2015 IL App (1st) 133408-U

FIFTH DIVISION
December 11, 2015

No. 1-13-3408



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 1755 |
| | ) | |
| DEMISKIC DEAR, | ) | Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

**O R D E R**

¶ 1 ***Held:*** Conviction of armed habitual criminal affirmed over defendant's contention that trial counsel provided ineffective assistance.

¶ 2 Following a jury trial, defendant Demiskic Dear was convicted of armed habitual criminal and sentenced to 17 years' imprisonment. On appeal, he contends that trial counsel

provided constitutionally deficient representation by advancing a legally non-viable defense that effectively conceded his guilt.

¶ 3 Defendant was charged, in relevant part, with armed habitual criminal and aggravated unlawful use of a weapon (UUW). At trial, the parties first stipulated that defendant had two prior felonies which were enumerated qualifying felonies under the Armed Habitual Criminal Act (720 ILCS 5/24-1.7 (West 2012)).

¶ 4 Chicago police officer Daniel Kolodziejski then testified that at 11:30 p.m. on January 5, 2013, he was on routine patrol with his partner, Officer Chapelau, when they observed defendant drive through a "solid" red light at the intersection of Cicero Avenue and Lake Street, and conducted a traffic stop. Officer Kolodziejski asked defendant for his driver's license and insurance, but defendant did not produce a driver's license, and the officer learned that his license had been suspended. Officer Kolodziejski then asked defendant if he had any knowledge of anything illegal either on his person or in the vehicle, and he responded "no." The officers took defendant into custody, and offered defendant's passenger a ride to the police station, but he declined.

¶ 5 Officer Kolodziejski further testified that his partner transported defendant's vehicle to the police station to be impounded. When they reached the station, Officer Chapelau searched the vehicle in front of defendant and found a firearm in the trunk.

¶ 6 Officer Kolodziejski brought defendant into a processing room at the police station, and advised him of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)). Defendant waived those rights and agreed to talk to police. Officer Kolodziejski asked defendant if he knew the gun

was in the trunk, and although he could not exactly recall defendant's response, he looked at his police report which reflected that defendant said that he did not know who the gun belonged to, but knew that it was unloaded. On cross-examination, Officer Kolodziejski acknowledged that he had paraphrased what defendant had said to him in his report. Officer Kolodziejski also discovered that the gun was not registered in Chicago or the State.

¶ 7 Chicago police officer Chapleau testified that he conducted the inventory search of defendant's vehicle, and found an unloaded gun inside the trunk. When asked about the weapon, defendant responded that he did not know anything about the weapon, but stated that it was not loaded and did not belong to him. On cross-examination, the officer was asked if his testimony regarding the statements defendant made were paraphrased, and he responded, "I wouldn’t say paraphrase, I couldn't say exact word for word," but he only said two statements basically, the gun is not mine or I don’t know anything about the gun, and it was unloaded. The officer further testified that if defendant knew it was unloaded, how would he not know the gun was in the trunk.

¶ 8 The defense called Melinda Cannon as a witness. She testified that defendant is her boyfriend, and that they met in September 2012. In January 2013, she did not have any guns registered in her name, but had a valid Firearm Owner's Identification card (FOID), and did not know defendant to be in possession of any weapon. At 1 p.m. on January 3, 2013, Cannon went to the park by the river in Quincy, Illinois, and saw several kids playing with a gun. She confiscated the gun, then made sure it was unloaded by pulling the trigger. After discovering it was unloaded, she placed the gun in the trunk of her car. Cannon stated that she intended to turn

the gun in to police, but "got busy," "forgot" the gun was in the trunk, and thus, did not tell anyone about it. Cannon stated that prior to January 5, 2013, she told defendant that she did not want any guns around her house or in her car, "so he does not keep his guns at my house."

¶ 9 Cannon further testified that she did not give defendant permission to drive her car on January 5, 2013. The vehicle defendant was driving on the night in question was registered in Cannon's name and that of her ex-husband.

¶ 10 On cross-examination, Cannon stated that she received her FOID card on June 1, 2013, which was set to expire on June 1, 2023. However, she claimed that she also had a valid FOID card before that date, but did not have it with her because it expired. Cannon further testified that when she took the gun from the children, she knew it was unloaded. When she asked the children where they got the gun, they told her they had found it, and ran away when she asked about their parents. She placed the gun in the trunk of her car, then continued with her walk in the park, and went home.

¶ 11 Cannon further testified that she knew defendant was innocent, and had called the police station five times, but the arresting officer kept hanging up on her. She did not know what to do after that, and could not go anywhere because her car was impounded. On redirect examination, Cannon stated that she knew she could be charged with a crime based on her testimony at trial, and that the consequence could be one-year of imprisonment.

¶ 12 At the close of evidence, the jury found defendant guilty of armed habitual criminal and aggravated UUW. The court subsequently merged the UUW conviction into the armed habitual criminal offense and sentenced defendant to 17 years' imprisonment.

¶ 13 On appeal, defendant contends that he received ineffective assistance of trial counsel because counsel presented a legally non-viable defense effectively conceding his guilt. He maintains that counsel stipulated that he had two prior qualifying felonies, and then admitted during opening and closing statements the second necessary element, that he had constructive possession of the gun.

¶ 14 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The scrutiny of defense counsel's performance is highly deferential due to the inherent difficulties of making the evaluation, and the reviewing court must indulge in a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *People v. Robinson*, 299 Ill. App. 3d 426, 433 (1998).

¶ 15 To prove defendant guilty of armed habitual criminal in this case, the State was required to establish that defendant possessed a firearm after having been convicted of two or more qualifying felonies. 720 ILCS 5/24-1.7 (West 2012). The record shows that the parties stipulated that defendant had two prior qualifying felonies, and thus the only issue was whether defendant possessed the firearm.

¶ 16 Criminal possession may be actual or constructive. *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010). Where, as here, possession was constructive, the State must prove that defendant had knowledge of the firearm, and immediate and exclusive control over the area where it was found.

*Nesbit*, 398 Ill. App. 3d at 209. Evidence of constructive possession is often entirely circumstantial. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002).

¶ 17 Defendant contends that counsel pursued a non-viable defense where she conceded in her opening and closing statements that he had constructive possession of the firearm found in the trunk of the car he was driving, but did not knowingly possess the gun. He claims that the concession was tantamount to a concession of his guilt and established ineffective assistance of counsel.

¶ 18 Counsel's opening statement included the following comments which defendant maintains support his claim of ineffective assistance:

> "Ladies and Gentleman the evidence here will show that my client was in fact in possession of the gun. As the State in their opening argument also indicated, this is not a case of actual possession, it is constructive possession. The evidence here is showing that my client in fact was driving a vehicle where there was a handgun that was found in the trunk and my client does not dispute this. *** The evidence in this case will show that my client did not in fact have any knowledge of this handgun being in his constructive possession."

¶ 19 Counsel then presented a defense witness, who attempted to show how the gun made its way into her car and that defendant was unaware of it when he was driving the vehicle. Following that, closing arguments were presented, including the following comments by defense counsel:

> "Now, the things which the State's Attorney needs to prove in this case are that there was a weapon, that this weapon was in the possession of the individual being charged here, and that that individual had actual or some other knowledge, implied knowledge in this case, that the gun was in the trunk. In order to prove this possession, the Defendant would not dispute that, even though the gun was in the trunk and inaccessible to him, this constructive possession, as it would be called, is present in this case. There is no denying that a gun was found in the back of Ms. Cannon's vehicle."

¶ 20 Defendant claims that through these comments counsel conceded his constructive possession of the gun, and, in doing so, provided ineffective assistance of counsel. The State responds that defendant's argument is based on the mistaken premise that defense counsel conceded his constructive possession of the gun merely because she did not dispute that the gun was in the trunk of the car he was driving. The State also maintains that defendant has taken counsel's arguments out of context and "seizes on one sentence occurring in the midst of a three-page opening statement and another sentence occurring in the midst of a fifteen-page closing argument."

¶ 21 As noted, the record shows that counsel reserved her opening statement until the start of the defense case, and articulated that this was a case of constructive possession. This followed the State's indisputable evidence that defendant was driving a car in which a handgun was found in the trunk. Counsel, however, repeatedly argued that defendant did not have knowledge of the presence of the gun in the trunk of the car, and presented a defense witness to that effect. As

such, it appears that counsel attempted to call the jury's attention to the "knowledge" component of constructive possession and argued that the State had not made its case in this regard. This was evident in counsel's closing argument where she asserted that the State was required to prove that defendant had some knowledge that the gun was in the trunk, maintained that such knowledge could not be implied by the evidence presented, and reminded the jury that the State needed to prove beyond a reasonable doubt that defendant had knowledge of the gun being in the vehicle. Through these efforts, counsel did not concede defendant's guilt, but rather, attempted to hold the State to its burden of proof and argued that it had not proved defendant's knowledge of the gun in the car he was driving to establish the charged offense.

¶ 22 Defendant also contends, however, that the jury instructions showed the impossibility of counsel's theory, and cites to the instructions that constructive possession includes "intention" to exercise control over the object (Illinois Pattern Jury Instructions (IPI), Criminal, No. 4.16 (4th ed. 2000)), and that a person acts with "intent" to accomplish a result or engage in conduct when his "conscious objective or purpose" is to accomplish that result or engage in that conduct (IPI Criminal, No. 5.01A (4th ed. 2000)). Defendant contends that IPI 4.16 instructed the jury that constructive possession includes the element of knowledge, and informed the jury that counsel's concession to defendant's constructive possession was also a concession that he had knowledge of the gun and was thus guilty of armed habitual criminal and aggravated UUW.

¶ 23 We disagree. As explained above, counsel conceded under the indisputable facts, that this was a constructive possession case, then attempted to defend on the basis that defendant had no knowledge of the presence of the gun in the trunk. The cited jury instructions on the "intent"

requirement were consistent with that theory. We thus find that the instructions do not support defendant's contention that counsel conceded his constructive possession of the gun, and thus provided ineffective representation.

¶ 24 Moreover, even if we assume that counsel's performance was deficient, we find that defendant was not prejudiced thereby given the strength of the State's case. Although the State may not solely rely on an inference of knowledge from defendant's presence in a motor vehicle where a weapon is found (*Nesbit*, 398 Ill. App. 3d at 209), the circumstantial evidence of defendant's guilt was evident, and there is no reasonable probability that the outcome of the case would have been different had counsel used a different strategy (*People v. Weathersby*, 383 Ill. App. 3d 226, 233 (2008)).

¶ 25 In addition to the discovery of the weapon in the trunk of the car which he was driving, further evidence showed that defendant told police that he knew nothing about the gun, but also stated that the gun was unloaded, thereby giving rise to the natural inference that he knew the gun was in the car. *People v. Moore*, 394 Ill. App. 3d 361, 364-65 (2009). In addition, the testimony of the defense witness regarding her recovery of the weapon from children in the park, that she knew the gun was unloaded when she took the gun from the children, although she pulled the trigger to make sure it was unloaded, then forgot about placing the gun in the trunk of her car and went on with her walk in the park, was dubious. It is well-settled that when defendant chooses to give an explanation for his conduct, he must provide a reasonable story or be judged by its improbabilities (*People v. Hart*, 214 Ill. 2d 490, 520 (2005)), and, here, the explanation provided by the defense witness was implausible and rejected by the jury.

¶ 26 Notwithstanding, defendant contends that pursuing a legally non-viable defense is ineffective assistance of counsel, citing *People v. Torres*, 209 Ill. App. 3d 314, 320-21 (1991), and *People v. Hattery*, 109 Ill. 2d 449, 464 (1985), where prejudice was presumed. We find these cases distinguishable.

¶ 27 In *Torres*, 209 Ill. App. 3d at 320, defendant was convicted of aggravated criminal sexual assault in that he committed an act of sexual penetration, which was defined, in relevant part, as any contact, however slight, between the sex organ of one person and the mouth of another person. During trial, counsel presented no opening statement or testimony on defendant's behalf; his theory at trial was that there was no sexual penetration despite the oral-vaginal contact which he conceded took place. *Torres*, 209 Ill. App. 3d at 320-21. This court concluded that the trial court had no other choice but to convict defendant of aggravated criminal sexual assault, and that counsel's deficient performance clearly prejudiced defendant. *Torres*, 209 Ill. App. 3d at 321. In *Hattery*, 109 Ill. 2d at 453, defendant was convicted of murdering three individuals, and prejudice was presumed because counsel unequivocally conceded defendant's guilt in opening statement noting that the only issue to be decided was whether defendant should receive the death penalty, advanced no theory of defense, presented no evidence, and made no closing argument. *Hattery*, 109 Ill. 2d at 459, 464-65.

¶ 28 Here, unlike *Torres* and *Hattery*, counsel did not completely fail to subject the State's case to meaningful adversarial testing to warrant a presumption of prejudice. *People v. Milton*, 354 Ill. App. 3d 283, 290 (2004). Prejudice is only presumed where counsel has clearly, unequivocally and without defendant's consent conceded every significant aspect of defendant's

guilt, or where counsel's mistaken and baseless understanding of relevant law resulted in defendant receiving no defense at all. *People v. Montanez*, 281 Ill. App. 3d 558, 565 (1996). In this case, counsel focused on the knowledge element of constructive possession, arguing that defendant had no knowledge that the gun was in the trunk of the car, extensively cross-examined the State's witnesses, called a witness in support of that theory of defense, and forcefully argued that defendant should be found not guilty. *People v. Nieves*, 192 Ill. 2d 487, 495, 499 (2000). Under these circumstances, we conclude that defendant failed to establish that but for counsel's deficient performance, the result of the trial would have been different (*People v. Harris*, 206 Ill. 2d 293, 304 (2002)), and his claim of ineffective assistance fails.

¶ 29 We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.