

No. 1-09-3357

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 08 CR 18009
)	
RODNEY JONES,)	Honorable
)	Lawrence E. Flood,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.

Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty beyond a reasonable doubt of unlawful use of a weapon by a felon (UUWF). The UUWF statute did not violate defendant's constitutional right to bear arms. Defendant's sentence violated the rule against double-enhancement. This court affirmed defendant's conviction, but vacated his sentence and remanded the case for resentencing.

¶ 2 Following a bench trial, defendant Rodney Jones was found guilty of unlawful use of a weapon by a felon (UUWF) and sentenced to six years in prison. On appeal, he contends the State failed to prove him guilty beyond a reasonable doubt because the State's principal witness was not credible; his prior conviction was impermissibly used both as an element of the UUWF offense and to enhance his sentence, thus violating the rule against double-enhancement; and the

UUWF statute violates his constitutional right to bear arms. We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing.

¶ 3 Defendant was arrested, then charged with UUWF after police observed him toss a gun behind him while in a vehicle. Trial testimony revealed a confidential informant notified police that defendant was in a van with a weapon. After this alert, officers set up surveillance, then used their cars to block a van matching the description given. Chicago police officer Emmett McClendon, who was familiar with defendant, saw defendant in the driver's seat. Officer McClendon approached the vehicle and stood near the driver's-side window. Defendant sat up in his seat, then tossed a blue steel weapon from his right hand to the rear of the van. Officer McClendon yelled, "[g]un, he's got a gun," opened the vehicle door, and detained defendant. Meanwhile, Rayshawn Cherry, the rear-seat passenger, fled from the van. Sergeant James Sanchez, who was also on the scene, testified that he saw defendant in the driver's seat of the van and heard Officer McClendon yell defendant had a gun.

¶ 4 Police recovered a nine millimeter blue steel handgun with 11 live cartridges in the middle of the van under the right passenger seat. Officer McClendon identified the gun as the one defendant had tossed. Officer McClendon informed defendant of his *Miranda* rights, then questioned him regarding why he had the gun. Defendant responded, "Officer, you know them guys after me, sh***t, you know." Defendant again made this statement while detained at the police station. In his police report, Officer McClendon noted this statement was made at the station, but not at the scene of the crime.

¶ 5 The State entered into evidence a certified copy of conviction for aggravated unlawful use of a weapon.

¶ 6 Defendant admitted being in the van, but denied possessing a weapon. Rather, he testified that it was Cherry who possessed and disposed of the gun when the police arrived.

Defendant acknowledged that he knew Officer McClendon and had been in contact with Officer McClendon previously.

¶ 7 Following evidence and argument, the trial court found defendant guilty of UUWF. The court found Officer McClendon more credible than defendant, and his testimony corroborated by Officer Sanchez. The court noted, Officer McClendon's observation that defendant possessed the gun was unimpeached. The court specifically stated: "I think based upon the testimony of McClendon that the weapon was thrown over the back of the vehicle based upon his observation that the defendant had the weapon and that's what occurred." In determining defendant's guilt, the court refused to consider testimony of defendant's admissions regarding the gun because they were not in the police report. The court found defendant was required to be sentenced as a Class 2 felon based on his prior felony conviction and sentenced defendant to six years' imprisonment. This appeal followed.

¶ 8 Defendant first challenges the sufficiency of the evidence to sustain his conviction. In assessing the sufficiency of evidence, a reviewing court, considering all the evidence in a light most favorable to the State, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 9 The UUWF statute prohibits the possession of firearms by any person previously convicted of any felony. 720 ILCS 5/24-1.1(a) (West 2008). Defendant does not challenge his status as a previously convicted felon, but the element of possession. Defendant contends his conviction cannot be upheld where the "State's sole eyewitness *** was labeled not credible by the trial judge." Defendant notes that the trial court, in denying defendant's motion for a new

trial, stated Officer McClendon's testimony that defendant admitted possessing the gun was impeached "by omission."

¶ 10 Defendant mischaracterizes the court's findings. The court did not "label" Officer McClendon "incredible." Rather, the court found Officer McClendon's testimony impeached to the extent that he had not included defendant's alleged admissions in the police report. In the police report, Officer McClendon noted that defendant admitted possessing the gun at the police station, but not at the crime scene; Officer McClendon, however, testified that defendant made the admission both at the crime scene and the police station. The court stated it would not consider the admissions in determining defendant's guilt, but it would consider Officer McClendon's otherwise competent testimony that he observed defendant toss a gun into the rear of the van. The court noted this testimony was corroborated by that of Officer Sanchez.

¶ 11 It was for the trial judge in this case to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences therefrom. See *Siguenza-Brito*, 235 Ill. 2d at 224, 228. It is not the role of this court to substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. See *Siguenza-Brito*, 235 Ill. 2d at 224-25, 228. To the extent the trial court deemed a portion of Officer McClendon's testimony impeached by omission, on this record, such a finding did not make it impossible for the court to accept Officer McClendon's testimony as a whole. See *People v. Cunningham*, 212 Ill. 2d 274, 283-84 (2004). We cannot say the evidence was so improbable or unsatisfactory as to raise a reasonable doubt of defendant's guilt.

¶ 12 Defendant next contends the trial court impermissibly used his prior felony conviction both as an element of the UUWF offense and to enhance his sentence, thus violating the rule against double-enhancement. Although defendant did not raise this issue in the court below, we may review it for plain error because it affects a substantial right. See *People v. Myrieckes*, 315

Ill. App. 3d 478, 483 (2000); *People v. Bahena*, 296 Ill. App. 3d 67, 69 (1998).

¶ 13 In sentencing, there is a general prohibition against using a single factor both as an element of the offense and as an aggravating factor to justify a harsher sentence. *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992).

¶ 14 The State concedes, and we agree, that defendant's sentence violates the rule against double-enhancement. Defendant does not meet the criteria set forth in the statute for an enhanced sentence. Therefore, his UUWF conviction constitutes a Class 3 offense carrying a sentencing term of 2 to 10 years, not a Class 2 offense as the trial court found. See 720 ILCS 5/24-1.1(e) (West 2008).

¶ 15 Although defendant's six-year sentence is within the Class 3 range mandated by the statute, defendant argues he is entitled to a new sentencing hearing because the judge mistakenly relied on the Class 2 guidelines and the higher minimum and maximum sentences when imposing defendant's sentence. The State does not dispute defendant's assertion, and we find it has record support. We therefore vacate defendant's six-year sentence and remand the case for resentencing consistent with this order. See *People v. Milka*, 336 Ill. App. 3d 206, 236 (2003), *aff'd* 211 Ill. 2d 150, 187 (2004); *Myrieckes*, 315 Ill. App. 3d at 484.

¶ 16 Defendant, finally, contends the UUWF (see 720 ILCS 24-1.1(a) (West 2010)) statute violates his constitutional right to bear arms. He relies on *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), both of which held that the second amendment precluded banning possession of loaded handguns in the home for self-defense. Defendant argues the holdings should be extended to this case, where defendant, a convicted felon, carried a loaded and accessible gun outside his home, to invalidate his conviction.

¶ 17 We disagree. In *McDonald*, the Supreme Court specifically noted: "We made it clear in

Heller that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill' ***. We repeat these assurances here. *** [I]ncorporation does not imperil every law regulating firearms." *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3047, quoting *Heller*, 554 U.S. at 626-27.

¶ 18 Following *Heller* and *McDonald*, this court has definitively determined that the Illinois UUWF statute is not unconstitutional. See *People v. Davis*, 408 Ill. App. 3d 747, 750-51 (2011); *People v. Williams*, 405 Ill. App. 3d 958, 964 (2010); see also *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011), and cases cited therein (upholding constitutionality of armed habitual criminal statute). *Davis* reasoned that the UUWF statute serves to protect the public from the danger posed when convicted felons possess firearms, and this proportionate restriction serves a legitimate State interest. *Davis*, 408 Ill. App. 3d at 750.

¶ 19 We see no basis to depart from these soundly reasoned decisions. Defendant's facial challenge to the statute therefore fails, as does his "as-applied" challenge. In challenging the statute as applied to him, defendant argues there was no evidence "adduced to suggest that he possessed the handgun for an unlawful purpose." However, the UUWF statute does not require a showing of any improper purpose for the felon's possession of a firearm. As *Davis* noted, "[c]onvicted felons present special dangers when they possess firearms ***." *Davis*, 408 Ill. App. 3d at 750. Defendant's as-applied constitutional challenge therefore has no merit.

¶ 20 Based on the foregoing, we affirm defendant's UUWF conviction, but vacate his sentence and remand the case for the limited purpose of resentencing.

¶ 21 Affirmed in part; vacated in part; and remanded.