

**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).

No. 3--09--0679

Order filed January 26, 2011

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

|                                      |   |   |
|--------------------------------------|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the Tenth Judicial Circuit Peoria County, Illinois |
| Plaintiff-Appellee,                  | ) |   |
| v.                                   | ) | No. 07--CF--778   |
| MICHAEL HAYES,                       | ) | Honorable James E. Shadid,  |
| Defendant-Appellant.                 | ) | Judge Presiding   |

---

JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Carter concurred in the judgment.  
Justice Schmidt concurred in part and dissented in part.

---

**ORDER**

*Held:* (1) Defendant was not denied due process when the State failed to disclose that a witness received consideration for his testimony because the witness testified that he received consideration; (2) Defendant's sentence of 20 years imprisonment for armed violence was not excessive and did not violate the proportionate penalties clause; (3) The trial court did err in considering a pending charge against defendant in sentencing where a police officer testified about the events surrounding the charge; (4) Defendant's convictions for unlawful possession

of a controlled substance, unlawful possession with intent to deliver and aggravated unlawful use of a weapon are vacated because they violated the one-act, one-crime principle; (5) Defendant's conviction for armed violence is affirmed.

Defendant, Michael Hayes, pled guilty to aggravated unlawful use of a weapon (720 ILCS 5/24--1.6(a)(1) (West 2006)) and was found guilty of armed violence (720 ILCS 5/33A--2(a) (West 2006)), unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(d)(i) (West 2006)), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2006)). The trial court sentenced defendant to 20 years imprisonment for armed violence, concurrent prison terms of 6 years for unlawful possession with intent to deliver and 3 years aggravated unlawful use of a weapon, and a consecutive 3-year prison term for unlawful possession of a controlled substance. On appeal, defendant argues that (1) the State failed to disclose the consideration a witness received in exchange for his testimony, (2) his sentence for armed violence is excessive and disproportionate to the nature of the offense, (3) the trial court improperly considered criminal conduct for which he had not yet been convicted against him in sentencing, and (4) his convictions violate the one-act, one-crime rule. We affirm defendant's armed violence conviction and sentence but vacate the remaining convictions and sentences.

On July 31, 2007, defendant Michael Hayes was charged with (1) armed violence (possessing heroin while being armed with a dangerous weapon), (2) unlawful possession with intent to deliver a controlled substance (heroin), (3) unlawful possession of a controlled substance (heroin), and (4) aggravated unlawful use of a weapon (possessing an uncased loaded firearm immediately accessible to him in a motor vehicle).

On September 4, 2008, defendant pled guilty to aggravated unlawful use of a weapon. The other charges proceeded to a bench trial. At trial, Officer Aaron Watkins testified that he stopped the vehicle defendant was driving on July 12, 2007, because defendant failed to use his turn signal. When Watkins asked defendant for proof of insurance, defendant provided him with a rental agreement from a rental car company that listed someone other than defendant as the renter. Watkins called the rental car company, and a representative told him that no one other than the renter should be driving the car. The representative said that he would send someone to pick up the vehicle.

Watkins then informed defendant that he needed to exit the vehicle. Defendant refused. Watkins threatened to break the window, so defendant unlocked the door. Watkins had to force the door open and remove defendant from the vehicle. Once defendant was on the ground, Watkins retrieved a loaded revolver from

defendant's pocket. Watkins's partner, John Williams, found cannabis in defendant's other pocket.

Defendant was then placed in the rear of Watkins' squad car, where he remained until a transport vehicle arrived to take him to jail. After defendant was placed in the transport vehicle, Watkins drove his squad car from the scene. Soon thereafter, Watkins smelled cannabis. He searched the car but did not find anything. Later, the driver of the transport vehicle called Watkins and told him that defendant was bragging to another passenger about hiding drugs in Watkins' car. Watkins removed the rear seat panel of his car and found a package of heroin and cannabis. Defendant was the only person in the back seat of Watkins' vehicle that day. Watkins did not notice the odor of cannabis before defendant was in his vehicle.

Officer Williams testified that on July 12, 2007, he and Watkins stopped defendant for failing to use his turn signal. After Watkins told defendant to exit the vehicle, a "brief struggle" between Watkins, defendant and Williams ensued. After defendant was handcuffed, Watkins retrieved a gun from defendant's pocket. Williams then found a small bag of cannabis in one of defendant's pockets and \$532 in cash in another pocket. Defendant was placed in the back of Watkins' squad car, where he remained for 20 to 30 minutes. He was alone for approximately 10

minutes.

Defendant was then taken to the county jail by a transport vehicle, and Williams and Watkins returned to the squad car. Soon thereafter, Watkins smelled cannabis. About 10 to 15 minutes later, Williams smelled a "real strong, heavy odor of cannabis." Watkins pulled over, and he and Williams searched the vehicle but could not find anything. After that, they received a phone call from the driver of the transport vehicle, who said that something might be stashed in the car. They searched the car again and saw a small baggie in the back of the rear passenger seat, but they could not reach it. They obtained tools so they could take the rear seat off. Once they did, they found 17 bindles of heroin and another bag of cannabis. Williams testified that he searched the vehicle prior to his shift starting that day and did not observe any cannabis or other drugs at that time. Defendant was the only person in the rear of the vehicle that day.

Anthony Sasso testified that he was the transport driver for the Peoria Police Department on July 12, 2007. That day he transported defendant to the Peoria County Jail. There was one other individual (whose name he could not remember) in the transport vehicle with defendant. When Sasso was in the holding cell alone with the other individual, the individual told Sasso

that defendant was bragging to him that he had dumped a bunch of weed and drugs in the back seat of the squad car. Sasso then notified Watkins and Williams.

Brian Roecker testified that he was in the back of the Peoria Police Department transport vehicle on July 12, 2007. While he was being transported to the Peoria County Jail, defendant was placed in the vehicle with him. No one else was in the vehicle. Roecker asked defendant what he got caught for. Defendant said "a weapon." Roecker said, "that won't be too bad." Defendant responded, "as long as they don't find the boy that I left in the cop car." Roecker understood that "boy" meant heroin. Roecker testified that he had charges pending against him for unlawful possession of a controlled substance and unlawful possession with intent to deliver. He admitted that he was receiving consideration for those charges in exchange for his testimony.

Defendant testified that on July 12, 2007, he was driving to his daughter's grandmother's house to drop off his daughter. He was pulled over by Watkins and Williams. Watkins approached his car and asked for his license and insurance information. Defendant gave him the rental car agreement. Watkins came back to defendant's vehicle and said, "Come on." Defendant eventually opened the door, and Watkins and another officer pulled him out

of the car.

Watkins searched his pockets and found cannabis in his left back pocket and a gun in his right front pocket. After that, the officers placed him in the back seat of a squad car. He had handcuffs on the entire time. He denied having any heroin or putting anything in the seat of the squad car. Defendant was then put in the transport vehicle to be taken to jail. Roecker was also in the vehicle. He had a brief conversation during which Roecker said, "at least I am going to go in here buzzed." Defendant denied saying anything to Roecker about having drugs on him. He said Roecker's testimony was completely fabricated.

The trial judge found defendant guilty of armed violence, unlawful possession of a controlled substance and unlawful possession of a controlled substance with intent to deliver. At the sentencing hearing, the State offered as aggravating evidence the testimony of Peoria Police Officer Erin Barisch. She testified that she searched defendant's home on May 2, 2008, while defendant was out on bond in this case. Barisch found cannabis and heroin. The heroin was in a shoebox in a bedroom. The cannabis was on the dining room table, where defendant was sitting. She also found items commonly used by drug dealers, as well as a safe containing a .45 caliber handgun and a large sum of money. Defendant had a key to the safe and helped open it.

On cross-examination, Barisch testified that Carrie Hayes, defendant's sister, said that the cannabis and the shoebox containing the heroin were hers. Officer Barisch thought that defendant denied possessing the cannabis.

At the sentencing hearing, the trial court stated that it considered aggravating factors, including the May 2, 2008, search of defendant's home that uncovered heroin and guns. The court considered as a mitigating factor that defendant's conduct did not cause serious physical harm. The court sentenced defendant to 20 years imprisonment for armed violence, concurrent terms of 6 years for unlawful possession with intent to deliver and 3 years for aggravated unlawful use of a weapon, and a consecutive prison term of 3 years for unlawful possession of a controlled substance.

#### ANALYSIS

##### I

Defendant first argues that the State violated his due process rights by failing to disclose the consideration it provided to Roecker in exchange for his testimony.

The State must disclose charges pending against its witness and the terms of any deal of leniency for that witness so that a defendant can show bias. *People v. Morse*, 185 Ill. App. 3d 503, 505 (1989). Failure to do so can deprive a defendant of due

process. *Id.* However, if the defendant has knowledge of the leniency, there is no prejudice in failure to disclose. *Id.* at 506-07.

Evidence of an understanding or an agreement between a witness and the State as to any future prosecution is a factor that is relevant to the witness' credibility about which the trier of fact should be informed. *People v. Thurman*, 337 Ill. App. 3d 1029, 1032 (2003). If a witness falsely testifies that he is not receiving consideration for his testimony and the State does not correct the falsity, the defendant's due process rights may be violated. See *People v. Ellis*, 315 Ill. App. 3d 1108, 1117-18 (2000). However, the State does not have an affirmative duty to disclose promises of leniency when a witness truthfully testifies that he is receiving consideration in exchange for his testimony. *People v. Potter*, 384 Ill. App. 3d 1051, 1059 (2008).

Here, on direct examination, Roecker admitted that he had charges pending against him for unlawful possession of a controlled substance and unlawful possession with intent to deliver. The State specifically asked Roecker if he was receiving consideration for those charges in exchange for his testimony. He said that he was. Thus, defendant and the trier of fact were made aware that the State promised leniency to

Roecker. Defendant was given the opportunity to cross-examine Roecker about the consideration he received in exchange for his testimony. Defendant was not denied due process.

## II

Defendant next argues that his 20-year prison sentence for armed violence is excessive and violates the proportionate penalties clause.

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 (West 2006). Any felonies not expressly excluded from the armed violence statute may serve as predicate felonies. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008). Possession of a controlled substance is a predicate offense within the meaning of the armed violence statute. *People v. King*, 155 Ill. App. 3d 363, 367 (1987).

### A. Excessive Sentence

The sentencing range for armed violence is 15 to 30 years imprisonment. 720 ILCS 5/33A--3(a) (West 2006). A sentence that is within statutory limits will not be disturbed on appeal unless it amounts to an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). For the reviewing court to modify a sentence that is within the statutory limits, it must appear that the sentence imposed is a clear departure from the spirit and

purpose of the fundamental law and the constitutional requirement that the sentence be proportionate to the nature of the offense. *People v. Miller*, 284 Ill. App. 3d 16, 27 (1996).

The trial court's sentence of 20 years imprisonment for defendant's armed violence conviction was not improper. The court considered aggravating and mitigating factors and determined that a sentence five years above the minimum and ten years below the maximum was appropriate. We find no abuse of discretion.

#### B. Proportionate Penalties Clause

The proportionate penalties clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. In analyzing a proportionate penalties challenge, the ultimate question is whether the legislature has set the sentence in accordance with the seriousness of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 83 (2007). Courts generally defer to the legislature regarding sentencing because the legislature is better equipped to gauge the seriousness of an offense and to fashion sentences accordingly. *People v. Sharpe*, 286 Ill. 2d 481, 487 (2005).

The supreme court has found that the armed violence statute

does not violate the proportionate penalties clause, explaining:

"The plain language of the armed violence statute demonstrates that the legislature was targeting the carrying of a weapon in the commission of felonies. \* \* \* Given the required presence of a weapon for an armed violence offense, the legislature reasonably could have decided to impose a more stringent penalty because of the high risk of bodily harm associated with the presence of a weapon. We will not disturb the legislature's determination that such conduct is worthy of a greater penalty. Accordingly, the penalty for armed violence is not disproportionate to the seriousness of the offense." *People v. Koppa*, 184 Ill. 2d 159, 172 (1998).

The Fourth District specifically held that the proportionate penalties clause is not violated when a defendant is convicted of armed violence predicated on possession of a controlled substance. See *People v. Green*, 301 Ill. App. 3d 767, 772-73 (1998),

Here, defendant was convicted of armed violence for carrying a gun while possessing heroin. The legislature has determined that such conduct carries with it a penalty of 15 to 30 years. The legislature's determination that a felony committed by a person possessing a weapon is more serious than a felony committed by someone not possessing a weapon is not unreasonable.

See *Koppa*, 184 Ill. 2d at 172. The armed violence statute does not violate the proportionate penalties clause.

### III

Defendant next argues that the trial court improperly considered evidence presented by Officer Barisch that he committed other crimes for which he had not been charged or convicted.

Ordinary rules of evidence which govern at trial are relaxed at the sentencing hearing. *People v. Harris*, 375 Ill. App. 3d 398, 408 (2007). A sentencing court is given broad discretionary power to consider various sources and types of information so that it can make a sentencing determination. *Id.*

Outstanding indictments or other criminal conduct for which there has been no prosecution or conviction may be considered in sentencing. *People v. Jackson*, 149 Ill. 2d 540, 548 (1992); *People v. English*, 353 Ill. App. 3d 337, 339 (2004). Such evidence should be presented by witnesses who can be confronted and cross-examined so that the defendant has an opportunity to rebut the testimony. *Jackson*, 149 Ill. 2d at 548; *English*, 353 Ill. App. 3d at 339.

Here, the trial court considered the testimony of Officer Barisch in sentencing. Barisch testified that while defendant was out on bond for the underlying charges in this case, she

searched defendant's home and found heroin, marijuana, a gun and a large sum of money. Even though defendant had not been convicted of any crimes associated with the search conducted by Barisch, the trial court could consider Barisch's testimony in sentencing. See *Jackson*, 149 Ill. 2d at 548; *English*, 353 Ill. App. 3d at 339. The trial court properly exercised its discretion in allowing Barisch's testimony at the sentencing hearing.

#### IV

Finally, defendant argues that his unlawful possession of a controlled substance and aggravated unlawful use of a weapon convictions should be vacated pursuant to the one-act, one-crime principle.

The one-act, one-crime principle precludes a defendant from being convicted of more than one offense that is carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). First, a court must determine whether a defendant's conduct consisted of separate acts or a single physical act. *People v. Miller*, No. 107878, slip op. at 3-4 (Ill. Sept. 23, 2010). Multiple convictions are improper if they are based on the same physical act. *Id.* at 4. Second, if the conduct involves multiple acts, the court must determine if any of the offenses are lesser included offenses. *Miller*, No. 107878, slip op. at 4.

If an offense is a lesser-included offense, multiple convictions are improper. *Id.*

Where multiple convictions arise from the same act, a reviewing court must vacate the less serious offense. *People v. Garcia*, 396 Ill. App. 3d 792, 797 (2009). A conviction should be entered and a sentence imposed on only the most serious offense. See *People v. Smith*, 258 Ill. App. 3d 261, 264 (1994).

#### A. Unlawful Possession of a Controlled Substance

The State concedes that defendant's conviction and sentence for unlawful possession of a controlled substance should be vacated because it is a lesser included offense of armed violence. We agree and vacate defendant's conviction and sentence for unlawful possession.

#### B. Unlawful Possession with Intent to Deliver

Convictions for both armed violence and unlawful possession with intent to deliver a controlled substance violates the one-act, one-crime principle where all of the drugs are seized from a single area. See *People v. Strong*, 316 Ill. App. 3d 807, 816 (2000); *People v. Garcia*, 296 Ill. App. 3d 769, 784 (1998); *People v. Roberts*, 263 Ill. App. 3d 348, 354 (1994); *Smith*, 258 Ill. App. 3d at 263-64. A conviction should be entered and a sentence imposed only on the armed violence offense; the conviction and sentence for possession of a controlled substance

with intent to deliver must be vacated. See *Garcia*, 296 Ill. App. 3d at 784.

Here, defendant was convicted of armed violence for possessing a weapon and heroin which was seized from the back of Watkins' squad car. Defendant was convicted of unlawful possession with intent to deliver the same heroin. Because the same drugs were the basis of both the armed violence and unlawful possession with intent to deliver convictions, the conviction and sentence for possession of a controlled substance with intent to deliver must be vacated. See *Garcia*, 296 Ill. App. 3d at 784.

C. Aggravated Unlawful Use of a Weapon.

Though we cannot find any case law on whether convictions for both armed violence and aggravated unlawful use of a weapon violate the one-act, one-crime rule, two appellate courts have considered whether armed violence and unlawful possession of a weapon by a felon are based on separate acts. See *People v. White*, 311 Ill. App. 3d 374 (2000); *People v. Williams*, 302 Ill. App. 3d 975 (1999).

The Second District found that they constitute a single act:

"[T]he common act is a felon possessing a gun and drugs simultaneously. There is no separate act. In one instance the gun is combined with possession of a controlled substance to constitute armed violence, and

in the other it is combined with the act of a convicted felon status to create a separate offense. We hold that the one-act, one-crime rule does apply to these convictions. Accordingly, the separate conviction of the unlawful possession of a weapon by a felon is reversed and the separate sentence vacated." *Williams*, 302 Ill. App. 3d at 978.

The Fourth District found that convictions for armed violence and unlawful possession of a weapon by a felon are based on separate acts because "[a]lthough both offenses share the common act of possession of a weapon, armed violence required the additional act of possession of 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 387.

We agree with the reasoning of the Second District in *Williams*. Defendant's convictions for aggravated unlawful use of a weapon and armed violence are based on the same physical act: defendant possessing a weapon. The one-act, one-crime principle precludes a defendant from being convicted of more than offense one that is carved from the same physical act. See *King*, 66 Ill. 2d at 566; *Miller*, No. 107878, slip op. at 4. Since defendant's conduct in committing aggravated unlawful use of a weapon and armed violence were based on the single act of possessing a

weapon, only one conviction could be entered.

The Fourth District's analysis in *White* improperly reverses and then merges the first two steps of the one-act, one-crime analysis, finding that if the crimes are not lesser included, they constitute two separate acts. However, a proper one-act, one-crime analysis requires the court to first determine whether a defendant's conduct consisted of separate acts or a single physical act. See *Miller*, No. 107878, slip op. at 3-4. Only if the court finds that the defendant committed multiple acts does the court examine if any of the offenses are lesser included offenses. See *Miller*, No. 107878, slip op. at 4. Here, because defendant's conduct consisted of a single act, our analysis begins and ends there.

Thus, we vacate defendant's conviction and sentence for aggravated unlawful use of a weapon, the less serious offense. See *Garcia*, 396 Ill. App. 3d at 797. Defendant's conviction and sentence for armed violence, the most serious offense, remain. See *Smith*, 258 Ill. App. 3d at 264.

#### CONCLUSION

The judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

Affirmed in part and vacated in part.

JUSTICE SCHMIDT, concurring in part, dissenting in part:

I concur with the majority's order with the exception of that part of the order which vacates defendant's conviction of aggravated unlawful use of a weapon (AUUW) as a violation of the one-act, one-crime principal. I would follow the Fourth District's reasoning in *People v. White* (311 Ill. App. 3d 374 (2000)) and affirm this conviction.

The majority concludes that the Fourth District's analysis in *White* improperly reverses and then merges the first two steps of the one-act, one-crime analysis. Slip op. at 16. This statement by the majority shows that it simply misapprehends the analysis made in *White*. The argument before the *White* court was that defendant's convictions for unlawful possession of a weapon by a felon and armed violence based on illegal possession of a controlled substance were carved out of the same physical act. *White*, 311 Ill. App. 3d 374, 384. The Fourth District rejected that argument along with the Second District's decision in *Williams* (302 Ill. App. 3d 975 (1999)) relied upon by the majority here. Like the *White* court, I conclude that *Williams* was wrongly decided. *White*, 311 Ill. App. 3d at 385.

Defendant's convictions for armed violence and AUUW both stem from the fact that defendant was carrying a weapon; however,

the charges are not based on the same act. To be charged and convicted under the AUUW statute, the person must knowingly carry a weapon, including specifically any pistol, revolver, stun gun, taser or other firearm when not on his land, not in his abode, or not in his fixed place of business. 720 ILCS 5/24-1.6(a)(1) (West 2008). To be charged with armed violence, a person must commit a felony while armed with a dangerous weapon. 720 ILCS 5/33A-2(a) (West 2008). AUUW does not require the separate act of committing a predicate felony while carrying a dangerous weapon as does armed violence. AUUW requires a person to carry specified weapons while not on his own land, not in his own abode, or not in his own business, which are not required for a charge of armed violence. Certainly, the act of carrying a firearm was an act which was common to armed violence and AUUW. There is no doubt that the carrying of a firearm was a single act. However, the fact that these two offenses shared a common act does not mean that they cannot support multiple convictions under the one-act, one-crime rule. *People v. Pena*, 317 Ill. App. 3d 312, 322 (2000); *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996). The offense of armed violence required a separate act: the commission of a felony while armed with a dangerous weapon. 720 ILCS 5/33A-2(a) (West 2008). Therefore, we have separate offenses that support separate convictions even though they share

an act in common (carrying a weapon). The fact that the offenses occurred simultaneously does not change the analysis. *People v. White*, 311 App. 3d at 385; *People v. Green*, 199 Ill. App. 3d 927 (1990). As the *White* court pointed out, in *Rodriguez*, the supreme court emphasized that "[a] person can be guilty of two offenses when a common act is part of both offenses." (Internal quotation marks omitted.) *White*, 311 Ill. App. 3d at 385, quoting *Rodriguez*, 169 Ill. 2d at 188.

One can commit the offense of armed violence without committing the offense of AUUW. Likewise, one can commit the offense of AUUW without committing the offense of armed violence. Neither is a lesser-included offense of the other. See *People v. Miller*, No. 107878, slip op. at 12 (Ill. S. Ct. Sept. 23, 2010).

I respectfully dissent from the majority's decision to vacate defendant's conviction for AUUW.