

1-11-0952

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 10341
	)	
DANDRE WARRIOR,	)	Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Trial court did not err in denying the defendant's motion to quash arrest and suppress evidence; and finding that statute which creates offense of aggravated unlawful use of a weapon did not violate the defendant's constitutional right; the defendant forfeited his claim that jury waiver was not knowing and intelligent; fines and fees order corrected; judgment affirmed in all other respects.
- ¶ 2 Following a bench trial, defendant Dandre Warrior was found guilty of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2008)), and sentenced to 24 months' probation. On appeal, he argues that: (1) the trial court erred in denying his motion to quash arrest and suppress evidence; (2) the aggravated unlawful use of a weapon statute is unconstitutional; (3) his jury waiver was not knowingly and intelligently made; and (4) the total amount of fines and fees imposed against him is incorrectly stated in the fines and fees order.
- ¶ 3 On May 22, 2009, the defendant was arrested for aggravated unlawful use of a weapon. He

subsequently filed a motion to quash arrest and suppress evidence alleging that police approached him while he was on the porch of a residential home, arrested him, and then conducted a custodial search which revealed the presence of a handgun and suspected cannabis. The defendant maintained that this warrantless arrest was not supported by probable cause because the facts and circumstances known to the police prior to his arrest were insufficient to lead a person of reasonable caution to believe that he was committing or had committed a crime. He also argued that, as a direct or indirect result of the unlawful arrest and unreasonable search, certain evidence was obtained, which should be suppressed.

¶ 4 At the suppression hearing, the defendant testified that at 2:30 p.m. on May 22, 2009, he was at the house of his friend, Eric Mickles, at 124th Street and Perry Avenue in Chicago. Mickles was sitting on the bottom steps of the porch, and the defendant was standing on the porch, leaning against a railing and talking on his cellular phone. From there, he saw one unmarked police car and two marked police cars slowly being driven on the street before stopping in front of the house. Six officers exited the police cars. The defendant testified that a "dark-skinned" officer approached the porch, "snatched" Mickles who was at the bottom of the porch, and searched him. A "light-skinned" officer then "snatched" the defendant by the coat or tee-shirt, pulled him off the porch, and told him to drop his phone. The officer then searched the defendant and found a gun and cannabis.

¶ 5 The defendant further testified that at no point when he saw police did he attempt to throw or discard the gun or any cannabis that he had in his pocket. He stated that the officer who searched him later told him that he was searched because he looked like a person the police were seeking.

¶ 6 Eric Mickles then testified. Mickles acknowledged his 2005 conviction for possession of a controlled substance and probationary sentence that he did not successfully complete. He also disclosed his close friendship with the defendant. Mickles testified that at 2:30 p.m. on May 22, 2009, he was on the porch of his house at 12435 South Perry Avenue in Chicago with the defendant. Mickles stated that the defendant pulled out two bags of cannabis which he showed to Mickles, then

returned to his pocket. Mickles further testified that he was standing at the bottom of the porch, and that the defendant was "sitting." However, Mickles instantly changed his testimony and said that the defendant was "leaning up against the banister talking on his phone." At that point, two unmarked police cars approached his house and paused. Six officers exited the police cars. The officers first approached Mickles, placed him in handcuffs and searched him. Mickles testified that three officers then went up the stairs of the porch where they grabbed the defendant and searched him. Mickles described Officer Brian Reed (Officer Reed) as black, light-skinned and muscular. Mickles stated that Officer Reed recovered a gun from the defendant. According to Mickles, the officer who grabbed him was older and white. Mickles further testified that when police arrived, the cannabis was in the defendant's pocket. He stated that the officers pulled the cannabis out of the defendant's pocket. On cross-examination, Mickles stated that he was not on the porch when police arrived, but was standing on the sidewalk near the porch steps.

¶ 7 Chicago police officer Harland (Officer Harland) testified that on the afternoon of May 22, 2009, he and his partner, Officer Reed, were in an unmarked vehicle, and driving in the area of 124th Street and Perry Avenue looking for a murder suspect. At approximately 2:38 p.m., they saw the defendant, who matched the description of the homicide suspect, on the porch of the residence at 12435 South Perry Avenue. Officer Harland testified that he observed the defendant sitting on the porch, then immediately changed his testimony to say that the defendant was standing on the porch. Officer Harland also testified that there was another man sitting on the top step of the porch, who Officer Reed approached.

¶ 8 Officer Harland testified that he approached the defendant "from about the sidewalk," and noticed an object drop from the defendant's hand to the ground by his feet. Officer Harland noted that he was 15 feet away from the defendant at this time, and that nothing obstructed his view. As Officer Harland approached, he did not lose sight of the item that the defendant had dropped, and, as he got closer, he found it to be a small, clear bag containing a green leafy substance. He suspected

that the substance in the bag was cannabis. Officer Harland placed the defendant in custody, and conducted a custodial search which revealed a loaded handgun and more cannabis in a knotted bag.

¶ 9 Officer Harland acknowledged that during previous testimony in a preliminary hearing, he stated that he had observed the defendant drop the bag while he was "[o]n the curb in the car." When asked which version of the facts was correct, he responded, "[c]urb, sidewalk. It was the sidewalk. The curb leads to the sidewalk." He further stated that he was in the car when he first saw the defendant, and "got out of the car to the curb on to the sidewalk to approach [the defendant]." Officer Harland also noted that, at the preliminary hearing, he testified, consistent with his trial testimony, which stated that he was 15 feet away from the defendant when he observed the defendant drop an object to the ground.

¶ 10 Officer Harland further testified that he did not recall if there were other police vehicles in the vicinity of the home in question, but did recall that there were other officers working in that immediate vicinity who did not approach the porch. He later recalled that there was one more unmarked police car in front of the home. Officer Harland was also asked why Officer Reed searched Mickles, however, the State objected to this question and the court sustained the State's objection.

¶ 11 At the close of evidence and argument, the court denied the defendant's motion to quash arrest and suppress evidence. In doing so, the court found that the defense witnesses' testimony was inconsistent and "not even close on many items." The court also found there were too many inconsistencies in the defense witnesses' testimony for it to note all of them, but observed that there were inconsistencies with regard to the number of marked and unmarked cars, and how many police officers searched them. The court further stated that, "[b]ased on everything I believe the officer to be credible, and I don't believe for purposes of this motion I don't believe the Defendant's version of events."

¶ 12 On February 12, 2011, prior to trial, the defendant and the court engaged in the following

colloquy regarding the jury waiver:

"THE COURT: [Y]ou have a right if you wish to enter a plea of not guilty and have a trial either before a judge or a jury.

Do you understand that?

[DEFENDANT]: Yes, sir.

THE COURT: Did you discuss with your attorney what it means to give up or waive your right to a trial by jury?

[DEFENDANT]: Yes, sir.

THE COURT: After that discussion with your attorney, did you sign this jury waiver that I'm holding in my hand?

[DEFENDANT]: Yes, sir."

The court then accepted the defendant's jury waiver, and the defendant's trial commenced in the circuit court of Cook County.

¶ 13 At trial, Officer Harland testified that he has been a Chicago police officer for over six years, then presented testimony consistent with that given at the hearing on the motion to quash arrest and suppress evidence. Officer Harland added that he observed the defendant drop the bag of cannabis to his feet, then placed him in custody and conducted a custodial, protective pat down search which revealed a small loaded chrome handgun and more bags of cannabis. Officer Harland also noted that the defendant told him that he lived in Evergreen Park.

¶ 14 Officer David Solski testified that the defendant was placed in his car after the incident, and told him that he carried the gun for protection.

¶ 15 At the close of evidence, the court found the defendant guilty of aggravated unlawful use of a weapon. In doing so, the court stated that it did not "find any particular problem with the credibility of the officer." The court noted that it did not find it unbelievable that the defendant would drop cannabis to the ground while having other contraband on his person if he had the

cannabis in his hand when he saw police approaching. The court also found that the State proved that the defendant was not in his own abode.

¶ 16 On March 21, 2011, the defendant filed a motion for a new trial alleging, in relevant part, that the court erred in denying his motion to quash arrest and suppress evidence. The court denied the motion, and then sentenced him to 24 months' probation. The court also assessed \$710 for fees and costs.

¶ 17 On appeal, the defendant first contends that the trial court erred in denying his motion to quash arrest and suppress evidence. He maintains that the trial court was wrong to accept Officer Harland's testimony as true because he was materially impeached, proffered an account contrary to human experience, and was contradicted by the defendant and Mickles.

¶ 18 On review of a trial court's ruling on a motion to suppress, great deference is accorded the trial court's factual findings and credibility determinations, and the reviewing court will reverse those findings only if they are against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). However, we review *de novo* the legal challenge to the denial of the motion to suppress. *Id.*

¶ 19 The defendant argues that the evidence was "grossly insufficient" for police to approach the porch in the first place pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), where Officer Harland merely claimed that he initially approached the porch because the defendant fit the description of an unnamed homicide suspect. The defendant further claims that the trial court was wrong to accept Officer Harland's testimony that he observed him drop narcotics because his testimony was materially impeached, contrary to human experience, and contradicted by credible testimony from the defendant and his friend, who testified that the defendant did not drop a bag of cannabis in plain view of police.

¶ 20 The fourth amendment of the United States Constitution guarantees the right of the people against unreasonable searches and seizures. U.S. Const., amend. IV. Not all encounters between

police and a private citizen result in seizures (*People v. Luedemann*, 222 Ill. 2d 530, 544 (2006)), and a seizure does not occur simply where police approach and question a citizen (*United States v. Drayton*, 536 U.S. 194, 200-01 (2002)). These "consensual encounters" do not implicate fourth amendment interests (*Luedemann*, 222 Ill. 2d at 544), and thus do not require reasonable suspicion (See *People v. Harris*, 228 Ill. 2d 222, 247 (2008)).

¶ 21 The State's evidence shows that the defendant was standing on the porch of his friend, Mickles, when two officers approached after noting his resemblance to a homicide suspect they were seeking. As the officers were approaching the porch, the defendant dropped the suspected narcotics to the ground which prompted further investigation, and the pat down search which revealed the gun. Prior to the defendant's action, there was no evidence that police displayed their weapons or that there was a threatening presence of several officers, nor testimony that the officers touched the defendant or used language that indicated that they were requesting the defendant's compliance. *People v. Cosby*, 231 Ill. 2d 262, 287 (2008). Thus, there was no seizure.

¶ 22 The defendant concedes that if he dropped the cannabis in plain view, it "would provide an independent basis to search [him] - incident to his arrest for possessing the [cannabis]." However, he contests the credibility of Officer Harland who testified that he saw the defendant drop the drugs. The defendant argues that the testimony he presented to the contrary is correct. He claims that Officer Harland's testimony was impeached with regard to where he was when he observed the defendant allegedly dropping the cannabis, that it was contrary to human experience, and contradicted by two credible defense witnesses. We disagree. The minor discrepancy in Officer Harland's testimony regarding whether he was on the curb near the sidewalk, or in his car at the curb, when he observed the defendant drop the cannabis, does not detract from his consistent testimony that he had an unobstructed view of the defendant dropping the drugs from his hand. This minor discrepancy is not of such magnitude as to undermine his credibility. *People v. Villalobos*, 78 Ill. App. 3d 6, 13 (1979).

¶ 23 Furthermore, the trial court, which had the superior opportunity to observe the witnesses as they testified, expressly found Officer Harland credible, and that the defendant and his friend Mickles were incredible. We defer to the trial court's determination on this issue, particularly given the many inconsistencies in the defense witnesses' testimony regarding matters such as, how many officers approached, the number of marked and unmarked cars, and Mickles' confusing testimony regarding whether he was on the porch or not, and finally, the close relationship between the defendant and Mickles. *People v. Minniti*, 373 Ill. App. 3d 55, 72 (2007); *People v. Young*, 269 Ill. App. 3d 120, 123-24 (1994). Moreover, we note that the trial court was not required to accept the defense testimony over that of the police officer, *People v. Clessen*, 177 Ill. App. 3d 103, 113 (1988). Also, contrary to the defendant's contention, the search of Mickles has no bearing on the propriety of the search of the defendant. *People v. Govea*, 299 Ill. App. 3d 76, 84 (1998).

¶ 24 The defendant, however, further contends that Officer Harland's testimony is classic false "dropsy" testimony, citing to law review and newspaper articles. "A 'dropsy case' is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that defendant dropped the narcotics in plain view (as opposed to discovering them in an illegal search)." *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004). While the defendant would have us find otherwise, we will not disturb the trial court's credibility determination regarding Officer Harland's testimony (*People v. Hernandez*, 278 Ill. App. 3d 545, 551, 553 (1996)), nor find that his testimony was contrary to human experience simply because the defendant believes we should do so. Contrary to the defendant's argument, the fact that he dropped some of the cannabis as police arrived is not, in itself, unbelievable or contrary to human experience. See *e.g. People v. Gustowski*, 102 Ill. App. 3d 750, 754 (1981). We acknowledge that credibility was clearly the determining factor in this case, and after considering the testimony provided, we cannot substitute our determination for that of the trial court on this issue. Accordingly, there was no error in the trial court's denial of the defendant's motion to quash arrest and suppress evidence.

¶ 25 The defendant next argues that the aggravated unlawful use of a weapon statute is unconstitutional on its face, and as applied to him in this case. He asserts that the statute creating the offense violates his individual right to bear arms under the second amendment for the purpose of self-defense, relying 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).

¶ 26 This court has previously considered these same arguments multiple times and found that the aggravated unlawful use of a weapon statute is constitutional. *People v. Aguilar*, 408 Ill. App. 3d 136, 146-48 (2011), *appeal allowed*, No. 112116 (Ill. May 25, 2011); *People v. Montyce H.*, 2011 IL App (1st) 101788, ¶¶24-28, 40 (and cases cited therein). We find no reason to depart from those holdings. Furthermore, as to the defendant's "as applied" theory, it is well settled that where, as here, there has been no evidentiary hearing or any findings of fact in the lower court, the reviewing court cannot make an "as applied" determination of the constitutionality of a statute. *People v. Brisco*, 2012 IL App (1st) 101612, ¶57. We, therefore, decline to consider the defendant's "as applied" challenge to the statute since he failed to raise this issue in the trial court and has therefore forfeited a review. *Id.*, ¶57.

¶ 27 We next address the defendant's argument that he did not knowingly and intelligently waive his right to a jury trial where the trial court failed to ensure that he knew the difference between a jury and bench trial. He contends that this is the duty of the trial court which cannot be delegated to defense counsel, and that this error invalidates his jury waiver.

¶ 28 A defendant validly waives his right to a jury trial if he does so understandingly and in open court. *People v. Turner*, 375 Ill. App. 3d 1101, 1108 (2007). The trial court has a duty to ascertain whether the defendant understandingly waives his right to a jury trial, but such determination is dependent on the facts and circumstances of each particular case. *Id.* We review this issue *de novo*. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004).

¶ 29 Here, the defendant not only signed a written jury waiver, but was also questioned by the

court regarding his understanding of jury waiver and his discussion with his attorney on the subject. The defendant indicated that he had conferred with his counsel regarding what it meant to waive his right to a jury trial, and that he understood his right to a trial before either a judge or jury. Under these facts, it is clear that the defendant knowingly and intelligently waived his right to a jury trial. *People v. Bannister*, 232 Ill. 2d 52, 70-71 (2008); *People v. Smith*, 114 Ill. App. 3d 1007, 1015-16 (1983).

¶ 30 We find the defendant's reliance on *People v. Phuong*, 287 Ill. App. 3d 988 (1997), *People v. Sebag*, 110 Ill. App. 3d 821 (1982), and *People v. Scott*, 186 Ill. 2d 283 (1999), misplaced. In *Phuong*, the defendant, a Chinese-speaking woman who had recently immigrated to the United States and did not understand English, had signed a written jury waiver which was translated to her. *Phuong*, 287 Ill. App. 3d at 99. Her counsel indicated to the court that she agreed to a bench trial, and the court merely informed her that she could be tried by a jury or a judge without further elaboration. *Id.* The appellate court found that it was unclear whether the defendant actually understood what a jury was, noting that trial courts should be particularly careful to ascertain whether a jury waiver is made knowingly where the defendant does not speak English. *Id.* At 995-96. The appellate court concluded that the record in that case did not show that the defendant knowingly and voluntarily waived her right to a jury trial. *Id.* at 996. Here, unlike *Phuong*, the defendant is English speaking, and in response to questions by the trial court, indicated his understanding that he could have a trial before either a judge or a jury. The court's question determined that the defendant understood what it meant to waive his right to a jury. See *Smith*, 114 Ill. App. 3d at 1015.

¶ 31 *People v. Sebag*, 110 Ill. App. 3d 821 (1982), also relied upon by the defendant, is not supportive of his argument. In that case, the defendant was charged with battery and public indecency. The defendant, acting *pro se*, signed a written jury waiver, and the trial court merely informed him, with regard to the battery charge, that he had a right to a jury or bench trial and that by waiving his right to a jury trial he could not later reinstate it. *Id.* at 828-29. The reviewing court

concluded that the record did not adequately demonstrate that the defendant voluntarily and knowingly waived his right to a jury trial on the public indecency charge. *Id.* at 829. Here, unlike *Sebag*, the defendant had the benefit of counsel when he executed the written jury waiver, and the court inquired as to whether the defendant discussed the different options with his counsel and what it meant. The defendant indicated that he had discussed the issue with his counsel and that he understood that he could have a trial either before a judge or jury. Therefore, the defendant's reliance on *Sebag* is misplaced.

¶ 32 Likewise, *People v. Scott*, 186 Ill. 2d 283 (1999), does not support the defendant's argument. In *Scott*, the written jury waiver was executed in the defendant's attorney's office, and later filed outside of the defendant's presence. *Scott*, 186 Ill. 2d at 284. On the day of trial, counsel merely stated to the court that they would be proceeding with a bench trial. *Id.* The supreme court found that where the defendant was never present in open court when a jury waiver was discussed, the waiver was not knowingly and intelligently made. *Id.* at 284-86. Here, unlike *Scott*, the written jury waiver was executed in court by the defendant after the trial court inquired if the defendant understood what it means to waive a jury trial, and the defendant indicated that his counsel had explained the matter to him. Thus, *Scott* is factually distinguishable from this case, and we find that the defendant's jury waiver was knowingly and intelligently made.

¶ 33 The State concedes, and we agree with the defendant on his final contention that the fees and fines levied by the trial court incorrectly reflect a total of \$710. The correct amount should be \$610. Pursuant to our authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we correct the trial court's order to reflect the total of fines and fees to be \$610.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, and correct the fines and fees order as indicated.

¶ 35 Affirmed, as modified.