2018 IL App (1st) 151142-U
Order filed: February 23, 2018

FIFTH DIVISION

No. 1-15-1142

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 14 CR 7459
	)	
NATHANIEL HARRIS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
PRESIDING JUSTICE REYES and JUSTICE HALL concurred in the judgment.

ORDER

¶ 1 ***Held*:** We reversed defendant's conviction for aggravated unlawful use of a weapon. The trial court erred when it denied defendant's motion to suppress where the police did not have probable cause to arrest defendant. Under the exclusionary rule, defendant's statement that he did not have a concealed carry license, made after the unlawful arrest, must be suppressed.

¶ 2 Following a bench trial, defendant-appellant, Nathaniel Harris, was found guilty of aggravated unlawful use of a weapon (AUUW) in violation of 720 ILCS 5/24-1.6(a)(1)/(3)(A-5) (West 2014), and was sentenced to 14 months' probation. On appeal, defendant contends that the trial court erred when it denied his motion to quash arrest and suppress evidence (motion to

suppress). He also argues that the State failed to prove him guilty beyond a reasonable doubt because the only evidence to prove he did not possess a valid concealed carry license was his own post-arrest admission, which violated the *corpus delicti* rule. We find that the trial court erred in denying defendant's motion to suppress and that defendant's post-arrest statement should have been excluded at trial under the exclusionary rule and reverse defendant's conviction.

¶ 3 On March 29, 2014, Chicago police arrested defendant after they found him carrying a loaded handgun in his waistband. He was charged with two counts of AUUW based on his carrying or possessing a handgun when he had not been issued a currently valid license under the Firearm Concealed Carry Act (Act) (430 ILCS 66/10(g) (West 2015)) (count 1), and a Firearm Owner's Identification (FOID) card (count 2). Before trial, defendant filed the motion to suppress. The hearing on the motion and trial were held contemporaneously. The State proceeded only on count 1.

¶ 4 Chicago police sergeant Enriquez testified that, on March 29, 2014, he was on duty with his partner, Officer Howe, in an unmarked police vehicle. Sergeant Enriquez was in plain clothes, with his police badge visible around his neck. At about 2:05 a.m., Sergeant Enriquez received a radio call about "a person with a gun," in the approximate area of the "700 block Grand and the 700 block of Ohio." The person was described as a "male black wearing a black and white striped polo shirt." Sergeant Enriquez and Officer Howe went to that location, where Sergeant Enriquez saw a person, identified in court as defendant, who matched that description. Defendant was "[o]n the sidewalk walking" alone in the vicinity of 719 West Ohio Street.

¶ 5 Sergeant Enriquez approached defendant on foot and, when he was about eight feet away from defendant. Sergeant Enriquez announced his office and defendant "raised his arms straight

up in the air." Sergeant Enriquez testified that he announced his office "[b]ecause that's customary when you work in civilian dress[.]" After Sergeant Enriquez announced his office, defendant "raised his arms straight up in the air." As defendant raised his arms, Sergeant Enriquez observed "the handle of a handgun protruding" in the front waistband of defendant's pants. When defendant saw Sergeant Enriquez looking at the gun, defendant said: "I got a gun on me." Sergeant Enriquez moved toward defendant to "safely remove it." Sergeant Enriquez "took the gun and detained" defendant. Officer Howe placed handcuffs on him. The gun was loaded with eight live rounds. Sergeant Enriquez testified that, at that point, defendant was placed in custody.

¶ 6 At the police station, Sergeant Enriquez read defendant his *Miranda* rights and asked him "whose gun it was." Defendant told him that "the gun was his brother's and that he had it with him because it gets crazy by the clubs." Sergeant Enriquez asked defendant if he had a valid concealed carry license and defendant told him that he did not.

¶ 7 On cross-examination, Sergeant Enriquez testified that he never spoke with the individual who transmitted the radio call to him about "a person with a gun," and he did not know how the information was received through the dispatch system. When Sergeant Enriquez observed defendant, defendant was not breaking any laws. Sergeant Enriquez did not know defendant prior to March 29, 2014. Sergeant Enriquez did not observe the gun in defendant's waistband until after he approached defendant and announced his office. Defendant did not attempt to prevent Sergeant Enriquez from removing the gun from his waistband.

¶ 8 Following arguments, the trial court denied defendant's motion to suppress and found him guilty of AUUW in that he carried or possessed a handgun on his person and had not been issued a valid license to carry a firearm under the Act at the time of the offense. With respect to

the motion to suppress, the trial court found that "there was probable cause once the officer observed the handle of the firearm." The court subsequently denied defendant's motion for a new trial, sentenced him to 14 months' probation, and 66 days in Cook County jail with time served, and imposed fines and fees.

¶ 9 Defendant contends on appeal that the trial court erred when it denied his motion to suppress because possession of a gun, without more, did not establish probable cause for his arrest. Defendant argues that there was no evidence that he was participating in any suspicious or illegal activity when the police stopped him and, therefore, the police did not have probable cause to arrest him. Defendant asserts that he made the statement that he did not have a concealed carry license only after the unlawful arrest and, therefore, his statement should have been suppressed. Finally, defendant argues that we should reverse his conviction outright because the State cannot prove its case without his statement.

¶ 10 The State argues that the initial encounter between defendant and the police was consensual and became a *Terry* stop when Sergeant Enriquez observed the handle of the gun in defendant's waistband. The State asserts that the police had probable cause to believe that he illegally possessed an unconcealed gun in public based on the information which Sergeant Enriquez obtained from a radio call and from the stop, including that defendant possessed an uncased, loaded, and immediately accessible handgun on a public street.

¶ 11 In the trial court, when a defendant files a motion to quash an arrest and suppress evidence, "it is the defendant's burden to present a *prima facie* case that the police lacked probable cause to arrest." *People v. Walter*, 374 Ill. App. 3d 763, 765 (2007). If the defendant meets this burden, "the State has the burden of going forward with evidence to counter the

defendant's *prima facie* case." *People v. Gipson*, 203 Ill. 2d 298, 307 (2003). "However, the ultimate burden of proof remains with the defendant." *Id.*

¶ 12 A trial court's ruling on a motion to quash and suppress evidence presents a mixed question of law and fact. *People v. Green*, 2014 IL App (3d) 120522, ¶ 27. We apply a two-part standard of review when we review the trial court's ruling. *People v. Timmsen*, 2016 IL 118181, ¶ 11. We review the trial court's factual findings with "great deference" (*People v. Jackson*, 2012 IL App (1st) 103300, ¶ 13), and will only reverse those findings "if they are against the manifest weight of the evidence." *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). However, a reviewing court, may "undertake its own assessment of the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted." *Id*. We, therefore, apply a *de novo* standard of review when we review the trial court's ruling regarding whether the evidence should have been suppressed. *Id.*

¶ 13 The fourth amendment guarantees the right to be free from unreasonable searches and seizures. *People v. Colyar*, 2013 IL 111835, ¶ 31; U.S. Const., amend. IV. When there is a seizure of a person, "the fourth amendment generally requires a warrant supported by probable cause." *People v. Thomas*, 198 Ill. 2d 103, 108 (2001). To make a valid arrest without a warrant, a police officer must have probable cause. *People v. Love*, 199 Ill. 2d 269, 278 (2002). Probable cause exists "when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563 (2008). Whether an officer had probable cause to arrest "depends upon the totality of the circumstances at the time of the arrest." *Love*, 199 Ill. 2d at 279. The officer needs "more than bare suspicion" to establish probable cause. *People v. Jones*, 215 Ill. 2d 261, 273 (2005). Under the exclusionary rule, if a defendant is arrested without probable cause, the

evidence obtained from that arrest is suppressed as fruit of the poisonous tree. See *People v. Bernard,* 2015 IL App (2d) 140451, ¶ 12.

¶ 14 As an initial matter, we find that defendant was not seized until after Sergeant Enriquez observed the gun on defendant and removed it from him. Under the fourth amendment, a person is considered "seized" when an officer, by " 'physical force or show of authority,' " has restrained his or her freedom. *People v. Gherna*, 203 Ill. 2d 165, 177 (2003) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). To determine whether a seizure occurred, courts consider the following factors: "(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person; or (4) using language or tone of voice compelling the individual to comply with the officer's requests." *People v. Almond*, 2015 IL 113817, ¶ 57 (citing *People v. Oliver*, 236 Ill. 2d 448, 456 (2010) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980))).

¶ 15 Here, at about 2:05 a.m., Sergeant Enriquez received a radio call about a "person with a gun," described as "male black wearing a black and white striped polo shirt," at around the "700 block of Grand and the 700 block of Ohio." Sergeant Enriquez and Officer Howe went to that location and saw defendant, who matched the description. Sergeant Enriquez approached defendant and, when he was about eight feet away, announced his office. Even though defendant raised his arms straight up in the air in response, we find that defendant was not seized at this point.

¶ 16 Sergeant Enriquez did not display his gun and there were only two officers present. Neither officer physically touched defendant or threatened the use of force. Further, Sergeant Enriquez announced his office because it was "customary" when wearing civilian clothes, but the record does not indicate he used language or a tone of voice compelling defendant to comply

with any requests. See *People v. Tilden*, 70 Ill. App. 3d 859, 863 (1979) (no *Terry* stop occurred where the uniformed officer did not draw his weapon and asked the defendant to approach and show identification). Accordingly, under the *Mendenhall* factors, we find that defendant was not seized when Sergeant Enriquez initially approached defendant and announced his office.

¶ 17 Furthermore, the trial court found that defendant was not seized when Sergeant Enriquez approached and announced his office. The court's factual findings are entitled to "great deference," and we cannot find that its finding was against the manifest weight of the evidence.

¶ 18 After Sergeant Enriquez approached and announced his office, defendant raised his arms in the air and Sergeant Enriquez observed "the handle of a handgun protruding" in defendant's front waistband. Sergeant Enriquez then went to defendant to "safely remove it," "took the gun," "detained" him, and Officer Howe placed him in handcuffs. According to Sergeant Enriquez, at this point, defendant was in custody.

¶ 19 The State asserts that the initial encounter led to a *Terry* stop when Sergeant Enriquez observed the handle of a gun, "which corroborated the information provided by the anonymous tip." Although the parties dispute whether a *Terry* stop applies here or was justified, the State concedes that defendant was arrested after Sergeant Enriquez removed the gun from defendant, as it argued that Sergeant Enriquez removed the gun and found that it was loaded with eight live rounds, and "[a]t that point, probable cause existed to arrest defendant for AUUW and, thereafter, [Sergeant Enriquez] so arrested defendant." We disagree that there was probable cause and conclude that, when Sergeant Enriquez removed the gun and found eight live rounds, the police did not have probable cause to arrest defendant at that time. Given this disposition, we need not analyze whether a *Terry* stop was justified after Sergeant Enriquez observed the gun.

¶ 20 Beyond defendant's possession of a handgun, there was no evidence presented that, before or during the police encounter, he was engaged in any suspicious or criminal activity independent of, or connected to, his possession of the handgun. The radio call informed Sergeant Enriquez that there was a "person with a gun," nothing more. No evidence indicated that defendant, who matched the description of the "person with a gun," was doing anything suspicious or overt with the gun, such as waving it around when the call was made. When Sergeant Enriquez first saw defendant, he was walking on the sidewalk and not breaking any laws. After Sergeant Enriquez announced his office, defendant raised his arms and, thus, surrendered immediately to authority. It was only after defendant raised his arms that Sergeant Enriquez saw the "handle" of the gun protruding from defendant's waistband. But, defendant told Sergeant Enriquez that he had a gun and then fully complied with the police, as he did not prevent Sergeant Enriquez from removing the gun. The officers arrested defendant solely because he was carrying a gun.

¶ 21 In *People v. Aguilar*, 2013 IL 112116, our supreme court held that the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2012)) which "categorically prohibited the possession and use of an operable firearm for self-defense outside the home" was unconstitutional. *Id*. ¶¶ 19-22. In its ruling, *Aguilar* followed the analysis in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which had previously concluded that the AUUW statute was unconstitutional because it was a " 'flat ban on carrying ready-to-use guns outside the home.' " *People v. Aguilar*, 2013 IL 112116, ¶¶ 19-20 (quoting *Moore*, 702 F.3d at 940).

¶ 22 Defendant's arrest occurred on March 29, 2014, after *Aguilar* was issued. Thus, at the time of his arrest, the section of the AUUW statute that categorically prohibited the possession of an operable firearm outside the home was unconstitutional. Accordingly, defendant's possession

of a firearm, without more, was insufficient to show that he was participating in any suspicious or criminal activity and thus was insufficient to give the officers probable cause to arrest him.

¶ 23 Defendant was charged with violating the AUUW statute providing that a person may not carry or possess on his person an uncased, loaded, and immediately accessible handgun without having been issued a currently valid license under the Firearm Concealed Carry Act. 720 ILCS 5/24-1.6(a)(1)/(3)(A-5) (West 2014). However, there was no evidence presented to show that, before defendant was arrested, the officers had any knowledge or basis to conclude that he did not have or was not carrying a concealed carry license. Rather, the police discovered that defendant did not have a concealed carry license at the police station, after his arrest. Thus, at the time of the arrest, the officers only knew that he was carrying a handgun, which was not categorically prohibited and, therefore, did not provide probable cause to arrest.

¶ 24 We note that, under the Act, if an officer initiates an investigative stop, upon the request of the officer, a licensee shall disclose to the officer that he or she is in possession of a concealed firearm under the Act, present his or her license to the officer, and identify the location of the concealed firearm. 430 ILCS 66/10(h) (West 2014). Section 108-1.01 of the Code of Criminal Procedure of 1963 provides that, when an officer has stopped a person for temporary questioning under the "Temporary Questioning without Arrest" provision in the Code and "reasonably suspects that he or another is in danger of attack, he may search the person for weapons" and may take the weapon "until the completion of the questioning, at which time he shall either return the weapon, if lawfully possessed, or arrest the person" who was questioned. 725 ILCS 5/108-1.01 (West 2014). Here, Sergeant Enriquez secured defendant's handgun during the encounter, then immediately arrested defendant without further investigation at the scene. As a

result, Sergeant Enriquez did not know before he arrested defendant that defendant was not in possession of a concealed carry license.

¶ 25 Furthermore, there was no evidence presented that the manner in which defendant was carrying the gun was in violation of the Act such that it gave the officers probable cause to arrest. The Act defines "[c]oncealed firearm" as "a loaded or unloaded handgun carried on or about a person completely or mostly concealed from view of the public[.]" 430 ILCS 66/5 (West 2014). The Act permits a licensee to carry a concealed firearm on his or her person "fully concealed or partially concealed." 430 ILCS 66/10(c)(1) (West 2014). Sergeant Enriquez observed "the handle" of the gun "protruding" from defendant's front waistband only after defendant raised his arms in response to Sergeant Enriquez announcing his office. Thus, the facts are insufficient to support that the officer had probable cause to arrest defendant based on his carrying a gun that was not completely or mostly concealed.

¶ 26 Accordingly, based on the foregoing, the police did not have probable cause to arrest defendant and, therefore, the court erred when it denied defendant's motion to suppress.

¶ 27 Having found that the police did not have probable cause to arrest defendant, we must determine whether defendant's statement made after he was unlawfully arrested should be suppressed under the exclusionary rule as fruit of the poisonous tree. The State argues that we should not apply the exclusionary rule because there was "no purposeful or flagrant misconduct by the police," the police acted in good faith, nothing about their actions "shocks the conscience," and applying the rule here would "punish the police for properly enforcing the law and protecting the public."

¶ 28 The exclusionary rule is a "sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231-

32 (2011). Courts will ordinarily "not admit evidence obtained in violation of the fourth amendment." *People v. Burns*, 2016 IL 118973, ¶ 47. The exclusionary rule serves "as a general deterrent to future fourth amendment violations." *People v. LeFlore*, 2015 IL 116799, ¶ 17.

¶ 29 Under the "good-faith exception" to the exclusionary rule, when there is a fourth amendment violation, evidence will not be suppressed if the officer obtained the evidence "in objectively reasonable reliance on a subsequently invalidated search warrant." *United States v. Leon*, 468 U.S. 897, 920-22 (1984). The exclusionary rule also does not apply in situations where the evidence was "obtained during a search conducted in reasonable reliance on binding precedent." *Davis v. United States*, 564 U.S. 229, 241 (2011); see *People v. Burns*, 2016 IL 118973, ¶ 49. When a defendant proves a fourth amendment violation, the State has the burden to prove that the good-faith exception to the exclusionary rule applies. *People v. Morgan*, 388 Ill. App. 3d 252, 264 (2009).

¶ 30 The good-faith exception does not apply here. At the time of defendant's offense, March 29, 2014, the AUUW statute that categorically prohibited possession of a gun outside the home had already been declared unconstitutional, about six months earlier. *Aguilar*, 2013 IL 112116, ¶¶ 19-22. Thus, defendant's possession of the handgun, without more, did not give the officers an objectively reasonable basis to believe that defendant was violating the law.

¶ 31 The State cites *People v. LeFlore*, 2015 IL 116799, to support its argument that we should not apply the exclusionary rule. However, *LeFlore* is distinguishable. In *LeFlore*, the police placed a GPS tracking device on the exterior of the defendant's vehicle without a search warrant. *Id.* ¶ 4. At that time, there was controlling judicial precedent that authorized such conduct. *Id.* ¶ 33. The trial court denied the defendant's motion to quash arrest and suppress evidence, relying on controlling authority to conclude that there was no fourth amendment

violation. *Id.* ¶ 8. While the case was pending on appeal, the United States Supreme Court issued *United States v. Jones*, 565 U.S. 400, 404 (2012), which held that the attachment of GPS device and the subsequent monitoring of a vehicle's movement on the public street was a search under the fourth amendment. See *LeFlore*, 2015 IL 116799, ¶ 10. However, our supreme court held that the good-faith exception applied because, at the time of the police conduct, there was binding appellate precedent allowing for attachment and use of GPS technology without a warrant on which the police could have reasonably relied. *Id.* ¶¶ 31-57, 71.

¶ 32 Here, there was no evidence presented, and the State did not argue, that the officers relied on any binding judicial precedent that authorized their conduct. Further, the trial court's ruling did not point to any judicial precedent for its conclusion that the officers had probable cause to arrest defendant solely based on his possession of a handgun, where the officer first observed the fully or mostly concealed firearm only after defendant raised his arms and there was no evidence that defendant ever openly displayed the weapon. Thus, we do not find *LeFlore* persuasive for our analysis.

¶ 33 Accordingly, as the good-faith exception does not apply, defendant's statement that he did not have a valid concealed carry license, which occurred at the police station after his unlawful arrest, must be suppressed pursuant to the exclusionary rule.

¶ 34 Lastly, defendant contends that we should reverse his conviction outright because the State cannot prove that he did not have a valid concealed carry license without his statement. Beyond asserting that the exclusionary rule does not apply, the State does not respond to defendant's argument.

¶ 35 When the State cannot meet its burden of proof without the suppressed evidence, a defendant's conviction is reversed outright. See *People v. Sims*, 2014 IL App (1st) 121306, ¶ 19.

The only evidence presented at trial to establish that defendant did not have a valid concealed carry license was defendant's statement. Because the State cannot prove defendant guilty without the suppressed statement, we reverse defendant's conviction. See *People v. Merriweather*, 261 Ill. App. 3d 1050, 1056 (1994) (reversing the defendant's conviction outright because the "State could not prevail on remand without the evidence" that was suppressed).

¶ 36 Given our disposition, we need not address defendant's contentions that the court improperly imposed certain fines and fees and the State did not prove him guilty because the only evidence presented that he did not have a concealed carry license was his admission, which violated the *corpus delicti* rule.

¶ 37 For the reasons stated above, we reverse the trial court's denial of defendant's motion to quash arrest and suppress evidence, and we reverse defendant's conviction.

¶ 38 Reversed.