

No. 1-10-3642

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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 10717
)	
MILTON MOSLEY,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* Judgment entered on defendant's conviction of unlawful use of a weapon by a felon affirmed over his claim that the trial court erred in denying his motion to quash a search warrant and challenge to the sufficiency of the evidence; \$200 DNA fee vacated.
- ¶ 2 Following a bench trial, defendant Milton Mosley was found guilty of unlawful use of a weapon by a felon (UUWF), then sentenced to three years' imprisonment. He was also assessed fines and fees totaling \$690. On appeal, defendant contends that the trial court erred in denying his motion to quash a search warrant, that the State failed to prove him guilty of UUWF beyond a reasonable doubt, and that he was improperly assessed a \$200 DNA fee.

1-10-3642

¶ 3 The record shows that on May 28, 2009, Chicago police officer Cedric Taylor and an anonymous informant (hereinafter, J. Doe) appeared before a circuit court judge and swore to a complaint for search warrant naming defendant and the single family residence at 6506 South May Street, in Chicago. In the complaint, Officer Taylor stated, in relevant part, that he spoke with J. Doe and learned that defendant "was observed on several occasions entering and exiting" the subject residence with keys that were in his possession. J. Doe also told the officer that about two weeks before, he observed defendant exit the front door of his residence, remove a blue steel semi-automatic handgun from his waistband, chamber a round, and return the gun to his waistband. J. Doe and defendant then had a brief conversation during which J. Doe saw the handgun in defendant's waistband, and after which defendant reentered the residence with keys that were in his possession. J. Doe is familiar with handguns as he has handled them before.

¶ 4 Officer Taylor further stated that he discovered a convicted felon in the Chicago Police Department's I-Clear system whose name and description matched those given by J. Doe. He showed J. Doe a photograph of defendant, and J. Doe verified that defendant was the individual whom he had seen with the handgun. Officer Taylor also drove by the subject residence with J. Doe who positively identified it to be the property where he had seen defendant exit and reenter with the handgun.

¶ 5 Based on these facts, the court issued a warrant to search defendant and the entire single family residence at 6506 South May Street, and to seize as evidence of UUWF, a blue steel semi-automatic handgun, any ammunition, and any documentation of proof of residency. Thereafter, Chicago police officers executed the search warrant and recovered a handgun and ammunition from the residence which led to defendant being charged with two counts of UUWF.

¶ 6 Prior to trial, defendant filed a motion to quash the search warrant and suppress evidence, alleging that the complaint made no mention of the reliability of J. Doe, that the information was stale, and that Officer Taylor offered no corroboration of the information received from J. Doe.

1-10-3642

After a hearing on the motion, the trial court noted, *inter alia*, that "it is not up to me to make my own independent determination as to whether or not I would issue that same warrant that [the issuing judge] did. It's – she had the matter in front of her and she had John Doe in front of her." The court also noted that the information was not stale in light of *People v. Beck*, 306 Ill. App. 3d 172 (1999) where defendant was engaged in a continuing course of criminal conduct, and that, in any event, the officers could have relied on the warrant under the good faith exception. The court thus denied defendant's motion.

¶ 7 At trial, Officer Taylor testified that about 9:40 p.m. on May 28, 2009, he participated in the execution of the search warrant at 6506 South May Street. Upon arriving at that location, Officer Sikorski knocked on the door, and when a black male answered, the officer announced his office and informed the individual of the search warrant. The other officers then entered the residence through the front door, and Officer Taylor proceeded through the living room and into the dining room area where he looked through the doorway of an adjacent bedroom which was illuminated by a television set. Defendant was inside that room, about four feet away from him, and with an unobstructed view, Officer Taylor observed him lift the mattress of the bed with his left hand, put a gun underneath, then drop the mattress. Officer Taylor related his observations to Sergeant Bocardo who then lifted the mattress and retrieved a semi-automatic weapon. As the sergeant did so, Officer Taylor also saw a clear plastic bag containing live ammunition underneath the mattress. Eventually, Officer Taylor handcuffed defendant and brought him into the dining room where he "told him to have a seat."

¶ 8 On cross-examination, Officer Taylor denied throwing defendant and the other individual present onto the floor and handcuffing them, or making them sit in "the chairs." He also stated that when defendant lifted the mattress, he saw a "shiny object" and "was sure it was a gun." However, he acknowledged testifying at a preliminary hearing, "I saw a shiny object. I wasn't

1-10-3642

sure if it was a weapon or not." On redirect, Officer Taylor testified that he detained defendant after the sergeant recovered the gun.

¶ 9 Chicago police sergeant Michael Bocardo testified that he also participated in the execution of the search warrant at the subject premises. When he went to the bedroom, he saw defendant being removed from it by Officer Taylor. Then, after speaking with Officer Taylor, he lifted the mattress and recovered a semi-automatic handgun and a bag of ammunition. The gun was cocked and loaded with seven live rounds, and ready to fire with a slight press of the trigger. On cross-examination, Sergeant Bocardo stated that the bedroom light was on when he entered the room.

¶ 10 Chicago police officer Dennis Oboikovitz testified that he recovered a set of keys to the front door from defendant's right, front pants pocket. Chicago police officer Daniel Ludwig testified that he recovered two pill bottles in defendant's name from the bathroom, and on cross-examination, stated that the address on the pill bottles was 8453 South 88th Avenue, Justice, Illinois. Finally, the State entered into evidence a certified copy of defendant's felony conviction for possession of cannabis in case no. 95-CR-03888.

¶ 11 For the defense, Anthony Turner testified that about 9:45 p.m. on May 28, 2009, he was living in the house at 6506 South May Street and watching a basketball game with defendant when he heard a knock on the front door. As he went to answer the door, defendant remained in the living room watching the game. Police instructed Turner to open up, and when he complied, an officer came in, told him to "get on the ground," and handcuffed him. The officers then handcuffed defendant, sat them in chairs, and searched the house. Turner never saw defendant leave the room, and about 10 minutes later, an officer "came out" with a gun in his hand.

¶ 12 Turner testified that his door keys were on top of the television set when police entered the house, that he saw police recover defendant's pills from his pocket, that he never saw a gun on the night in question, and that defendant did not live in the subject premises. He also testified

1-10-3642

that there was not enough room for defendant to be at the foot of the bed "[b]ecause it's too close to the door," and noted that to get into the bed, "you have to come in and shut the door and then get in the bed." On cross-examination, Turner acknowledged his prior felony conviction for possession of a controlled substance.

¶ 13 Defendant testified that he has lived with his mother at 6551 South May Street "[o]n and off" for about 25 years, and he identified his state identification with that address. He testified that he gave that address upon his release from a Wisconsin penitentiary on January 13, 2004, and when asked about the Justice, Illinois address on his pill bottles, he explained, "My cousin lives in Justice, and he brings my medicine out there. Me and my mother go shopping out there, and we drop our medicine off at the Wal-Mart out there." Defendant identified three letters addressed to him at 6551 South May Street, including a letter regarding the end of his parole dated December 3, 2009, a letter from the State's Attorney dated November 19, 2008, and a letter from Dorothy Brown, Clerk of the Circuit Court, dated December 4, 2008.

¶ 14 On May 28, 2010,¹ defendant walked from his mother's house to 6506 South May Street to watch a basketball game with Turner. As they were watching the game, Turner answered a knock at the door, and police entered the house, put them on the ground with their hands behind their backs, placed them under arrest, and sat them in chairs. About 10 minutes later, the officers "came out and said they found a gun." They told defendant that it was his gun because his name was on the search warrant, but he was never in the room where it was found. The officers also recovered the medicine he had brought with him from his right pants pocket.

¶ 15 In announcing its findings, the trial court found, *inter alia*, that "this is not a constructive possession case," and that "defendant was in fact in control of that handgun that was recovered." The court also noted that it found the officers credible and did not find the defense witnesses

¹ The record reflects that the date testified to by defendant was inconsistent with the date on which the search warrant was executed.

1-10-3642

credible. Ultimately, the court found defendant guilty of one count of UUWF (possession of a firearm), not guilty of the other (possession of firearm ammunition), and sentenced him to three years' imprisonment.

¶ 16 In this appeal from that judgment, defendant first contends that the trial court erred in denying his motion to quash the search warrant. He claims that the warrant was issued on a "bare bones" complaint which did not provide the issuing judge with a substantial basis to conclude that probable cause existed.

¶ 17 The State responds that when viewed under the totality of the circumstances, the complaint for search warrant was highly detailed, corroborated, reliable, and supported by the appearance of Officer Taylor and the informant before the issuing judge, thus sufficiently establishing probable cause. The State also responds that the good faith exception applies even if the search warrant was not supported by probable cause.

¶ 18 For a search warrant to be valid, a complaint and supporting affidavit do not have to show beyond a reasonable doubt that the warrant should be issued; rather, they need only establish probable cause. *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007), citing *People v. Stewart*, 104 Ill. 2d 463, 476-77 (1984). Probable cause exists if the facts and circumstances known to the affiant are sufficient to warrant a person of reasonable caution to believe that an offense has occurred and that evidence of it is at the place to be searched. *Stewart*, 104 Ill. 2d at 476. In construing an affidavit for a search warrant, we do not substitute our judgment for that of the issuing judge, but rather, decide whether the judge had a substantial basis to conclude that probable cause existed. *Smith*, 372 Ill. App. 3d 182, citing *People v. Sutherland*, 223 Ill. 2d 187, 204 (2006).

¶ 19 Defendant claims that the search warrant at issue was not supported by probable cause because there was an insufficient showing of the anonymous informant's reliability. He points out that the complaint did not indicate that Officer Taylor had prior experience with J. Doe, that

1-10-3642

J. Doe did not provide any specific, predictive information that could have been used by police to verify his tip, and that Officer Taylor's investigation did not substantially corroborate the tip.

¶ 20 Where, as here, defendant challenges the credibility of an informant, this court considers several factors in assessing that informant's reliability, including the informant's personal observations, the degree of detail given, independent police corroboration of the information, and whether the informant testified at the probable cause hearing. *Smith*, 372 Ill. App. 3d at 183-84, citing *United States v. Johnson*, 289 F.3d 1034, 1038-39 (7th Cir. 2002). We note that no single factor is dispositive, and that a deficiency in one may be offset by a strong showing in another or by some other indication of reliability. *Smith*, 372 Ill. App. 3d at 183-84, citing *Johnson*, 289 F.3d at 1038-39.

¶ 21 Here, the record shows that J. Doe observed defendant entering the single family residence at 6506 South May Street on "several occasions" with his own set of keys. He also observed an incident in which defendant exited the front door of the residence, removed a blue steel semi-automatic handgun from his waistband, chambered a round, and returned the gun to his waistband before reentering the residence using keys in his possession. In addition, reference was made to J. Doe's familiarity with handguns which bolsters the reliability of this information. *Smith*, 372 Ill. App. 3d at 184. Although the record does not establish that J. Doe was questioned in court, he/she did appear before the judge when the warrant was issued and was available for questioning, thus providing further support for a finding of reliability. *Smith*, 372 Ill. App. 3d at 184. Taken as a whole, we find that these facts provided the judge with a substantial basis to conclude that probable cause existed to search defendant and the residence at 6506 South May Street. *Smith*, 372 Ill. App. 3d at 184.

¶ 22 Defendant disagrees with this conclusion, however, and claims that Officer Taylor was required to establish the reliability of the anonymous informant within the complaint, citing *Florida v. J.L.*, 529 U.S. 266 (2000) and *People v. Brown*, 343 Ill. App. 3d 617 (2003). We

1-10-3642

disagree. Those cases involved *Terry* stops based on tips from anonymous, unknown callers alleging criminal activity, while J. Doe was a *known* informant who appeared before the court when the search warrant was issued, but whose name was kept anonymous in the complaint. The reliability concerns that were at issue in *J.L.* and *Brown* are therefore not present here, and *People v. Rhinehart*, 2011 IL App (1st) 100683, ¶ 16, cited by defendant in reply, also does not warrant a contrary result because in that case, unlike here, "the officers did not know the informant's identity" and the informant never appeared in court. We therefore find defendant's reliance on these cases misplaced.

¶ 23 Defendant further claims that the search warrant was not supported by probable cause because it was issued two weeks after J. Doe observed the gun, thus rendering that information stale. He also claims that the trial court's reliance on *Beck* was misplaced because the complaint for search warrant did not indicate that defendant was engaged in a continuing course of criminal activity. We note that this court reviews the correctness of the trial court's conclusion, not the validity of its reasoning, and may affirm a judgment on any basis discernable from the record. *People v. Minor*, 281 Ill. App. 3d 568, 574 (1996).

¶ 24 For a search to be justified, probable cause must be current and not rest upon facts which existed in the past, unless there is reason to believe those facts still exist. *People v. Thompkins*, 121 Ill. 2d 401, 435 (1988), citing *Brinegar v. United States*, 338 U.S. 160 (1949). There is no arbitrary cutoff period expressed in days or weeks beyond which probable cause ceases to exist; rather, other factors are just as important as the element of time, including the nature of the object sought, its location on the premises, and the state in which it was observed. *Thompkins*, 121 Ill. 2d at 435, citing *United States v. Beltempo*, 675 F.2d 472, 478 (2d Cir. 1982).

¶ 25 Here, the record shows that defendant was observed entering and exiting the residence at 6506 South May Street on "several occasions" with his own set of keys. On one such occasion, he came out carrying a handgun in his waistband and chambered a round, indicating that he kept

1-10-3642

the gun loaded. He then replaced the gun into his waistband and reentered the residence.

Common sense dictates that defendant kept this loaded handgun for his own personal use, that the gun was ordinarily stored inside the residence from which he was seen emerging with it, and that these circumstances would not have changed over the course of a mere two weeks.

Thompkins, 121 Ill. 2d at 436. It was thus reasonably likely that a gun would be found inside the residence at 6506 South May Street on May 28, 2009 (*Thompkins*, 121 Ill. 2d at 436); and, consequently, the issuing judge had a substantial basis to conclude that probable cause existed for issuing the warrant (*Smith*, 372 Ill. App. 3d at 184). Having so found, we need not address the applicability of the good faith exception to this case.

¶ 26 Defendant next contends that the State failed to prove him guilty of UUWF beyond a reasonable doubt. He specifically claims that the State failed to prove the element of possession where the testimony of Officer Taylor was "inconsistent and impeached." The State responds that the trial court acted properly in resolving credibility determinations and conflicts in the evidence against defendant.

¶ 27 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *Sutherland*, 223 Ill. 2d at 242. A reviewing court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Campbell*, 146 Ill. 2d at 375.

1-10-3642

¶ 28 To sustain defendant's conviction of UUWF, the State was required to prove that defendant knowingly possessed a firearm after having been previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008). Viewed in the light most favorable to the prosecution, the record shows that on May 28, 2009, Chicago police officers executed a search of the single family residence at 6506 South May Street. Upon entering the premises, Officer Taylor proceeded to a bedroom doorway where he observed defendant about four feet away inserting a shiny object under the mattress on the bed. Sergeant Bocardo then lifted the mattress and recovered a loaded, cocked semi-automatic handgun. At trial, the State established that defendant has a prior felony conviction for possession of cannabis. This evidence was thus sufficient to allow the trier of fact to find that the essential elements of UUWF were proved beyond a reasonable doubt. 720 ILCS 5/24-1.1(a) (West 2008).

¶ 29 Defendant disputes this conclusion and claims that "the State's entire case rested on Officer Cedric Taylor's testimony, however such impeached, contradicted, and inconsistent testimony cannot support [defendant's] conviction." He specifically points out a discrepancy between Officer Taylor's testimony that the bedroom was illuminated by the television set and Sergeant Bocardo's testimony that the light was on in the bedroom, the officer's uncertainty as to whether a photograph was taken of the bed where the gun was found, his testimony that defendant and Turner were not seated in chairs, and the impeachment of his testimony that he initially saw a gun in defendant's hands.

¶ 30 Defendant asks us to view the "flaws" in Officer Taylor's testimony together and conclude that "no rational trier of fact could believe Taylor's testimony that [defendant] was in actual possession of the fire arm." We observe, however, that it is not the province of this court to second-guess the verdict or to retry defendant on appeal (*People v. Villarreal*, 198 Ill. 2d 209, 231 (2001)); rather, our task is to carefully examine the evidence while giving due consideration

1-10-3642

to the fact that the court saw and heard the witnesses (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)).

¶ 31 Here, we find that it was reasonable for the trial court to infer that the "shiny object" Officer Taylor saw defendant conceal underneath the mattress was the firearm recovered from that spot moments later by Sergeant Bocardo, regardless of whether Office Taylor knew it was a firearm at first sight. *Sutherland*, 223 Ill. 2d at 242. The other discrepancies cited by defendant do not undermine his consistent testimony regarding the elements of the charged offense, and are of an immaterial nature which do not destroy his credibility. *People v. Reed*, 80 Ill. App. 3d 771, 780-82 (1980). The trial court expressly found the officers credible and defendant not so (*Sutherland*, 223 Ill. 2d at 242), and we have found no basis for disturbing that determination (*People v. Berland*, 74 Ill. 2d 286, 306 (1978)). In reaching that conclusion, we note that *People v. Herman*, 407 Ill. App. 3d 688 (2011), cited by defendant, does not warrant a different result where the witness in that case was "a self-described crack cocaine addict" whose testimony was "fraught with inconsistencies and contradictions." In sum, the evidence was not so unreasonable as to justify a reasonable doubt of defendant's guilt (*Campbell*, 146 Ill. 2d at 389), and we therefore affirm his conviction of UUWF.

¶ 32 Lastly, defendant claims that he was improperly assessed a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) because his DNA profile was already registered in the Illinois State Police database in connection with an earlier conviction. Although defendant did not raise this claim in the circuit court, a sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. The propriety of court-ordered fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 33 Here, the State concedes, and we agree, that defendant's \$200 DNA fee should be vacated pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011) that a

1-10-3642

trial court may not assess the fee where defendant is currently registered in the DNA database.

Since defendant meets that criterion, we vacate the \$200 DNA fee imposed by the trial court.

¶ 34 For the reasons stated, we vacate defendant's \$200 DNA fee and affirm the judgment in all other respects.

¶ 35 Affirmed in part; vacated in part.