2017 IL App (1st) 171007-U

No. 1-17-1007

FIFTH DIVISION
September 1, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF S.D., a Minor,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellant.	)	Cook County.
	)	
	)	No. 17 JD 273
	)	
	)	The Honorable
	)	Stuart P. Katz,
	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶1 *HELD*: The delinquent minor could not support his ineffective assistance of counsel claim where he failed to establish a motion to quash arrest and suppress evidence would have been successful. In addition, the evidence sufficiently supported the minor's adjudication for possession of a defaced firearm. The minor's additional adjudications, however, must be vacated as violations of the one-act, one-crime doctrine.

¶2 Respondent-minor, S.D., was adjudicated a delinquent for possession of a defaced firearm, aggravated unlawful use of a weapon by an individual under 21 years old, and

unlawful possession of a firearm by an individual under 18 years old. S.D., who was 17 at the time of the offense and 18 at the time of sentencing, was sentenced to the Illinois Department of Juvenile Justice for a period not to exceed five years or his 21st birthday, whichever occurred first. On appeal, S.D. contends: (1) his trial counsel was ineffective for failing to file a motion to quash S.D.'s arrest and to suppress a recovered firearm where the police lacked probable cause to arrest him based on possession of the gun; (2) his adjudication for possession of a defaced firearm should be vacated where the State failed to establish beyond a reasonable doubt that he knew the serial number on the firearm had been defaced; and (3) his adjudications should be merged under the one-act, one-crime doctrine. Based on the following, we affirm S.D.'s adjudication of possession of a defaced firearm and vacate his remaining adjudications.

¶3 FACTS

¶4 At trial, Chicago Police Officer Israel Gamez testified that, around 11 a.m. on January 31, 2017, he and his partner, Officer Delgado Fernandez, were in an unmarked vehicle near 72nd Street and Loomis Boulevard in Chicago, Illinois, when he observed a white four-door vehicle drive through a stop sign without stopping. The officers activated their emergency lights and pulled behind the white vehicle. The white vehicle turned right from Loomis Boulevard and proceeded past three or four houses on 72nd Place before pulling over. Officer Gamez testified that the officers parked one car length behind the white vehicle. According to Officer Gamez, there were four individuals in the white vehicle, all of who were looking back at the officers while moving within the vehicle.

¶5 Officer Gamez stated that Officer Fernandez approached the driver's side of the vehicle while Gamez approached the passenger's side. The windows were tinted, so

Officer Gamez instructed the driver to roll them down to provide the officers with visibility inside the vehicle. As Officer Gamez approached the rear passenger door, he observed a spent shell casing and a live round on the floorboard of the rear passenger seat. According to Officer Gamez, he opened the rear passenger door, instructed the individuals inside the vehicle to keep their hands visible, and informed Officer Fernandez of the shell casing. At that time, Officer Fernandez was conversing with the driver and instructing the driver to exit the vehicle.

¶6 Officer Gamez further testified that he looked toward the front of the car and observed the butt of a firearm sticking out from underneath the front passenger's right thigh. S.D. was seated in the front passenger's seat. Officer Gamez then notified Officer Fernandez of the firearm. In response, Officer Fernandez proceeded to the passenger's side of the vehicle and recovered the firearm from under S.D.'s thigh. After recovering the firearm, Officer Fernandez placed S.D. under arrest and sat him on the curb. Officer Gamez testified that he placed his handcuffs on the individual seated in the rear passenger seat near the spent shell casing and live round "after [he] found he was another juvenile." Meanwhile, Officer Fernandez returned to the driver's side of the vehicle and instructed the individual seated in the rear driver's side to exit the vehicle. As that individual exited, Officer Gamez observed a firearm had been underneath him, and he was also placed into custody. Officer Gamez testified that he asked that juvenile whether there were any more weapons in the vehicle. The juvenile failed to respond. No more firearms were recovered. According to Officer Gamez, all four individuals were placed in custody. The group included "three minors and one adult."

¶7 Officer Gamez stated that he inventoried S.D.'s firearm: a "blue steel," black semi-automatic Ruger .380. The firearm was loaded with a live round in the chamber and an unknown number of rounds in the magazine. Officer Gamez testified that the firearm was "defaced, meaning the serial number was scratched off." According to Officer Gamez, the serial number was unreadable; it had been scratched off with something hard, "like a stencil."

¶8 On cross-examination, Officer Gamez testified that the officers were unable to take any statements from S.D. because he was "a juvenile."

¶9 S.D. moved for a directed finding, which was granted on the charge of aggravated unlawful use of a weapon based on a firearm owner's identification card. The motion was denied as to the remaining charges for which he ultimately was adjudicated delinquent. Following a dispositional hearing, S.D. was committed to the Department of Juvenile Justice as previously described. This appeal followed.

¶10 ANALYSIS

¶11 I. Ineffective Assistance of Counsel

¶12 S.D. first contends his trial counsel was ineffective for failing to file a motion to quash S.D.'s arrest and suppress the recovered firearm. S.D. argues that the officers lacked probable cause to recover his firearm and place him under arrest.

¶13 To support an ineffective assistance of counsel claim, a defendant must satisfy the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Pursuant to *Strickland*, a defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced as a result. *Id.* at 687.

¶14 To show deficient representation, a defendant must establish his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of a counsel's performance is highly deferential, such that a court must indulge in a strong presumption that the counsel's conduct fell within the wide range of professional assistance. *Id*. at 689. "Because effective assistance refers to competent and not perfect representation, mistakes in trial strategy or judgment will not, of themselves, render the representation incompetent." *People v. Moore*, 2012 IL App (1st) 100857, ¶ 43.

¶15 To demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's deficient representation, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The Supreme Court advised that "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome" of the proceeding. *Id*. In the context of a motion to quash arrest and suppress evidence, the defendant must show that, but for counsel's errors, the motion would have been granted and that there exists a reasonable probability the ultimate outcome of trial would have been different had the arrest been quashed and the evidence suppressed. See *People v. Jones*, 2017 IL App (1st) 143766 ¶ 46. Moreover, because the defendant must satisfy both parts of the *Strickland* test, if an ineffective assistance claim can be disposed of on the ground of lack of sufficient prejudice, a court need not consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶16 An ineffective assistance claim presents mixed questions of fact and law. *Id*. at 698. A reviewing court defers to the trial court's findings of fact unless they are against the manifest weight of the evidence, while *de novo* review applies to the ultimate

question of whether a counsel's omission amounted to ineffective assistance. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009).

¶17 The fourth amendment of our federal constitution provides individuals protection from unreasonable searches and seizures. U.S. Const. amend IV. "An arrest executed without a warrant is valid only if supported by probable cause." *People v. Grant*, 2013 IL 112734, ¶ 11. Probable cause exists where the facts and circumstances known to the officers at the time of the arrest are sufficient to warrant a person of reasonable prudence and caution to believe that an offense has been committed and that the offense was committed by the person arrested. *People v. Sims*, 192 Ill. 2d 592, 614 (2000). Probable cause does not require the degree of proof necessary to support a conviction nor does it require a probability that the suspected individual has committed a crime; however, more than a mere suspicion or hunch of criminal activity is required. *Id*. at 614-15. Whether sufficient probable cause exists is a case-specific analysis that must be determined after examining the totality of the circumstances. *Id*. at 615.

¶18 Here, S.D. concedes the officers had probable cause "to enter and search the vehicle for their own safety." S.D., however, contends that, following *People v. Aguilar*, 2013 IL 112116, "the possible observation of a handgun is not in itself, without any other evidence of a crime, sufficient to provide an officer with probable cause for arrest." See *People v. Horton*, 2017 IL App (1st) 142019, ¶ 50. S.D. acknowledges it is illegal to possess a defaced firearm and to do so under the ages of 21 or 18 (720 ILCS 5/24-5(b) (West 2016); 720 ILCS 5/24.16(a)(1)/(3)(I) (West 2016); 720 ILCS 5/24-3.1(a)(1) (West 2016)) , but argues the fact of defacement and his age were unknown at the time of his arrest and, therefore, cannot support a finding of probable cause.

¶19 Based on the record before us, we find S.D. failed to establish his claim of ineffective assistance of counsel where he cannot demonstrate that a motion to quash arrest and suppress evidence would have been successful. Unlike in *Horton*, in this case, there was more evidence of a crime than the mere possibility that S.D. had a firearm. Rather, Officer Gamez testified to observing a spent shell casing and a live round in the rear passenger seat and a firearm under S.D.'s right thigh as he was seated in the front passenger seat. After S.D.'s firearm was retrieved and he was removed from the vehicle, one of his copassengers also was found with a firearm. Moreover, not only did S.D. have a firearm under his thigh, but he was 17 at the time of the offense, riding in a car with two other minors. S.D. has not advanced any facts in the record demonstrating that his status as a minor could not be assumed by the arresting officers; instead, Officer Gamez referred to S.D. as a juvenile both on direct examination and on cross-examination. Keeping in mind S.D.'s burden, we cannot find he established the requisite prejudice resulting from his trial counsel's decision not to file a motion to quash his arrest and suppress the evidence where S.D. failed to demonstrate the motion was meritorious and the outcome of trial would have been different. See *Jones*, 2017 IL App (1st) 143766 ¶ 46. We, therefore, conclude S.D. failed to support his ineffective assistance of counsel claim.

¶20 II. Sufficiency of the Evidence

¶21 S.D. next contends the State failed to prove beyond a reasonable doubt he committed the offense of possession of a defaced firearm where there was insufficient evidence to establish he knew the firearm was defaced. In the alternative, S.D. contends

section 24-5(b) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-5(b) (West 2016)) is unconstitutional.

¶22 A challenge to the sufficiency of the evidence requires a reviewing court to determine "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." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶23 Section 24-5(b) of the Code provides that "[a] person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony." 720 ILCS 5/24-5(b) (West 2016).

¶24 S.D. argues his adjudication must be vacated where the State failed to prove beyond a reasonable doubt that he knew the serial number on the firearm had been defaced. S.D.'s argument has been rejected and dismissed by this court in *Stanley* and *People v. Falco*, 2014 IL App (1st) 111797.

¶25 In *Stanley*, the defendant similarly contended his conviction for possession of a defaced firearm should be vacated where the State failed to present evidence suggesting he knew the identifying marks had been scratched off the gun he possessed. 397 Ill. App. 3d at 603. The *Stanley* defendant alternatively argued that if such knowledge was not required, the statute was unconstitutional as tending to criminalize innocent conduct without showing a culpable mental state. *Id*. While extensively analyzing section 24-5(b) of the Code, this court noted the statute, as written, did not provide a mental state, but found the applicable *mens rea* for the offense was knowledge and that "the knowledge required applies only to the possessory component of the offense." *Id*. at 608. Accordingly, to prove a defendant guilty of possession of a defaced firearm, the State was required to demonstrate the defendant knowingly possessed the defaced firearm, but was not required to establish knowledge of the character of the firearm where defacement was not an element of the offense. *Id*. at 609. The *Stanley* court rejected the idea that possession of a defaced firearm was a strict liability offense. *Id*. This court cited *Stanley* with approval in *Falco*, reiterating that, in order to prove the offense of possession of a defaced firearm, the State need only prove that the defendant's possession was knowing and not that the defendant knew the firearm was defaced. *Falco*, 2014 IL App (1st) 111797, ¶ 18.

¶26 We see no reason to depart from our holding in *Stanley* or *Falco*. As a result, the State was only required to establish S.D. knowingly possessed the firearm in this case, which it did beyond a reasonable doubt, and which S.D. does not dispute. Officer Gamez testified that he observed the firearm under S.D.'s thigh and his partner retrieved the defaced firearm prior to placing S.D. under arrest. Viewed in a light most favorable to the

State, the evidence established the essential elements of the crime. We, therefore, conclude S.D.'s challenge to the sufficiency of the evidence must fail.

¶27 We also find S.D.'s alternative argument regarding the constitutionality of section 24-5(b) of the Code fails. S.D. contends that if the statute criminalizing possession of a defaced firearm does not require a mental state then the statute is unconstitutional. However, in *Stanley*, this court held that the statute did require proof of a mental state, such that the State was required to show knowing possession of the defaced firearm. *Stanley*, 397 Ill. App. 3d at 608-09. In light of its conclusion as to the construction of the statute, the *Stanley* court found the constitutional challenge was without merit and did not warrant further discussion. *Id*. at 610. We conclude that the same reasoning applies here. We, therefore, reject S.D.'s constitutional challenge.

¶28 III. One-Act, One-Crime Violation

¶29 S.D. finally contends, and the State agrees, his three adjudications must be merged into a single adjudication based on the one-act, one-crime doctrine.

¶30 In *People v. King*, our supreme court set forth the one-act, one-crime doctrine such that a defendant suffers prejudice "where more than one offense is carved from the same physical act." 66 Ill. 2d 551, 566 (1977). Under the one-act, one-crime doctrine, a court should impose a sentence upon the more serious offense and vacate the less serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009).

¶31 In this case, all of S.D.'s adjudications were based on his possession of a single firearm, which violates the one-act, one-crime doctrine. When multiple convictions violate the one-act, one-crime doctrine, we must vacate the less serious of the convictions. *Id*. The parties agree that S.D.'s most serous adjudication is possession of a

defaced firearm. We, therefore, vacate S.D.'s adjudications for aggravated unlawful use of a weapon and unlawful possession of a firearm by a person under the age of 21.

¶32 CONCLUSION

¶33 We affirm S.D.'s adjudication of possession of a defaced firearm. We find S.D. received effective assistance of counsel and the State proved him guilty of the offense beyond a reasonable doubt. We vacate S.D.'s remaining convictions as violations of the one-act, one-crime doctrine.

¶34 Affirmed in part; vacated in part.