

No. 1-10-3660

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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. 08 CR 22093
)	
JONATHAN PHILLIPS,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* There was sufficient evidence that defendant possessed narcotics and a firearm, and particularly that the gun and narcotics were simultaneously within his reach while a police officer had entered the room occupied by defendant alone. Defendant's conviction for possession of a controlled substance with intent to deliver must be vacated as based on the same physical act as his armed violence conviction, but his conviction for unlawful use of a weapon by a felon stands. Defendant's 8-year sentence for armed violence was void and he must be resentenced in compliance with the relevant statutes.

¶ 2 Following a bench trial, defendant Jonathan Phillips was convicted of armed violence, possession of a controlled substance (15 grams or more, but less than 100 grams, of cocaine) with intent to deliver (PCSI), and unlawful use of a weapon by a felon (UUWF) and sentenced to

concurrent prison terms of eight, eight, and five years respectively. On appeal, he contends that there was insufficient evidence to convict him, in that the State failed to prove (1) actual or constructive possession of either the narcotics or gun found in an apartment he was visiting, and (2) that he was armed with a dangerous weapon for purposes of the armed violence statute. In the alternative, he contends that his PCSI and UUWF convictions must be vacated as they were based on the same physical act as his armed violence conviction, and that his mittimus should properly reflect his conviction for PCSI if not vacated. The State contends that (1) defendant must be sentenced on two counts of UUWF, and (2) his sentence for armed violence is void for being shorter than the statutory minimum so that this case must be remanded for resentencing.

¶ 3 The circuit court issued on the morning of November 30, 2007, a search warrant for "items used in the manufacture, distribution and possession of Cocaine, also articles that establish proof of residency and all United States Currency" to be executed at the second-floor apartment (the Apartment) at a specified address, and upon a "John Doe" known as Junior and described as a dark-complected black man about 35 years old weighing about 160 pounds and being about 5 feet, 9 inches tall.

¶ 4 Defendant and codefendants Cornell Gibson, Terry Anderson, and Marvin Cates were charged with armed violence for, on or about November 30, 2007, allegedly possessing a handgun while committing the felony of possession of a controlled substance (PCS). They were also charged with PCS and PCSI for allegedly possessing 15 grams or more, but less than 100 grams, of cocaine on the same date. Defendant was charged with two counts of UUWF for possessing a firearm and ammunition respectively after having been convicted of manufacturing or delivering a controlled substance in case 07 CF 84. In that case, defendant was convicted of the Class 1 felony of PCSI and sentenced to 3 years' probation.

¶ 5 At trial, police officer Harlan Lewis testified that he and other officers executed the aforementioned search warrant on the day in question. Officer Lewis believed that the

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Apartment was rented by codefendant Cates. At the front door of the Apartment, Officer Lewis announced that he was with the police, then broke in the door with a battering ram and entered the Apartment. There, he saw defendant seated behind a table in the front or living room; nobody else was in the room. Defendant immediately fled the room towards the kitchen with Officer Lewis in pursuit. There were other men in the kitchen, and defendant and these other men were detained. When Officer Lewis returned to the living room, he saw a handgun and a substance he suspected to be narcotics on the aforementioned table along with a scale and plastic bags. He explained that cocaine is commonly packaged for sale in such bags. The handgun was loaded with six bullets and there was a box of bullets and a box of shotgun shells on the living room table as well. On cross-examination, Officer Lewis testified that he did not see defendant touch any of the contraband on the living room table. The parties stipulated to the effect that the substance found on the table consisted of 34.4 grams of cocaine.

¶ 6 The court denied defendant's motion for a directed finding, finding that the drugs and gun were in defendant's plain view, that he was the only person sitting at the table or even in the living room, and that his flight further demonstrated his knowledge of the contraband.

¶ 7 Defendant testified that he lived in a different residence in a different city than the Apartment. He was with codefendants at the Apartment when the police arrived, but he was on the front porch rather than in the living room. Defendant admitted to knowing that there were drugs on the living room table but denied handling the drugs. He also denied that there was a gun on the table and stated that he had never seen the gun before trial. Before the police entered the Apartment, defendant heard "banging" and codefendants fleeing from the living room to the kitchen, so he also fled from the front porch through the living room to the kitchen. He and codefendants were then arrested in the kitchen.

¶ 8 The court found defendant guilty as charged, finding that Officer Lewis was credible while defendant was not and expressly finding constructive possession from defendant being

seated at the living room table with the contraband within his reach. In his post-trial motion, defendant challenged the sufficiency of the evidence for his convictions; that is, whether there was sufficient evidence that he actually or constructively possessed a gun or narcotics as alleged. The court denied the motion, reiterating its credibility determination and finding of constructive possession.

¶ 9 Following arguments in aggravation and mitigation, the court sentenced defendant as stated above. This appeal timely followed the denial of defendant's post-sentencing motion. During the hearings on sentencing and the post-sentencing motion, the State did not object to the entry of sentence on a single count of UUWF nor request that sentence be entered on two counts of UUWF.

¶ 10 On appeal, defendant contends that there was insufficient evidence to convict him, and in particular that the State failed to prove (1) that he was armed with a dangerous weapon for purposes of the armed violence statute, and (2) his actual or constructive possession of either the narcotics or gun found in the Apartment, where he was visiting at the time of the police search.

¶ 11 A person commits armed violence "when, while armed with a dangerous weapon, he commits any felony" except for specified offenses. 720 ILCS 5/33A-2(a) (West 2010). A valid conviction for armed violence is based on evidence that the defendant was armed with – that is, had immediate access to or timely control over – a dangerous weapon when there was an immediate potential for violence, such as during a drug transaction or a confrontation with police. *People v. Scott*, 2011 IL App (2d) 100990, ¶ 13; *People v. Anderson*, 364 Ill. App. 3d 528, 538-39 (2006). Conversely, mere possession of drugs and a weapon simultaneously cannot sustain a conviction if the weapon is not immediately accessible. *Scott*, ¶ 16; *Anderson*, 364 Ill. App. 3d at 539. The trier of fact must determine whether there was a possibility of violence, rather than whether the defendant actually intended to commit or threaten violence. *Scott*, ¶ 20.

¶ 12 A person commits PCSI when he possesses a controlled substance, including cocaine, with the intent to manufacture or deliver the same. 720 ILCS 570/401(a)(2) (West 2010). A person commits UUWF when he knowingly possesses a firearm or firearm ammunition "if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2010). Possession may be actual or constructive and is often proven with circumstantial evidence. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Actual possession is proven with evidence that the defendant exercised some form of dominion over the contraband, such as trying to conceal it or throwing it away. *Id.* Constructive possession exists when the defendant has the intent and capability to maintain control and dominion over the contraband, and may be proven with evidence that the defendant had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found. *Id.* Such knowledge may be inferred from several factors, including (1) the size of the contraband, (2) its visibility from the defendant's location, (3) the amount of time that the defendant had to observe the contraband, and (4) any gestures or movements by the defendant that would suggest that he was attempting to retrieve or conceal the contraband. *Id.*

¶ 13 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt.

Id. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 14 Here, looking at the evidence in the light most favorable to the State as we must, we find sufficient evidence that defendant committed armed violence, PCSI, and UUWF. A reasonable finder of fact could conclude that defendant was seated at the living room table, alone at the table and in the living room, with the cocaine, gun, and ammunition on that table when Officer Lewis entered the Apartment. While there was no evidence that defendant reached for or otherwise touched this contraband before fleeing, it was readily visible to him and within his immediate reach. Defendant corroborated such a conclusion by admitting knowledge of the cocaine's presence. We find this evidence sufficient to show his constructive, if not actual, possession of the gun, ammunition, and cocaine for purposes of his PCSI and UUWF convictions.

¶ 15 As to armed violence, we consider it key that the gun was within defendant's reach after Officer Lewis broke in the door and before defendant fled, even if that time was momentary. Though defendant's flight showed that he did not intend to use or threaten violence, the potential for violence – the target of the armed violence statute – existed. This case is thus distinguishable from *People v. Condon*, 148 Ill. 2d 96 (1992), in which police executing a search warrant at a suspected drug dealer's home found him in the kitchen where there were no guns; guns elsewhere in the home were far out of his reach, and "[t]here was no evidence of when, if ever, he had had immediate access to the guns." *Scott*, ¶ 15, citing *Condon*. This case is also distinguishable from *People v. Smith*, 191 Ill. 2d 408 (2000), where a defendant dropped his gun out a window before the police made entry to his home. Instead, this case is similar to *Scott*, where:

"When the police arrived outside his apartment, defendant was lying on the couch, perhaps a foot or two away from the love seat under which he had placed the shotgun. The photograph of the love seat and the shotgun show that, although the coffee table

might have been a slight inconvenience, defendant would have had little difficulty getting up, reaching for the gun, and taking control of it as the doors of the apartment opened. That he did not do so, and that he did not attempt resistance after the police entered the apartment, does not rescue him from guilt of armed violence."

Scott, ¶ 30.

¶ 16 Defendant also contends that his PCSI and UUWF convictions must be vacated as they were based on the same physical act as his armed violence conviction, and in the alternative that his mittimus should properly reflect his conviction for PCSI.

¶ 17 The parties correctly agree that defendant's PCSI conviction must be vacated as based on the same physical act as his armed violence conviction. His possession of the cocaine from the table is the basis for both the armed violence and PCSI convictions. As we are vacating the PCSI conviction, we need not address the issue of correcting that conviction on the mittimus.

¶ 18 The parties join issue, however, on whether the UUWF conviction must also be vacated. Defendant relies upon *People v. Williams*, 302 Ill. App. 3d 975 (2^d Dist. 1999), holding that the one-act-one-crime rule precluded a defendant from being convicted for both UUWF and armed violence based on PCS where both offenses were based on the conduct of simultaneously possessing a gun and drugs because there was no separate act. The State in turn relies upon *People v. White*, 311 Ill. App. 3d 374, 386 (4th Dist. 2000), where this court was faced with the same charges as in *Williams* – UUWF and armed violence based on PCS – but disagreed with *Williams* and found that the two convictions would stand because "[a]lthough both offenses shared the common act of possession of a weapon, armed violence required the additional act of possession of the drugs, and [UUWF] required the additional element of status as a felon." See *People v. Pena*, 317 Ill. App. 3d 312 (2nd Dist. 2000)(expressly following *White* rather than *Williams*). We also choose to follow *White* rather than *Williams*.

¶ 19 Moreover, defendant was charged with and found guilty of two counts of UUWF based on his possession of a gun and ammunition respectively. This case therefore resembles *People v. McCarter*, 339 Ill. App. 3d 876 (2003), where we rejected a one-act-one-crime claim because:

"the State did charge defendant with three separate counts based on his possession of three different types of contraband: a rifle, a handgun, and ammunition. *** Therefore, we conclude that, in this case, where the State brought separate charges, each of which would support a separate conviction, defendant's convictions on three counts of unlawful possession of a weapon by a felon, none of which was a lesser-included offense, were proper." *McCarter*, 339 Ill. App. 3d at 881-82.

We conclude that defendant's UUWF conviction stands.

¶ 20 However, the State further contends that the trial court erred in not entering convictions and sentences on two counts of UUWF. While the cases cited by the State amply support the proposition that multiple convictions for UUWF are authorized or possible here, they do not support the contention that multiple convictions are required so that failure to enter multiple convictions constitutes reversible error. In other words, the State fails to support its proposition that the trial court lacked the discretion to merge offenses as it did here. Moreover, the State's claim is both forfeited and unappealable: the State did not object in the trial court to the entry of sentence on a single count of UUWF, and only a conviction with a sentence imposed constitutes a final and appealable judgment. *People v. Hall*, 159 Ill. App. 3d 1021, 1029-30 (1987); see also *People v. Montyce H.*, 2011 IL App (1st) 101788, ¶ 5, citing *People v. Baldwin*, 199 Ill. 2d 1, 5 (2002)(only a conviction with sentence is appealable).

¶ 21 Lastly, the State contends that defendant's sentence for armed violence is void and this case must therefore be remanded for proper sentencing. Defendant agrees that his sentence is

less than the statutory minimum but argues that this does not render his sentence void. Indeed, defendant's 8-year prison sentence for armed violence committed with a handgun is less than the 15-year minimum sentence required by statute. 720 ILCS 5/33A-1(c), -2(a), -3(a) (West 2010). As to the effect of this discrepancy, the State is correct that this renders the sentence void. *People v. Jackson*, 2011 IL 110615, ¶ 10, citing *People v. Arna*, 168 Ill. 2d 107 (1995). Our supreme court has repeatedly and recently stated the rule that a sentence contrary to statute is void, and we have no authority to declare otherwise. *People v. Artis*, 232 Ill. 2d 156, 164 (2009). Thus, the trial court shall resentence defendant for armed violence within the applicable range of 15 to 30 years' imprisonment. 720 ILCS 5/33A-3(a); 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 22 Accordingly, defendant's conviction for possession of a controlled substance with intent to deliver is vacated. Defendant's sentence for armed violence is vacated and this cause is remanded for resentencing as provided above. The judgment of the circuit court is otherwise affirmed.

¶ 23 Affirmed in part, vacated in part, and remanded with directions.