2018 IL App (1st) 161262-U

No. 1-16-1262

Order filed September 18, 2018.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 2862
	)	
APOLONIO MARRUFO,	)	The Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel not ineffective for not filing motion to quash arrest.

¶ 2 Following a 2015 bench trial, defendant Apolonio Marrufo was convicted of unlawful use of a weapon by a felon (UUWF) and sentenced to three years' imprisonment. On appeal, he contends that trial counsel rendered ineffective assistance by not filing a motion to quash his arrest and suppress the resulting evidence. We affirm.

¶ 3 Defendant was charged with UUWF (720 ILCS 5/24-1.1(a) (West 2014)) for, on or about January 1, 2014, knowingly possessing a firearm – to wit, a rifle – "on his land" after being convicted of the felony of possession of a controlled substance in case 02 CR 994.

¶ 4 At trial, Chicago police officer Jason Arellano testified that he was patrolling a residential neighborhood of Chicago with other officers as part of "the New Year's Eve response." Shortly after midnight, he heard gunshots. While Arellano had heard gunfire that night, these shots were multiple "really loud" shots from "extremely close by." He explained that he based his determination that the shots were so close from his military as well as police experience. When he looked for the source of the shots, he saw defendant standing next to the side door of a house, holding in his hand an "older-looking" rifle with a wooden stock and a long barrel. Defendant initially had the rifle pointed "up in the air, but it was going down like he was *** lowering the muzzle." Defendant was about 15 to 20 feet away, and the area was lighted. Arellano could not recall at trial if there was a fence around the house. Arellano radioed for other officers nearby, then approached defendant announcing his office. Defendant looked briefly at Arellano, then entered the house by the side door. From the gunshots to defendant entering the house was "[w]ithin a minute."

¶ 5 When Arellano had reported the gunshots and armed man by radio, his "voice kind of heightened" out of "fear." Arellano waited for the other officers to arrive a few minutes later. Arellano and the other officers entered the house by breaking in a door. The officers searched the house for defendant "knowing that [he] had a rifle." He was found in the basement, crouched in a closet, and officers detained him by handcuffing him. Nobody else was in the house. Once defendant was detained, the officers began looking for the rifle. An officer found a rifle with a wooden stock in one of the bedrooms, not in the basement, and showed it to Arellano. Arellano

said that the rifle looked like the one he saw defendant holding, and defendant was then arrested. Arellano learned defendant's name and, in his processing at the police station, learned that his home address was the house where the incident occurred.

¶ 6 Officer Isabella Figus testified that she was patrolling with Arellano and several other officers in multiple vehicles. She also heard gunshots nearby a few minutes after midnight, and she ran with Arellano towards the gunshots. Other officers also ran towards the gunshots. She entered the house with Arellano, and she found a rifle under a bed in a bedroom. She showed it to Arellano, who identified it as the gun he saw defendant holding. Figus did not see defendant with a gun, and she entered the house because "my co-workers saw something and I went where they were." She did not recall having to go through or over a fence to enter the house, and she "believe[d]" other officers kicked in the front door. She went to the basement, and saw defendant "being arrested" in handcuffs, before she found the rifle. Nobody but defendant and the officers were in the house.

¶ 7 The parties stipulated to defendant's prior felony conviction for possession of a controlled substance in case 02 CR 994.

¶ 8 Defendant testified that he lived in the house in question with his family. The house had a fence, and the front door faced the gangway on the side of the house. He was leaving his house shortly after midnight by the front door when he saw several police officers outside the front gate. Believing they were following someone, he went back inside the house. When he looked out the front window, he saw the officers enter his front lawn. Believing that they had followed someone onto his front lawn, he went to the basement to hide from whoever the police were following in case that person entered the house. Several minutes later, he heard the front door being kicked open and heard the officers inside his house. They found him, handcuffed him, and

asked him about a weapon. "But I didn't have anything." One officer watched him, while the other officers searched the house. After some time, they brought him up from the basement and took him to the police station. While the police told him they found "a shotgun" in the house, they did not show him a shotgun. He denied that he had a weapon in the house. They later showed him two guns "like rifles" and told him that he was arrested for possessing one of them. "Both weapons looked new," he testified.

¶ 9 Following closing arguments, the court found defendant guilty of UUWF. While the court noted some discrepancies between the accounts of Officers Arellano and Figus, the court found defendant's account to be "unbelievab[le]."

¶ 10 In his posttrial motion, defendant challenged the sufficiency of the trial evidence. The court denied the motion, reiterating that it found the evidence sufficient to convict despite discrepancies in the officers' testimony. Following a sentencing hearing, the court sentenced defendant to three years' imprisonment.

¶ 11 On appeal, defendant contends that trial counsel rendered ineffective assistance by not filing a motion to quash his arrest. He argues that the State's trial evidence – an officer saw him on his property holding a rifle after hearing gunshots nearby – showed that police had neither probable cause to arrest him nor exigent circumstances to justify forcibly entering his home.

¶ 12 A defendant's claim that trial counsel failed to render effective assistance is governed by a two-pronged test whereby the defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced by that performance. *People v. Brown*, 2017 IL 121681, ¶ 25. Prejudice is a reasonable probability that the result of the proceeding would have been different absent counsel's error, and a reasonable

probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Peterson*, 2017 IL 120331, ¶ 79, *petition for cert. pending*, No. 17-9464.

¶ 13 The United States and Illinois Constitutions prohibit unreasonable searches and seizures and require probable cause for an arrest. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6; *People v. Holmes*, 2017 IL 120407, ¶ 25. Probable cause to arrest exists when the facts known to the police at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the defendant has committed a crime. *People v. Grant*, 2013 IL 112734, ¶ 11. Probable cause concerns the probability of criminal activity and does not require proof beyond a reasonable doubt. *Id*. The existence of probable cause depends upon the totality of the circumstances at the time of arrest and is governed by practical and commonsense considerations, including the officers' experience, upon which reasonable and prudent people act. *Id*.; *People v. Durden*, 2017 IL App (3d) 160409, ¶ 17. When police officers work together or in concert, the knowledge of each is imputed to all, and probable cause may be established from all the information received by the officers. *Durden*, 2017 IL App (3d) 160409, ¶ 17. Probable cause is objective, and an officer's state of mind or subjective motivation is irrelevant. *People v. Wear*, 229 Ill. 2d 545, 566 (2008). Probable cause does not require showing that the belief that the defendant has committed a crime is more likely true than false, because arrest serves an investigative function as well as producing persons for prosecution. *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009).

¶ 14 Because physical entry of one's home is a particular focus of the right to be free of unreasonable search and seizure, a warrantless and nonconsensual entry to a defendant's home to conduct a search or seizure is presumptively unreasonable and must be supported by exigent circumstances as well as probable cause. *Wear*, 229 Ill. 2d at 562-63. Whether exigent

circumstances existed is a question of reasonableness under the totality of the circumstances at the time of the warrantless and nonconsensual entry. *People v. Smock,* 2018 IL App (5th) 140449, ¶ 21. Some of the factors we consider in that determination are whether (1) the offense under investigation was recently committed, (2) there was any deliberate or unjustifiable delay by the police during which a warrant could have been obtained, (3) a grave offense is involved, particularly one of violence, (4) the suspect was reasonably believed to be armed, (5) the police officers were acting upon a clear showing of probable cause, (6) there was a likelihood that the suspect would have escaped if not swiftly apprehended, (7) there was strong reason to believe that the suspect was on the premises, and (8) the police entry was made peaceably. *Id*.

¶ 15 The defendant filing a motion to quash bears the burden of proving that the search or seizure at issue was unlawful. *Biagi,* 2017 IL App (5th) 150244, ¶ 24. When a ruling on a motion to quash involves factual determinations or credibility assessments, the trial court's findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Holmes,* 2017 IL 120407, ¶ 9. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, not merely because the record may support a contrary decision. *Biagi,* 2017 IL App (5th) 150244, ¶ 52. However, we review *de novo* the ultimate legal ruling to grant or deny a motion to quash. *Holmes,* 2017 IL 120407, ¶ 9.

¶ 16 Here, defendant contends that the police could not have had probable cause – and thus a motion to quash was so certain of success that counsel was ineffective for not presenting such a motion – because of the constitutional right to keep firearms on one's property for self-defense. See *District of Columbia v. Heller,* 554 U.S. 570, 635 (2008)("In sum, we hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-

defense."); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)("our central holding in *Heller* [was] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense *within the home*")(Emphasis added). Defendant repeatedly emphasizes that the police entered his property, and then his home, because he had a firearm on his own property.

¶ 17 However, the police suspected that defendant did not merely possess the rifle but had very recently fired it into the air. Officer Arellano heard very loud gunshots "extremely" nearby and, in looking for the source of the shots, saw defendant holding the rifle. In particular, Arellano saw defendant holding the rifle with the muzzle pointing up in the air, then lowering it. Officer Figus corroborated that running towards the source of the gunshots caused her and the other officers to run towards the house in question.

¶ 18 Reckless discharge of a firearm is a felony, committed "by discharging a firearm in a reckless manner which endangers the bodily safety of an individual." 720 ILCS 5/24-1.5 (West 2014). Our supreme court has held that reckless discharge does not require proof that the firearm was discharged in the direction of another person, and that the offense may be committed by firing a gun into the air. *People v. Collins*, 214 Ill. 2d 206, 214-16 (2005). In reaching the latter conclusion, our supreme court noted that "legislative transcripts reveal that the mere shooting of a gun into the air is precisely the type of conduct the legislature intended to criminalize." *Id* at 216. Also, "[t]he inherent danger caused by the reckless discharge of a firearm into the air, and the obvious ricochet effect that may occur when bullets fall to the ground, are matters of common sense." *Id* at 218. Thus, evidence that a person was in the vicinity of a discharge into the air suffices to show the requisite endangerment. *Id*. The *Collins* court found sufficient evidence of a person in the vicinity of the discharge from the presence of the police witness and

from evidence that the area of the discharge was a residential neighborhood. *Id*. Here, the police reasonably believed that defendant had just fired a rifle into the air in a residential neighborhood, near enough to Officer Arellano to consider the shots "extremely close by." In sum, the police had probable cause to believe that defendant just committed the felony of reckless discharge.

¶ 19 Turning to the question of exigent circumstances, we find that most of the aforementioned factors supporting exigent circumstances are present. The offense under investigation – the nearby gunshots – had just occurred when defendant was seen holding a rifle. We find no unjustifiable delay during which a warrant could have been obtained, as Officer Arellano waited only for the arrival of backup before entering the house where the armed defendant just retreated. Defendant was reasonably believed to be armed, and the police had a clear showing of probable cause: the nearby gunshots were followed by seeing defendant, holding a rifle, where the gunshots were heard to have come from. There was strong reason to believe that defendant was in the house, as Officer Arellano saw him enter. As to whether a grave offense was involved, we reiterate that reckless discharge of a firearm is a felony, and note that the police saw a man, holding a rifle, flee into a house that the police did not know at the time was his home. On the other hand, defendant is correct that the police entry was not made peaceably. We also agree with defendant that there was not a significant likelihood that he would have escaped as the police could have surrounded the house. However, we give that factor low weight because the entry of an armed man into a house that the police did not know was his home nor whether it was occupied by others is a matter of greater concern than just the man's possible escape. In light of all the circumstances, we find that exigent circumstances supported the police entry to defendant's home.

¶ 20 Having found probable cause and exigent circumstances, we conclude that a motion to quash did not have a reasonable probability of success. Therefore, trial counsel did not render ineffective assistance by not filing such a motion.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.