2015 IL App (1st) 134015-U

THIRD DIVISION
October 7, 2015

No. 1-13-4015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 12 CR 8004
	)	
JOE MCCOY,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's motion to suppress evidence recovered following a warrantless search of his father's home was properly denied where defendant did not have legitimate expectation of privacy in the home. Two of defendant's five convictions are vacated pursuant to one-act, one-crime rule.

¶ 2 Defendant Joe McCoy was charged with one count of being an armed habitual criminal, two counts of unlawful use of a weapon by a felon, and two counts of aggravated unlawful use of a weapon in connection with his possession of a handgun and ammunition on April 12, 2012. The trial court denied McCoy's motion to suppress the gun, which was discovered after a

warrantless search of his father's home. Following a bench trial, McCoy was convicted and sentenced to seven years' imprisonment on all counts, to run concurrently. On appeal, he argues that his three convictions for possession of a firearm violated one-act, one-crime principles, and further contends that the trial court erred in denying his motion to suppress. We affirm in part and vacate in part.

¶ 3 BACKGROUND

¶ 4 Prior to trial, McCoy filed a motion to suppress evidence and quash arrest. At the hearing on his motion, McCoy testified that he was arrested on April 12, 2012, in his father's house at 7252 South Peoria Street in Chicago, where his uncle also lived. According to McCoy, he was not violating any laws when an officer entered the house, ordered him outside, and arrested him. He testified that officers then conducted a search of the home, whereupon they discovered a gun. McCoy denied that the gun belonged to him and testified that he had never seen it before. McCoy further denied knowing what type of gun the officers recovered. Following his arrest, McCoy informed the officers that he lived at 6937 South Ada Street. The trial court denied the motion on the basis that McCoy lacked "standing" to challenge the legality of the search and arrest.

¶ 5 At the ensuing trial, Chicago police officers Garcia and Carreno testified that they were on patrol the evening of April 12 when they received a report of a person with a gun at 7336 South Peoria Street. As the officers were driving westbound on 73rd Street, they did not see any activity on the 7300 block of Peoria Street; they did, however, see a commotion on the 7200 block. The officers turned onto the 7200 block, and among a group of four to seven people, saw one black man choking another black man on the porch of 7252 South Peoria Street. The officers exited their car and announced their office, at which point the attacker, identified in

court as McCoy, ran inside the residence. Officer Garcia testified that he saw the handle of a gun in McCoy's waistband, but he did not immediately alert his partner to this fact. Officer Carreno went to the front screen door of the house, which McCoy had shut and locked behind him, while Officer Garcia went to the back to prevent McCoy from escaping through the rear door.

¶ 6 Carreno tried to persuade McCoy to come outside and talk to him, but McCoy instead went to the rear of the residence. From his position at the back door, Garcia saw a light turn on in the kitchen and then observed McCoy pull the refrigerator forward, put a "black item" underneath, and push the refrigerator back into place. McCoy then returned to the front of the house, and Garcia arrived at the front door as McCoy complied with Carreno's instruction to step outside. Garcia then informed Carreno that he had seen the butt of a gun in McCoy's waistband. McCoy was arrested while other officers who had arrived on the scene entered the house with Garcia and discovered a handgun underneath the refrigerator.

¶ 7 On cross-examination, both Garcia and Carreno acknowledged that the police reports incorrectly stated that the arrest and search occurred at 7336 South Peoria – the location where the officers were initially called – and not 7252 South Peoria.

¶ 8 After McCoy's motion for a finding at the close of the State's case was denied, McCoy's sister, Alisha, testified on his behalf. She stated that she and some friends were sitting on the porch of her father's house on April 12 while McCoy was inside the house, alone. Police arrived and ordered those outside to stand against the wall. They ordered McCoy to exit the house, and when he did not comply, the police "bussed [sic] in" and brought McCoy out in handcuffs. Alisha did not see McCoy with a gun, nor did she see him choke anyone.

¶ 9 The trial court credited the testimony of the officers and found McCoy guilty on all counts. The court went on to sentence McCoy to seven years' imprisonment on each count, to run concurrently. This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 McCoy's first contention on appeal is that three of his five convictions all arose from his possession of the same weapon, and as such, violated one-act, one-crime principles. The State agrees, as do we. It is axiomatic that a defendant cannot be convicted of more than one crime stemming from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1966). And when this rule is violated, we must vacate the "less serious offense[s]." *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, McCoy's convictions of being an armed habitual criminal (count 1), unlawful use of a weapon by a felon (count 2), and aggravated unlawful use of a weapon (count 4) were all premised on the same conduct – namely, possession of a firearm.[1] Therefore, we vacate counts 2 and 4 as lesser offenses and order the clerk of the circuit court to correct the mittimus.

¶ 12 McCoy next argues that the trial court erred in denying his motion to suppress evidence. Specifically, he maintains that he had a legitimate expectation of privacy in his father's home where the search occurred. When reviewing the denial of a motion to suppress, we defer to the trial court's factual findings unless they are against the manifest weight of the evidence, but review *de novo* the court's legal conclusion as to whether suppression is warranted. *People v. Won Kyu Lee*, 2014 IL App (1st) 130507, ¶ 19.

¶ 13 In order to challenge a search on fourth amendment grounds, a defendant must have a legitimate privacy interest in the area or property searched. *See Rakas v. Illinois*, 429 U.S. 128, 133-34 (1978) (fourth amendment rights are personal, and a violation only occurs when the

[1] Count 3 was premised on possession of firearm ammunition, and Count 5 on possession of a firearm without a Firearm Owner's Identification Card.

defendant's own privacy interest is invaded). The trial court referred to this interest as "standing," but this term has been replaced with the more precise "legitimate expectation of privacy" rubric. *See People v. Sutherland*, 223 Ill. 2d 187, 229 (2006). Factors to consider in determining the legitimacy of a defendant's privacy interest include (1) ownership of the property searched, (2) whether the defendant was legitimately present in the area searched, (3) a possessory interest in the area searched or property seized, (4) prior use of the area searched or property seized, (5) ability to exclude others from using the property, and (6) a subjective expectation of privacy in the property. *People v. Rosenberg*, 213 Ill. 2d 69, 78 (2004). Importantly, it is defendant's burden to establish a privacy interest in the area searched. *Id.* at 78 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980)).

¶ 14 McCoy failed to satisfy this burden here. He primarily argues that an adult child has a "psychological relationship with the family home" that gives rise to an expectation of privacy. However, he cites no authority for this proposition, and, in fact, authority is to the contrary. *See, e.g., U.S. v. $40,955 in U.S. Currency*, 554 F.3d 752, 757-58 (9th Cir. 2009) (adult child with free access and key to parents' home had no legitimate expectation of privacy in that home). But even if we assume that society *does* recognize an adult child's expectation of privacy in his or her childhood home, there is no evidence to support the characterization of 7252 South Peoria Street as McCoy's "family home." There was no testimony that McCoy grew up in that house or that he lived there for any length of time; indeed, the record does not reflect how long his father owned the residence.

¶ 15 In the absence of a *per se* rule that adult children have a legitimate expectation of privacy in their childhood home (and the absence of any evidence that 7252 South Peoria *was* McCoy's childhood home), we turn to the traditional multi-factor test to determine McCoy's privacy

interest. *See Rosenberg*, 213 Ill. 2d at 78. Here, too, McCoy has not met his burden. First, it is undisputed that he neither owned the home nor resided there. McCoy testified that the house belonged to his father and informed police that he lived on South Ada Street. In addition, McCoy also lacked a possessory interest in the seized property: he disclaimed ownership of the gun and denied seeing it before. Finally, there was no evidence that McCoy was at the house pursuant to his father's invitation (indeed, he was alone inside when he was arrested), that he had visited the house on prior occasions, or that he stored any belongings there. *Cf. People v. Parker*, 312 Ill. App. 3d 607, 613 (2000) (non-overnight guest may establish privacy interest through storage of personal effects or other "indicia of residence"); *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1981) (adult defendant had privacy interest in parents' home where he kept clothing there, occasionally remained overnight, and possessed a key). Nor is there testimony, as McCoy contends, that he had a key to the house. (We note that McCoy's repeated misrepresentation of this significant fact, even following a correction by the State, impairs the credibility of his arguments on appeal.) McCoy's presence in his father's house, standing alone, does not demonstrate a legitimate expectation of privacy.

¶ 16 In arguing to the contrary, McCoy points out that he clearly had a subjective expectation of privacy given that he locked the door upon entering the house in order to exclude the officers. As an initial matter, it bears noting that it was the officers, and not McCoy, who testified to this version of events. At the motion to suppress, McCoy said nothing about locking the door, but instead said only that he was drinking a beer when an officer entered the house, ordered him outside, and proceeded to arrest him. In any event, a subjective expectation of privacy is legitimate only "if it is one that society is prepared to recognize as reasonable." *People v. Wimbley*, 314 Ill. App. 3d 18, 23 (2000). And society has not recognized a reasonable

expectation of privacy among guests in someone else's home. *Id.*; *see also People v. Williams*, 186 Ill. App. 3d 467, 471-72 (1989) (defendant had no expectation of privacy in girlfriend's apartment); *People v. Cohen*, 146 Ill. App. 3d 618, 628 (1986) (social guest has no expectation of privacy in host's home).

¶ 17 McCoy finally argues that he can bolster the weak evidence regarding his "relationship" to his father's house, and urges us to remand for further proceedings so that he may do so. He cites *People v. LeFlore*, 2013 IL App (2d) 100659 (*rev'd*, *People v. LeFlore*, 2015 IL 116799), in support of this proposition, but that case is inapposite. There, the trial court denied a motion to suppress after finding that the conduct complained of (placing a GPS tracking device on an automobile) was not a "search" within the meaning of the fourth amendment. *Id.* at ¶ 8. Following that ruling, the United States Supreme Court held that such conduct did, in fact, amount to a search and further clarified who could challenge that search. *Id.* at ¶¶ 13, 25-26 (analyzing *United States v. Jones*, 132 S. Ct. 945 (2012)). Thus, on appeal, this court remanded for the parties to put forth evidence regarding the recently announced "*Jones* trespass test." *Id.* at ¶ 29. In contrast, McCoy does not point to a new test that arose between the time of the trial court's ruling and the instant appeal; what he seeks is a second chance to provide evidence that was relevant and available to him at the time of the original motion hearing. He is not entitled to one.

¶ 18 Because we agree with the State that McCoy had no legitimate expectation of privacy that would allow him to challenge the search, we do not address the State's argument in the alternative that exigent circumstances supported the search in any event.

¶ 20 CONCLUSION

¶ 21 We find that the trial court properly denied McCoy's motion to suppress evidence where McCoy lacked a reasonable expectation of privacy in his father's home. However, we agree with McCoy that counts 2 and 4 – unlawful use of a weapon by a felon and aggravated unlawful use of a weapon – must be vacated as violative of the one-act, one-crime rule.

¶ 22 Affirmed in part and vacated in part.