2015 IL App (1st) 131487-U

SECOND DIVISION
April 19, 2016

No. 13-1487

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Respondent-Appellee,	)	
	)	
v.	)	12 CR 11786
	)	
ANTWOYNE WRIGHT,	)	
	)	Honorable James B. Linn
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce concurs in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to quash the arrest and suppress evidence. There was evidence from which the trial court could find beyond a reasonable doubt that the defendant constructively possessed the weapons and ammunition found during the execution of a search warrant.

¶ 2 Following a bench trial, defendant Antwoyne Wright was convicted of two counts of being an armed habitual criminal and one count of possession of a controlled substance. The trial court sentenced defendant to eight years in prison for each of the armed habitual criminal convictions, and three years for possession of a controlled substance. The trial court ordered all

three sentences to run concurrently. Defendant appeals his convictions and his sentence. We affirm.

¶ 3 BACKGROUND

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and suppress evidence arguing that he had been illegally detained while the police executed a search warrant. Defendant attached a copy of the search warrant to his motion, which authorized the search of a "male Black, Nickname 'Spider[,]' 30-40 years[,] 5'07"-5-09", medium build, dreadlocks, light complexion," and "[t]he tan-sided single family residence located at 9523 South Princeton," for the presence of an assault weapon and ammunition.

¶ 5 At hearing of defendant's motion to quash the arrest and suppress evidence, Officer Jon Mikuzis testified that he authored and filed the complaint for the warrant, based on information provided by a confidential informant. Officer Mikuzis also participated in the execution of the warrant on May 27, 2012. As he pulled up to 9523 South Princeton Street, he saw an individual on Princeton Avenue who appeared to match the description of "Spider." That person was located between the targeted house and 95th Street, about 100 to 150 feet away from the residence. Mikuzis asked some patrol officers to detain this person until he could be identified.

¶ 6 Mikuzis and other police officers proceeded inside the single family residence at 9523 South Princeton Avenue and conducted the search. The officers went to the basement apartment and recovered: crack cocaine from a windowsill, ammunition for an AK-47 assault rifle, a digital scale, narcotics packaging and a Comcast service order with defendant's name on it listing the address of 7710 South Normal. Upon finding these items and approximately 5 minutes after entering the home, Mikuzis exited the home to speak with defendant. Mikuzis provided defendant his *Miranda* rights and questioned defendant about the items he found in the

basement. Defendant told him that the narcotics discovered belonged to him, and then offered to tell Mikuzis the location of a rusted AK-47 rifle in exchange for his freedom. During this conversation, Officer Mikuzis was informed by the other officers that they had recovered two weapons from under the back porch attached to the home. When Mikuzis informed defendant of the recovery of the firearms, defendant refused to speak anymore and told him to take him to jail.

¶ 7 Mikuzis testified that the recovery of the firearms was not instigated by the information defendant provided to him. Upon performing a custodial search on defendant, Mikuzis recovered a set of keys which accessed the residence at 9523 South Princeton Avenue.

¶ 8 Hope Miles testified that, on May 27, 2012, she was working at a hair salon on 251 West 95th Street, near the corner of 95th Street and Princeton Avenue. She had known defendant as a customer for about two weeks. Between 5 and 6 p.m. that day she pulled her car in front of the salon and asked defendant to help her unload some supplies for the shop. When defendant arrived at her car, some police officers approached defendant, asked him a couple of questions, handcuffed him, placed him in their car, and drove south on Princeton Avenue. Miles described defendant as an African-American man with light complexion, in his thirties, around 5 feet 9 inches tall, and wearing braids.

¶ 9 The trial court denied defendant's motion to quash the arrest and to suppress evidence holding that defendant's detention for a short amount of time before his arrest did not violate defendant's Fourth Amendment rights. Subsequently, the trial court denied defendant's motion to reconsider its decision.

¶ 10 At defendant's trial, Officer Mikuzis testified in a manner consistent with his testimony presented at the hearing of defendant's motion to quash the arrest and suppress evidence. Officer Buford testified that he recovered an unloaded and rusty AK-47 rifle and a .38-caliber

revolver which was loaded with five rounds, from the porch located in the rear of the residence, near the basement door and underneath a three-to-four-step stairwell. Officer Buford testified that the AK-47 was sticking out from a box which was visible from outside of the porch. The .38 revolver was on top of one of the beams which supported another enclosed structure above the porch.

¶ 11 The parties stipulated that the narcotics recovered were sent to the Illinois Crime Lab where they were tested and found to consist of one rock-like substance, weighed 10.4 grams, and tested positive for cocaine. The parties also stipulated that defendant had a prior conviction for armed robbery in 2001, and a prior conviction for delivery of cannabis in 1999.

¶ 12 Kristine Williams, a resident of 9517 South Princeton Avenue, testified that she was familiar with the home at 9523 South Princeton, located two houses down from her house. Williams stated that she knew the people who lived there including Jamie Young, two other adults and two children. Williams testified that she went to that home frequently to socialize with Jamie Young, and to do her laundry in the basement. Williams stated that she had never seen anyone live or sleep in the basement. Williams knew defendant because she saw him at the store she owned near her home, but she never saw defendant inside the home at 9523 South Princeton Avenue.

¶ 13 The trial court found defendant guilty of one count of possession of a controlled substance, two counts of being an armed habitual criminal, and five counts of unlawful use of a weapon by a felon based on defendant's possession of the AK-47 rifle, the .38-caliber revolver, and the ammunition recovered from the premises. The trial court merged the convictions of unlawful use of a weapon by a felon into the convictions of being an armed habitual criminal. The court sentenced defendant to eight years in prison for each of the armed habitual criminal

convictions and three years in prison for possession of a controlled substance. The court ordered all three sentences to run concurrently.

¶ 14 Defendant filed a motion for a new trial arguing that the State failed to prove defendant guilty beyond a reasonable doubt and that the trial court erred in denying his motion to quash the arrest and suppress the evidence. The trial court denied defendant's motion for a new trial and this appeal followed.

¶ 15 On appeal, defendant argues that: (1) the trial court erred in denying defendant's motion to quash the arrest and suppress the evidence, and (2) his convictions of being an armed habitual criminal should be reversed when the State failed to prove beyond a reasonable doubt that defendant possessed the weapons and ammunition found during the execution of the search warrant.

¶ 16 ANALYSIS

¶ 17 I. Motion to Quash the Arrest and to Suppress Evidence

¶ 18 Defendant contends that the trial court erred when it denied his motion to quash his arrest and suppress the statement he made to the police officers. Defendant argues that his detention by the police officers prior to his arrest was not authorized by the search warrant because he was not in the immediate vicinity of 9523 South Princeton Avenue. Defendant also argues that his detention was not based on probable cause or in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968), and maintains that, because his detention was illegal, his statements to the police officers were tainted and should have been suppressed by the trial court.

¶ 19 In reviewing an order denying defendant's motion to quash arrest and suppress evidence mixed questions of law and fact are presented. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). Factual findings made by the trial court will be upheld unless they are against the manifest

weight of the evidence while the trial court's application of the facts to the issues presented and the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *Id.*

¶ 20 The Fourth Amendment to the United States Constitution guarantees the right to be free from unreasonable searches and seizures. U.S. Const., amend, IV; *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). Some seizures, however, constitute such limited intrusions on the personal security of those detained, and are justified by such substantial law enforcement interests, that they may be made on less than probable cause. *Michigan v. Summers*, 452 U.S. 692, 699 (1981). The central inquiry under the fourth amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *People v. Connor*, 358 Ill. App. 3d 945, 949 (2005) citing *Summers*, 452 U.S. at 700, n. 11. In *Michigan v. Summers*, the Supreme Court recognized three important law enforcement interests that justify detaining an occupant who is on the premises during the search warrant's execution: preventing any of the occupants from fleeing, minimizing the risk of harm to the officers, and facilitating the orderly completion of the search. *Summers*, 452 U.S. at 702-703.

¶ 21 In the instant case, defendant's short detention prior to his arrest by the police officers incident to the execution of the search warrant was justified. The police officers had a search warrant not only for the premises located at 9523 South Princeton Avenue in Chicago but also for an individual nicknamed Spider, "' 30-40 years[,] 5'07"-5-09" [tall], medium build, dreadlocks, light complexion." Defendant matched the description of the target and the police officers detained him while the search of the premises was being conducted. It was reasonable for the police officers to detain defendant for a short period of time so that they minimize the risk of harm to them posed by defendant when, based on the search warrant, the police had reason to

believe that defendant was armed with a firearm.

¶ 22 *People v. Conner*, 358 Ill. App. 3d 945, 948 (2005) is instructive. In *Conner*, the defendant challenged his conviction for unlawful use of a weapon by a felon on the grounds that the police violated his Fourth Amendment rights when they detained him during the course of the execution of a search warrant. *Id*. The defendant was inside of a residence while the police executed a narcotics search warrant but did not live at the targeted residence and was not personally a target of the warrant. *Id*. Upon executing the warrant, police officers discovered defendant and two other individuals inside of the residence. *Id*. at 947. The police officers immediately handcuffed the defendant and the other two occupants to ensure their safety. *Id*. Police officers spoke to defendant after they handcuffed him, learned his name and address and discovered that the defendant had an outstanding search warrant. *Id*. The officers relayed the information to another officer simultaneously executing a related search warrant at a second location where the officer discovered defendant's driver's license next to a loaded handgun at the second location. *Id*. The defendant was convicted of unlawful use of a weapon by a felon. *Id*.

¶ 23 On appeal, defendant in *Conner* argued the police officers unconstitutionally detained him while executing a search warrant. *Id*. at 949. In *Conner* we held that the defendant's detention was justified after balancing the nature of the intrusion against the officers' safety. *Id*. at 956. We also noted that the execution of a search warrant for narcotics is the kind of transaction that might give rise to "violence or frantic efforts to conceal or destroy evidence," or flight in the event incriminating evidence was found. *Id*. at 958.

¶ 24 Similarly, in the instant case, the safety of the officers and the risk of defendant's flight justified defendant's detention when defendant was in the immediate vicinity of the targeted premises, approximately 100 feet away. In addition, the officers could have reasonably

concluded that they were in greater danger than the officers in *Conner* when they were executing a warrant for a firearm, and defendant matched the description of the individual targeted in the search warrant.

¶ 25 Defendant contends that, pursuant to *Bailey v. U.S.*, 133 S. Ct. 1031 (2013), the police officers were not justified in detaining him incident to the execution of the search warrant when defendant was not in the immediate vicinity of the premises. In *Bailey*, the Supreme Court held that detention of a person in connection to the execution of a search warrant was limited to "the immediate vicinity of the premises to be searched." *Id.* at 1042. In *Bailey*, the officers preparing to execute a search warrant at the defendant's apartment observed the defendant leave the premises in a vehicle. *Id*. at 1036. They followed him for about a mile before pulling the vehicle over. *Id*. The detectives ordered defendant and the other man out of the vehicle, conducted a pat-down search of both men, placed them in handcuffs, and had a patrol car drive both men to the target residence of the search warrant. *Id*. Once they got to the premises, they were arrested upon the discovery of evidence found at the residence. *Id*.

¶ 26 In overturning defendant's conviction, the Court held that none of the underlying justifications for detaining defendant were present were "petitioner left the apartment before the search began and the police officers waited to detain him until he was almost a mile away." *Id*. at 1038. The Court did not define "the immediate vicinity" of the premises but noted that "courts could consider factors such as the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from his location and any other relevant factors." *Id*.

¶ 27 Unlike *Bailey* where the defendant was detained one mile away from the target of the search warrant, in the instant case, the police officers detained defendant within the line of sight

of the location to be searched approximately 100 to 150 feet away from the premises. Unlike *Bailey*, here defendant was detained immediately after Officer Mikuzis observed him on the street while the underlying justifications to detain him were imminent. Specifically, as noted above, it was reasonable for the police officers to believe that defendant posed a threat to them when he was standing in close proximity of the residence where the officers were conducting a search for a firearm. Further, defendant who matched the description of the person to be searched in the warrant could have fled. See *Summers*, 452 U.S. at 704-05. These justifications were not present in *Bailey* where the defendant was not in the vicinity of the premises but a mile away from the scene of the search and where the defendant could not have impacted in any way the execution of the search warrant. Therefore, defendant's reliance on *Bailey* is misplaced.

¶ 28 Because we find that the police officers were justified in detaining defendant for a short period of time incident to the execution of the search warrant, defendant's detention need not be based on probable cause or in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968). Accordingly, defendant's detention did not violate his fourth amendment rights and the trial court did not err in denying defendant's motion to quash the arrest and suppress defendant's statements made to the police.

¶ 29 II. Defendant's Convictions

¶ 30 Defendant argues that his convictions for unlawful use of a weapon by a felon and consequent convictions of being an armed habitual criminal should be reversed because the State failed to prove beyond a reasonable doubt that defendant possessed both the firearms and the ammunition recovered pursuant to the search warrant.

¶ 31 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 reviewing court's function to retry the defendant. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 40. 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. Johnson*, 2015 IL App (1st) 123249, ¶ 21. 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. *Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 40. To sustain a conviction on criminal charges, the State must prove every element of an offense beyond a reasonable doubt. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 20.

¶ 32 Defendant was convicted of two counts of being an armed habitual criminal. A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted two or more times of certain delineated offenses. 720 ILCS 5/24-1.7 (West 2012). The parties stipulated that defendant had been convicted of the qualifying underlying felonies. Defendant was also convicted of five counts of unlawful use of a weapon by a felon that were ultimately merged into defendant's convictions of being an armed habitual criminal. The elements of unlawful use of a weapon by a felon are: (1) the knowing possession or use of a firearm and (2) a prior felony conviction. *People v. Gonzalez*, 151 Ill. 2d 79, 87 (1992). Defendant does not contest that he was previously convicted of the requisite felonies but contends that the State failed to prove that he possessed the firearms and the ammunition beyond a reasonable doubt.

¶ 33 At the outset, we note that possession is a question of fact to be resolved by the trier of fact. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007). Possession, for purposes of the statutes at issue, may be actual or constructive. *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 28;

People v. Nesbit, 398 Ill. App. 3d 200, 211 (2010). In this case, defendant did not physically possess the weapons or ammunition so he could only have committed the offenses if the trier of fact found that he constructively possessed the weapons. The State can prove constructive possession by proving that the defendant had knowledge of the presence of the weapon, and had immediate and exclusive control over the area where the weapon was found. *Nesbit*, 398 Ill. App. 3d at 209. Knowledge may be shown by evidence of a defendant's acts, declarations, or conduct from which it can be inferred that he knew the contraband existed in the place where it was found. *People v. Beverly*, 278 Ill. App. 3d 794, 798 (1996). Control is established when a person has the "intent and capability to maintain control and dominion" over an item, even if he lacks personal present dominion over it. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Here, the trial court as the trier of fact, considered the evidence finding that defendant constructively possessed both the firearms and the ammunition.

¶ 34 The State presented evidence that after his arrest, defendant admitted that the narcotics discovered in the basement of the home located at 9523 South Princeton belonged to him, and offered to tell Officers Mikuzis the location of an AK-47 rifle in exchange for his freedom. Defendant described the weapon as "rusted." Officer Mikuzis testified that "during our talks with [defendant] I was notified by other officers who were still searching the residence, that under the rear porch, they located the AK-47 that [defendant] was talking about. And they also recovered from the same spot a 38-caliber revolver." The recovered AK-47 was, as defendant described, rusty in color.

¶ 35 Defendant argues that although the State established that defendant had knowledge of the AK-47 rifle, the State did not prove that the knowledge element for the .38-caliber revolver and ammunition required for his convictions of unlawful use of a weapon under counts 9 and 10. We

disagree. Evidence of constructive possession is often entirely circumstantial. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Defendant's knowledge of the color and rusted state of the AK-47, his offer to help police find it, and the close proximity between the two firearms under the porch of the home where defendant stored narcotics and ammunition amount to a reasonable inference that he also had knowledge of the loaded .38-caliber revolver.

¶ 36 Moreover, Officer Mikuzis conducted a custodial search of defendant after his arrest and recovered from him the keys that opened the front door of the residence. Having keys to a residence constitutes evidence of constructive possession. *People v. Chicos*, 205 Ill. App. 3d 928, 935 (1990). The police officers also discovered a Comcast cable bill inside the residence with defendant's name on it, although listing a different address. Defendant presented evidence that he did not live at the residence through the testimony of Kristine Williams and urged the trial court to find that there was a reasonable doubt on the question of possession. But the trial court rejected defendant's position. A reviewing court will not disturb a verdict merely because it could have determined the credibility of the witnesses differently or could have drawn different inferences from the facts. *People v. Jackson*, 231 Ill. App. 3d 801, 806 (1992). Viewing all of the evidence in the light most favorable to the prosecution, coupled 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 both firearms and the ammunition recovered at the time of the search and that the State had proven the essential elements of unlawful possession of a weapon by a felon beyond a reasonable doubt. See *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 18.

¶ 37 Defendant also argues that his convictions for unlawful use of a weapon by a felon for possessing the firearm ammunition under counts 8 and 9 should be vacated because the State did

not prove beyond a reasonable doubt that the ammunition charged against defendant was recovered by the police.

¶ 38 At trial, Officer Buford testified that he recovered a .38 caliber revolver *loaded* with five rounds. Furthermore, Officer Mikuzis testified that he recovered one round of ammunition for an AK-47 rifle from the basement apartment of the premises searched. The testimony of the police officers established that the ammunition matched the two firearms recovered from the premises under defendant's control. Therefore, the State proved beyond a reasonable doubt that defendant possessed the firearm ammunition for both the AK-47 rifle and the .38 revolver. However, the record indicates that defendant was charged and convicted for possessing the ammunition loaded in the .38 revolver under two different counts, count 9 and 10. Under the principles of one-act one-crime, we vacate defendant's conviction for unlawful use of a weapon by a felon under count 9. *People v. Almond*, 2015 IL 113817, ¶ 47. We note that defendant's convictions and sentences for being an armed habitual criminal are not affected by our decision to vacate one of defendant's five convictions for unlawful use of a weapon by a felon.

¶ 39 CONCLUSION

¶ 40 Accordingly, we affirm the judgment of the trial court.

¶ 41 Affirmed as modified.

¶ 42 JUSTICE HYMAN, dissenting:

¶ 43 The majority concludes that because the police who approached Antwoyne Wright had a warrant for a person known as "Spider," we need not consider whether the police had either the requisite reasonable suspicion to stop Wright or probable cause for his arrest. But the warrant only authorized the *search* of "Spider," not the arrest of any person happening to fit a physical description. The arrest of an individual who is otherwise acting lawfully merely based on

physical appearance contravenes the Fourth Amendment's protection from unreasonable seizures. I respectfully disagree with the majority and would hold that the police illegally arrested Wright, and his statements to Officer Mikuzis be suppressed as the inadmissible fruit of an unlawful arrest.

¶ 44 Even with Wright's statements, the evidence already was insufficient to establish Wright's possession of various types of ammunition and the .38 revolver. In addition, without Wright's statements, the evidence is insufficient as to the narcotics and the AK-47. Accordingly, I would vacate Wright's convictions and remand for a new trial.

¶ 45 The Trial Court Should Have Suppressed Wright's Statements.

¶ 46 Wright's Arrest

¶ 47 When the police approached 9523 South Princeton, Officer Mikuzis instructed his colleagues to detain Wright based on his physical similarity to "Spider." Immediately, police handcuffed Wright and put him in the backseat of a caged squad car. Officer Mikuzis did not witness the detention. After Officer Mikuzis completed the search of 9523 South Princeton, he advised Wright of his Miranda rights and began questioning him.

¶ 48 Handcuffing and placing Wright in the squad car constitutes a seizure within the meaning of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (person has been seized within meaning of Fourth Amendment if reasonable person would not have felt free to leave); *People v. Cosby*, 231 Ill. 2d 262, 273-74 (2008) (person "seized" when freedom of movement restrained by means of physical force or show of authority). At the time Wright was seized, all the police knew was (i) Wright fit the loose physical description of "Spider" given by the confidential informant, and (ii) Wright was 100 to 150 feet away from 9523 South Princeton. The State characterizes the seizure as a permissible investigatory stop under *Terry v. Ohio*, 392

U.S. 1 (1968). See *People v. Brown*, 2013 IL App (1st) 083158, ¶ 22 (in scope or duration, officer may briefly detain individual he or she reasonably suspects to be recently or currently engaged in criminal activity).

¶ 49 While Wright concedes that an investigative *Terry* stop would have been permissible under the circumstances, he argues that the police effected an arrest and not an investigative *Terry* stop. No bright-line test distinguishes the two, *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 38, but the State has the burden of justifying the seizure as sufficiently limited in scope and duration to satisfy constitutional scrutiny. *People v. Brownlee*, 186 Ill. 2d 501, 519 (1999).

¶ 50 Although courts permit officers to handcuff persons during *Terry* stops when necessary to protect the safety of the police, public, or suspect from undue risk of harm, *People v. Fields*, 2014 IL App (1st) 130209, ¶ 27, doing so heightens the "degree of intrusion." *People v. Johnson*, 408 Ill. App. 3d 107, 113 (2010). Police also may conduct a limited search for weapons, or "frisk," during a *Terry* stop if an officer reasonably believes the detainee to be armed and dangerous. See *People v. Brown*, 2013 IL App (1st) 083158, ¶ 22. But if these restraints were not reasonably necessary for safety, then the stop is invalid, as the appellate court explained in *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 40:

¶ 51 When "arrest-like measures" such as handcuffing are employed, "they must be '"reasonable in light of the circumstances that prompted the stop or that developed during its course."' [Citations omitted] "If the use of such restraints is not reasonably necessary for safety under the specific facts of the case, their use will indicate that the encounter should be viewed as an arrest."[Citation omitted].

¶ 52 The State suggests that the need for the restraint was due to the confidential informant

having said that "Spider" had an AK-47. But Wright was not carrying an AK-47 when police approached, and that particular weapon would have been nigh impossible to conceal. (An AK-47 measures anywhere between 34 and 37 inches in length depending on the model, in contrast to a handgun that can be concealed in a pocket.) Cf. *People v. Ware*, 264 Ill. App. 3d 650, 656 (1994) (reasonable to suspect detainee armed where seen leaving notorious location in an area known for gun arrests and having an observable bulge in clothing). Nor does the record disclose even a whisper that Wright needed to be restrained to prevent him from interfering with the premises search being conducted at least 100 feet away.

¶ 53 Accordingly, the record demonstrates that officer safety was not involved in handcuffing and placing Wright in a caged police car, and, thus the police exercised a degree of restraint associated with formal arrest and not detention under *Terry*.

¶ 54 Was there probable cause for the arrest? Probable cause to arrest exists when the known facts known would lead a reasonably cautious person to believe the arrestee has committed a crime. *People v. Hopkins*, 235 Ill. 2d 453, 471-72 (2009). Wright's similarity to the general description provided by the confidential informant (black male, 30 to 40 years old, 5'7" to 5'9", medium build, with light skin and dreadlocks) alone does not provide probable cause to arrest. *People v. Foster*, 309 Ill. App. 3d 1, 5 (1999) (person's similarity to general description of offender does not by itself provide probable cause to arrest). Wright was outside and a distance from the targeted house; no one had identified him as "Spider"; there was no crime in progress or recent report of a crime when the police went to the South Princeton address. See *People v. Jones*, 374 Ill. App. 3d 566, 575-76 (2007) (police need less factual basis to establish probable cause when acting in response to recent serious crime because chances of apprehending offender lessen unless caught in vicinity of scene).

¶ 55 Again, nothing in the record supports either the notion that Wright had committed a crime or a finding that the arresting officers had probable cause at the time of Wright's arrest. Cf. *Jones,* 374 Ill App. 3d at 575-76 (police had probable cause to arrest defendant for murder committed 15 minutes before apprehension, where defendant fit suspect's description, was within three blocks of crime scene, had been reported running, and had distinct odor of gunshot residue); *People v. Foster,* 309 Ill. App. 3d 1, 5 (1999) (police had probable cause to arrest defendant where defendant matched description of suspect, was arrested one hour after shooting in company of other suspects, and suspects' vehicle matched description of vehicle involved in crime, was still warm and found near suspects).

¶ 56 This court found an arrest illegal in *People v. Wells*, 403 Ill. App. 3d 849 (2010), an arguably much more serious situation than Wright's. There, a woman called 911 complaining that Wells, her boyfriend, was outside her apartment building and threatening to kill her. Police saw Wells walking away from the building but did not try to stop him. *Id.* at 850. Ten minutes later, the same police officers received a call that Wells had returned to the building and again was threatening his girlfriend. *Id.* This time, after Wells left the building, police stopped him to conduct a field interview. *Id.* Wells cooperated and did not appear to be armed. *Id.* But before questioning Wells, the officers immediately handcuffed him, conducted a pat-down, and found a gun in Wells's sock. *Id.* at 850-51. Despite having twice threatened to kill his girlfriend in the previous ten minutes, this court ruled that Wells' detention was an illegal arrest rather than a permissible *Terry* stop. The court attached importance to (i) the immediate handcuffing of Wells without discussion or interaction, (ii) the absence of indicia that Wells was armed, and (iii) the lack of any attempt by Wells to flee or struggle with the officers. *Id.* at 857-58.

¶ 57 Here, too, Wright was immediately handcuffed. There was no indication that he was

armed or posed a risk of flight or struggle. And, no crime was in progress.

¶ 58 While the facts known to the police justify a reasonable suspicion for a limited investigatory stop to determine if Wright was "Spider" and if he was armed, that is not what occurred. Police immediately restrained Wright and placed him under arrest without probable cause.

¶ 59 Wright's Statements Were "Fruit" of the Illegal Arrest

¶ 60 Wright's illegal arrest does not answer the question of whether his statements to Officer Mikuzis — admitting that he owned the narcotics found in the house, and knew the whereabouts of an AK-47 — should be suppressed. We must look further at whether the statements were obtained in a way as to "purge[] the primary taint" of illegality. *People v. Lovejoy*, 235 Ill. 2d 97, 130 (2009) (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). This is commonly (and horticulturally) known as the "fruit of the poisonous tree" doctrine. Courts consider: (1) whether the police gave *Miranda* warnings; (2) the proximity in time between the arrest and the statements; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the police misconduct. *People v. Jackson*, 374 Ill. App. 3d 93, 102 (2007). The last two factors hold particular significance. *Id.*

¶ 61 The presence of *Miranda* warnings carries "some weight" in the analysis, though police cannot cleanse the taint of an illegal arrest simply by advising a defendant of his constitutional rights. *Id.* Officer Mikuzis did Mirandize Wright before Wright made his statements, so this factor weighs in favor of admission.

¶ 62 According to Officer Mikuzis, only a few minutes elapsed between the time when the officers arrived and he instructed his colleagues to detain Wright, and the time Wright made his statements. Time can dissipate the taint of illegal arrest by allowing the arrestee to consider his

or her situation. *People v. Wilberton*, 348 Ill. App. 3d 82, 86 (2004); see *also People v. Salgado*, 396 Ill. App. 3d 856, 868 (2009) (passage of time weighs in favor of admission where defendant detained 47 hours before making incriminating statement). This factor weighs against admission since Wright had little time to reflect before undergoing questioning.

¶ 63 From Wright's perspective, he was walking on a street when, suddenly, police take him into custody, put handcuffs on him, place him in a caged squad car, and a few minutes later, question him about the contents of 9523 South Princeton. These circumstances do not indicate that Wright had time to consider and weigh his options before giving the statements, or, in a Kafkaesque way, he even knew why he had been arrested before Officer Mikuzis began questioning him.

¶ 64 The third factor—an "intervening circumstance" that can break the connection between the arrest and the statement — must be something that "induces a voluntary desire to confess." *Jackson*, 374 Ill. App. 3d at 105. Often, this involves new evidence that the police obtain legally through other means such as the statement of a codefendant or a witness sketch identifying the detainee. *Id.* at 105-06. If the new evidence sufficiently incriminates the detainee, it becomes an "intervening probable cause" justifying arrest and weighing towards admission of the statement (since police are not required to pointlessly release a suspect initially arrested illegally after obtaining evidence justifying a second, legal arrest). *Salgado*, 396 Ill. App. 3d at 863-64; *Wilberton*, 348 Ill. App. 3d at 88 (codefendant's statement implicating defendant establishes probable cause and serves as intervening circumstance).

¶ 65 Here, the "intervening circumstance" would have been discovery at 9523 South Princeton of the drugs, firearms, ammunition, and utility bill containing Wright's name, as well as Wright's possession of keys to the house, which were found on Wright's person. Police obtained these

items legally with a warrant on the premises, and Wright concedes that the keys could have been obtained through a lawful search during a *Terry* stop.

¶ 66 This evidence was not particularly incriminating and hardly viable as a factor favoring admissibility. The drugs, ammunition, and firearms in the house indicated that *somebody* at 9523 South Princeton was committing a crime, but those items were not tied to Wright in any way. And though Wright possessed keys to 9523 South Princeton, the utility bill with Wright's name was for an entirely different residence several miles away (7610 South Normal).

¶ 67 The final and fourth factor, whether the illegal arrest was "purposeful and flagrant" police misconduct, is found where the actions are taken to cause "surprise, fear, and confusion," or where it has a "quality of purposefulness," such as when police take illegal action in the hope that incriminating evidence might be obtained. *Jackson*, 374 Ill. App. 3d at 107 (quoting *People v. Jennings*, 296 Ill. App. 3d 761, 766 (1998)). The police officers' manner of taking Wright into custody — without warning and within minutes, physically restraining, handcuffing, loading him into a caged squad car, and interrogating him— were calculated to cause surprise, fear, and confusion. But more obviously, the police took Wright into custody so they could obtain more evidence from him regarding the illegal activity at 9523 South Princeton. Where the purpose of the misconduct was to conduct a "fishing expedition" to establish probable cause to arrest him (remember, the warrant against "Spider" was a search warrant, not an arrest warrant), it exploits the illegal arrest and weighs against attenuation. *Jackson*, 374 Ill. App. 3d at 108.

¶ 68 Considering all these factors — the *Miranda* warnings, the timing of the arrest, the unincriminating evidence, and the surprise, confusion, and purposeness, I would hold the illegal arrest tainted Wright's statements to police that he possessed the drugs found during the search of the house and that he knew the location of an AK-47.

¶ 69 Evidence Was Insufficient to Convict

¶ 70 The relevant inquiry when challenging the sufficiency of the evidence involves, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). A reviewing court will not substitute its judgment for that of the trier of fact on questions concerning the weight of the evidence or the credibility of the witnesses. *Id*. at 375. And, a reviewing court will not reverse a criminal conviction unless it determines the evidence to be so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Id*.

¶ 71 Ultimately, the trial court **c**onvicted Wright of two counts of being an armed habitual criminal (AHC) based on possessing the AK-47 and the .38 revolver, and one count of possession of a controlled substance (cocaine found on windowsill). Wright was also convicted of several additional counts of unlawful use of a weapon (UUW), based on possessing the .38 revolver, the AK-47, .40 caliber bullets, .380 caliber bullets, and .38 caliber bullets (loaded inside the .38 revolver). These UUW counts merged into the AHC convictions for sentencing. (Wright also was charged with UUW for possessing a 7.62 caliber bullet, but this count is not listed in the mittimus, though the indictment listed it as having been merged into the AHC convictions.) Each of these convictions should be overturned.

¶ 72 Counts 8 & 9 – UUW

¶ 73 The convictions for counts 8 and 9 — that Wright possessed .380 caliber and .40 caliber ammunition — should be vacated entirely. No evidence indicates that the police found .380 caliber and .40 caliber ammunition in 9523 South Princeton. (The majority attributes Wright with possessing .38 caliber and AK-47 ammunition under these counts. But counts 8 and 9 refer

to .380 and .40 caliber ammunition. Thus, there is no one-act one-crime issue as to count 9.) Indeed, throughout the bench trial and the earlier suppression hearing there is never a mention of .380 and .40 caliber ammunition!

¶ 74 The State labels this as "mere surplusage" in the charging instruments. Because they proved that Wright possessed some ammunition, the State apparently takes the position that no one should care that Wright didn't possess these particular types of ammunition. This argument must be rejected — the State cared enough to separately charge Wright with possessing four different types of ammunition. Each of its charging decisions subjects the State to scrutiny and the State overcharged Wright.

¶ 75 These convictions merged into Wright's AHC convictions, so they did not affect his ultimate sentence. But given that the AHC evidence was also insufficient, these convictions seem to emanate from thin air and should not have been reflected in the mittimus.

¶ 76 Counts 6 and 10 – UUW and Count 2 – AHC

¶ 77 The convictions for counts 6 and 10 (unlawful use of a weapon by a felon for possession of an EIG .38 revolver and the .38 caliber bullets loaded in that revolver) and count 2 (AHC for possession of the same revolver) should be overturned as there was insufficient evidence that Wright possessed an EIG .38 revolver or the ammunition inside it.

¶ 78 Unlawful use or possession of a weapon by a felon (UUW) means "knowingly possess[ing] on or about his person or on his land or in his own abode or fixed place of business" any firearm or ammunition, after having been convicted of a felony. 720 ILC 5/24-1.1(a). Wright argues that the State did not prove that 9523 South Princeton was his "abode." But, as the State points out, our Supreme Court has held that the only elements of this crime are (1) knowing possession of a firearm and (2) a prior felony conviction. *People v. Gonzalez*, 151 Ill.

2d 79, 84-85 (1992). *Gonzalez* and its progeny thus ignore a portion of the UUW statute, though a statute's plain language best indicates legislative intent. *In re A.A.*, 2015 IL 118605, ¶ 21. Had the legislature intended that UUW have only the elements enumerated in *Gonzalez*, there would be no need for "on or about his person or on his land or in his own abode or fixed place of business." This inconsistency calls for further legislative instruction. (As Wright's UUW counts were merged for sentencing into the AHC counts, the majority does not analyze this question.)

¶ 79 But even following *Gonzalez*, as I must, I would hold that the evidence as insufficient to prove Wright's possession of the revolver. This applies to both "possession" for the UUW statute, and "possession" of the same weapon under the AHC statute. See 720 ILCS 5/24-1.7(a) (person commits offense of being armed habitual criminal if he or she receives, sells, possesses or transfers any firearm after having been convicted of two enumerated felonies). The only evidence that Wright possessed these items was that (i) he had in his pocket a set of keys to 9523 South Princeton, and (ii) one of his personal items (the utility bill in his name for a different address) was found in the basement.

¶ 80 The State tried to prove that Wright "constructively" possessed the revolver and bullets since he did not have actual physical possession. The State needed to show that Wright had knowledge of the revolver and exercised "immediate and exclusive control" over the area where the revolver was found. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. A person may have constructive possession of contraband even if that possession is joint, or others have access to the area where the contraband was recovered. *Id.* at ¶ 43; see *also People v. Givens*, 237 Ill. 2d 311, 335 (2010) ("[i]f two or more person share the intention and power to exercise control, then each has possession").

¶ 81 But, Wright never made any statement indicating he owned the revolver or even knew of

its existence. Though the revolver was found near the AK-47 (and Wright mentioned knowing about an AK-47), the AK-47 stuck out from a box under the backstairs. The .38 revolver, however, was concealed on a beam under the stairs. Even if Wright knew about the AK-47, no evidence suggests he also knew about the nearby revolver. See *People v. Macias*, 299 Ill. App. 3d 480, 487 (1998) (knowledge of contraband cannot be inferred where items hidden under clothes or mattress). The State assumes that Wright must have known because of the proximity of the two items. *Id.* (defendant may have control over and access to area, but may not necessarily have knowledge of contraband stored in area). Other than the AK-47's proximity, the State presented no evidence that Wright actually knew about a revolver concealed under the back stairs of a home occupied by other people. *People v. Moore*, 2015 IL App (1st) 140051, ¶¶ 24-26 (insufficient proof defendant knew about contraband where found in different area of home from mail addressed to defendant, and no other evidence linked defendant to home).

¶ 82 If Wright had "control" over the premises, that could give rise to an inference of Wright's knowledge. *Maldonado*, 2015 IL App (1st) 131874, ¶ 39. Habitation where contraband is found denotes evidence of "control" for constructive possession. *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999). Evidence showing habitation can include rent receipts, utility bills, keys, listing the address on a driver's license, or having personal effects in the home. *Id.*; *People v. Spann*, 332 Ill. App. 3d 425, 445 (2002) (sufficient evidence of possession where defendant stayed in apartment, paid rent, and had key). The only evidence of Wright's habitation at 9523 South Princeton was he carried keys to the house. None of the clothes or other effects in the house was shown to belong to Wright. And the utility bill with Wright's name involved a residence several miles away. This evidence tends to show that Wright actually lived somewhere else. *Id.* (defendant lived at home where narcotics found, and no other evidence of

another address where defendant might have lived).

¶ 83 The evidence fails to prove that Wright knew about the revolver or exercised any control over it. His convictions on these counts should be overturned.

¶ 84 Count 11 – UUW

¶ 85 The same analysis applies to count 11 (the 7.62 caliber bullet found near the narcotics in the basement), which was not included in the mittimus (though it is marked in the record as merging into the AHC counts). (This caliber bullet can be used in an AK-47 weapon so the record sometimes refers to this bullet as an AK-47 round.) Wright never admitted to possession of the AK-47 round. Its proximity to the narcotics, which he did admit to possessing, makes it somewhat more likely that he had knowledge of the AK-47 round. But again, the State's evidence that Wright had "immediate and exclusive control" over the basement appears exceedingly tenuous: he had keys, but the utility bill indicated he lived elsewhere. And the evidence shows other adults lived in the house (and a neighbor testified to using the laundry machines in the basement). The items could not be shown to be Wright's by process of elimination, and the evidence was insufficient to convict him.

¶ 86 Count 1 – AHC, Count 5 – possession of controlled substance, and Count 7 – UUW

¶ 87 As already discussed, I believe Wright's statements to police that he owned the drugs and knew the location of an AK-47 should have been suppressed. Without those statements, the evidence of Wright's possession of the AK-47 for both the AHC and UUW counts and the drugs was as insufficient to convict him as it was for the other items.

¶ 88 Conclusion

¶ 89 Wright's statements to police should have been suppressed. Even with those statements, a number of his convictions should be overturned as being based on insufficient evidence. None

of Wright's convictions should stand. I would enter a judgment of acquittal on Counts 2, 6, 8, 9, 10, and 11, and permit retrial on Counts 1, 5, and 7. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995).