

2011 IL App (1st) 093481-U
No. 1-09-3481
Order filed October 18, 2011
Modified upon rehearing November 22, 2011.

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SECOND DIVISION
November 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> the Interest of Carlos B., a Minor)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
)	Cook County.
Petitioner-Appellee,)	
)	
v.)	No. 09 JD 3777
)	
CARLOS B.,)	Honorable
)	Carl Anthony Walker,
Respondent-Appellant).)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Where respondent committed the offense of possession of a controlled substance while armed with a dangerous weapon, he was proven guilty beyond a reasonable doubt of armed violence; the circuit court's judgment was affirmed.

¶ 2 Following a bench trial, minor respondent Carlos B. was found delinquent based on his commission of the Class X offense of armed violence, possession of a controlled substance, and unlawful possession of a firearm, and committed to the juvenile division of the Illinois Department of Corrections for an indeterminate period of time. On appeal, respondent contends that the State failed to prove him guilty of armed violence where his possession of a firearm did

not occur concomitantly with the offense of possession of a controlled substance, and there was no evidence of any nexus in time and place between his possession of the gun and his constructive possession of cocaine. We affirm.

¶ 3 At trial, Officer John Adreani testified that on the evening of September 15, 2009, he was on a tactical team of several officers who executed a search warrant at 1455 Avers Avenue in Chicago. As Adreani approached the residence, he saw respondent sitting on the front porch. When respondent looked in the direction of the officers, he reached for his waistband, stood up, and attempted to enter the residence, but Adreani detained him. Officer Zemba searched respondent's waistband and recovered a loaded gun. Respondent was placed under arrest and escorted to an area outside of the residence where several people from the house were being held for security reasons. Respondent was read his *Miranda* rights in front of his parents and indicated that he understood his rights.

¶ 4 Officer Adreani and Officer Livergood, who had his drug detection dog with him, went through the residence in question. The dog positively indicated that narcotics were in a garbage can and near a night stand in the front bedroom. The officers did not search the garbage can or the night stand and continued to investigate the rest of the house, which took about 25 minutes. Following their investigation of the house, Adreani and Livergood went outside, talked to respondent, and asked him if there was anything illegal in the house. Respondent stated that he had "some rocks" in his bedroom, and brought Adreani into his bedroom, which was the same bedroom that the dog indicated contained narcotics. While they were inside the bedroom, respondent indicated that there would be drugs in the area near the night stand. Adreani searched a pair of socks that was inside the night stand and recovered 40 rock-like substances in plastic baggies. Jorge Gomez, a forensic scientist, testified that he analyzed the contents of 1 of the 40 bags recovered by police, which had a weight of .1 gram, and that it tested positive for

cocaine.

¶ 5 Following closing arguments, the trial court found respondent delinquent based on his commission of armed violence, possession of a controlled substance, and unlawful possession of a firearm.

¶ 6 On appeal, respondent only contends that he was not proven guilty beyond a reasonable doubt of armed violence. He specifically maintains that the facts do not support the armed violence finding where there was no evidence of a nexus or proximity in time and place shown between his actual possession of a firearm and his constructive possession of the narcotics.

¶ 7 Relying on *People v. Smith*, 191 Ill. 2d 408, 411-12 (2000) and *People v. Lamborn*, 185 Ill. 2d 585, 590 (1999), respondent argues that *de novo* review should apply here because the issue involves whether the armed violence statute applies to a set of undisputed facts. The State maintains that respondent is in fact challenging the sufficiency of the evidence because he is contesting the inferences drawn from the evidence presented at trial when he argues that there was no evidence that respondent's possession of a gun and his constructive possession of drugs had any connection to each other in terms of time, place, and proximity. See *People v. Gilmore*, 356 Ill. App. 3d 1023, 1034 (2005) (holding that although the core facts may be undisputed, where the inferences drawn from those facts are disputed, the deferential standard of review applies). We find that, even applying *de novo* review, the evidence was sufficient to support the finding that respondent committed armed violence.

¶ 8 In this case, respondent was found delinquent of armed violence in violation of section 33A-2(a) of the Criminal Code of 1961, which provides that "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law," except for certain felonies listed in the statute that are inapplicable to the case at bar. 720 ILCS 5/33A-2(a) (West 2008).

¶ 9 As expressly conceded by respondent, it is well-settled that constructive possession of a controlled substance can serve as the predicate felony for an armed violence conviction. *People v. Hernandez*, 229 Ill. App. 3d 546, 552 (1992). For example, in *Scott*, the parties stipulated that the defendant's guilty plea to possession of cannabis with intent to deliver satisfied the State's burden to prove that, at the time of the alleged armed violence, he was committing a felony. *People v. Scott*, 2011 IL App (2d) 100990, ¶ 6. Specifically, in *Scott*, this court held that the defendant was armed with a dangerous weapon, while a bag of cannabis was found on the floor near him. *Scott*, 2011 IL App (2d) 100990, ¶¶ 7, 30; see also *People v. Lenoir*, 125 Ill. App. 3d 260, 267 (1984) (holding that the underlying offense of possession is not inconsistent with the purpose of the armed violence statute, and any potential danger posed by an armed felon does not necessarily depend on his actual possession of a substance).

¶ 10 When viewed in the light most favorable to the State, we find that respondent was proven guilty of armed violence beyond a reasonable doubt where he committed the offense of possession of a controlled substance while armed with a dangerous weapon. The evidence showed that on September 15, 2009, Officer Adreani and a tactical team of several officers executed a search warrant at 1455 Avers Avenue in Chicago. As Adreani approached the residence, he saw respondent, who was sitting on the front porch. Respondent looked in the direction of the officers, reached for his waistband, stood up, and attempted to enter the residence. Adreani detained him before he entered the residence, and a second officer searched his waistband and recovered a loaded gun. Respondent was placed under arrest and escorted to an area outside of the residence. Police then went through the residence with a drug detection dog, and the dog positively indicated that narcotics were in the front bedroom. The officers continued their investigation of the house, and then exited the residence. Adreani asked respondent if there was anything illegal in the house, and respondent stated that he had "some

rocks" in his bedroom. Adreani went into respondent's bedroom, which was the same bedroom that the dog indicated contained narcotics, and while they were inside, respondent indicated that drugs were near the night stand. Adreani searched a pair of socks that was inside the night stand, resulting in the recovery of cocaine.

¶ 11 Nevertheless, respondent maintains that the armed violence statute cannot apply unless the predicate offense and the possession of the firearm occurred "concomitantly," as a "single, continuous offense," and share "a nexus or proximity in time and place." These terms, however, do not appear in the statutory language. The primary purpose of statutory construction is to determine and give effect to the legislature's intent. *In re D.D.*, 196 Ill. 2d 405, 418-19 (2001). The best indication of legislative intent is the language of the statute itself. *In re D.L.*, 191 Ill. 2d 1, 9 (2000). As stated above, the plain language of the armed violence statute requires only that the offender commits any felony, "while armed with a dangerous weapon." 720 ILCS 5/33A-2(a) (West 2008). Under the plain language, the evidence here established respondent was in possession of a loaded gun on his front porch while he was in possession of cocaine in his bedroom.

¶ 12 The fact that respondent did not have actual possession of the cocaine in his bedroom at the time he possessed the gun does not show that the possession of the firearm and the possession of the cocaine were "separate events" as argued by respondent. Instead, respondent's constructive possession of the cocaine while he was armed with a dangerous weapon satisfies the statutory requirement of armed violence. Constructive possession exists without actual present dominion over a controlled substance, although there must be an intent and capability to maintain control and dominion. *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). Constructive possession thus presumes that the drugs are not on the defendant's person.

¶ 13 We find *Scott*, 2011 IL App (2d) 100990, instructive to the case at bar. In *Scott*, this

court affirmed the defendant's conviction for armed violence where the evidence showed that while police were executing a search warrant, the defendant was "armed with a dangerous weapon," and cannabis was found "near" where he was detained. *Scott*, 2011 IL App (2d) 100990, ¶¶ 7, 30. Specifically, the cannabis was found on the floor in the living room while the shotgun was underneath a love seat. Therefore, the defendant was in constructive possession of both the shotgun and the drugs. This court noted that the armed violence statute was enacted in response to the legislature's conclusions that the use of a dangerous weapon in the commission of a felony offense posed a greater risk to the public than when a weapon is not used, and using a firearm greatly facilitates the commission of a criminal offense. *Scott*, 2011 IL App (2d) 100990, ¶ 31. We concluded that the defendant's conviction in *Scott* was consistent with the legislature's intent to deter the use of firearms in the commission of a felony, particularly where he was protecting his merchandise with a shotgun. *Scott*, 2011 IL App (2d) 100990, ¶ 31.

¶ 14 Similarly to *Scott*, police in this case were executing a search warrant when they detained respondent on the front porch. The evidence showed that police recovered a gun from respondent as he attempted to enter the residence, and then found cocaine in his bedroom. The case at bar is an even stronger case than *Scott* because respondent here was in actual possession of the gun when police detained him. Moreover, respondent's conviction is consistent with the legislature's intent to deter the commission of felony offenses with firearms. In so finding, we are not persuaded by respondent's argument that there can be no nexus in the absence of evidence of drug dealing. Respondent was on his front porch with a loaded gun while police approached to execute a search warrant. Whether defendant intended to sell the drugs or protect his possession of them seems to produce the same danger. See *Scott*, 2011 IL App (2d) 100990, ¶ 31 (stating that in protecting his drugs, the defendant "was no less armed than a liquor store owner who keeps a weapon under the counter to protect himself and his money from potential

robbers").

¶ 15 We further note that the 25-minute period between the time the gun was recovered from respondent, and when police recovered the narcotics, does not suggest, as respondent contends, that there was a lack of any nexus between his possession of the gun and the cocaine. On the contrary, the record shows that Officer Andreani decided to finish his investigation of the residence before confronting respondent regarding any narcotics that might belong to him. This delay does not change the fact that respondent was found on the front porch of the residence with a loaded gun in his waistband while he was in constructive possession of the cocaine in his bedroom.

¶ 16 In reaching this conclusion, we find *Smith*, 191 Ill. 2d at 408 and *People v. Condon*, 148 Ill. 2d 96 (2002), relied on by respondent, distinguishable from the case at bar. In *Smith*, 148 Ill. 2d at 412, the Illinois Supreme Court concluded that the facts did not support a guilty verdict for armed violence, and relied on the defendant's lack of propensity for violence when he discarded his weapon when the police approached him. The supreme court specifically held that permitting an armed violence conviction to stand against a felon such as the defendant, who dropped an unloaded gun out of a window when approached by police, would not serve the statute's purpose deterring criminals from involving themselves in potentially deadly situations. *Smith*, 191 Ill. 2d at 412-13.

¶ 17 In *Condon*, 148 Ill. 2d at 109, the supreme reversed the defendant's conviction for armed violence where the police executed a search warrant to seize illegal drugs at the defendant's residence and found him unarmed. Although numerous guns were found in the defendant's residence, the supreme court held that he did not have immediate access to or timely control over a weapon when the police entered. *Condon*, 148 Ill. 2d at 110. See also *People v. Neylon*, 327 Ill. App. 3d 300, 309 (2002) (reversing the defendant's convictions for armed violence where the

gun was not immediately accessible to him).

¶ 18 Here, in contrast to *Smith*, *Condon*, and *Neylon*, respondent was in actual possession of a loaded weapon and reached for his waistband where the gun was located when the police approached. Here, as in *Scott*, defendant never abandoned his weapon. "*A fortiori*, he did not abandon the weapon before its presence created the type of danger that the armed violence statute was intended to prevent." *Scott*, 2011 IL App (2d) 100990, ¶ 29.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.