

NOTICE
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2011 IL App (4th) 100331-U

Filed 12/30/11

NO. 4-10-0331

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
TANISHA L. FERRELL,)	No. 09CF755
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice McCullough concurred in the judgment.
Justice Cook dissented.

ORDER

¶ 1 *Held:* (1) The court affirmed the trial court's judgment finding (1) the State was not required to prove defendant's knowledge of the firearm's defacement where possession of the defaced firearm was the only element of the crime, (2) the court did not err by not giving a jury instruction regarding defendant's knowledge of the firearm's defacement where it was not an element of the crime, and (3) defendant's constitutional challenge need not be reached given the resolution of the other issues.

(2) The court remanded the matter with directions to assess a \$200 DNA-analysis fee and establish a fee schedule for its payment.

¶ 2 In March 2010, a jury convicted defendant, Tanisha L. Ferrell, of possessing a defaced firearm (720 ILCS 5/24-5(b) (West 2008)), a Class 3 felony. In April 2010, the trial court denied defendant's motion for a new trial and sentenced defendant to 12 months' conditional discharge, ordered her to submit a deoxyribonucleic acid (DNA) sample, and ordered

her to pay various costs and fees. Defendant appeals, arguing (1) section 24-5(b) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/24-5(b) (West 2008)) is unconstitutional because it does not require proof of a culpable mental state, rendering it capable of punishing innocent conduct; (2) the State was required to prove defendant had knowledge the firearm was defaced and failed to do so; (3) the court erroneously failed to introduce a jury instruction regarding defendant's knowledge the firearm was defaced; and (4) defendant is due a \$10 credit against her fines based on the two days she spent in jail prior to trial. The State contends the court failed to order defendant to pay the \$200 DNA-analysis fee. We affirm as modified and remand with directions

¶ 3

I. BACKGROUND

¶ 4 In April 2009, the State charged defendant by information with one count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2008)) and one count of possessing a defaced firearm (720 ILCS 5/24-5(b) (West 2008)). Defendant pleaded not guilty and requested a jury trial. In March 2010, the State elected to proceed to trial on the possession-of-a-defaced-firearm charge and dismissed defendant's other charge. Evidence introduced at defendant's trial showed the following.

¶ 5 Champaign police officer Jaceson Yandell was involved in executing a search warrant on defendant's home in April 2009. Yandell collected evidence found during the search. Another officer alerted Yandell to a .22 caliber handgun found in defendant's bedroom closet. Yandell preserved the firearm as evidence. Yandell stated all firearms have serial numbers, and he believed the serial number had been removed from the firearm found in defendant's closet based on a discolored, filed down area on its handgrip. Yandell was not familiar with the

particular model of handgun found at defendant's residence.

¶ 6 Champaign police officer Matthew Henson was in charge of executing the warrant on defendant's residence in April 2009. Henson spoke directly with defendant during the search. Initially, Henson asked defendant if she possessed any illegal firearms, and she told him she did not. Defendant told Henson she had some ammunition in the residence, and previously owned a handgun, but it had been stolen. Officers later informed Henson a handgun had been located in defendant's bedroom closet. When questioned about the handgun found in her bedroom closet, defendant told Henson she purchased it "off the street" several years before and thought she paid \$70 for it. Henson testified he believed the serial number had been removed from the firearm.

¶ 7 Defendant testified she "bought [the handgun] off the street" several years before for protection after someone attempted to break into her house. When police seized the handgun, defendant possessed a valid firearm owner's identification card. Defendant stated she was not knowledgeable about handguns, did not notice anything unusual about the handgun in her possession, and did not know to look for a serial number on the exterior of the handgun.

¶ 8 During the jury instruction conference, the State and defendant disagreed regarding what issues instruction to submit to the jury. The State argued it only needed to show defendant knowingly possessed the firearm and did not need to show defendant had knowledge the firearm was defaced. Defendant argued the State was required to prove defendant had knowledge of the firearm's defacement. The court denied defendant's objection and allowed the State's issues instruction to go to the jury.

¶ 9 The jury found defendant guilty. Prior to sentencing, defendant filed a motion for

a new trial, arguing the court erred in (1) overruling defendant's various foundation objections to Yandell's and Henson's testimony, (2) allowing Henson to remove the handgrips of the handgun to show no serial number was present underneath them, (3) allowing the State's jury instructions over the defendant's, and (4) consistently ruling the knowledge element of possessing a defaced firearm applied to possession only and not the firearm's altered status. In April 2010, the court denied defendant's motion for a new trial and sentenced her to 12 months' conditional discharge. As part of its sentence, the court ordered defendant to submit a DNA sample for the State database. Though defendant submitted a DNA sample, the record does not show entry of a \$200 DNA-analysis fee.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues (1) section 24-5(b) of the Criminal Code (720 ILCS 5/24-5(b) (West 2008)) is unconstitutional because it does not require proof of a culpable mental state, rendering it capable of punishing innocent conduct; (2) the State failed to prove defendant guilty beyond a reasonable doubt because it was required to prove defendant had knowledge the firearm was defaced and failed to do so; (3) the court erroneously failed to introduce a jury instruction regarding defendant's knowledge the firearm was defaced; and (4) defendant is due a \$10 credit against her fines based on the two days she spent in jail prior to trial.

¶ 13 We will only reach defendant's constitutional challenge if necessary. See *People ex rel. v. Konetski*, 233 Ill. 2d 185, 196, 909 N.E.2d 783, 793 (2009) ("[C]onstitutional issues should be reached only as a last resort."). We will address defendant's other arguments before addressing her constitutional challenge.

¶ 14 A. Statutory Interpretation of Section 24-5(b)

¶ 15 The primary objective of statutory interpretation is to ascertain and give effect to the legislature's intent. *People v. Marshall*, 242 Ill. 2d 285, 292, 950 N.E.2d 668, 673 (2011).

The best evidence of legislative intent is the language of the statute itself, which is given its plain and ordinary meaning. *Id.* Statutes are read as a whole in light of "the evil to be remedied and the object to be attained." (Internal quotation marks omitted.) *People v. Bratcher*, 63 Ill. 2d 534, 543, 349 N.E.2d 31, 35 (1976). We review issues of statutory interpretation *de novo*. *Marshall*, 242 Ill. 2d at 292, 950 N.E.2d at 673.

¶ 16 Section 24-5(b) of the Criminal Code states:

"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 2008).

Defendant argues the State was required to show she knowingly possessed the firearm in question with the knowledge its serial number had been obliterated. The State argues it was not required to prove defendant's knowledge the firearm was defaced but instead was required to prove defendant's knowing possession of the defaced firearm.

¶ 17 Section 24-5(b) is silent on *mens rea*. Section 24-5(b) clearly contemplates a possessory crime. *People v. Stanley*, 397 Ill. App. 3d 598, 607-08, 921 N.E.2d 445, 452-53 (2009). Based on our reading of section 24-5(b), we conclude "the mere possession of [defaced] weapons is the evil sought to be remedied by this offense." *Stanley*, 397 Ill. App. 3d at 608, 921 N.E.2d at 453. We find the State was only required to show the defendant's knowledge on the

element of possession because the defacement, though it bore on the commission of the offense, was not an element of the offense. See *Stanley*, 397 Ill. App. 3d at 609, 921 N.E.2d at 454.

¶ 18 Further, the surrounding facts and circumstances show defendant was aware of the unlawful character of the weapon. Despite having a valid firearm owner's identification card (FOID card), she lied about having a weapon in the house contending her handgun had been stolen. When confronted with the handgun found in her closet she admitted it was hers and that she purchased it "off the street" for protection.

¶ 19 While claiming she was not knowledgeable about handguns, she admitted being a gun owner previously, told police she had ammunition in the house, possessed a FOID card, and admitted buying the defaced weapon "off the street" for protection. The guilty inferences, just as in *Stanley*, are more than enough.

¶ 20 Defendant argues the court's holding in *Stanley* was erroneous. In support of her argument, defendant relies on several cases standing for the proposition knowledge of the illegality of the act is required. See *Staples v. United States*, 511 U.S. 600, 615-16 (1994) (requiring the Government to prove the defendant knew the firearm in his possession had been converted from semi-automatic to automatic); *Liparota v. United States*, 471 U.S. 419, 434 (1985) (requiring the Government to prove the defendant knew his acquisition or possession of food stamps violated statutory or regulatory law); *People v. Gean*, 143 Ill. 2d 281, 289, 573 N.E.2d 818, 822 (1991) (finding the State must prove the defendant's possession of the certificates of title and his knowledge they were possessed without authority or complete assignment). These cases are distinguishable from the present case.

¶ 21 In *Staples*, 511 U.S. at 602, the Government charged the defendant with

possessing an unregistered machine gun. The issue before the Court in *Staples*, 511 U.S. at 603-04, was whether the Government was required to prove defendant knew the firearm in his possession had been altered to be fully automatic. In finding the Government was required to prove the defendant knew of the automatic nature of the firearm in his possession, the Court in *Staples*, 511 U.S. at 615, relied on the fact no external indicators put the defendant on notice the firearm had been modified. The present case is distinguishable because the lack of a serial number is not concealed but is obvious and easily discoverable by defendant.

¶ 22 In *Liparota*, 471 U.S. at 434, the Court found the Government was required to prove the defendant knew his purchase of food stamps violated statutory or regulatory law. However, the disputed statute in *Liparota*, 471 U.S. at 426-27, dealt with illegal transfers of food stamps, not their mere possession. Similarly, the court in *Gean*, 143 Ill. 2d at 289, 573 N.E.2d at 822, found the State was required to prove the defendant possessed the vehicle certificates of title with the knowledge either (1) he did not have authority to possess them or (2) the assignment was incomplete, where the purpose of the disputed statute was "to prevent 'chop shop' activities." The statutes in *Liparota* and *Gean* did not create possessory offenses. Their holdings are distinguishable from the present case because we conclude the purpose of section 24-5(b) is to deter the possession of defaced weapons, making it a possessory offense.

¶ 23 Because we conclude the knowledge required under section 24-5(b) only applies to defendant's possession of the firearm and not the fact of its defacement, defendant's argument regarding the trial court's failure to offer a jury instruction regarding his knowledge of the firearm's defacement necessarily fails. Similarly, our construction of section 24-5(b) renders defendant's constitutional challenge without merit. See *Stanley*, 397 Ill. App. 3d at 610, 921

N.E.2d at 454-55.

¶ 24 B. Defendant's *Per-Diem*-Credit Argument

¶ 25 The State concedes defendant is entitled to a \$5-per-day credit against her fines pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2008)) for the two days she spent in custody prior to trial. The State also argues she must be assessed a \$200 DNA-analysis fee as the trial court failed to assess it. See 730 ILCS 5/5-4-3(a), (j) (West 2008) (individual convicted of felony required to submit DNA sample and pay a \$200 analysis fee). Defendant concedes the \$200 DNA-analysis fee should be assessed but argues the matter must be remanded so the trial court can establish a fee schedule, as defendant cannot pay the \$200 fee immediately.

¶ 26 Section 5-4-3(j) of the Unified Code of Corrections (730 5/5-4-3(j) (West 2008)) states:

"If the [DNA] analysis fee is not paid at the time of sentencing, the court *shall* establish a fee schedule by which the entire amount of the analysis fee shall be paid in full."

Based on the parties' arguments and the mandatory nature of section 5-4-3(j), we find the matter must be remanded to the trial court to assess the \$200 DNA-analysis fee, establish a fee schedule for its payment, and apply defendant's \$10 statutory credit against her outstanding fines.

¶ 27 III. CONCLUSION

¶ 28 We affirm the trial court's judgment as modified and remand with directions to (1) assess a \$200 DNA-analysis fee against defendant, (2) establish a fee schedule for payment of defendant's \$200 DNA-analysis fee, and (3) apply defendant's \$10 credit to her outstanding

finer. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed as modified and remanded with directions.

¶ 30 JUSTICE COOK, dissenting:

¶ 31 There was evidence in this case from which the jury might have determined that defendant possessed a weapon on which she knew the serial number had been removed or obliterated. The obliteration apparently was visible, defendant bought the gun off the street, and lied about having a weapon. However, the jury was not allowed to consider whether defendant knew the serial number had been removed or obliterated. The trial court accepted the State's argument that section 24-5(b) requires only a showing that defendant knowingly possessed the weapon and does not require a showing that defendant knew that the weapon had been defaced, citing *Stanley*.

¶ 32 It would appear possible for an individual to legitimately purchase a firearm where a concealed serial number has been removed, or a surface serial number has been carefully removed without leaving an obvious trace. Officer Henson was allowed to remove the handgrips of the handgun in this case to show no serial number was present underneath them. Our Supreme Court has held that a statute violates the due-process clause if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge. *People v. Madrigal*, 241 Ill. 2d 463, 467, 948 N.E.2d 591, 594 (2011). Section 24-5(b) does not even require knowledge.

¶ 33 Section 24-5(b) formerly provided that possession of a firearm on which the identification number has been changed "shall be *prima facie* evidence that the possessor has changed *** the same." 720 ILCS 5/24-5(b) (West 2002). That statute was held unconstitutional in *People v. Quinones*, 362 Ill. App. 3d 385, 839 N.E.2d 583 (2005). The statute was then amended, by Public Act 93-906, but the amendment has been criticized. Pub.

Act 93-906, § 5, eff. Aug. 11, 2004 (2004 Ill. Legis. Serv. 2513, 2518 (West)). "Similar to the legislative maneuvering following *Pomykala*, Public Act 93-906 converted an offense containing an unconstitutional mandatory presumption into a strict liability offense ***. Instead of requiring the state to either prove the defendant's guilty mind through evidence or through the use of a constitutionally permissive inference based on the conduct of the accused, that element was simply discarded." Gottfried and Baroni, *Presumptions, Inferences and Strict Liability in Illinois Criminal Law: Pre-empting the Presumption of Innocence?*, 41 J. Marshall L. Rev. 715, 739-40 (2008).

¶ 34 I would have no problem with a statute that provided that possession of a firearm on which the identification number has been changed shall be *prima facie* evidence that the possessor knew that the identification number has been changed. I also would have no problem with reading a knowledge requirement into the statute. However, I cannot accept the State's argument that it "was reasonable for the legislature to decline to require proof that a possessor of a defaced firearm knew that the serial number had been obliterated."

¶ 35 As interpreted, section 24-5(b) is unconstitutional. We should vacate defendant's conviction.