that he maintained constructive possession over the recovered gun; and (2) the armed habitual criminal offense conviction violated the *ex post facto* clause of the United States and Illinois Constitutions. We affirm.

BACKGROUND

The following testimony was adduced at defendant's bench trial:

On August 19, 2009, at approximately 7:00 p.m. defendant, age 32, went to the apartment of Charise Alexander, the mother of his two daughters, after being informed that Charise had been arrested for fighting. Charise was also the mother of three other children, who were fathered by a man named Christopher Edmonds. Defendant testified that Charise, Edmonds, and all five children resided at Charise's apartment, located on the west side of Chicago. At trial, defendant testified that he had been residing with his mother and sister in a separate apartment located on the west side of Chicago for the previous four years. Upon arriving at Charise's apartment, defendant testified that Charise's friend, a woman named Quesha, who had been watching the children, let him into the apartment and left soon thereafter to catch a train leaving the city. Defendant testified that he began preparing dinner for the children.

At approximately 7:50 p.m., a group of police officers, which included Officers Richard Alvarez, Alexander Gallegos, and Marco Bruno arrived at Charise's apartment by squad car to execute a search warrant. Upon arrival at the unit, the officers testified that they proceeded through the alley of the multi-unit building to the backyard. The officers then proceeded up the rear staircases until they reached the third floor, where Charise's apartment was located. The officers noticed the rear door was ajar. Officer Alvarez announced the officer's presence and that they had a search warrant, and entered the apartment through the rear door into the kitchen.

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All three officers testified that they observed defendant in the rear bedroom from where they were standing. Officers Alvarez and Gallegos testified that once defendant saw the officers, defendant raised his hands and walked toward them. As defendant walked toward the kitchen area, Officer Bruno testified that he proceeded to the rear bedroom where defendant had first been observed.

Once defendant reached the kitchen, Officer Gallegos testified that he informed defendant that they were there to look for contraband, which included firearms, and read defendant his Miranda rights. Officer Alvarez testified that Officer Gallegos proceeded to ask defendant questions, while Officer Gallegos testified that he did not ask defendant questions. However, both Officers Gallegos and Alvarez testified that shortly after the Miranda rights were read defendant told them there was a gun under a sofa cushion. Officer Bruno testified that he was less than fifteen feet away from defendant and could observe Officers Gallegos and Alvarez talking to defendant as well as hear Officer Gallegos reading defendant his Miranda rights, but he could not recall if defendant said anything after he received his Miranda rights.

Officers Bruno and Alvarez testified that Officer Gallegos told Officer Bruno to look under the sofa cushion for a gun. However, Officer Gallegos testified that he did not have the opportunity to instruct Officer Bruno to look under the sofa cushion because shortly after defendant told them the location, Officer Bruno already had recovered the gun. Officer Bruno further testified that upon locating the gun, he noticed that the gun was loaded with six bullets. He continued to search the bedroom and found six additional live rounds hidden in a sock in the closet of the bedroom.

There were also inconsistencies between the officers' testimony and their written reports.

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The arrest report indicated the officers advised defendant of his Miranda rights, conducted a search of the premises, and then located the gun. On the other hand, the supplemental report stated that the officers detained defendant, conducted a systematic search of the premises, found the gun, and then advised defendant of his Miranda rights. Neither report indicated defendant made a statement regarding the location of the gun or that Officer Gallegos instructed Officer Bruno to look under the sofa cushion. However, Officer Alvarez testified that the arrest report was a summary and not “everything word for word that occurred that day.”

After the recovery of the gun, Officer Gallegos testified that he placed defendant in custody and conducted a custodial search. Officer Gallegos testified that he found a set of keys in defendant’s right pocket. First, Officer Gallegos proceeded to the rear door, where he had gained entry to the apartment, and inserted the keys in the lock and successfully turned the key inside the lock. Officer Gallegos then tested the keys on another lock on the rear door as well as a bottom lock on the front door; the keys worked for each lock. While the arrest report does not indicate that Officer Gallegos found keys in defendant’s right pocket, the supplemental report indicates “keys to an apartment” under an entry for proof of residency.

Officer Gallegos also testified that he photographed the gun after it had been recovered in the same place where it had been found. Officer Gallegos testified that the bedroom contained a television, video game system, a hot plate, cooler, and clothing. Officer Gallegos testified that he briefly looked at the clothing and noticed male clothing, but could not recall if there was any women’s clothing. Officer Gallegos did not indicate this observation in his arrest report. He further testified that it did not appear that a woman lived in the apartment. Officer Bruno also testified that he could not recall if the bedroom contained any women’s clothing, cosmetics, or

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photographs. Aside from the keys that Officer Gallegos obtained, the officers testified that they could not find any further proof of residency or any other adult, aside from defendant, in the apartment.

Defendant testified on his own behalf and testified that he was in the kitchen with his two daughters when the police entered the unit. He testified that he went to Charise's apartment on occasion to visit his children and did not have a relationship with Charise at the time of the incident. Defendant testified that he did not have keys to the apartment and did not use a key to unlock the door because a woman named Quesha let him in. He denied making any statements to the police that there was a gun under the sofa cushion. He denied any knowledge of a gun located in the apartment.

The parties stipulated to defendant's previous felony convictions, one for possession of a controlled substance with intent to deliver in 1996, and one for unlawful use of a weapon by a felon in 2000.

At the conclusion of the trial, the trial court found defendant guilty on all three counts.

The trial court stated:

"A couple of things are certain in this case.

That being that a gun was recovered from the bedroom. And the defendant was the only adult present when the gun was recovered.

Obviously mere presence on a scene or location where an item is found does not show knowledge or constructive possession.

I have to look to all the circumstances to determine whether or not there is in fact constructive possession shown of the gun that is found on the sofa.

[Defense counsel] argues that the circumstances surrounding admission that either lead to the recovery of the weapon or lead to the admission of ownership of the

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weapon is not consistent with the officers.

I would agree with him, it is not consistent. Some officers say it was before the gun was recovered, some infer simultaneous. Some say after the gun was recovered. But I have to determine whether that statement was in fact made.

Based on the totality of the circumstances here I do find that the testimony with regard to statement that the defendant admits ownership of the gun, knowledge of the gun is, in fact, credible.

Despite some inconsistencies with regard to how and when it was actually referred to. The defendant's version of the events that he just so happened to be there and unbeknownst to him search warrant was executed and he was literally without a chair as the music stopped, I don't find to be credible.

I believe that he has sole possession of that apartment as the sole adult. I also find that beside his admission that he knew where the gun was, and it was his gun.

I also find credible the fact keys were found on his person and fit both the front door and back door locks to that particular apartment.

The defense doesn't try to infer the gun could have been someone else's. However, I don't find the inference to be credible based on the testimony I have heard.

I believe there is direct and circumstantial evidence that the defendant had access and not ownership of the gun.

And that he was in fact staying there. Whether or not he was living there is irrelevant, but I don't think the was an innocent bystander, that he just so happened to be there when the gun was recovered."

Defendant filed a post-trial motion, which was denied. At sentencing the trial court heard aggravation and mitigation and then sentenced defendant to seven years in the Illinois Department of Corrections. Defendant filed a timely appeal.

ANALYSIS

On appeal, defendant argues that the State failed to prove constructive possession beyond a reasonable doubt over the gun recovered. Defendant further argues that his conviction under

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the Armed Habitual Criminal Statute violates the *Ex Post Facto* clauses of the United States and Illinois Constitutions because both of his qualifying offenses occurred before the effective date of the statute.

I. Constructive Possession

Defendant argues that the only evidence linking him to the weapon and ammunition was an “alleged recovery of keys from his pocket,” “his mere presence in the vicinity of the weapon,” and an “alleged uncorroborated, out-of-court admission.”

When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Pryor*, 372 Ill.App.3d 422 (2007); *People v. Smith*, 185 Ill.2d 532, 541 (1999). A reviewing court will not reverse a criminal conviction unless the evidence is so “unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt.” *People v. Rowell*, 229 Ill.2d 82, 98 (2008). Furthermore, a reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness's testimony. *People v. Jackson*, 232 Ill.2d 246, 281 (2009); *People v. Ross*, 229 Ill.2d 255, 272 (2008).

A person commits the offense of being an armed habitual criminal if he “receives, sells, possesses, or transfers any firearm” after having been convicted of at least two triggering offenses. 720 ILCS 5/24–1.7 (West 2008). A person commits the offense of unlawful use of a weapon by a felon if he knowingly possessed a a firearm, firearm ammunition, or another prohibited weapon after having been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008).

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Under both laws, criminal possession may be proven by showing that the defendant had actual or constructive possession of the weapon. *People v. McCarter*, 339 Ill.App.3d 876, 879 (2003).

Constructive possession exists where defendant has no actual personal present dominion over the contraband, but defendant has the intent and a capability to maintain control and dominion over the contraband. *People v. Morrison*, 178 Ill.App.3d 76, 90 (1988); *People v. Valentin*, 135 Ill.App.3d 22, 31 (1985). To establish guilt on a theory of constructive possession of a firearm, the State must prove that (1) that defendant had knowledge of the presence of the weapon and (2) that defendant exercised immediate and exclusive control over the area when the weapon was found. *McCarter*, 339 Ill.App.3d at 879; *People v. Bailey*, 333 Ill.App.3d 888, 891 (2002). Constructive possession is can be proven by circumstantial evidence. *People v. McLaurin*, 331 Ill.App.3d 498, 502 (2002). The trier of fact can rely on reasonable inferences to determine knowledge and possession. *People v. Smith*, 191 Ill.2d 408, 413 (2000). For example, control over the location where the weapons is found gives rise to a reasonable inference that defendant possessed the weapons. *People v. Hammer*, 228 Ill.App.3d 318, 323 (1992); *People v. Chico*, 205 Ill.App.3d 928, 935 (1990).

The evidence in the case at bar showed that defendant was the sole adult in the apartment at the time the police officers entered the apartment and executed the search warrant. All three officers testified that defendant was standing in the bedroom, the room in which the gun and ammunition were recovered, at the time of their entry. Further, Officer Gallegos testified that he recovered keys, which fit into the locks of both the front and rear doors of the apartment, from the defendant's front pocket. Finally, two police officers testified that defendant admitted to the location of the gun after being read his Miranda rights.

In support of his argument, defendant relies on *People v. Macias*, 299 Ill. App. 3d 480 (1998). In *Macias*, a police officer observed defendant, a suspected drug dealer, entering an apartment building. *Macias*, 299 Ill. App. 3d at 482. The police officers noticed that lights went on in the rear first-floor apartment when defendant entered the building and obtained a search warrant. *Macias*, 299 Ill. App. 3d at 482. The following day, the officers stopped defendant in his parked vehicle, served him the search warrant, read him his Miranda rights, and conducted a pat down search. *Macias*, 299 Ill. App. 3d at 482. The search revealed more than a dozen keys. *Macias*, 299 Ill. App. 3d at 482. The officers entered the same apartment that they had observed defendant enter the previous day with the keys. *Macias*, 299 Ill. App. 3d at 482. Inside the apartment the officers discovered cocaine and two guns hidden in a bedroom. *Macias*, 299 Ill. App. 3d at 482. Defendant admitted to possession of the keys, he testified that he did not live in the apartment and explained that his friend, who did live in the apartment, had given him the keys so that he could retrieve personal items for the friend from the apartment while his friend was in the hospital. *Macias*, 299 Ill. App. 3d at 482. This court reversed the defendant's conviction for unlawful use of a weapon by a felon for insufficient evidence. *Macias*, 299 Ill. App. 3d at 488. We took note of the fact that the officers testified that they had only "seen defendant enter the *building* and lights go on in the *rear apartment*, rather than seeing defendant enter the *apartment* and the lights go on in the *rear bedroom*." *Macias*, 299 Ill. App. 3d at 487. Furthermore, defendant's explanation of why he had the keys to the apartment was "not contradicted, and was, in fact, corroborated." *Macias*, 299 Ill. App. 3d at 485. Here, all three officers testified to observing defendant in the bedroom, which was the very room in which the weapon was recovered, when they entered the unit. Second, defendant's denial of the possession

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of keys to the apartment was not corroborated, but in fact, contradicted by the testimony of Officer Gallegos, which was corroborated by Officer Gallegos' indication on the supplemental report regarding the keys.

Defendant also cites to *People v. Jones*, 105 Ill. App. 3d 1143 (1982), in support of his argument. In *Jones*, the appellate court reversed a conviction despite the fact that there was police testimony that the defendant admitted to living in the apartment and the police discovered a letter in the apartment addressed to defendant at the same address. *Jones*, 105 Ill. App. 3d at 1148-49 (1982). At trial, defendant denied making any admissions to the police, and the other defense witnesses supported defendant's explanation as to why he was at the apartment, which was to move his mother's furniture. *Jones*, 105 Ill. App. 3d 1143 at 1149. The testimony showed that there were no towels, bed linen or toiletries found at the apartment, and the only items of clothing found at the apartment were "wadded up" in a box on the second floor. *Jones*, 105 Ill. App. 3d 1143 at 1149. Here, there was police officer testimony that the bedroom contained a television, video game system, a hot plate, cooler, and clothing, specifically men's clothing.

Viewing the evidence in the light most favorable to the State, we cannot say that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt.

II. Armed Habitual Criminal Offense

Next, defendant argues that the trial court's conviction under the armed habitual criminal statute should be reversed because it violates the *Ex Post Facto* clause of the United States and Illinois Constitutions because both of defendant's qualifying convictions occurred before the

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effective date of the armed habitual criminal statute.

When reviewing the constitutionality of a statute, this court presumes that the statute is constitutional and the party challenging it bears the burden of establishing its unconstitutionality. *People v. Malchow*, 193 Ill.2d 413, 418 (2000). We review defendant’s challenge to the constitutionality of this statute *de novo*. *People v. Thomas*, 407 Ill. App. 3d 136, *¹ (2011) citing *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009).

On August 2, 2005, the armed habitual criminal statute became effective and created the offense of an armed habitual criminal:

A person commits the offense of being an armed habitual criminal if he or she receives, sells or possesses or transfers any firearm after having been convicted a total of two or more times of any combination of the following offenses:

- (1) a forcible felony defined in Section 2–8 of this Code;
- (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm; or
- (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.”

720 ILCS 5/24–1.7(a) (West 2008). The elements of the offense are: (1) possession of a firearm; and (2) at least two prior convictions for certain enumerated offenses. The statute does not require that the prior offenses occur after the effective date of the statute.

Both the Illinois and United States Constitutions prohibit *ex post facto* laws. Ill. Const.1970, art. I, § 16; U.S. Const., art. I, § 9, cl. 3; § 10, cl. 1. An *ex post facto* law is one that

¹ Not yet cited.

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(1) makes criminal and punishable an act innocent when done; (2) aggravates a crime, or makes it greater than it was when committed; (3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the law; or (4) alters the rules of evidence to require less or different evidence than required when the crime was committed. *People v. Morgan*, 377 Ill. App. 3d 821, 823 (2007) (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). The prohibition against *ex post facto* laws is founded on the basis of a person's right to have fair warning of conduct giving rise to criminal penalties and punishment. *People v. Coleman*, 111 Ill.2d 87, 93-94 (1986). To establish an *ex post facto* violation, the defendant must show that the law in question was applied to events that occurred before its enactment and disadvantaged the defendant “by altering the definition of criminal conduct or increasing the punishment for the crime.” *Lynce v. Mathis*, 519 U.S. 433, 441 (1997).

Defendant argues that the application of the armed habitual criminal statute violates the *ex post facto* clause because “it changes the legal consequences of the act that resulted in [defendant’s] two qualifying convictions, acts which were completed years before the effective date of the armed habitual criminal statute.” Furthermore, he argues that the *ex post facto* clause “forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred.”

We have consistently rejected similar *ex post facto* challenges to the armed habitual criminal statute. See *People v. Adams*, 404 Ill. App. 3d 405 (2010); *People v. Bailey*, 396 Ill. App. 3d 459 (2009); *People v. Leonard*, 391 Ill. App. 3d 926 (2009). However, defendant argues that we should not follow these decisions because they conflict with the *ex post facto* principles. We disagree.

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Defendant's arguments regarding the armed habitual criminal statute and its claimed violation of ex post facto laws were recently raised in the Third District case of *People v. Leonard*, 391 Ill. App. 3d 926 (2004) and in the First District case of *People v. Bailey*, 396 Ill. App. 3d 459 (2009).

In *Leonard*, which is analogous to this case, the defendant was convicted as an armed habitual criminal upon possessing a firearm and having had been convicted previously of three qualifying offenses between 1998 and 2004. *Leonard*, 391 Ill. App. 3d at 931. Like this case, the defendant's prior convictions were used as an element of the offense, even though they occurred before the offense was enacted. *Leonard*, 391 Ill. App. 3d at 931. The *Leonard* court found that the statute does not constitute ex post facto legislation. *Leonard*, 391 Ill. App. 3d at 931. After examining the statute, the *Leonard* court explained that it did not punish the defendant for offenses he committed before it was enacted but, instead, punished him for the separate offense of possessing a firearm after having been convicted of three of the statute's enumerated offenses. *Leonard*, 391 Ill. App. 3d at 931. The *Leonard* court concluded that the defendant had ample warning that he was committing the offense. *Leonard*, 391 Ill. App. 3d at 931. Since his prior convictions were only an element of the offense, he was not being punished for those acts, but for the new act of possessing a firearm as a felon. *Leonard*, 391 Ill. App. 3d at 931-32.

In *Bailey*, this court came to the same conclusion when defendant, on July 26, 2006, was found in possession of four firearms, after a valid search of a furnace room in the basement of a residence where he resided. *Bailey*, 396 Ill. App. 3d at 461-62. The defendant had two prior felony convictions from November 1997. *Bailey*, 396 Ill. App. 3d at 462. The defendant was

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convicted of one count of the offense of armed habitual criminal and four counts of unlawful use of a weapon by a felon. *Bailey*, 396 Ill. App. 3d at 462. In *Bailey*, we said:

“We find no reason to depart from the holding of our sister court on this issue. It is clear to us that, contrary to defendant's contention here, the armed habitual criminal statute does not punish him for the drug offenses he committed in 1997 before the statute's effective date but, rather, properly punishes him for, as he himself points out, the new and separate crime he committed in 2006 of possessing firearms while having already been convicted of two prior enumerated felonies, an offense of which he had fair and ample warning. Accordingly, we too hold that the armed habitual criminal statute is not violative of the United States and Illinois constitutional prohibitions against *ex post facto* legislation.”

Bailey, 396 Ill. App. 3d at 464.

In addition, we made the same holding in *People v. Ross*, 407 Ill. App. 3d 931 (2011).

This court finds no reason to depart from the holding of our sister court on this issue or from what we have previously held in *Leonard*, *Bailey*, and *Ross*.

CONCLUSION

Viewing the facts in the light most favorable to the State, we cannot find that the trial court could not have found the essential elements of constructive possession beyond a reasonable doubt. Furthermore, we cannot find that the armed criminal habitual statute violates *ex post facto* clauses of the United States and Illinois Constitutions.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.