2015 IL App (1st) 130506-U

FIRST DIVISION
JANUARY 26, 2015

No. 1-13-0506

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 11148
	)	
ANTOINE JACKSON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Admission of a more than 10-year-old conviction for impeachment purposes did not constitute plain error; one count of possession of a weapon by a felon and aggravated unlawful use of a weapon vacated as violation of one-act, one-crime doctrine; fines and fees order modified; mittimus modified to reflect an additional day of presentence custody credit; judgment affirmed in all other respects.

¶ 2 Following a bench trial, defendant Antoine Jackson was found guilty of one count of being an armed habitual criminal, two counts of possession of a weapon by a felon, and one count of aggravated unlawful use of a weapon (UUW). He was then sentenced to concurrent terms of eight years' imprisonment for the armed habitual criminal conviction and seven years' imprisonment for each of the remaining counts. On appeal, he contends that he was denied his

right to a fair trial when the court allowed, as impeachment evidence, a certified copy of his prior felony conviction for possession of a controlled substance that was more than 10 years old. He further contends that his three convictions for the lesser gun charges violate the one-act, one-crime doctrine, and that he was entitled to one additional day of credit for time spent in presentence custody. Defendant also contests the propriety of the electronic citation fee assessed against him, and requests an additional $5 credit towards his fines and fees.

¶ 3 At trial, Chicago police officer Eric Lawriw testified that at 7:15 p.m. on July 1, 2011, he and his partners, Officers Andersen and Tapia, were in uniform, and driving in an unmarked vehicle in the area of 1501 North Leamington Avenue. Officer Andersen was at the wheel, and another unmarked police car was patrolling with them.

¶ 4 Officer Lawriw testified that it was still light out when he observed two groups of people on the street and sidewalk. One was defendant, who was having a verbal altercation with another person, and waving his hand in which he held a gun. There was nothing obstructing Lawriw's view of defendant, and when the officers were within 10 feet of defendant, Officer Lawriw exited his vehicle, announced his office. Defendant looked in Officer Lawriw's direction, then threw the gun to the ground, and fled. Officers Lawriw and Tapia pursued defendant, and eventually took him into custody. Officer Lawriw testified that he never lost sight of defendant, and when he returned to 1501 North Leamington Avenue, he saw that Officer Matthew Graf had recovered the gun which defendant had dropped.

¶ 5 Officer Graf testified that at the time in question he and his partner, Officer Orlando, were in uniform on routine patrol and driving an unmarked car. As they approached 1501 North Leamington Avenue, Officer Graf observed defendant engaging in a heated altercation and

waving a gun in his right hand. At this point, Officer Graf was 20 feet away from defendant and closing in on him with nothing obstructing his view. When he was less than 15 feet from defendant, he exited the vehicle. Defendant dropped the gun and fled, and Officer Graf immediately recovered the gun, which was loaded.

¶ 6 Officer Chris Andersen testified that at the time in question he came across two groups of people in a heated altercation. Officer Andersen had a clear view of defendant, who had a gun in his hand. As soon as the officers stopped the car and exited the vehicle, defendant dropped the gun and fled.

¶ 7 Eugene Jackson testified that he is a good friend of defendant, and has known him for 15 years. He sees him every day when defendant is not incarcerated, and on July 1, 2011, they spent the day together. At 7 p.m., they were walking on Leamington Avenue when they saw a group of people, and defendant noticed "AJ," who had hit his sister. Defendant confronted AJ, they argued, and when they started to get physical, Jackson and some others got between them to break it up. When police arrived on the scene, "[s]everal people ran," scattering everywhere. Jackson did not run away and did not see police recover anything from the ground.

¶ 8 Jackson testified that defendant did not have a gun on July 1, 2011, and that he did not observe defendant waving a gun in his hand during the altercation. Jackson further testified that defendant did not have a gun in his pants because he would have noticed a bulge, or the gun hanging out of his pocket. Jackson added that it is normal for him to check whether defendant has a gun on him.

¶ 9 Defendant testified that he spent the day in question with his friend Jackson. Later in the day, he and Jackson came across AJ, and he confronted him because he had hit his sister. An

argument ensued and then a fight. A group of guys got between them and tried to break up the fight, and when police arrived, he "panicked and ran." Defendant was later told that others also fled, but he did not see anyone running away. Defendant denied having a gun on the day in question or waving it in his hand or throwing it to the ground when police arrived.

¶ 10 In rebuttal, the State sought to introduce into evidence a certified copy of defendant's conviction for possession of a controlled substance on November 29, 2000, for which he was sentenced to four years' imprisonment. Defendant objected to the admission of the 2000 conviction, arguing that it was outside the applicable time period. The State responded that defendant was sentenced to four years' imprisonment and thus, was discharged within the 10-year period. The court found that the 2000 conviction was a viable conviction to consider and that any prejudicial effect was outweighed by the probative value. The court also allowed the State to admit into evidence, as impeachment, defendant's two other prior convictions, *i.e.*, a 2004 conviction for aggravated UUW and 2008 conviction of UUW by a felon.

¶ 11 At the close of evidence, the court found that defendant had some credibility issues due to his criminal history, and that defendant's best friend testified to help him out. The court then determined that the three officers testified credibly that defendant had a gun when they arrived, then dropped it and fled. Defendant was pursued by police and arrested, and the weapon was recovered. On this evidence, the court found defendant guilty beyond a reasonable doubt of one count of being an armed habitual criminal (based on defendant's 2004 conviction for aggravated UUW and his 2008 conviction of UUW by a felon), two counts of possession of a weapon by a felon, and one count of aggravated UUW.

¶ 12 Defendant filed a motion for a new trial, which the court denied. In doing so, the court stated that the officers' testimony was clear and convincing, consistent, unimpeached, and reasonable, and that it believed the officers.

¶ 13 On appeal, defendant first contends that the trial court denied him his right to a fair trial when it allowed him to be impeached with a prior felony conviction for possession of a controlled substance which was more than 10 years old. He further contends that the court failed to conduct a proper balancing test to determine whether the conviction was more probative than prejudicial, and claims that the prior conviction had no bearing on his veracity as a witness.

¶ 14 Defendant acknowledges that he did not properly preserve this issue by raising it in his post-trial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); however, he maintains that this court should consider his claim as plain error under the closely balanced prong of the plain error rule. The State responds that there was no error, and therefore, no plain error, because defendant's 2004 conviction for aggravated UUW for which he was sentenced to five years' imprisonment and his 2008 conviction of UUW by a felon for which he was sentenced to six years' imprisonment tolled the 10-year period of *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 15 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived of a substantial right and thus a fair trial. *Herron*, 215 Ill. 2d at 178-79. The burden of persuasion remains with defendant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 16 Evidence of a conviction is not admissible for impeachment purposes if a period of more than 10 years has elapsed since the date of conviction or the release of the witness from confinement, whichever date is later. *Montgomery*, 47 Ill. 2d at 516. *Montgomery* removed any discretion for the trial court to admit a prior conviction that lies beyond the 10-year limit. *People v. Naylor*, 229 Ill. 2d 584, 597 (2008). The proponent of the prior conviction has the responsibility of presenting evidence of a subsequent release date, and absent such evidence, a trial court must not resort to any presumptions regarding a release date and must employ the date of conviction. *Naylor*, 229 Ill. 2d at 597. Here, the State did not introduce the release date, and, therefore, defendant's date of conviction is the operative date for purposes of *Montgomery*. *Naylor*, 229 Ill. 2d at 597-98. Accordingly, we find that the introduction of the prior felony conviction for possession of a controlled substance, where the date of conviction was November 29, 2000, was error as the conviction was more than 10 years old. *Montgomery*, 47 Ill. 2d at 516.

¶ 17 That said, defendant must establish plain error under the closely balanced evidence prong of the plain error rule. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). We observe that three officers testified consistently with each other and credibly, that defendant was seen on a public street waving a gun in his right hand, and when police arrived, he dropped the gun and fled. *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992). Defendant testified to the contrary, and attempted to explain his flight. Defendant's testimony was sufficiently impeached by evidence of his two prior convictions (2004 and 2008), in addition to the one he now contests on appeal. *Naylor*, 229 Ill. 2d at 594. Although defendant's good friend testified on his behalf, that testimony, as noted by the court, is influenced by their close relationship (*People v. Young*, 269 Ill. App. 3d 120, 123-24 (1994)), and does not negate the testimony of the three police officers to

the contrary (*People v. Berland*, 74 Ill. 2d 286, 306-07 (1978)). Under these circumstances, we find that the evidence was not closely balanced, and accordingly, that the erroneous introduction of his conviction in 2000 as impeachment did not rise to the level of plain error. *People v. Sims*, 192 Ill. 2d 592, 628 (2000).

¶ 18 Defendant further maintains in his reply brief that this error can be reviewed under the second prong of the plain error test, but he has not argued error under that prong. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Since he failed to present argument on how that prong of the plain error doctrine is satisfied in this case, he has forfeited plain error review under that theory. *Hillier*, 237 Ill. 2d at 545-46.

¶ 19 Defendant next contends that his convictions of two counts of possession of a weapon by a felon, and one count of aggravated UUW should be vacated because they violate the one-act, one-crime doctrine. The State concedes that aggravated UUW and one count of possession of a weapon by a felon should be vacated because a single gun was involved, but contends that the count of possession of a weapon by a felon based on his possession of ammunition should stand along with the armed habitual criminal conviction. We agree with the State's concession, and, therefore, vacate one count of possession of a weapon by a felon (based on possession of a firearm, Count 2), and aggravated UUW (Count 6).

¶ 20 Defendant acknowledges that he did not object or raise this issue in the trial court, but maintains that it may be reviewed as plain error because a violation of the one-act, one-crime rule affects his substantial rights. For the reasons that follow, we find no error in defendant's conviction for one count of possession of a weapon by a felon based on his possession of ammunition (Count 3).

¶ 21 The one-act, one-crime rule prohibits multiple convictions where the convictions are carved precisely from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). When multiple convictions are returned for the same physical act, the mittimus should reflect only one conviction for the most serious charge, and the court must vacate the convictions on the less serious charges. *People v. Cardona*, 158 Ill. 2d 403, 411 (1994).

¶ 22 Section 24-1.1(a) of the Criminal Code of 1961 (720 ILCS 5/24-1.1(a) (West 2010)) precludes a person from knowingly possessing any firearm or any firearm ammunition if such person has been convicted of a felony. Section 24-1.1(e) renders the possession of each firearm or firearm ammunition under this section to be a single and separate violation of the section. 720 ILCS 5/24-1.1(e) (West 2010).

¶ 23 In *People v. Anthony*, 2011 IL App (1st) 091528-B, we rejected defendant's argument that these sections permit prosecution for one count of possession of a weapon and another count for separate ammunition, but not a weapon loaded with ammunition. Accord *People v. Howard*, 2014 IL App (1st) 122958, ¶17. We construed section 24-1.1(e) as clearly and unambiguously allowing for multiple convictions based upon the single act of possessing a firearm containing ammunition, found no exception in the statute for situations where the ammunition is loaded into the gun, and refrained from reading such an exception into the statute. *Howard*, 2014 IL App (1st) 122958, ¶17, citing *Anthony*, 2011 IL App (1st) 091528-B.

¶ 24 That said, defendant refers us to the decision of our supreme court in *People v. Carter*, 213 Ill. 2d 295, 304 (2004), that simultaneous possession of multiple firearms and firearm ammunition by defendant in that case constitutes a single offense. We are not persuaded, however, since section 24-1.1(e) was amended in 2005, in response to *Carter*, in order to

alleviate any ambiguity in the statute as found by the court in that case. *Howard*, 2014 IL App (1st) 122958, ¶17, citing *Anthony*, 2011 IL App (1st) 091528-B. We find that the amendment expressly authorized multiple convictions for a defendant possessing a gun containing ammunition (*Howard*, 2014 IL App (1st) 122958, ¶17, citing *Anthony*, 2011 IL App (1st) 091528-B), and thus have no basis for vacating defendant's conviction for that offense. Accordingly, we affirm defendant's conviction on Count 3.

¶ 25 In doing so, we note that defendant has cited, in support of his position, *People v. Almond*, 2011 IL App (1st) 093587, which held that there cannot be multiple convictions for a loaded firearm. *Almond*, 2011 IL App (1st) 093587, ¶¶78-86, leave to appeal granted, No. 113817 (Jan. 29, 2014). Although defendant requests that we hold this issue in abeyance until the supreme court issues its decision in *Almond*, we decline to do so given our most recent decision in *Howard*.

¶ 26 Defendant next contends, the State concedes and we agree that he is entitled to an additional day of credit for time spent in presentence custody. 730 ILCS 5/5-4.5-100(b) (West 2012). Defendant also contends, the State concedes and we agree that he was improperly assessed a $5 electronic citation fee which is only to be collected from defendants upon a judgment of guilty or grant of supervision in any traffic, misdemeanor, municipal ordinance, or conservation case. 705 ILCS 105/27.3e (West 2012).

¶ 27 Accordingly, we vacate the judgment entered on one count of possession of a weapon by a felon (based on possession of a firearm, Count 2), and aggravated UUW (Count 6), modify the mittimus to reflect an additional day of presentence custody credit, modify the fines and fees

order to reflect an additional $5 credit toward the fines imposed, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 28 Affirmed in part; vacated in part; mittimus and fines and fee order modified.