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2019 IL App (3d) 170039-U

Order filed April 26, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0039
DAVID M. COWAN,)	Circuit No. 15-CF-789
Defendant-Appellant.)	Honorable Albert L. Purham Jr., Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not proven guilty beyond a reasonable doubt of unlawful possession of a firearm by a felon.

¶ 2 Defendant, David M. Cowan, was indicted for unlawful possession of a firearm by a felon under section 24-1.1(a) of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2014)) (the Code). Following the denial of his motion to suppress the handgun, the trial court found defendant guilty based upon stipulated evidence presented at a bench trial. Defendant filed a motion to reconsider the trial court's finding of guilt, which was denied. Defendant now appeals.

¶ 3

I. BACKGROUND

¶ 4

On December 8, 2015, the State charged defendant by indictment with unlawful possession of a firearm by a felon. The indictment alleged that on or about November 23, 2015, defendant, a convicted felon, knowingly possessed a handgun. On July 1, 2016, defendant filed a motion to quash the arrest and suppress the evidence (motion to suppress).¹ In support of the motion, defendant argued law enforcement officers unlawfully detained and arrested him, and lacked probable cause to search the vehicle where the handgun was discovered.

¶ 5

On October 13, 2016, the trial court conducted a hearing on defendant's motion to suppress. Michael Jones, a patrol officer for the Peoria Police Department, testified that he responded to a call at a Circle K gas station at approximately 6:18 a.m. on November 23, 2015. The caller indicated that a shirtless black male left a vehicle parked on the business premises and walked into the Circle K. The caller also indicated that the same vehicle contained a partially clothed female. After entering the gas station, the shirtless male used the bathroom and was acting suspiciously, but the caller did not report the commission of a specific crime.

¶ 6

After arriving at the Circle K, Jones observed a silver Jaguar parked by a gas pump. Jones spoke to the Circle K attendant who placed the 911 call. When describing the vehicle at issue, the Circle K attendant pointed to the silver Jaguar and indicated to Jones, "I'm pretty sure that's the vehicle." While Jones spoke to the Circle K attendant, other officers spoke to defendant, who was trying to enter the silver Jaguar. While standing near the vehicle, Jones observed a "mostly-naked" and unconscious female through the front passenger's side window. Specifically, Jones viewed the unconscious female wearing "a sweater that was pulled up just below her chest." Jones could see "her bare abdomen, vagina, legs, and [pants] wrapped around her ankles." Jones

¹Defendant was previously convicted of felony unlawful possession of a controlled substance in Peoria County case No. 08-CF-315.

did not observe injuries to the female or any evidence indicating she had been attacked. Officers tried, unsuccessfully, to awaken the female. The officers on scene called for an ambulance to attend to the female passenger, who was then taken to OSF Hospital for treatment.

¶ 7 Jones testified that even though it was “extremely cold” on the morning in question, defendant was not wearing a shirt. Jones testified that when the officers approached the vehicle to deal with the unconscious female, “[defendant] became very agitated, he was pacing a lot, he was tensing his arms.” Based on Jones’s prior contacts, the officer recognized this behavior as an indication defendant might attempt to flee. Jones stated that he has had people get very agitated and nervous, then just take off. For this reason, Officer Jones placed defendant in handcuffs, escorted him to the squad car, and locked him in the back seat. Jones told defendant he was being temporarily detained while the officers assessed the situation, but that he was not under arrest. Jones testified that defendant made no threats, had no weapon, and made no attempts to flee.

¶ 8 When asked whether, at this point, Jones had any suspicion that defendant committed a crime, Jones responded “[w]hen I spoke with him he strongly smelled of alcohol. I compared him to -- I mean, it was reeking off of him several feet away, I could tell that, I could smell the odor of alcohol coming from him.” Jones testified that he would not allow defendant to drive the vehicle based on the information he gathered prior to this point in time.

¶ 9 Under normal circumstances, Jones would have performed field sobriety tests to determine whether defendant was capable of driving. Officer Jones stated it was too cold to require the shirtless defendant to stand outside for an on-scene sobriety test. Jones agreed that he did not later perform a preliminary breath test (“PBT”) or any other field sobriety tests somewhere indoors, such as in the intoxilyzer room at the police station.

¶ 10 After securing defendant in the squad car, Jones directed the other officers to tow the vehicle because it was blocking a gas pump and defendant was too intoxicated to drive. Jones testified that, based upon the potential crime scene and presence of an unconscious female, he arranged for the vehicle to be towed to the “lab port,” rather than the “tow yard.” The inventory search of the vehicle, conducted by the officers before the tow, revealed a loaded 380 handgun in the pocket of a pair of grey shorts located on the back seat floorboard.

¶ 11 Following argument, the trial court determined the inventory search of the vehicle was justified. The trial court determined the pivotal fact was the unconscious female passenger with her pants pulled down to her ankles. Thus, the trial court found it was proper to treat the vehicle as a potential crime scene. The trial court denied defendant’s motion to suppress.

¶ 12 On October 24, 2016, defendant waived his right to a jury trial. The matter was presented as a stipulated bench trial.² The stipulated facts are set forth below:

“MR. GAST: Judge, the People—I believe the parties would stipulate to the information that the Court received during the motion to quash and suppress evidence. The People would supplement that evidence by indicating that officers Caleb Cunningham and Brian Moore were also on the scene. They were asked by Officer Jones to conduct an inventory search of the vehicle. Pursuant to that request, Officer Cunningham found what he believed to be a handgun in a pair of grey shorts that were in the back of the vehicle that Mr. Cowan was seen exiting and that [the female passenger] was located in when the officers arrived. Officer

²On the date of trial, defense counsel filed a motion *in limine* seeking to bar the usage of statements made by the unconscious female passenger. Defense counsel asserted her statements were inconsistent, and made while she was highly intoxicated, incoherent, and unresponsive. Thus, they were unreliable and devoid of probative value. Neither the parties nor the trial court further addressed the motion *in limine*.

Moore actually took the handgun out of the pockets of the—or out of the pocket of the grey shorts. It was a 380 handgun. It was loaded at the time.

[The female passenger], who—although was intoxicated and she did not—she indicated she did not want treatment, the hospital did let her go without treatment. She eventually spoke with Detective Matt Miller of the Peoria Police Department. She indicated that she—the officer woke her up and asked—asked—and asked why she was at the police station. She indicated she didn't know, she was out partying last night. She was asked who was—she was with last night, and she said, '[n]o one.' She was asked who was—whose car she was in. She indicated she did not know, that she was by herself. She was asked if the gun found in the car was her's [*sic*], and she replied, 'It was David's gun.' She further was asked who David was, and she willingly replied, 'David had a silver 380.'

Further, the People would be able to indicate that the defendant has a prior felony conviction for the offense of unlawful possession of a controlled substance, in Peoria County Case 2008-CF-315. That would be the substance of the case.

THE COURT: All right. Are those the facts you're stimulating [*sic*] to, in addition to what I heard in discretion, Mr. Asbury?

MR. ASBURY: Yes, I may have missed it, but the—the shorts you indicated were found in the backseat, on the floorboard.

THE COURT: Okay.

MR. GAST: They were in the backseat of the car. I did not indicate they were on the floorboard, but yes.

THE COURT: Okay.

MR. ASBURY: Those would be the facts, Your Honor.

THE COURT: You understand that [defendant]?

MR. COWAN: Yes, sir.

THE COURT: You in agreement with this?

MR. COWAN: Yes, sir.”

Based on the evidence presented, the trial court found defendant guilty of unlawful possession of a firearm by a felon.

¶ 13 On January 12, 2017, defendant filed a motion to reconsider the finding of guilty, claiming the trial court erred by not suppressing the handgun and the evidence was insufficient to sustain a finding of guilty beyond a reasonable doubt. The trial court denied defendant’s motion and sentenced defendant to four years’ imprisonment. The trial court gave defendant 34 days of presentence incarceration credit. Defendant appeals.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant raises the following issues: (1) whether the trial court erred by denying defendant’s motion to suppress; (2) whether the State failed to prove defendant guilty beyond a reasonable doubt of unlawful possession of a firearm by a felon; (3) whether defendant received ineffective assistance of trial counsel; and (4) whether defendant’s cost sheet should be amended to reflect \$5 *per diem* credits to offset various fines.

¶ 16 We conclude that the second issue concerning reasonable doubt is outcome determinative and address that issue first. Defendant asserts that the State failed to prove him guilty beyond a reasonable doubt of unlawful possession of a firearm by a felon and urges this court to reverse his conviction for that offense.

¶ 17 When considering challenges to criminal convictions based upon the sufficiency of the evidence, we 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 proven beyond a reasonable doubt. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Reviewing courts do not retry defendant or substitute their judgment for that of the trier of fact and, accordingly, a conviction will not be set aside unless the evidence is so unreasonable, improbable, or unsatisfactory as to create reasonable doubt of guilt. *Id.*; *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 16. Indeed, it is the trier of fact’s responsibility to weigh testimony, assess witness credibility, resolve inconsistencies and conflicts in evidence, and draw reasonable inferences. *Sutherland*, 223 Ill. 2d at 242.

¶ 18 With regard to the charge of unlawful possession of a firearm by a felon, section 24-1.1(a) of the Code provides:

“It is unlawful for a person to knowingly possess on or about his person *** any weapon prohibited under Section 24-1 of this Act or any firearm *** if the person has been convicted of a felony under the laws of this State or any other jurisdiction.” 720 ILCS 5/24-1.1(a) (West 2014).

¶ 19 Under this section, when a defendant is not found in actual possession of the firearm, as the State concedes here, the State must prove constructive possession. *Spencer*, 2012 IL App (1st) 102094, ¶ 17; *People v. Bogan*, 2017 IL App (3d) 150156, ¶ 27. Constructive possession exists where defendant (1) knew of the presence of the firearm, and (2) exercised immediate and exclusive control over the area where the firearm was found. *Spencer*, 2012 IL App (1st) 102094, ¶ 17; *Bogan*, 2017 IL App (3d) 150156, ¶ 27. When making these determinations, the trier of fact

is entitled to rely on reasonable inferences, absent factors that create reasonable doubt of guilt. *Spencer*, 2012 IL App (1st) 102094, ¶ 17; See also *People v. Smith*, 191 Ill. 2d 408, 413 (2000).

¶ 20 For purposes of constructive possession, the case law provides several factors for a trier of fact to consider in order to infer knowledge of the presence of a weapon in a certain location. These factors include the following: “(1) the visibility of the weapon from defendant’s location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon.” *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010).

¶ 21 Turning to the four *Nesbit* factors for inferring defendant’s knowledge of the presence of the handgun in the vehicle, we observe that the State’s evidence is quite weak. First, defendant was positioned outside of the vehicle when law enforcement arrived. The visibility of the weapon from outside the vehicle was highly unlikely since the handgun was in the pocket of a pair of grey shorts. Thus, not even the officers could observe the handgun in plain sight.

¶ 22 Second, the State failed to introduce any evidence regarding the length of time defendant was either in control of the vehicle as the driver or in control of the back seat floorboard as a passenger. Further, there was no evidence, circumstantial or direct, linking defendant to the ownership or possession of the grey shorts. Namely, the State did not demonstrate the size of the shorts, whether they fit a man or a woman, or introduce any other forensic evidence, such as fingerprints or DNA, linking the shorts or the handgun to defendant.

¶ 23 Third, other than the vague indication that officers spoke to defendant while he was trying to enter the vehicle, nothing at the suppression hearing or in the stipulated facts revealed gestures or movements by defendant that could be viewed by this court as consistent with an

effort to retrieve or further conceal the handgun. Fourth, by all accounts, the size of the handgun was small and easily concealed in the pocket of a pair of shorts. Thus, the size or shape of the handgun does not support a conclusion that defendant knew about the handgun.

¶ 24 As a result, the *Nesbit* factors do not support an inference for defendant's knowledge of the handgun in the vehicle. However, the case law also provides, more generally, that knowledge of a weapon in a certain location may be inferred by a defendant's acts, declarations, or conduct. See *Spencer*, 2012 IL App (1st) 102094, ¶ 17. After carefully reviewing this record, we conclude defendant's behavior, while positioned outside the vehicle, did not support an inference that defendant knew of the handgun in the back seat of the vehicle parked at the Circle K.

¶ 25 Next, the control prong of constructive possession is fulfilled when it is shown a defendant had the intent and capability to maintain dominion over the firearm. *Id.*; See also *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Further, control over the location where the firearm was found gives rise to an inference of possession. *Spencer*, 2012 IL App (1st) 102094, ¶ 17. "It is control of a vehicle where [contraband is] found, rather than ownership, which is pertinent to proving exclusive control of the area." *People v. Robinson*, 233 Ill. App. 3d 278, 287 (1992). Similarly, "a defendant's 'status as owner-driver of the vehicle does not put him into possession of everything within the passenger area when there are passengers present who may, in fact, be the ones in possession of the contraband. [Citation omitted].'" *People v. McIntyre*, 2011 IL App (2d) 100889, ¶ 17.

¶ 26 Again, the State's evidence was quite weak with respect to the control prong of constructive possession, as demonstrated by the analogous facts in another recent case from this court. In *People v. Bogan*, law enforcement discovered several firearms and ammunition on the backseat [*sic*] floorboard of a vehicle, without occupants, situated in a parking lot. See 2017 IL

App (3d) 150156, ¶¶ 5-6. While the defendant was not observed inside the vehicle, a search of the vehicle yielded several receipts bearing the defendant's name, a health insurance card, and a crossbow with arrows. *Id.* ¶¶ 9, 47. The defendant was also the registered owner of the vehicle. *Id.* ¶¶ 4, 46. The officers did not find a key to the vehicle, but defendant's fingerprints were found on a box of ammunition and an extraction of defendant's phone revealed pictures of a firearm found in the vehicle. *Id.* ¶¶ 10-12, 37. Our court found the evidence presented in *Bogan*, though "imperfect," was sufficient for a reasonable trier of fact to conclude the defendant was a regular driver of and had control over the vehicle, as needed to prove constructive possession of items seized from the vehicle. *Id.* ¶ 36; Compare *People v. Hampton*, 358 Ill. App. 3d 1029, 1033-34 (2005) (holding the defendant, who had only been driving his brother's vehicle for a few minutes, had control of the vehicle, but that the control was not for a long enough period of time to infer knowledge of items in the glove compartment).

¶ 27 The evidence relied upon by the State here pales in comparison to the evidence of control in *Bogan*. In this case, the State failed to demonstrate defendant's ownership of the vehicle, possession of a key to the vehicle, length of time driving the vehicle, or any other evidence, such as receipts or fingerprints, linking defendant to the vehicle, the shorts, or the handgun. Further, the female passenger's presence in the vehicle negates the suggestion that defendant had exclusive dominion over the vehicle and its contents. See *McIntyre*, 2011 IL App (2d) 100889, ¶ 17. Even if we could infer defendant was the driver of the vehicle, such an inference does not cure the State's failure to prove defendant, not the female passenger, possessed the handgun.

¶ 28 In the absence of other evidence proving the knowledge and control prongs of constructive possession, the cornerstone of the State's theory of constructive possession hinges on the truthfulness of the Circle K attendant and the female passenger's statements. The out-of-

court statements of the Circle K attendant and the female passenger were the best evidence for the State. It is undisputed that the Circle K attendant told Officer Jones, “I’m pretty sure that’s the vehicle.” In addition, when questioned after refusing treatment at the hospital, the female passenger stated, “It was David’s gun” and “David had a silver 380.”

¶ 29 However, viewing these statements favorably does not negate their hearsay nature. The trier of fact could only consider these out-of-court statements, recited at the hearing on the motion to suppress and again as part of the stipulated facts, to explain the investigative steps of the officers, or for some other nonhearsay purpose. *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997); See also *People v. Banks*, 237 Ill. 2d 154, 180 (2010) (“Hearsay is an out-of-court statement offered to establish the truth of the matter asserted [citations omitted] and testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay [citations omitted].”). These statements could not be considered by the trier of fact for the truth of the matter asserted in each statement, i.e. to show, in fact, “that’s the vehicle,” or that “[i]t was David’s gun” or “David had a silver 380.” *Pulliam*, 176 Ill. 2d at 274; *Banks*, 237 Ill. 2d at 180.

¶ 30 Here, neither the Circle K attendant nor the female passenger testified under oath during the suppression hearing. Consequently, the trial court did not have an opportunity to consider the credibility of either witness or evaluate their testimony as substantive evidence. Moreover, perhaps due to an oversight, the State did not protect the record by constructing the stipulated facts to describe for the trial court what each witness would say if called to testify on behalf of the prosecution. In particular, the State did not tell the trial court that either witness would testify at all or would testify consistent with her prior out-of-court statement. Instead, the parties stipulated to mere recitations of what each witness told law enforcement during the investigation,

not what each witness would tell the trial court under oath and subject to cross-examination. Therefore, although we must view the evidence in favor of the State on appeal, we cannot ignore the rules of evidence by substantively considering out-of-court statements for the truth of the matter asserted by each witness to law enforcement. This is the state of the record on appeal.

¶ 31 Based upon the evidence presented at the suppression hearing and the stipulated facts, we conclude no rational trier of fact could have found defendant constructively possessed the handgun without substantively considering the truth of the matter asserted in the statements of the Circle K attendant and female passenger. Thus, the State failed to prove defendant guilty beyond a reasonable doubt of unlawful possession of a firearm by a felon. We reverse defendant's conviction without reaching the merits of the other issues raised in this appeal.

¶ 32

III. CONCLUSION

¶ 33 The judgment of the circuit court of Peoria County is reversed.

¶ 34 Reversed.