

No. 1-11-3009

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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. 10 CR 6478
)	
JUAN CASTILLO,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* Trial court's denial of motion to suppress evidence reversed due to warrantless search of closed cooler inside defendant's garage; armed habitual criminal and aggravated unlawful use of a weapon convictions vacated; cause remanded for a new trial; mittimus corrected.

¶ 2 Following a bench trial, defendant Juan Castillo was found guilty of armed habitual criminal (AHC) and aggravated unlawful use of a weapon (AUUW), then sentenced to concurrent, respective terms of 18 and 7 years in prison. On appeal, defendant contends that his

conviction for AHC should be reversed because the gun at issue was recovered from a closed cooler in his garage without a warrant, or exception thereto. Defendant further contends that his conviction for aggravated unlawful use of a weapon must be vacated because it violates the one-act, one-crime doctrine, and that his mittimus should be corrected to reflect an additional 30 days of presentence credit.

¶ 3 Defendant's conviction arose from events that transpired on March 23, 2010, on the southwest side of Chicago. That night, police officers detained him in an alley near his residence and recovered a loaded firearm from a closed cooler in his garage. As a result, defendant was charged with a variety of gun possession offenses, including AHC (Count 1) and AUUW (Counts 2-7).

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and suppress evidence, asserting that his warrantless arrest was made without probable cause, and in the process a handgun was recovered from a closed cooler in the garage. Defendant requested the suppression of the gun and other items discovered as a result of the arrest and detention.

¶ 5 At the suppression hearing, defendant testified that on the night of the incident, he was standing in his garage at 6054 South Menard Avenue, with two of his neighbors. About 6 p.m., a squad car containing a male and a female police officer stopped in front of his garage. The male officer asked "how are things going," and he responded that everything was fine. The male officer then exited the squad car and told him and his neighbors to go into the alley and place their hands on the trunk of the car. They complied, and the officer entered defendant's garage and began to open cabinets.

¶ 6 Defendant testified that the officer had not shown him an arrest or search warrant, and he did not give him permission to enter the garage and conduct a search therein. When defendant told the officer that it was private property and asked why he was searching the garage, the officer told him to shut up. Defendant further testified that on the night of the incident many items, including radios, speakers, and boxes, were on top of the cooler in his garage, and that the cooler is one foot deep.

¶ 7 On cross-examination, defendant stated that before the officers arrived on the night of the incident, several men from a gas company were soliciting in the alley near his garage, and returned numerous times despite his request that they leave. On one of those occasions, the men entered his garage and mentioned his wife, which angered him. The police arrived "way later" after the men finally left the area. Defendant denied cursing at those men or having a gun in his cooler on the night of the incident, but acknowledged that he is Hispanic and was wearing a sleeveless tank top at the time.

¶ 8 The defense rested and the State called Chicago police officer Christopher Stark. He testified that about 6 p.m. on March 23, 2010, he was on routine patrol in a squad car with his partner, Officer Melissa Miller, when they were flagged down by two men near 6000 South Menard. The men, Saladin Turner and Christopher Watson, appeared nervous, as though something traumatic had happened to them. Watson told the officers that a Hispanic man wearing a "wife beater" tank top had just shot at him and Turner in a nearby alley. Officers Stark and Miller drove southbound through the alley, in the direction in which Watson indicated, and saw one white and two Hispanic men standing inside a garage at 6054 South Menard. The door

to the garage was open and Officer Stark saw that one of the men, who he identified in court as defendant, was wearing a tank top and was standing near a plastic cooler.

¶ 9 Officer Stark ordered the three men into the alley and told them to place their hands on the officers' squad car for safety purposes. The men complied with this order, and the officers performed a protective pat down of defendant, but did not recover anything. Officer Stark then searched inside the garage for the gun, looking in places that were "open that could easily be accessible to hide a firearm," while Officer Miller watched over the three men, whose hands were still on the squad car. When he opened the closed cooler, which defendant had been standing near, Officer Stark found a .38 caliber handgun that was loaded with two live rounds and one spent shell casing. The officers detained defendant, and Watson and Turner then identified him as the person who had shot at them.

¶ 10 On cross-examination, Officer Stark testified that Watson told him that the shooting had just occurred, but he had not heard any gunshots. Officer Stark denied looking in any cabinets or drawers while searching for the gun, and testified that he only opened the closed lid to the cooler, which had nothing on top of it. On re-direct examination, Officer Stark testified that no other garage door was open in the alley, and that defendant's garage was the only one that contained a Hispanic male wearing a tank top, as reported by the men who informed him of the incident.

¶ 11 After reviewing the evidence presented at the hearing, the trial court denied defendant's motion. In reaching its decision, the court observed that the version of events provided by both parties was consistent in most respects, particularly the setting. The court found that the officers were acting on a citizen's report of a violent crime and had probable cause to detain defendant. The court further found that the officers would not have had time to obtain a warrant, and that

exigent circumstances were present to allow the officers to check out the situation and recover the gun.

¶ 12 At the ensuing trial, the parties agreed to incorporate by reference the testimony presented at the suppression hearing. Christopher Watson then testified that in March 2010, he worked for a gas supply service company and, on the night of the incident, he and Turner, a trainee, were walking through the alley near 6054 South Menard on their way to a nearby park. As they proceeded, they passed three men standing inside an open garage. Watson identified defendant as one of those men who was standing about eight feet away from him and holding a "dirty silver" handgun. Defendant asked him why they "keep coming around here," and Watson instructed Turner to remain silent and keep walking.

¶ 13 Watson further testified that defendant exited the garage, and, although neither he (Watson) nor Turner had spoken, defendant asked them "what did you say," and then stated "say something else." Immediately thereafter, Watson heard a gunshot, but did not see defendant fire the gun because he was not facing him at that time. He and Turner continued walking, and, when they reached the end of the alley, they told police officers in a nearby squad car about the incident. The officers left to investigate, and shortly thereafter Watson identified defendant on the scene as the person he had seen holding a gun in the alley. The officers also showed him a gun at that time, and he identified it as the gun defendant had been holding.

¶ 14 On cross-examination, Watson stated that when defendant exited the garage and yelled, he turned around and saw defendant standing about 30 feet behind him and Turner pointing a gun in their direction. Watson did not turn around to look at defendant after he heard the noise, but believed that noise was a gunshot, and acknowledged that he did not see defendant, or

anyone else, fire a gun at that time. Watson denied any altercation with, or even speaking to, defendant on the night of the incident.

¶ 15 Saladin Turner corroborated Watson's description of events, and also made an in-court identification of defendant as the man he saw holding a silver gun on the night of the incident. He testified that he also identified defendant on the scene as the man he had observed with a silver gun, and identified the gun that police showed him as the one defendant had in his hands. On cross-examination, Turner stated that he turned around after he heard the gunshot, and saw defendant holding a gun in his hand, but acknowledged that he did not know the direction the gun was pointed at the time it was fired.

¶ 16 Officer Stark testified that he has been a police officer for 10 years and is familiar with the way firearms work. He found the condition of the gun he recovered from defendant's garage on the night of the incident consistent with a gun that had been recently discharged. On cross-examination, Officer Stark testified that he did not bring the gun to court, and, although the gun was inventoried, he did not believe that it had been fingerprinted or that a gunshot residue test was performed on defendant. When asked if the gun was also consistent with a gun that was fired six months before the incident, he stated "that's possible, yes." Defendant's certified convictions for armed robbery in Case No. 89 CR 1474402 and home invasion in case No. 94 CR 0433601 were then entered into evidence, and both sides rested.

¶ 17 The trial court found defendant guilty of Counts 1 through 7, stating, "the government has met their burden of proof beyond a reasonable doubt as to Counts 1, 2, 3, 4, 5, 6 and 7, all will merge into Count 1. One act, One crime," and not guilty of the remaining three counts.

¶ 18 At the start of the sentencing hearing, the trial court reiterated that defendant had been found guilty of Counts 1 through 7, and stated that "counts 2 through 7 all merged." The trial court then sentenced defendant "to 18 years in the penitentiary on Count 1, 7 years in the penitentiary on Counts 2 through 7, Counts 3, 4, 5, 6, and 7 will all merge, everything runs concurrently." On appeal, defendant seeks reversal of his convictions, claiming first that the gun found in the cooler was obtained in violation of his fourth amendment rights, and that the trial court erred in denying his motion to quash arrest and suppress evidence.

¶ 19 The fourth amendment of the United States Constitution guarantees the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). A search conducted without a search warrant is presumptively unreasonable unless it is a search conducted pursuant to consent, it is incident to an arrest, or it is predicated on probable cause where there are exigent circumstances which make it impractical to obtain a warrant. *People v. Alexander*, 272 Ill. App. 3d 698, 704 (1995). On a motion to suppress evidence, defendant bears the burden of proving that the search and seizure were unlawful; however, once defendant has established such a *prima facie* case, the burden shifts to the State to produce evidence that justifies the intrusion. *People v. McQuown*, 407 Ill. App. 3d 1138, 1143 (2011).

¶ 20 In reviewing an order denying defendant's motion to quash arrest and suppress evidence, mixed questions of law and fact are presented. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). Factual findings made by the trial court will be upheld unless they are against the manifest weight of the evidence, whereas the trial court's application of the facts to the issues presented and the ultimate question of whether the evidence should be suppressed is subject to *de novo*

review. *Pitman*, 211 Ill. 2d at 512. In reaching our determination, we may properly consider testimony presented at trial, in addition to that provided at the suppression hearing. *People v. Rhinehart*, 2011 IL App (1st) 100683, ¶ 9.

¶ 21 Here, the trial court upheld the warrantless search in the garage based on its finding of probable cause and exigent circumstances. On appeal, defendant specifically disputes the court's conclusion regarding exigent circumstances, asserting that any possible exigency had been eliminated before Officer Stark entered the garage and began his search. The exigent circumstances analysis is an objective one (*People v. Nichols*, 2012 IL App (2d) 100028, ¶ 65), and the determination of whether they were present must be based on the totality of the facts presented, a decision guided by factors which the supreme court has identified as potentially relevant to exigency (*People v. McNeal*, 175 Ill. 2d 335, 345 (1997)).

¶ 22 In this case, Watson testified that he reported the incident to Officer Stark as soon as he and Turner exited the alley where the incident occurred, and told him that a Hispanic man in a tank top had fired a gun at him and Turner in the alley, indicating a recently committed crime of violence. The officers left immediately to investigate, no evidence was presented that they engaged in unjustified or deliberate delay during which time a search warrant could have been obtained, and defendant does not contest that the officers had probable cause to arrest him. The record also shows that Officer Stark's entry into defendant's garage was made peaceably, if nonconsensually. Accordingly, these factors weigh in favor of the court's ruling. *McNeal*, 175 Ill. 2d at 345.

¶ 23 On the other hand, it is uncontested that at the time Officer Stark entered the garage to conduct a search therein, he was aware that defendant was no longer inside the garage, but rather

in the alley with his two neighbors who all had their hands on the squad car and were being guarded by Officer Miller. In addition, the pat down search of defendant revealed no weapon. Thus, when Officer Stark opened the closed cooler inside defendant's garage, the exigency no longer existed to excuse the warrantless search of the cooler. *McNeal*, 175 Ill. 2d at 345, see also *People v. Rushing*, 272 Ill. App. 3d 387, 389, 391-93 (1995) (finding no exigent circumstances where defendant's brother reported that defendant threatened him with a gun, but a pat down search of defendant in the home he shared with his brother revealed that defendant was unarmed). As a consequence, we conclude that the warrantless search was not justified under the exigent circumstances exception to the rule.

¶ 24 In reaching that determination, we have considered *Nichols*, 2012 IL App (2d) 100028, ¶ 69, and *McNeal*, 175 Ill. 2d at 347, relied upon by the State, where the reviewing courts found that exigent circumstances justified a warrantless search and seizure. Unlike the case at bar, however, the suspects in those cases had not yet been apprehended and were still at large when the officers searched the premises in question. *Nichols*, 2012 IL App (2d) 100028, ¶¶ 6-8; *McNeal*, 175 Ill. 2d at 343. Here, in contrast, defendant had already been detained and searched, and was being guarded by another officer in the alley, circumstances which readily distinguish this case from *Nichols* and *McNeal*.

¶ 25 The search was also not justified as incident to arrest, or a protective sweep, *i.e.*, one conducted to protect the safety of officers or others, and limited to a cursory visual inspection of places in which a person may be hiding. *People v. Pierini*, 278 Ill. App. 3d 974, 979-80 (1996). The record shows that the cooler was no longer in defendant's immediate control when the search was conducted (see *People v. Hobson*, 169 Ill. App. 3d 485, 489-90 (1988) (finding that search

of garage was not incident to an arrest because defendant was arrested outside of garage and was in custody when police conducted the search)), nor was the cooler an item in which a person could hide and launch an unexpected attack (*Pierini*, 278 Ill. App. 3d at 980)). Thus, the officers' safety was not at risk and the search of the cooler was not encompassed under the protective sweep exception. See *Rushing*, 272 Ill. App. 3d at 392 (reaching the same conclusion in relation to the search of a toolbox).

¶ 26 We also find unpersuasive the State's alternative argument that the entry of the garage and seizure of the firearm was justified as a brief investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 30 (1968). In so arguing, the State relies on *Michigan v. Long*, 463 U.S. 1032 (1983), and *People v. Colyar*, 2013 IL 111835, ¶ 48, both of which we find inapplicable here.

¶ 27 In *Long*, 463 U.S. at 1049, the Supreme Court extended *Terry* to permit a protective search of a passenger compartment of a vehicle during an investigatory stop, and in *Colyar*, 2013 IL 111835, ¶¶ 48, 52, our supreme court relied upon *Long* in upholding a protective search of the interior and trunk of a vehicle, after officers observed a bullet in plain view on the center console of the vehicle, and recovered a bullet from defendant's person following a subsequent pat-down search. Here, unlike *Long* and *Colyar*, the particularly hazardous conditions inherent in roadside encounters were not present, the search at issue did not involve the passenger compartment of a car, nor was defendant in a position to gain immediate control of the gun. Accordingly, we find the reasoning employed in *Long* and *Colyar* inapplicable here.

¶ 28 In sum, we find that Officer Stark's warrantless search of the closed cooler in defendant's garage was not justified by any exception to the warrant requirement, and, accordingly, that the

trial court erred in denying defendant's motion to suppress the gun and testimony relating to its recovery.

¶ 29 The question remains as to the appropriate remedy for the fourth amendment violation. Where evidence is obtained in violation of a constitutional right, a conviction based on that evidence will be reversed unless admission of the illegally obtained evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Hobson*, 169 Ill. App. 3d at 493. The State does not argue that evidence that police recovered the gun was harmless beyond a reasonable doubt, and our review of the record shows that it was not. The trial court expressly relied on evidence that the gun had been recovered in finding defendant guilty, stating that the police quickly responded to the scene and "found a gun in a condition with one expired cartridge consistent with what – what was told to them by the two witnesses ***." The remaining evidence was not overwhelming; it consisted of the testimony of the two victims, which was contradicted by the defendant's testimony. Defendant maintains that, under these circumstances, he is entitled to outright reversal of his convictions. The State responds that defendant is not entitled to outright reversal and that this case should be remanded for a new trial because the remaining evidence may still be sufficient to support the convictions.

¶ 30 In determining whether remand for a new trial is proper in this case, we must determine whether doing so would raise a double jeopardy concern. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). Although the double jeopardy clause prohibits retrial after a conviction is reversed due to insufficient evidence to support that conviction, it does not preclude retrial where a conviction is set aside due to a trial error, such as the admission of inadmissible evidence. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). For purposes of double jeopardy, we may take all evidence

submitted at the original trial, including that which we have now ruled inadmissible, into consideration in determining the sufficiency of the evidence. *Lopez*, 229 Ill. 2d at 367.

¶ 31 Defendant was convicted of AHC and AUUW. AHC occurs where a person "receives, sells, possesses, or transfers" any firearm after previously having been convicted of two or more qualifying offenses identified by the statute. 720 ILCS 5/24-1.7(a) (West 2010). AUUW occurs where, *inter alia*, a person carries an uncased, loaded and immediately accessible firearm on their person. 720 ILCS 5/24-1.6(A)(1) (West 2010).

¶ 32 At trial, the State presented evidence of defendant's prior qualifying convictions for robbery and home invasion and the testimony of Watson and Turner regarding their observation of defendant holding a gun, which he then fired in their vicinity. The State also presented the testimony of Officer Stark, who found defendant in the only open garage in the alley and testified that defendant matched the description of the man that was given to him by the victims. Officer Stark also testified regarding his recovery of a loaded gun inside defendant's garage. Viewing this evidence in the light most favorable to the prosecution (*Lopez*, 229 Ill. 2d at 367), we find that a rational trier of fact could have found defendant guilty beyond a reasonable doubt of AHC and AUUW, and, as such, that there is no double jeopardy impediment in remanding this case for retrial.

¶ 33 In reaching this decision, we have considered *People v. Alexander*, 272 Ill. App. 3d 698, 709 (1995), upon which defendant for his argument that he is entitled to an outright reversal of his conviction because it was "contingent in large part" upon the fruits of the illegal search. In *Alexander*, officers conducted a warrantless search of defendant's garage and recovered numerous stolen vehicle parts, as evidenced by their examination of the vehicle identification

numbers (VINs). *Alexander*, 272 Ill. App. 3d at 701, 708. On review, this court found no exception to the warrant requirement, and that the trial court erred in denying defendant's motion to suppress evidence. *Alexander*, 272 Ill. App. 3d at 706, 708. In doing so, this court noted that the incriminating nature of the parts could not have been immediately apparent to the officers, and would only have become apparent after the officers searched for and read the VINs.

Alexander, 272 Ill. App. 3d at 708. This court thus reversed defendant's conviction, rather than remanding the case for a new trial, finding that defendant's conviction was contingent in large part upon the evidence seized in the warrantless search. *Alexander*, 272 Ill. App. 3d at 709.

¶ 34 In *Alexander*, defendant was charged with possessing stolen motor vehicle parts, whereas here, defendant was charged with possessing a gun in general, not with a specific gun.

Accordingly, there was no need to ascertain the serial number on the gun defendant was seen holding, or otherwise particularize it, as in *Alexander*, where evidence relating to the VINs was required to prove possession of the stolen motor vehicle parts. As such, the testimony of Watson and Turner regarding their observation of defendant holding a gun as they passed him in the alley, if deemed credible by the jury, could sustain convictions for AHC and AUUW.

Accordingly, we find *Alexander* inapplicable to the case at bar.

¶ 35 For the foregoing reasons, we reverse the trial court's denial of defendant's motion to suppress, vacate defendant's convictions for AHC and AUUW, and remand this case to the trial court for a new trial. Due to our determination on this issue, we need not consider the one-act, one-crime issue raised on appeal, but will address the remaining issue concerning pretrial custody credit.

¶ 36 Defendant claims, the State concedes, and we agree that he is entitled to 30 additional days of credit for time spent in pretrial custody. Defendant is entitled to receive credit for each day spent in presentence custody, excluding the day the mittimus is issued. 730 ILCS 5/5-4.5-100(b); *People v. Williams*, 239 Ill. 2d 503, 505, 509 (2011). Here, defendant is entitled to 542 days' credit because he was arrested on March 23, 2010, and remained in custody until he was sentenced on September 16, 2011. However, at sentencing the trial court credited defendant for only 512 days spent in presentence custody. We thus direct the clerk of the circuit court to correct the mittimus to reflect 542 days of presentence custody credit.

¶ 37 Reversed and remanded, mittimus corrected.