2018 IL App (1st) 170008-U

No. 1-17-0008

Order filed September 4, 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. 12 CR 18002
	)	
ANTONJUAN SMITH,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for unlawful possession of a weapon by felon predicated on his constructive possession of ammunition found outside of his vehicle is reversed where the State failed to prove beyond a reasonable doubt that he had immediate and exclusive control of the area outside of his vehicle or that he had knowledge of the ammunition.

¶ 2 Following a jury trial, defendant Antonjuan Smith was convicted of one count of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West Supp. 2011)) and one count of unlawful possession of a weapon by a felon predicated on his possession of firearm ammunition (720

ILCS 5/24-1.1(A) (West 2010)), and was sentenced to respective, concurrent terms of 12 and 5 years' imprisonment. On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that he constructively possessed a bag of ammunition that was found outside of his vehicle. For the reasons set forth herein, we reverse defendant's conviction for unlawful possession of a weapon by a felon.

¶ 3 Defendant was charged by information with one count of being an armed habitual criminal (AHC), one count of unlawful possession of a weapon by a felon predicated on his possession of a firearm, one count of unlawful possession of a weapon by a felon predicated on his possession of firearm ammunition, and four counts of aggravated unlawful use of a weapon. Prior to trial, the State indicated that it would proceed on the AHC count and the count of unlawful possession of a weapon by a felon which was predicated on possession of ammunition, and entered a *nolle prosequi* on all other counts. The case then proceeded to a jury trial.

¶ 4 Julius Lawson testified that, on September 4, 2011, he went to visit his grandparents at their house on South Albany Street. As he and his daughter's mother were walking on a sidewalk on Albany, Lawson observed defendant sitting in the back seat of a champagne colored sport utility vehicle (SUV) with the words "for sale $800" written on the back window. Defendant was looking at Lawson "like he knew" him, and Lawson asked defendant, "what's up?" Defendant got out of the vehicle and started to "cuss [Lawson] out." After a five minute argument, Lawson left defendant and walked toward his grandparents' house.

¶ 5 Later that evening, shortly before 8:30 p.m., Lawson left his grandparents' house and was confronted by defendant, who had been standing in an alley near the house. Defendant pointed a silver gun at Lawson and said "where the f*** is he at now?" Lawson's mother, Deborah

Wilson, jumped between defendant and Lawson and asked defendant not to shoot her son. Defendant ran to the corner of Albany Street and Jackson Boulevard, turned eastbound onto Jackson, and ran towards a house. When a police lieutenant arrived on the scene, Lawson directed him toward the house that defendant had run to. There, Lawson saw defendant and a woman on the front porch. As the lieutenant approached the porch, defendant walked into the house. After a "short time," defendant returned to the porch. The lieutenant told defendant to approach him and to put his hands behind his back. When the lieutenant tried to secure his hands behind his back, defendant pushed the lieutenant and ran eastbound toward Sacramento Boulevard.

¶ 6 Lawson spoke with the police lieutenant about his earlier confrontation with defendant, and he and the lieutenant drove around the neighborhood looking for the SUV he had seen defendant sitting in. Lawson spotted the SUV parked near a gas station at the corner of Van Buren Street and Sacramento Boulevard.

¶ 7 On September 15, 2012, Lieutenant Kane contacted Lawson and asked him to view a physical lineup. The next day, after signing a lineup advisory form, Lawson identified defendant as the man who pointed a gun at him.

¶ 8 On cross-examination, Lawson testified that, when he arrived at the gas station with Lieutenant Kane, he observed a Crown Royal bag lying on the ground near the front door of the SUV. He described that the bag was not under the front tire, but was "by the door *** like as you getting out the car, right there." He did not see how the bag got there, and did not tell officers about it. He saw a police officer pick up the bag, but could not recall if that officer was the police lieutenant who drove him to the gas station.

¶ 9 Felicia Day testified that, in September of 2011, she lived on Jackson Boulevard with her three sons and her cousin. Shortly before 8:30 p.m. on September 4, 2011, she was sitting on her front porch when defendant approached her and began speaking with her. She had known defendant for more than a year, and stated that defendant had once helped her move her wheelchair-bound daughter up a flight of stairs. A short time after defendant joined Felicia on the porch, she heard a voice say "there he go sitting right there" and saw a police officer approaching her house. Defendant stood up and walked into Felicia's house without invitation. Felicia testified that defendant had never been inside of her house before. Defendant returned to the front porch less than 30 seconds later, and the police officer ordered him to walk down the porch steps. Defendant walked down to the police officer, and the officer ordered defendant put his hands on a gate. After defendant put his hands on the gate, Felicia heard a loud sound and observed the defendant run away. Felicia later saw police officers recover a firearm from her living room.

¶ 10 Lieutenant Paul Kane testified that, on September 4, 2011, he received a dispatch call about a man with a gun in the area of Jackson Boulevard and Albany Street. When he arrived at the scene, Lawson directed him to the front porch of a house on Jackson. As he approached the house, he saw defendant run up the porch stairs and into the house, where he remained for approximately five seconds. When defendant returned to the porch, Kane ordered him to stand against a fence. As Kane attempted to holster his weapon and push defendant against the fence, defendant "broke free" and ran away. Kane's gun fell out of his holster, and Kane stopped to recover it. Defendant ran eastbound toward Sacramento Boulevard. Kane was given permission to enter the house, where he recovered a silver .22 caliber revolver with black tape on the handle.

¶ 11 After Kane secured the firearm, he spoke with Lawson, who described the vehicle that he had seen defendant in earlier in the day. Lawson and Kane drove around the neighborhood searching for the SUV. They found the SUV, a Mitsubishi Montero, parked next to a gas station located at 3010 West Van Buren Street. As Kane exited his vehicle and approached the SUV, he observed a purple Crown Royal bag on the ground "right next to" the driver's side door. Kane picked up the bag, opened it, and found that it contained a small plastic bag containing .22 caliber bullets. Kane "ran" the vehicle identification number of the SUV and learned that it had not been registered in the previous two years. Kane searched the SUV because it was going to be towed as part of the investigation. Inside of the passenger-side glove compartment, Kane found two pieces of mail addressed to defendant. After trying to locate him at multiple addresses, Kane put out an investigative alert for defendant. On September 15, 2012, Kane learned that a Chicago police officer had taken defendant into custody on an unrelated matter. On September 16, 2012, Lawson identified defendant in a physical lineup.

¶ 12 Trenton Meeks testified that he was an inmate in the Cook County jail. He denied knowing defendant, ever meeting him, or ever having a conversation with him. He denied that defendant had told him to write a letter to Felicia Day telling her to not come to court or to lie on the witness stand, but acknowledged writing a letter to Day telling her that defendant did not want her to come to court. The letter also told Day that defendant would "take care of her" if she did not come to court, and that if she did come to court she should testify that the police left the gun in her house. He acknowledged telling Assistant State's Attorney Katherine Levine that he had met defendant, knew his nickname, and had a conversation with defendant, during which defendant asked him to write a letter asking Day not to appear in court or to testify that he had

nothing to do with the gun. On cross-examination, Meeks testified that defendant did not tell him to write the letter, and that he had overheard the details of defendant's case and decided to write the letter on his own. He stated that had lied to the assistant state's attorney and that he "just went along with" her questions. On re-direct examination, Meeks acknowledged that had a charge pending for harassing a witness, and that Day was the victim in that case.

¶ 13 Assistant's State's Attorney Katherine Levine testified that, on May 16, 2014, she spoke to Trenton Meeks in the courthouse. Meeks was given *Miranda* warnings and was not promised lenience or immunity for his statement. Levine did not tell or suggest to Meeks what to say. After Meeks gave his statement, he signed each page of the statement. Levine identified a copy of the written statement, and the State entered the statement into evidence.[1]

¶ 14 The State then proceeded by way of stipulation. The parties stipulated that evidence technician Matthew Savage recovered a partial fingerprint from the gun recovered at the scene, but that it could not be linked to defendant. Savage was unable to lift suitable fingerprints from the ammunition loaded in the gun or from the ammunition recovered from the Crown Royal bag. The parties also stipulated that Lisa Kell of the Illinois State Police crime lab would testify that swabs taken from the handle of the gun recovered revealed a potential mixture of DNA from two people. The DNA present did not contain a complete profile and was unsuitable for comparison. Finally, the parties stipulated that defendant had previously been convicted of two qualifying felonies.

[1] The contents of written statement were not published in open court, and a copy of the written statement was not included in the record on appeal. Appellant has the burden of providing a sufficiently complete record on appeal so that the reviewing court is fully informed regarding the issues to be resolved; in the absence of a complete record on appeal, it is presumed that the trial court's judgment conforms to the law and has a sufficient factual basis. *People v. Moore*, Ill. App. 3d 294, 300 (2007).

¶ 15 Defendant testified that, on September 4, 2011, he parked his Mitsubishi "Montenaro" on Albany Street because he was going to a barbeque at his girlfriend's mother's house located on Jackson Boulevard. As he was sitting in the SUV, he saw Lawson walking down the street and looking at his vehicle. Defendant got out of the vehicle and asked Lawson if he wanted to buy it, "because he was looking at [defendant and his girlfriend] like real crazy" or like he knew one of the people sitting in the vehicle. Lawson replied "no, b*** a*** n***, I'm trying to figure out why you all lookin' at me." Defendant told Lawson that he was not looking at him and did not even know him. Another occupant of the vehicle intervened and told defendant to get away from Lawson. Lawson left the area for two minutes, but came back to the area with an unknown man and a "rifle with a scope on it." Lawson pointed the rife at defendant, and the unknown man was telling him to shoot defendant. Defendant got into his vehicle, drove south toward Van Buren Street, and turned into an alley.

¶ 16 Defendant had planned to leave the area, but his vehicle was low on gas so he parked "on the side" of the gas station located at 3010 West Van Buren. He opened the glove compartment and removed a knife for protection. He was scared, but knew he had to return to his girlfriend's mother's house to ask his girlfriend for gas money. Defendant walked through an alley to get back to the house, and once again encountered Lawson and the unknown man. Lawson asked defendant if he was "still on that," and defendant responded by pulling out his knife and telling Lawson that he would stab him if he "[ran] up on [him]." The unknown man told Lawson to leave defendant alone, and defendant went to his girlfriend's mother's house to ask his girlfriend for gas money. His girlfriend did not have money, so he started to walk to a liquor store to ask a man for money. On the way to the liquor store, he saw Felicia Day sitting on her porch.

Defendant sat on the porch with Day and began speaking with her. A short time later, a police officer drove up to her house. The officer told defendant that he was responding to a call about a gun and that he wanted to search him for a weapon. When defendant came down the porch stairs, the police officer grabbed him by the arm and pushed his chest against a fence. Defendant then ran away from the officer because he knew that he had a knife in his pocket and he did not want to go to jail.

¶ 17 On cross-examination, defendant testified that he did not call the police or ask anyone else to call the police after Lawson pointed a rifle at him. He did not tell the police officer who came to Days' house that Lawson had pointed a rifle at him. He had no knowledge of the .22 caliber revolver found in Day's house or the bag of bullets found next to his vehicle.

¶ 18 The jury found defendant guilty of being an armed habitual criminal and unlawful possession of a weapon by a felon predicated on his possession of firearm ammunition. During a hearing on defendant's motion for a new trial, defendant contended, *inter alia*, that the State failed to prove beyond a reasonable doubt that he possessed the firearm ammunition, and argued that there was no evidence regarding who put the Crown Royal bag on the ground, how long it had been there, or whether he had actually possessed the bag. In response, the State argued that the evidence presented at trial, including that defendant possessed a .22 caliber revolver, that the bag of ammunition was found outside of defendant's car, and that ammunition inside the bag "matched" the ammunition found in the gun, supported the jury's determination that defendant unlawfully possessed the ammunition. The trial court denied the motion, stating that "the jurors heard the evidence, they were properly instructed on what the law was, and they found the defendant guilty. And I cannot say as a judge that no rational jury could have found that way."

After a sentencing hearing, the court sentenced defendant to concurrent terms of 12 and 5 years' imprisonment. Defendant did not file a timely notice of appeal.

¶ 19 On December 31, 2015, defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), arguing that his trial counsel was ineffective for failing to timely file a notice of appeal on his behalf. On December 14, 2016, the trial court granted defendant's petition, and allowed him to file a late notice of appeal. On December 15, 2016, defendant filed a late notice of appeal.

¶ 20 On appeal, defendant does not challenge his conviction for being an armed habitual criminal. Nor does he dispute that he was found to have possessed a .22 caliber pistol. Rather, he argues that the State failed to prove beyond a reasonable doubt that he constructively possessed the ammunition found in the bag outside of his vehicle because the State did not show that he had knowledge of the ammunition or immediate and exclusive control over the area where it was found. The State argues that the circumstantial evidence of possession; the proximity of the ammunition to defendant's vehicle and the similarity between the caliber of bullets found and the caliber of bullets in the gun that defendant possessed; coupled with reasonable inferences drawn in its favor, could lead a rational trier of fact to find beyond a reasonable doubt that defendant had constructive possession of the ammunition found on the ground near the gas station. It also argues that it was the jury's duty, as the trier of fact, to draw reasonable inferences from the evidence.

¶ 21 The due process clause of the fourteenth amendment protects defendants against conviction in state courts except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443

U.S. 307, 315-16 (1979). When ruling on a challenge to the sufficiency of the evidence, a reviewing court " 'is not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. On the contrary, we must ask, after considering all of the evidence in the light most favorable to the prosecution, whether the *** evidence [in the record] could reasonably support a finding of guilt beyond a reasonable doubt.' " *People v. Grant*, 2014 IL App (1st) 100174-B, ¶ 24 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 116-17 (2007)). In doing so, we must draw all reasonable inferences from the record in favor of the prosecution, and " '[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). A conviction may be sustained on circumstantial evidence alone. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 10.

¶ 22 A person commits the offense of unlawful possession of a weapon by a felon when he knowingly possesses any firearm or firearm ammunition after being convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010)). Possession may be either actual or constructive. *People v. Terrell*, 2017 IL App (1st) 142726, ¶ 18. Constructive possession exists where there is no personal dominion over the contraband, but the defendant has control over the area where the contraband was found. *Id*. To prove constructive possession, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the contraband and exercised "immediate and exclusive" control over the area where the contraband was discovered. *People v. Tates*, 2016 IL App (1st) 140619, ¶ 19 "Evidence of constructive possession is 'often entirely circumstantial.' " *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003) (citing *People v.*

McLaurin, 331 Ill. App. 3d 498, 502 (2002)). A defendant's knowledge of contraband can be shown with circumstantial evidence, and inferred from his control over the area in which the contraband was found. *People v. Bogan*, 2017 IL App (3d) 150156, ¶ 29 (citing *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998)). A trier of fact is entitled to rely on an inference of knowledge and possession sufficient to sustain a conviction "absent other factors that might create a reasonable doubt as to the defendant's guilt." *McCarter*, 339 Ill. App. 3d at 879.

¶ 23 Here, we conclude that the State failed to prove beyond a reasonable doubt that defendant constructively possessed the ammunition found in the Crown Royal bag, because there is no evidence that he had "immediate and exclusive control" of the area where the ammunition was found or that he had knowledge of the ammunition. Although there is no dispute that defendant owned the vehicle in question and had parked it next to the gas station, defendant was not present at the time that the bag was found. Further, there was no evidence regarding how the bag ended up on the ground, how long it had been there, or how many people had been present near the gas station between the time that defendant parked the vehicle and the time that Detective Kane arrived at the gas station. Because the area in which the vehicle was parked was open to the general public, it cannot be said that defendant had exclusive control of the area outside of his vehicle. Further, no physical or forensic evidence linked defendant to the ammunition. The fact that Kane found the bag of ammunition "right outside" of the driver's side door of defendant's vehicle is insufficient to prove that defendant had knowledge of the ammunition. Similarly, the fact that the ammunition found in the bag was the same caliber as the .22 caliber bullets found in the firearm that defendant possessed earlier in the evening does not support the inference that defendant had knowledge of the ammunition. See *People v. Fernandez*, 2016 IL App (1st)

141667, ¶ 23 (finding that the discovery of the defendant's passport, insurance card, framed pictures of defendant, men's clothing, and a .38-caliber gun in the bedroom of a house bore a tenuous relationship to the .38-caliber bullets found in the house's detached garage).

¶ 24 In reaching this conclusion, we find the cases of *People v. Wright*, 2013 IL App (1st) 111803, and *People v. Ray*, 232 Ill. App. 3d 459 (1992), to be persuasive. In *Wright*, police officers chased defendant and another man through a house while executing a search warrant. *Wright*, 2013 IL App (1st) 111803, ¶ 6, 7. During the chase, the defendant and the other man fell while running down a flight of stairs and landed on a basement floor. *Id*. at ¶ 7. There, officers recovered a handgun from "the floor slightly underneath the Defendant['s]" torso. *Id.* at ¶¶ 10, 12. None of the police officers saw defendant with the gun in his hand or saw him make any movements suggesting that he was disposing of the gun. *Id*. at ¶¶ 11-12. Three other individuals were in the basement area at the time. *Id.* at ¶ 12. On appeal, this court concluded that the defendant did not constructively possess the gun because there was no evidence, other than his proximity to the gun, that defendant had knowledge of the gun. *Id*. at ¶ 26. This court also found that the State failed to prove that the defendant had immediate and exclusive control of the area where the gun was found, as defendant was not a resident of the house and three other people were in the basement area when the gun was found. *Id.*

¶ 25 In *Ray*, police officers entered an apartment and observed the three defendants sitting on a couch. *Ray*, 232 Ill. App. 3d at 460. From a coffee table situated 18 inches in front of the couch, the officers recovered a handgun, cash, and 21 small packets of cocaine. *Id.* at 461. On appeal, this court found that the State failed to prove that the defendants constructively possessed the handgun or the cocaine, as that the State did not present evidence, other than "a lone cable

television bill" which was addressed to one of the defendants, that the defendants had control of the premises.

¶ 26 Here, the ammunition was found in a bag outside of defendant's vehicle, which was parked next to a gas station. Defendant was not present when the officers recovered the ammunition, and, as we noted above, there was no evidence regarding the amount of time that had elapsed between the time that defendant parked the vehicle and the time that Kane found the ammunition, or how many members of the public had been present in the area during that timeframe. Following the reasoning of *Wright* and *Ray*, we cannot conclude that defendant had immediate and exclusive control of the area where the ammunition was found.

¶ 27 The State contends that the holding in *People v. Bogan*, 2017 IL App (3d) 150156, provides a strong argument that a person's ownership of a vehicle supports the proposition that they have a level of control over the vehicle and the immediate areas around it. We disagree. In *Bogan*, a firearm with a defaced serial number was found in a vehicle registered in the defendant's name. *Bogan*, 2017 IL App (3d) 150156, ¶ 5. Receipts and a health insurance card bearing the defendant's name were found in the vehicle, and the defendant's fingerprint was found on a box of ammunition in the backseat. *Id*. at ¶ 33. This court found that any rational trier of fact could have concluded that the defendant exercised control over the vehicle, and noted that "it seems unquestionable that proof of one's ownership of a vehicle tends to make more likely the fact that that person also has control over the vehicle. While such evidence alone is surely not sufficient to demonstrate control, it is nonetheless highly probative of that element." *Id*. at ¶ 32. Although we agree with this proposition, we do not believe that this logic can be extended to the

area outside of an owned vehicle, especially where, as here, that vehicle is parked in area accessible to the general public.

¶ 28 The State further argues that defendant's guilt "is shown by" the testimony of Trenton Meeks, who testified that he had written a letter to Felicia Day asking her to not show up in court or to testify that defendant had no connection the gun found in her house. Although he denied that defendant had told him to write the letter to Day, his written statement, taken by ASA Katherine Levine, stated that defendant told him to write it. Although witness tampering can be probative to demonstrate a defendant's intent and consciousness of guilt (*People v. Gwinn*, 366 Ill. App. 3d 501, 516-17 (2006)), we note Meeks testified that the letter asked Day give false testimony about the origin of the gun found in her house, but failed to mention the ammunition found near defendant's vehicle. Although this information was relevant to determine defendant's guilt for AHC predicated on his possession of the firearm, it does not similarly lead to an inference that defendant constructively possessed the ammunition found outside of his vehicle.

¶ 29 Finally, the State argues that the jury's determination that defendant constructively possessed the ammunition is entitled to great deference on appeal. Although deference should be given to a trier of fact's determinations, "this deference does not require a mindless rubber stamp" when we review for the sufficiency of the evidence. *People v. Hernandez*, 312 Ill.App.3d 1032, 1037 (2000). Here, we conclude that the evidence presented at trial was insufficient for any rational trier of fact to determine beyond a reasonable doubt that defendant constructively possessed the ammunition found on the ground outside of his vehicle. Accordingly, we reverse defendant's conviction for unlawful possession of a weapon by a felon. As defendant does not challenge his conviction for being an armed habitual criminal, we affirm that conviction.

¶ 30 Affirmed in part and reversed in part.