2015 IL App (1st) 131482-U

FOURTH DIVISION
January 29, 2015

No. 1-13-1482

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. 12 CR 150
	)	
JESUS ZEPEDA,	)	Honorable
	)	William Timothy O'Brien,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence sufficient to convict defendant of unlawful possession of a firearm by a street gang member. Record on direct appeal inadequate to evaluate claim of ineffective assistance of trial counsel for not filing a motion to quash arrest.

¶ 2 Following a bench trial, defendant Jesus Zepeda was convicted of unlawful possession of a firearm by a street gang member and sentenced to 12 years' imprisonment. On appeal, defendant contends that trial counsel rendered ineffective assistance by not filing or arguing a

motion to quash his arrest. He also contends that the evidence was insufficient to convict him beyond a reasonable doubt.

¶ 3 Defendant and codefendant Mark Terry were charged with unlawful possession of a firearm by a street gang member and aggravated unlawful use of a weapon (AUUW), and defendant was charged with unlawful use of a weapon by a felon (UUWF), allegedly committed on or about November 29, 2011. The charges of possession of a firearm by a street gang member alleged that they possessed – had immediately accessible – a firearm and ammunition in a vehicle in a parking lot while neither was in his abode or had a firearm owner's identification card (FOID) and while they were members of a street gang. The case proceeded to severed but simultaneous bench trials.

¶ 4 At trial, police officer Mary Via testified that, shortly before midnight on November 29, 2011, she and Officer Garett Suderski responded to a report of a person with a gun in a restaurant parking lot at Cicero Avenue and Addison Street. The restaurant was open, but only for drive-through service. When they arrived there, she saw two Hispanic men in "hoodies" leaving a car parked in the lot, matching the description from the report. Defendant exited the passenger side of the car and walked towards the restaurant, then towards the intersection of Cicero and Addison when he found the restaurant door locked. Codefendant exited the driver's side, leaving the door ajar, and walked towards the Addison sidewalk. He was thus walking towards the officers' marked police car. Officers Via and Suderski stopped and detained defendant and codefendant respectively. They returned to the car, and Officer Via saw a large handgun – a blue-steel .357 with an eight- or nine-inch barrel – on the passenger side of the floorboard. She

denied that the gun was even partially under the passenger seat. Officer Suderski recovered the gun, which was loaded with six rounds, and Officer Via later inventoried the gun and bullets.

¶ 5 Officer S. Martin testified that he brought defendant to the police station following his arrest in the restaurant parking lot by Officers Via and Suderski, and that codefendant was also taken to the station. Officer Martin saw the car in the parking lot, a 2000 Dodge Neon, and later found that it was registered to Cynthia Morales, codefendant's mother. Officer Martin identified post-arrest photographs of defendant and codefendant, including their tattoos.

¶ 6 Defendant was interviewed by Officer Martin around 5 a.m., after being informed of and acknowledging his *Miranda* rights. Defendant admitted to being a member of the Familia Stone gang for about two months, in particular an unranked fighter, and previously being in the Four Corner Hustlers gang. He acknowledged that the gun was on the floor of the car when he entered the car. Officer Martin did not recall asking defendant if he had touched the gun.

¶ 7 Officer Martin then went to interview codefendant, first informing him of his *Miranda* rights. After acknowledging his rights, codefendant admitted to being an unranked member of the Latin Kings gang for about two months, and previously an unranked member of the Spanish Cobra gang. On the night in question, codefendant picked up defendant because defendant "wanted to shoot up some Maniac Disciples" due to an earlier altercation at Cicero and Addison. Codefendant saw the gun for the first time when defendant put it on the passenger-side floorboard upon seeing the approaching officers.

¶ 8 Officer Jon Ohlicher testified to being a gang or organized crime investigator. Based on lengthy investigations by himself and other officers, he identified Familia Stone, Spanish Four Corner Hustlers, Spanish Cobras, and Latin Kings as street gangs. Officer Ohlicher viewed the

post-arrest photographs of defendant and codefendant and identified their tattoos as gang-related. In particular, defendant had a tattoo linking him to Familia Stone and codefendant had tattoos linking him to the Spanish Cobras.

¶ 9 The court admitted certifications to the effect that defendant (and codefendant) had never been issued an FOID and that the Neon was registered to Morales. The court admitted, for purposes of the UUWF charges, defendant's prior conviction for AUUW. Defendant and the State stipulated to six incidents on specified dates between 2006 and 2012 when defendant "flashed" gang signs, yelled gang slogans, and/or admitted to being a member of the Spanish Four Corner Hustlers gang.

¶ 10 Motions for directed findings by defendant and codefendant were denied without argument or findings. Defendant and codefendant chose, after admonishment, not to testify. Following closing arguments, the court found defendant and codefendant guilty on all counts. The court found that the gun was clearly found in the Neon registered to codefendant's mother, that the gun was "very large," that the State proved both defendant and codefendant to be gang members and to not have FOIDs, and that this was a case of constructive possession. Regarding defendant, the court found that the gun was at his feet and thus within both his knowledge and control, that he admitted knowing the gun was in the car, and that he tried to distance himself from the gun by walking away rather than returning to the car when he found the restaurant closed. Regarding codefendant, the court found that the gun was only a few feet away from him in the car, that he admitted that "the purpose of the drive was retribution against another gang," and that walking away from the car without closing the door indicated haste to leave and thus knowledge of the gun.

¶ 11 Defendant filed a post-trial motion arguing insufficiency of the evidence, and in particular that constructive possession of contraband is not proven by mere proximity. Following argument, the court denied the motion. Following argument in aggravation and mitigation, the court sentenced defendant to 12 years' imprisonment for unlawful possession of a firearm by a street gang member. Defendant's post-sentencing motion was denied, and this appeal followed.

¶ 12 On appeal, defendant first contends that trial counsel rendered ineffective assistance by not filing or arguing a motion to quash his arrest. He cites extensively to *People v. Henderson*, 2013 IL 114040, ¶¶ 18-24, where our supreme court considered the merits of such a claim on direct appeal despite a State argument that the record was insufficient for such a review. However, the *Henderson* court affirmed the general rule that evaluating such an ineffective-assistance claim on direct appeal would require the parties and court to proceed on a trial record that was not developed for the purpose of litigating or preserving a suppression claim and thus often incomplete or inadequate for that purpose. *Id.*, ¶¶ 21-22. The *Henderson* court found the case before them distinguishable from that general rule: "[i]n the instant case, however, the trial court allowed defense counsel considerable leeway in her examination of [the o]fficers ***, eliciting the type of testimony that would have been elicited at a suppression hearing." *Id.*, ¶ 22.

¶ 13 Here, Officers Via and Suderski detained defendant and codefendant based on Officer Via perceiving a match to a description in a radioed report of a person with a gun. This was not an inherently improper detention: an anonymous tip may supply sufficient reasonable suspicion to conduct a detention or *Terry* stop if the information bears some indicia of reliability, such as accurate predictions of future behavior. *Henderson*, 2013 IL 114040, ¶ 26. However, in the absence of any challenge to the propriety of the detentions, neither the State nor defense elicited

the content or circumstances of the report from Officer Via or any other witness. The sum total of the evidence in the record, including police reports as well as trial testimony, was that Officer Via received a "flash" or police radio message of "a call of a person with a gun" containing some description, which Officer Via believed was matched by defendant, codefendant, and/or the Neon. Not only are the details of the report not in the trial record, neither are the most basic facts of whether it was anonymous – that it may have been anonymous to Officers Via and Suderski does not inherently imply that it was anonymous to the police as a whole – and whether it was from an informant or a concerned citizen. See *People v. Sanders*, 2013 IL App (1st) 102696, ¶¶ 15, 19 (information from concerned citizen is more credible than tip from person providing information for personal gain, and information from known informant whose reputation can be ascertained and who can be held accountable for fabrication is more credible than anonymous tip). Unlike the unusual circumstances in *Henderson*, the record here is insufficient to evaluate the instant claim, and said claim should be presented in a postconviction petition if an adequate record regarding it can be established.

¶ 14 Defendant also contends that the trial evidence was insufficient to convict him beyond a reasonable doubt, and in particular that his constructive possession of the firearm was unproven.

¶ 15 In reviewing a challenge to the sufficiency of the evidence, we determine, after taking the evidence in the light most favorable to the prosecution, whether the fact finder could rationally find every element of the offense beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. We generally refrain from substituting our judgment for that of the fact finder on issues involving the weight of evidence or witness credibility because the fact finder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences. *Id*. We will not reverse a

conviction merely because the defendant argues that a witness was not credible. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The fact finder need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, all the evidence taken together must satisfy the fact finder beyond a reasonable doubt of the defendant's guilt. *Id.* Similarly, the fact finder need not disregard inferences that flow normally from the evidence or 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. *Brown*, 2013 IL 114196, ¶ 48.

¶ 16 For purposes of the Criminal Code (720 ILCS 5/-11 *et seq*. (West 2012)), "[p]ossession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his possession." 720 ILCS 5/4-2 (West 2012). When a defendant is not found in actual possession of contraband such as a firearm, the State must prove constructive possession; that is, that the defendant (1) knew a firearm was present and (2) exercised immediate and exclusive control over the area where the firearm was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. The State may establish knowledge through evidence of a defendant's acts, declarations, or conduct, from which it may be inferred that he knew of the firearm's presence, and a defendant's control over the location where a weapon is found gives rise to an inference that he possesses that weapon. *Id*. While a defendant who is the owner and/or driver ("owner/driver") of a vehicle is not *ipso facto* in possession of everything in the passenger area of the vehicle if there are also passengers who may be in possession of the contraband, possession may be jointly held by the owner/driver and

passengers if the evidence supports a conclusion that the defendant had control, or the ability to exercise control, over the contraband. *People v. McIntyre*, 2011 IL App (2d) 100889, ¶ 17.

¶ 17 Here, defendant and codefendant were seen exiting a car where, virtually immediately thereafter, a large gun was found on the passenger-side floorboard in plain view; that is, not under the passenger seat. In that location, the gun would have been easily visible to and readily reachable by both defendant and codefendant while they were in the car. This is in stark contrast to the gun in *McIntyre*, which was "in an opening between the plastic base of the front-passenger seat and the leather portion of that seat, on the side of the seat that was closest to the front-passenger door" so that the court could not infer that the owner/driver "had control, or the ability to exercise control, over the weapon." *McIntyre*, 2011 IL App (2d) 100889, ¶ 18. Both defendant and codefendant demonstrated knowledge of the gun by their actions after leaving the car: defendant did not return to the car upon finding the restaurant closed to walk-in customers, and codefendant walked away in such haste that he left his door open. On such evidence, taken in the light most favorable to the State as we must, a reasonable finder of fact could conclude that both defendant and codefendant constructively possessed the firearm in the car in that each was aware of and could have exercised control over it. We find sufficient evidence to convict defendant.

¶ 18 Accordingly, the judgment of the circuit court is affirmed.

¶ 19 Affirmed.