2015 IL App (1st) 132197-U

SECOND DIVISION
January 27, 2015

No. 1-13-2197

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 CR 2228
	)	
DOUGLAS JOHNSON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty of unlawful use of a weapon by a felon and possession of cannabis with intent to deliver. His 15-year sentences for armed habitual criminal and possession of cannabis are not excessive.

¶ 2 Following a bench trial, defendant Douglas Johnson was convicted of armed habitual criminal (720 ILCS 5/24-1.7(A) (West 2010), unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(A) (West 2010), possession of a controlled substance with intent to deliver more than 100 grams but less than 400 grams of cocaine (720 ILCS 570-401(A)(2)(B) (West 2010) and possession of cannabis with intent to deliver (720 ILCS 550/5(D) (West 2010) .

Defendant was sentenced to concurrent terms of 15 years, 6 years, 15 years and 5 years respectively. On appeal, defendant argues that the State failed to prove him guilty of UUWF and possession of cannabis with intent to deliver beyond a reasonable doubt. Defendant also argues that his 15-year sentences for armed habitual criminal and possession of a controlled substance with intent to deliver are excessive. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The Chicago police department executed a search warrant on December 23, 2009, at the first floor apartment of 5325 South Honore Street in Chicago. A team of ten to twelve police officers forced entry into the apartment after no one answered the door. They entered into the living room of the apartment and found defendant, who was paralyzed from the chest down, lying on a sofa about a foot away from his wheelchair and two unidentified women lying on a mattress on the living room floor. The officers recovered handguns, three plastic bags containing a total of 118.3 grams of cocaine and a ziplock bag containing 303.8 grams of cannabis.

¶ 5 Officer Berg of the Chicago police department testified that he entered the living room and saw three individuals lying down. He, along with Officer Korwin and Officer Thomas, detained defendant. After he was detained, defendant told the officers that there was a handgun in the back pouch of his wheelchair. Officer Thomas opened the pouch and Officer Berg saw a .40 caliber semi-automatic pistol. Officer Berg ejected the magazine and found a live round in the chamber. There were 11 live rounds in the magazine. Office Berg then placed defendant under arrest and handcuffed him, but left him lying on the sofa. Defendant then told Officer Berg that the drugs they were looking for were in the kitchen in a blue bag under the table.

¶ 6 Officer Berg went into the kitchen and found a blue book bag under the table. Inside the book bag were three knotted plastic baggies of suspect cocaine as well as a scale and empty baggies. The items were photographed and turned over to Sergeant Muth, who was supervising the evidence. Officer Berg went to the front bedroom where Officer Fitzgerald showed him a ziplock bag containing cannabis, a beige bag containing cannabis and $61. These items were also turned over to Sergeant Muth. All of the items were taken to the 9th District police station to be inventoried.

¶ 7 Officer Fitzgerald testified that he searched the front bedroom off of the living room and noticed a cubby hole in the wall at the head of the bed. He removed the mattress and box spring and was able to access the cubby hole. Inside, he found a beige plastic bag that contained a clear ziplock bag with suspect cannabis, a roll of $61 and a digital scale. He gave the items to Sergeant Muth.

¶ 8 Officer Conway testified that he saw a gray or silver bag on a ledge underneath a glass coffee table in the living room. Inside the bag, he found $231, an expired Illinois identification card for defendant and an envelope from an inmate at the Illinois Department of Corrections addressed to defendant at the address of 5325 S. Honore Street. The State identification card listed defendant's address as 3134 West Marquette Road in Chicago.

¶ 9 Sergeant Muth testified that he was the search warrant supervisor and evidence officer for the execution of the search warrant. He collected all of the evidence Officers Berg and Fitzgerald recovered.

¶ 10 The State admitted two certified statements of conviction for defendant: (1) a 2001 conviction for a Class 3 unlawful use of a weapon by a felony under case number 01CR1493401;

and (2) a 1998 conviction for a Class 2 drug offense violation of section 570/401(d) of the Illinois Controlled Substances Act under case number 98 CR 2092801. 720 ILCS 570/401(d) (West 1998).

¶ 11 The parties then stipulated to the chain of custody for the narcotics evidence and the chemical composition of what was found to be 118.3 grams of cocaine and 303.8 grams of cannabis. The State rested.

¶ 12 Defendant called Officer Korwin. Officer Korwin stated that he was not involved in inventorying any of the recovered items but acknowledged that his name appeared on some of the inventory sheets. Those sheets were not admitted into evidence. Officer Korwin testified that he recovered the letter addressed to defendant, defendant's expired identification card and some currency.

¶ 13 After hearing all of the evidence, the court found defendant guilty of all five counts. After hearing evidence in aggravation and mitigation, the court sentenced defendant to 15 years' imprisonment for the Class X offense of armed habitual criminal, 15 years' imprisonment for the offense of possession of a controlled substance with intent to deliver, six years for the Class 2 offense of UUWF, and five years for the Class 3 offense of manufacture or delivery of cannabis. Defendant's sentences were ordered to run concurrently. It is from this judgment that defendant now appeals.

¶ 14 ANALYSIS

¶ 15 Defendant first argues that his conviction for unlawful use of a weapon by a felon should be reversed because the State failed to prove beyond a reasonable doubt that defendant possessed the firearm or ammunition in his abode. In addition, defendant argues that the State failed to

prove him guilty of possession of cannabis beyond a reasonable doubt because the cannabis was concealed in a cubby hole in a wall of a bedroom, not linked to defendant in any way, there were two other individuals in the apartment and his paralysis calls into question whether he could have removed the mattress and box spring to access the cubby hole.

¶ 16 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the function of the reviewing court to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony and resolves conflicts or inconsistencies in the evidence. *People v. Naylor*, 229 Ill. 2d 584, 614 (2008). The trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 332 (2000). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 17 Defendant was convicted of UUWF under section 24–1.1(a), which states:

> "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24–1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24–1.1(a) (West 2010).

¶ 18 The elements that must be established in order to prove UUWF are: "(1) the knowing possession or use of a firearm [or firearm ammunition] and (2) a prior felony conviction." *People v. Gonzalez*, 151 Ill.2d 79, 87 (1992). The location of the firearm or ammunition is not an element of the offense of UUWF and therefore proving that the firearm was found in defendant's abode is not required. *Id.*; See 720 ILCS 5/24–1.1(a) (West 2010).

¶ 19 Although the charging instruments in this case relating to defendant's two counts of UUWF both indicate that defendant "knowingly possessed in his own abode, a firearm" the use of the word "abode" in the charging instruction is surplusage. As previously stated, proof that the defendant possessed the firearm in his abode is not an element of the offense of UUWF. The charging instrument in this case charged the essential elements of the offense of UUWF: the knowing possession and a prior felony. "Where an indictment charges the elements essential to an offense under the statute, other matters unnecessarily appearing in the indictment may be rejected as surplusage." *People v. Adams*, 46 Ill.2d 200, 204 (1970); *People v. Figgers*, 23 Ill.2d 516, 519 (1962).

¶ 20 However, even if the State was required to prove that the firearm was found in defendant's abode, we believe that the State has proven this fact beyond a reasonable doubt. In *People v. Price*, 375 Ill. App. 3d 684, 695 (2007), this court defined abode as "a place of residence where an individual maintains substantial and longlasting contacts." Under this definition, it is possible that "an individual may have more than one abode[ ] * * *." *Id.*

¶ 21 In the instant case, the police arrived at the first floor apartment at 5325 South Honore shortly before 9:00 a.m. and upon forcing entry, found defendant who is paralyzed from the chest down, lying on the sofa. Defendant's wheelchair was about a foot away. Defendant told officers

where to find a handgun and a book bag containing drugs. Officers found those items in the exact locations described by defendant. In the front room of the premises, officer Conway found a bag containing defendant's expired Illinois identification card, originally issued in 2003, listing his address as 3134 West Marquette Road and a letter dated December 19, 2009, eight days before the execution of the search warrant, addressed to defendant at 5325 South Honore Street. See *People v. McCarter*, 339 Ill. App. 3d 876 (2003). The clear inference drawn from a letter addressed to the defendant at the location of the search warrant is that this is where defendant maintains "sufficient and longstanding contacts" sufficient to establish this location as his abode. The trial court found the evidence proved defendant "stayed in the apartment" and that he "did live there." Viewing the evidence in the light most favorable to the State, we conclude that the trier of fact could have found the essential elements of the offense of UUWF beyond a reasonable doubt.

¶ 22 Defendant next argues that the State did not prove him guilty of possession of cannabis with intent to deliver because defendant was not in actual possession of the cannabis or other contraband. Defendant claims that the State failed to prove that the apartment was his residence or abode or that he had immediate and exclusive control over the cannabis. Furthermore, defendant suggests that even if there was sufficient evidence to link him to the apartment, there were two other people in the apartment at the time of the search. In addition, defendant argues that there was no evidence connecting him to the bedroom where the cannabis was found and his physical limitations cast doubt on his ability to access the location where the drugs were found.

¶ 23 To sustain a conviction for possession of cannabis with intent to deliver, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the drugs

and that the drugs were in his immediate possession or immediate and exclusive control. 720 ILCS 55//5 (West 2010). Proof of constructive possession is sufficient in establishing the element of possession and the State need not prove that defendant had actual physical possession of the controlled substance. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). The State must show that defendant had knowledge of the controlled substance, and exercised immediate and exclusive control over the area where it was found to establish constructive possession. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Constructive possession is often proved entirely by circumstantial evidence. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003).

¶ 24 We reject defendant's argument that the State failed to prove that the apartment was his residence or abode or that he had immediate and exclusive control over the cannabis. As previously discussed, the evidence was sufficient to support a finding that the apartment was defendant's abode. The evidence was also sufficient to establish possession because defendant knew of the location of the drugs in the kitchen and directed the police to its exact location. This familiarity and knowledge also supports an inference that defendant knew of the existence and presence of the other contraband and narcotics located in the immediate area, including the bedroom.

¶ 25 Defendant relies on *People v. Wolski*, 27 Ill. App. 3d 526 (1975) to support his next argument that even if there was sufficient evidence to link him to the apartment, there were two other people in the apartment at the time of the search. In *Wolski*, police found marijuana in an apartment the defendant shared with his brother. The defendant testified that for three days prior to the search, he did not stay at the apartment and many other people had access to the apartment. We reversed the defendant’s conviction for possession of marijuana due to insufficiency of the

evidence, holding that "there was no corroborating evidence associating the defendant with the contraband." *Id*. at 528-29.

¶ 26 We find *Wolski* factually distinguishable. In *Wolski*, there was no corroborating evidence to connect defendant to the drugs found in a room he shared with his brother and two other people where defendant was not present at the time the drugs were recovered and there was testimony that he had not been in the room for several days. In this case, defendant was sleeping on the sofa at approximately 9:00 a.m. when officers forced entry. His wheelchair was about a foot away. Defendant told officers where to find his gun and the drugs in the kitchen. In a bag near defendant were his expired Illinois state identification, a letter addressed to him at the address of the apartment and presumably his money. Constructive possession of narcotics can be established even where possession is joint or others have access to the area where they are located. *People v. Griffin*, 194 Ill. App. 3d 286, 292 (1990). Viewed in the light most favorable to the State, the evidence summarized herein supported a conviction for possession of cannabis with intent to deliver.

¶ 27 We similarly repudiate defendant's argument that his physical limitations prevented him from being able to access the narcotics in the cubby hole and therefore he could not have constructive possession of them. The speculative argument that because of his paralysis it may have been physically difficult for defendant to reach the narcotics found in the cubby hole does not negate constructive possession in this case. A defendant's control over the premises where controlled substances are located gives rise to an inference of knowledge and control of those substances. *People v. Brown*, 277 Ill. App. 3d 989, 997-98 (1996), citing *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Habitation of the residence where controlled substances are discovered

constitutes sufficient evidence of control to constitute constructive possession. *People v. Spen*cer, 2012 IL App (1st) 102094, ¶ 17; *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999). A rational trier of fact could infer that defendant lived in the apartment and had constructive possession of the narcotics found therein. *Spencer*, 2012 IL App (1st) 102094, ¶ 18.

¶ 28 Finally, defendant argues that his 15-year prison sentences for violating the armed habitual criminal and possession of a controlled substance statutes are excessive in light of his criminal background, his rehabilitative potential and his medical condition.

¶ 29 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment regarding the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill. App. 3d 444, 455 (1998). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the sentencing judge is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶ 30 We find no abuse of discretion in this case where the trial court sentenced defendant to concurrent terms of 15 years' imprisonment. A conviction for violating the armed habitual criminal statute is a Class X felony punishable by 6 to 30 years' imprisonment. 720 ILCS 5/24-1.7(b) (West 2010). Possession of a controlled substance with intent to deliver 100 grams or more but less than 400 grams of a controlled substance containing cocaine is a Class X felony punishable by 9 to 40 years' imprisonment. 720 ILCS 570/401(a)(2)(B) (West 2010). Defendant was sentenced to 15 years for each of these offenses. A sentence which falls within the statutory range is presumptively proper and does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). The sentences in this case are not manifestly disproportionate to the nature of the offenses and are presumed proper as they fall within the statutory range. Consequently we cannot say the trial court abused its discretion in imposing the 15-year sentences.

¶ 31 At sentencing, the court heard in aggravation that defendant had four prior felony convictions: a 2001 UUWF and 2001, 1998 and 1997 drug related offenses. The State called Chicago police officer Thomas Gaffney to testify to the circumstances surrounding the 2001 arrest and conviction for UUWF. Officer Gaffney testified that he and his partner were called to a party at 4957 South Paulina after someone called the police reporting an individual with a gun. When he and his partner arrived there, defendant was standing across the street from the location, facing the officers. A woman from the party identified defendant as the individual with the gun. The officers ordered defendant to take his hands out of his pockets but defendant did not move. When Officer Gaffney's partner removed his gun from the holster, defendant took his hand out of his pockets and was holding a shiny object. Defendant started to run and the officers

gave chase. Officer Gaffney heard a gunshot and then saw defendant come from behind a building toward him. After Officer Gaffney ordered defendant to stop and drop the gun, defendant pointed the gun at Officer Gaffney and Officer Gaffney fired two shots at defendant, hitting him and leaving him paralyzed from the waist down. The State then argued that despite his criminal history and being paralyzed and in a wheelchair, defendant was unable to conform to the laws of society. In mitigation, defense counsel argued that the evidence in this case did not support the convictions. Defense counsel argued that the gun was in defendant's possession for his protection given his helpless condition and was not able to reach any of the narcotics without considerable effort. In addition, defendant is paralyzed from the stomach down and needs help to do most things.

¶ 32 In sentencing defendant, the court stated that it considered the evidence presented at trial, the presentence investigation report, and the evidence and arguments offered in aggravation and mitigation (see 730 ILCS 5/5-5-3.1, 3.2 (West 2010)), the financial impact of incarceration, the arguments as to available sentencing parameters and alternatives and defendant's statement in allocution. The court stated that defendant "does not know when to quit." The court went on to state, "[u]nfortunately for the defendant, he did not choose that righteous path, the path of common sense, and live his life as a law-abiding citizen" even after he went through the life-changing experience of being shot by police and paralyzed. Clearly, the court considered defendant's criminal history, rehabilitative potential and his medical condition in imposing sentence. For this reason, we cannot find that the court abused its discretion in imposing concurrent 15-year terms of imprisonment for armed habitual criminal and possession of a

controlled substance with intent to deliver more than 100 grams but less than 400 grams of a controlled substance containing cocaine

¶ 33 CONCLUSION

¶ 34 Based on the foregoing, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.