2015 IL App (1st) 140312-U

Sixth Division
Order filed: April 24, 2015

No. 1-14-0312

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 2412
	)	
TRINITY WHITNEY,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court was affirmed where the evidence was sufficient to prove that the defendant constructively possessed a firearm and ammunition and where the defendant's ineffective-assistance-of-counsel claim failed.

¶ 2 Following a bench trial, the defendant, Trinity Whitney, was convicted of two counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to concurrent terms of seven years' imprisonment. On appeal, he argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt and that his trial counsel was ineffective for failing to file a motion to suppress the gun and ammunition which were retrieved after the police searched his home pursuant to a warrant. For the reasons that follow, we affirm.

¶ 3 The following evidence was adduced at the defendant's bench trial, which commenced on December 3, 2013.

¶ 4 On January 3, 2013, the Circuit Court of Cook County issued a search warrant based on the information contained in the affidavit of Chicago Police Officer Alphonsus O'Connor. The affidavit stated that an informant had purchased crack cocaine from the defendant three times per week over the course of a month at an apartment located at 7654 North Sheridan Road, Unit B1W, Chicago, Illinois ("apartment"). The affidavit also stated that Officer O'Connor ran a "computer check" of the defendant, finding his inmate record and past mug shot from which the informant identified the defendant. The search warrant permitted the police to search the defendant and the apartment and seize "[c]ocaine, *** any documents showing residency, any paraphernalia used in the weighing, cutting or mixing of illegal drugs, *** [a]ny money, [and] any records detailing illegal drug transactions…which have been used in the commission of, or which constitute evidence of the offense of" possession of a controlled substance.

¶ 5 On January 4, 2013, approximately eight to ten police officers, including Officers O'Connor, Brendan McCormack and Thomas Carroll, executed the search warrant. Officer McCormack testified that he knocked on the apartment's rear door while announcing his position and that he had a search warrant. When no one answered, the officers forced entry into the apartment. After entering the apartment, the officers encountered the defendant and his girlfriend, Tracy Nichols, and detained them in the kitchen. Officer O'Connor testified that, while he was searching the kitchen, the defendant, without solicitation, said, "[a]nything you find in there belongs to me. Don't put no shit on my bitch."

¶ 6 Officer McCormack testified that he searched the living room where he saw a six-foot tall lamp with an upside-down shade. Because Officer McCormack is 6' 6" tall, he was able to peer

into the lamp shade and observe a gun, which he seized. The gun was a .22 caliber revolver loaded with six rounds of live ammunition.

¶ 7 Officer Carroll testified that he searched the bedroom, finding a bond slip dated December 12, 2012, for the defendant's January 31, 2013, court date in another case, and two pieces of mail addressed to the defendant at the apartment's address. Additionally, Officer Carroll observed that the closet contained both male and female clothing. In the closet, the officers found three "knotted plastic bags containing a green crushed plantlike substance," which they suspected to be marijuana, two digital scales, and one "small knotted baggie containing a white rock like substance," which they suspected to be crack cocaine.

¶ 8 Based on the items retrieved from the search, the defendant was arrested and advised of his *Miranda* rights. Officer O'Connor testified that the defendant stated, "[t]his shit won't stick to me" because Nichols' name, alone, was on the lease. But, the defendant again stated that anything incriminating that the officers found in the apartment should be "put…on" him.

¶ 9 During the trial, the parties stipulated that the defendant had two prior convictions: a 1997 conviction for unlawful use of a weapon and a 2006 conviction for possession of a controlled substance. Based on these convictions, it is undisputed that the defendant was a felon under Section 24-1.1(a) at the time of the incident.

¶ 10 After the parties rested, the circuit court found the defendant guilty on two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)). The court held that the State had established the defendant's residence at the apartment based on the evidence, including the male clothing, the bond slip and the mail addressed to the defendant at the apartment. The court also found that the revolver's placement in the lamp shade was not obscure; rather, the location implied that someone was attempting to conceal it quickly. As to

the defendant's statement regarding not placing blame on Nichols, the court acknowledged that it could infer either that the defendant was: (1) trying to protect Nichols from criminal liability; or (2) accepting responsibility for all of the items that the officers found in the apartment. Regardless, the court determined that the other evidence, including the gun's location and the defendant's residency at the apartment, proved that he had constructive possession.

¶ 11 The defendant filed a motion for a new trial, which the circuit court denied. The court then sentenced the defendant to concurrent terms of seven-years' imprisonment. The defendant filed a motion to reconsider the sentence, which the court also denied. This appeal followed.

¶ 12 The defendant first argues that the evidence was insufficient to prove that he possessed the revolver and ammunition.

¶ 13 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. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id.* Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is the duty of the trier of fact to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302, 307 (1989); see also *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-5 (2009). Thus, we will not substitute our judgment for that of the trier of fact on issues involving the weight to be given to the evidence. *Siguenza-Brito*, 235 Ill. 2d at 224-5.

¶ 14 Section 24-1.1(a) of the Criminal Code of 1961 (720 ILCS 5/24-1.1(a)(West 2012)), in relevant part, states that "[i]t is unlawful for a person to knowingly possess *** in his own abode *** any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State". To convict a defendant for a violation of this statute, the State must prove that a defendant: (1) knowingly possessed a weapon; and (2) was previously convicted of a felony. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. Here, the defendant concedes that he had previous felony convictions, but he maintains that he did not constructively possess the weapon.

¶ 15 A defendant can actually or constructively possess a weapon. *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 28. Constructive possession occurs when a defendant (1) knows a firearm is present; and (2) exercises immediate and exclusive control over the area where the firearm is found. *Sams*, 2013 IL App (1st) 121431, ¶ 10. Evidence of constructive possession is "often entirely circumstantial." *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24, *reh'g denied* (Dec. 10, 2013) (citing *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002)). Residency, alone, is sufficient to establish the defendant's constructive possession of a weapon. *People v. Givens*, 237 Ill. 2d 311, 335 (2010); *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Further, where two people exercise control over the premises, each person has possession. *Givens*, 237 Ill. 2d at 335. Once the State establishes possession, "an inference of culpable knowledge can be drawn from the surrounding facts and circumstances," including a defendant's acts, declarations or conduct. *Id.; Sams*, 2013 IL App (1st) 121431, ¶ 10.

¶ 16 Here, the trier of fact determined that the defendant resided at the apartment based on the objects that the officers found during the search, including the mail, the bond slip and the male clothing in the bedroom closet. Although the defendant argues that another resident hid the gun

without his knowledge, the court determined that the location of the gun implied that it was quickly hidden by someone in the vicinity, rather than by another resident, further pointing to the defendant's constructive possession. Additionally, the defendant argues that he could not have possessed the revolver because Nichols was the apartment's sole leaseholder; however, as stated, possession may be joint. *Givens*, 237 Ill. 2d at 335. Accordingly, after viewing the evidence in the light most favorable to the State along with the reasonable inferences that may be drawn therefrom, we conclude that a rational trier of fact could have found that the defendant constructively possessed the revolver and ammunition that were recovered during the search.

¶ 17 The defendant also argues that he did not specifically admit to possessing the gun when he told the police that he, rather than Nichols, should be held accountable for any evidence recovered from the search. He contends that, when he made these statements, he was trying to protect Nichols and that his statements referred only to the drugs. However, the trial court, as the fact-finder, acknowledged that the defendant's statements could be interpreted either as an attempt to protect Nichols or as an admission, but found that other evidence established the defendant's constructive possession of the weapon.

¶ 18 Finally, we reject the defendant's assertion that the trial court erred when it presumed facts not in evidence. The defendant contends that the trial court assumed that the lamp was operable and that an observer could see the revolver's outline through the lamp shade whenever the lamp was illuminated. He refers specifically to the circuit court's following comment:

> "[The lamp shade is] an easy place to hide a weapon. But it's more consistent with getting rid of a weapon quicker rather than trying to hide it from someone - - a group of police officers that are going to do a systematic search of your apartment. And, you

know, presumably, the light would be used during that period of time in which it would be on, and you know, you'd see the outline of a gun in the shade."

The defendant maintains that no evidence was ever submitted proving that the lamp was operable.

¶ 19 The State points out that the defendant forfeited this argument by failing to timely object or raise the issue in a post-trial motion. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal"). The State further argues that the plain error doctrine does not apply in this case because no error occurred and the evidence was not closely balanced. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (setting forth two-prongs of plain error doctrine).

¶ 20 We agree with the State that the evidence was not closely balanced. Even if the circuit court assumed that the lamp was lit or operable at the time that the gun was found, the evidence clearly showed that Officer McCormack saw the weapon because his height permitted him to see directly inside of the lamp shade. Further, the court determined that the defendant was a resident of the apartment through other evidence presented at the trial.

¶ 21 Next, the defendant argues that his counsel was ineffective for failing to file a motion to suppress the weapon. He contends that the suppression motion would have been successful because: (1) weapons were not expressly listed in the search warrant; and (2) the plain view exception to the search warrant rule is inapplicable because the incriminating nature of the gun was not immediately apparent. We disagree with the defendant's arguments.

¶ 22 Claims of ineffectiveness of counsel are judged using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, the defendant must show that: (1) his counsel's performance fell below an

objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 688, 694). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel (*People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001)), and here, the defendant's claim fails under the first prong.

¶ 23 In order to meet the first prong, the defendant must show that his attorney's performance was so inadequate that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment. *Manning*, 241 Ill. 2d at 326-27. "Counsel's performance is measured by an objective standard of competence under prevailing professional norms," and the defendant "must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *Id.* at 327 ("Matters of trial strategy are generally immune from claims of ineffective assistance of counsel"). Courts consider an attorney's decision of whether to file a motion to suppress evidence a matter of trial strategy and give counsel "great deference" in this choice. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). If a motion to suppress would be futile, counsel is not ineffective for his failure to file it. *Id.*

¶ 24 In this case, the defendant fails to show that a motion to suppress would have been successful. A search warrant need not specify each particular item for seizure; rather, it may describe a class of items and their characteristics (*People v. McCarty*, 223 Ill. 2d 109, 152 (2006)), and courts have previously held that guns are linked to drug crimes (*People v. Jones*, 269 Ill. App. 3d 797, 803 (1994)). Thus, the search warrant was not required to expressly list guns in order for the police to seize any weapons that they found during the search of the defendant's apartment in connection with his drug activity.

¶ 25 Moreover, law enforcement officers are legally justified in seizing items without a warrant if the items are in plain view. *People v. Jones*, 215 Ill. 2d 261, 271 (2005). The requirements of the plain-view doctrine are as follows: "(1) the officers are lawfully in a position from which they view the object; (2) the incriminating character of the object is immediately apparent; and (3) the officers have a lawful right of access to the object." *Id.* at 271-72.

¶ 26 Here, Officer McCormack lawfully entered the defendant's apartment pursuant to the search warrant. The gun's incriminating nature was immediately apparent based on its connection to drug crimes and the defendant's felony background which was included in the affidavit supporting the warrant. Even if we held that the gun did not fall under the class of items listed in the search warrant, once Officer McCormack saw the gun in the lamp shade, the police had a right to seize it under the plain view exception. As such, we cannot find that the defendant's trial counsel was ineffective for failing to file a motion to suppress that would have been futile.

¶ 27 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.