2015 IL App (1st) 132883-U

FIRST DIVISION
JULY 27, 2015

No. 1-13-2883

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 9823
	)	
REGINALD DAVENPORT,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his conviction for armed violence.

¶ 2 Following a jury trial, defendant Reginald Davenport was convicted of armed violence and possession of a cannabis and sentenced to 16 years' imprisonment. On appeal, his sole challenge is the sufficiency of the evidence to sustain his conviction for armed violence.

¶ 3 Defendant was charged, in relevant part, with armed violence, possession of cannabis and possession of a controlled substance. Defendant elected a jury trial.

¶ 4 At that trial, Chicago police officer Zachary Rubald testified that at 7:10 p.m. on May 4, 2012, he was on patrol in an unmarked police vehicle with his partner, Officer Harris. He was also working with Officers Habiak, Johnson, and Proano who were in a separate police vehicle. Officer Rubald was wearing his police vest with his star, name tag and duty belt which held his gun and handcuffs. While in the area of Damen Avenue and 79th Street in Chicago, he observed defendant driving a Dodge Durango westbound on 79th Street, and noticed that defendant was not wearing a seatbelt. Officer Rubald pulled behind defendant and activated his lights and sirens. After driving an entire block, defendant stopped his vehicle. Officer Rubald exited his vehicle, and as he was walking up to the rear of defendant's Dodge Durango, he observed defendant toss a black grocery bag between the two front seats into the backseat. As Officer Rubald approached the driver's side, he saw defendant make "furtive movements" in that he was "moving around between his legs with his hands." Officer Rubald testified that defendant's driver's side window was down, and he observed a clear knotted plastic bag of suspect cannabis in defendant's hands which were between his legs, and could smell the cannabis, which has a very pungent odor. Defendant dropped the bag to the floor of the vehicle, and the officer asked defendant to exit his vehicle. Officer Rubald arrested defendant, and Officer Proano retrieved the bag of cannabis from the floor of the vehicle's driver's side.

¶ 5 Officer Rubald further testified that Officers Habiak, Johnson and Proano searched the vehicle. They recovered a black plastic bag from the backseat of the vehicle. Officer Rubald testified that it was the same bag that he observed defendant toss to the backseat. Officer Rubald

testified that when they looked up the license plate of defendant's vehicle, they learned that it belonged to his girlfriend.

¶ 6 Officer Robert Johnson testified that he searched the backseat of defendant's vehicle. He found a prescription pill bottle with defendant's name on it. He also found a black plastic bag toward the middle of the backseat. Inside the bag, he observed a spray container, which contained three plastic bags of suspect cannabis, and 27 tinfoil packets of suspect heroin. There was also a black pouch in the bag, which contained 27 plastic bags of suspect cannabis and a loaded .22 chrome revolver.

¶ 7 Forensic scientist Chandra Girtman testified that the suspect cannabis tested positive and the suspect heroin also tested positive. The parties stipulated that the total recovered suspect cannabis weighed 42.7 grams, and the total recovered suspect heroin weighed 5.1 grams.

¶ 8 Rhonda Bowman testified that she has known defendant for 18 years, and they were best friends for the last two years. She owned the Dodge Durango that defendant was driving at the time in question. Bowman testified that the gun belonged to her. She kept the gun behind the backseat of her vehicle in the trunk, and could not reach it from the driver's seat. When she gave the vehicle to defendant to use, the gun was in the trunk. Bowman testified that defendant did not know she hid a gun in the vehicle. She was unaware of any black plastic bag in the vehicle when defendant drove it.

¶ 9 Bowman denied having any heroin or cannabis in her vehicle. Bowman testified that she kept the gun unloaded and the bullets near the jack in the trunk. Bowman further testified that the

day before she lent her vehicle to defendant, she allowed her friend "Red" to use it to move some things.

¶ 10 Defendant testified that while he was driving westbound on 79th Street, he made eye contact with Officer Rubald who was driving an unmarked police car. Officer Rubald pulled him over for not wearing a seatbelt. Defendant testified that he was wearing a seatbelt, but had it under his arm instead of across his chest because it was more comfortable, and told the officer that he was wearing the seatbelt. After he gave his driver's license and insurance card to Officer Rubald, he was asked to exit the vehicle. The officer searched him, defendant asked if he was under arrest, and was told that he was not. Defendant had a prescription pill bottle in his pants pocket. Defendant testified that he did not know there was a gun in the vehicle. The officers searched his vehicle near the back driver's side door, and retrieved a gun. Defendant testified that you cannot reach from the driver's side to the back of the Dodge Durango truck.

¶ 11 Defendant further testified that he did not have any cannabis or drop any in the vehicle. Defendant did not see police recover a black plastic bag from the vehicle, and stated that the cannabis and heroin recovered did not belong to him. Defendant also testified that he did not see police recover any drugs, or a plastic bag. Defendant acknowledged that he had prior drug convictions.

¶ 12 The jury found defendant guilty of armed violence, possession of cannabis and possession of a controlled substance. Defendant filed a motion for a new trial, alleging that the State failed to prove him guilty beyond a reasonable doubt.

¶ 13 At the proceeding on this motion, defendant argued that there is supreme court case law, *People v. Smith*, 191 Ill. 2d 408 (2000), which held that where defendant discards a weapon before police arrest him, there is no armed violence. Defendant stated that the purpose of the armed violence statute is to prevent violence to police officers, but, in this case, he discarded the black bag which contained the gun, throwing it onto the backseat, thereby making it inaccessible when police began walking up to the vehicle.

¶ 14 The State responded that defendant's reliance on *Smith* was misplaced. The State explained that in *Smith*, defendant was seen leaning out of the window of an apartment and tossed a gun, and when police entered the apartment, there were drugs found in different rooms but there was no immediate control over the gun at the time the felony possession of controlled substance was being committed. The State maintained that here, as police were approaching defendant, they saw him holding a bag that had a loaded gun, and thus was possessing narcotics at the time he was holding the loaded gun. The State further maintained that here the gun was immediately accessible within defendant's hand, and even when he threw it, the gun was within arm's reach. The State asserted that defendant had immediate access and timely control over the gun at the same time he was committing the possession of a controlled substance.

¶ 15 Defendant replied noting that there was no testimony that defendant could have reached the gun in the backseat. There was also no testimony that he ever did reach back there.

¶ 16 The court denied defendant's motion, finding that *Smith* was factually dissimilar to the case at bar because in *Smith* defendant actually got rid of the gun off the premises, so the gun was not in the apartment when the narcotics were recovered. In this case, the gun and narcotics

were "pretty much comingled." The court also noted that throwing the gun onto the backseat of the vehicle is not the same thing as throwing it outside the vehicle or outside a building. The court explained that in this case, defendant had immediate access to and timely control over the gun at the time of his arrest. The court subsequently merged the possession of a controlled substance count into the armed violence conviction. The court imposed 16 years' imprisonment for armed violence and a concurrent 2-year term for possession of cannabis.

¶ 17 On appeal, defendant's sole contention rests upon the sufficiency of the evidence to sustain his conviction for armed violence. He maintains that the State failed to prove that he was otherwise armed with a dangerous weapon when he did not have immediate access to or timely control over the handgun recovered from the pouch of the grocery bag in the backseat of the Dodge Durango.

¶ 18 As an initial matter, defendant contends, citing to *Smith*, 191 Ill. 2d 408, that our standard of review is *de novo* because there are no facts in dispute and his guilt is a question of law. We disagree. Defendant is challenging the sufficiency of the evidence to prove an element of the offense. *People v. Pulley*, 345 Ill. App. 3d 916, 920 (2004). In such a case, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proven beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). A criminal conviction will be reversed only if the evidence is so unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297. For the reasons that follow, we do not find this to be such a case.

¶ 19 To sustain defendant's conviction for armed violence, the State was required to prove that that defendant, while armed with a dangerous weapon, committed possession of a controlled substance. 720 ILCS 5/33A-2(a) (West 2012). Defendant does not contest that he was in possession of a controlled substance, but, rather, contends that he was not armed with a dangerous weapon. A person is considered armed with a dangerous weapon when he carries on or about his person or is otherwise armed with a gun. 720 ILCS 5/33A-1(c)(1) (West 2012). Defendant is otherwise armed if he has some type of immediate access to or timely control over the weapon. *People v. Harre*, 155 Ill. 2d 392, 396 (1993); *People v. Condon*, 148 Ill. 2d 96, 110 (1992). Immediate access has been held to be within immediate reach. *Harre*, 155 Ill. 2d at 396.

¶ 20 Here, the evidence showed that defendant, who was not wearing a seatbelt, and threw a plastic bag between the front driver's side and passenger seats to the backseat as police approached. We find *Harre*, instructive. In that case, the weapons were on the front seat of the car within arm's reach of defendant who was standing next to the car and the window of the car was partially open, and the supreme court found that defendant had immediate access to the weapons. *Harre*, 155 Ill. 2d at 396, 400. Here, as in *Harre*, the gun was within arm's reach of defendant where he was sitting in the front driver's seat without a seatbelt on, was 5 feet and 10 inches tall, and the gun was on the backseat of the vehicle toward the middle; defendant had direct access to the gun. Although there was no testimony from police that the gun was within defendant's immediate reach as in *Harre*, 155 Ill. 2d at 396, it can be reasonably inferred, from common human experience, that defendant could reach behind his seat and grab the bag that was toward the middle of the backseat. *In re Gregory G.*, 396 Ill. App. 3d 923, 929 (2009).

¶ 21 Defendant, nonetheless, contends that this case is similar to *Condon* and *Smith*. In *Condon*, 148 Ill. 2d at 109-10, the supreme court explained that the intended purpose of the armed violence statute is to deter felons from using dangerous weapons so as to avoid the deadly consequences which might result if the felony victim resists, and that the deterrent purpose was not served under the circumstances of its case where defendant was found in the kitchen of a house with guns throughout it, but no guns were in the kitchen. The supreme court explained that it was impossible for defendant to use the guns as they were too far removed from him, and the danger that he would be forced to make an instantaneous decision to use the guns was nonexistent because he had no immediate access to or timely control over the guns. *Condon*, 148 Ill. 2d at 110. The supreme court further held that constructive possession is insufficient to support an armed violence conviction. *Condon*, 148 Ill. 2d at 111-12.

¶ 22 Here, defendant, who was 5 feet 10 inches tall and not wearing a seatbelt which would constrain him, was within arm's reach of the gun he had thrown on the backseat of the Dodge Durango. *Harre*, 155 Ill. 2d at 396, 399. Accordingly, and contrary to defendant's contention, the purpose of the armed violence statute was met in this case as defendant could have used the deadly weapon in his encounter with police.

¶ 23 We also find defendant's reliance on *Smith* misplaced. In *Smith*, 191 Ill. 2d at 410, as police approached the apartment building, they saw defendant throw a gun out of a window, and police found narcotics in the apartment. The supreme court found that defendant did not commit the offense of armed violence because he did not have immediate access to or timely control over a weapon when police entered where he dropped the gun out of the window as soon as he

became aware that police were approaching. *Smith*, 191 Ill. 2d at 412. Here, unlike *Smith*, defendant did not drop the gun outside of the vehicle he was in, but, rather, dropped it in the backseat within immediate reach. Accordingly, defendant was otherwise armed with a gun (*Harre*, 155 Ill. 2d at 396, 400; *Condon*, 148 Ill. 2d at 110), and we find that the evidence was sufficient to allow the jury to conclude that defendant was guilty of armed violence beyond a reasonable doubt.

¶ 24 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.