

No. 1-11-3369

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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. 11 CR 1254
)	
DERRICK HICKS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for possession of ammunition (one bullet) by a felon was reversed because the evidence was not sufficient.
- ¶ 2 Following a bench trial, defendant Derrick Hicks was found guilty of unlawful possession of ammunition by a felon and sentenced to six years in prison. On appeal, defendant first contends the State failed to prove he constructively possessed the ammunition, a bullet, beyond a reasonable doubt, because there was insufficient evidence defendant had knowledge and control of the bullet. Defendant also contends his sentence was excessive and the offense was misstated on his mittimus. For the reasons that follow, we reverse defendant's conviction.

¶ 3 Defendant was arrested and charged with being an armed habitual criminal, unlawful possession of ammunition by a felon and unlawful possession of a weapon by a felon. At trial, Officer Jacqueline Rios testified she was part of a team of officers that executed a search warrant for a home located at 5753 South Artesian in Chicago around 6:20 a.m. on December 21, 2010¹. The home had two floors and a basement. After the police entered, Rios and her team went to the second floor, where Rios observed defendant and other people. Defendant was not at that time in possession of any weapons or ammunition. An apartment located in the basement of the home was not accessible from "inside the first floor" because "it was boarded."

¶ 4 Sergeant Brian Hawkins testified he first saw defendant when defendant was being detained by police in the front hallway of the Artesian home. Hawkins was not sure exactly where defendant was standing, but did not believe it was on the second floor. Hawkins eventually searched a detached garage of the home and found a .22 caliber handgun and live rounds of ammunition. Hawkins could not recall if the weapon was loaded or not.

¶ 5 Officer Melissa Watkins testified that when she entered the Artesian home with her team, she proceeded to the second floor and there observed defendant. She then searched the basement apartment and recovered a lease bearing defendant's name. Watkins also recovered a bullet and "several other things" including a police radio. The lease was located in a shoebox with other paperwork. The lease lists defendant as the tenant and the term covers January 27, 2010 to January 27, 2011.

¶ 6 The parties stipulated defendant had two prior felony convictions for unlawful use of a weapon (06 CR 13090 and 04 CR 04878).

¹ The warrant directed officers to search the Artesian home for defendant along with a handgun, other firearms, ammunition and proof of residency which could constitute evidence of the offense of "unlawful use of a weapon by a felon."

¶ 7 After the State rested, defense counsel moved for a directed finding on all counts, arguing, *inter alia*, the garage was "anything but secure," anyone could have had access to it, and there was no evidence presented that defendant knew of the gun and ammunition recovered from the garage. The court noted there was no mention of the garage in the lease, and granted defendant's motion for a directed verdict as to Count 1 (armed habitual criminal) and Count 3 (unlawful possession of a firearm by a felon) but denied the motion as to Count 2 (unlawful possession of ammunition by a felon).

¶ 8 After closing arguments, the court noted the State presented sufficient evidence to prove defendant's "constructive possession" of the bullet found in the basement because the premises were "clearly in Mr. Hicks' name and the bullet was found in the same room."

¶ 9 The court found defendant guilty of unlawful possession of a firearm by felon, a Class 2 felony, and denied defendant's motion for a new trial. During defendant's sentencing hearing, the parties made corrections to defendant's presentence investigation report (PSI). The State initially argued defendant could be sentenced as a Class X offender because of his prior convictions. Defense counsel disagreed and the court granted the State's motion for an extension so that the State could collect certified copies of defendant's prior convictions.

¶ 10 When the sentencing hearing resumed, the court noted defendant's conviction of a previous Class 1 felony in 2003 made him "non-probationable" for the instant offense. The State conceded defendant's prior conviction in 2006 of unauthorized use of a weapon by a felon was the predicate offense for this case and defendant was not a Class X offender. It argued for an "extended term" in prison, stating defendant was a habitual criminal and referencing, *inter alia*, defendant's four felony convictions.

¶ 11 Defense counsel argued the court should sentence defendant to the minimum three-year sentence. In mitigation, counsel noted defendant's upbringing "wasn't the greatest," his mother

abused drugs and he had little contact with his father. Counsel also argued defendant had a "good" relationship with three of his five children. Counsel noted defendant earned his GED and had worked as a stocker at a grocery store. Finally, counsel discussed that defendant had asthma, was shot three times in 2009 and had a history of drug and alcohol abuse.

¶ 12 The court stated defendant had an "illness" due to his drug and alcohol abuse. It stated defendant "had to pay the cost" based on his "criminal history" and the "facts and circumstances of this case." The court sentenced defendant to six years in prison.

¶ 13 On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt of constructive possession of the one bullet. The evidence revealed that, when she entered the building, Officer Watkins found defendant on the second floor of the two-story building and then she searched the basement where she found a lease bearing defendant's name in a shoebox. Officer Watkins failed to provide the location of the recovered bullet other than in the basement, which was not even accessible from the first floor because it was boarded up. We find defendant's arguments persuasive.

¶ 14 When presented with a challenge to the sufficiency of evidence, our inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). The State bears the burden of proving a defendant guilty beyond a reasonable doubt of the existence of every element of the offense. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008).

¶ 15 A defendant is guilty of unlawful possession of firearm ammunition if he knowingly possessed the ammunition "on his land or in his own abode." 720 ILCS 5/24-1.1(a)(West 2010).

¶ 16 Possession of a weapon or ammunition can be actual or constructive. *People v. Spencer*, 2012 IL App (1st) 102094 ¶17. There is no dispute that the State had to establish constructive

possession because there was no actual personal present dominion over the bullet. *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998). A defendant constructively possesses ammunition if he had knowledge of the presence of the ammunition and exercised immediate and exclusive control over the area where the ammunition was *found*. *Id.*

¶ 17 The State failed to meet its burden of proof of immediate and exclusive control of the area where the bullet was *found*. The only testimony by Officer Watkins regarding the recovery of the lease and the bullet from the basement was the following: "I recovered a lease bearing the defendant's name Hicks, Derrick. I also recovered one bullet, one round, and several other things, transistor, like a radio, like a police radio, that sort of stuff." When asked where she found the "lease agreement", the officer replied: "There was a shoe box with a lot of paperwork inside of it and I just kind of dug through it until I found something there." Officer Watkins was never asked, nor did she ever say, precisely where the bullet was recovered in the basement. Although Officer Watkins inventoried the gun and ammunition from the detached garage, she never really said that about the one bullet recovered from the basement even though the record includes an inventory sheet that lists the recovery of one live round. In addition to the complete absence of testimony or evidence as to where the one bullet was *found* in the basement, the officers testified that the entrance to the basement was boarded up inside the house and, therefore, could not be accessed from the first floor. Notably, Officer Rios testified that the premises had two floors and a basement and the officers found defendant on the second floor with "other people." Viewing the evidence in the light most favorable to the State, as we must, we find that the evidence was not sufficient to prove beyond a reasonable doubt that defendant constructively possessed one bullet which was recovered in an unidentified location in the basement which had no access from inside the building because it was blocked by boards.

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¶ 18 For the foregoing reasons, we reverse the judgment of the trial court and need not address defendant's remaining issues.

¶ 19 Reversed.