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2013 IL App (3d) 110443-U

Order filed April 4, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0443
	)	Circuit No. 10-CF-505
	)	
IVAN T. COLE,	)	Honorable
	)	Edward A. Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Holdridge and McDade concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The State proved defendant's guilt of unlawful possession of a firearm beyond a reasonable doubt; and (2) trial counsel was not ineffective for failing to file a motion to suppress evidence.

¶ 2 After a jury trial, defendant, Ivan T. Cole, was found guilty of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The trial court sentenced defendant to eight years' imprisonment. On appeal, defendant argues that: (1) the State failed to prove his guilt beyond a reasonable doubt; and (2) he was deprived of his right to the effective assistance of

counsel. We affirm.

¶ 3

### FACTS

¶ 4 On March 25, 2010, defendant was charged by indictment with possession of a stolen firearm and two counts of unlawful use of a weapon by a felon. Defendant's case proceeded to a jury trial that ended in a mistrial. On December 7, 2010, the case proceeded to a retrial.

¶ 5 At the retrial, Terry White testified that he was a Department of Corrections (DOC) counselor who counseled inmates that were about to be released on parole. White met with defendant in May 2009. Defendant told White that he was going to live with Jayme Haire at 104 Walden Road in Joliet after he was paroled. Defendant was released on parole on May 20, 2009.

¶ 6 Haire testified that defendant stayed at her home between five and seven nights per week from the date of his parole until March 11, 2010. Defendant stayed in the second bedroom of the home. The bedroom contained a bed, computer desk, and recording equipment. The recording equipment belonged to defendant. Around March 11, 2010, defendant had clothes and shoes in the room. Approximately five to six of defendant's friends frequently came to the house to use the recording equipment. Haire recalled that on the morning of March 11, 2010, the police came through the front door while she was using the computer in her daughter's bedroom. At the time, defendant was "in his room sleeping."

¶ 7 Brian Prochaska testified that he was a Joliet police officer. On March 11, 2010, Prochaska executed a search warrant on a residence located at 104 Walden Road. Prochaska was acting on information that defendant, a felon, resided at that location and had committed the offense of unlawful use of a weapon by a felon. After entering the house, Prochaska proceeded to the northwest corner bedroom. Inside the bedroom, Prochaska saw defendant and two other

officers. Prochaska told defendant that he had a search warrant to search the house and defendant's person for a firearm. Defendant responded that he was at the house when someone brought a firearm over. Defendant nodded towards the closet. Prochaska asked if the firearm was inside the closet, and defendant said yes. Defendant stated that the firearm was a silver revolver and Damian Anderson had brought it into the house.

¶ 8 Inside the closet, Prochaska saw a silver handgun inside a black holster. Prochaska also noted that the officers found the following items in the bedroom: traffic tickets issued to defendant, an envelope addressed to defendant, articles of clothing, defendant's eighth grade diploma, and a small billfold. The billfold contained a boxing gym photographic identification card, Visa card, MasterCard, and a social security card, all of which that identified defendant. The billfold also contained a Will County Work Force System card with no name on it.

¶ 9 Thomas Banas testified that on the day of the search, he found defendant sleeping in the northwest bedroom. Sometime thereafter, Prochaska entered the room. Banas handcuffed defendant and sat him up on the bed. The officers explained to defendant that they were executing a search warrant for a firearm. Defendant advised the officers that the firearm was in the closet. Banas searched the closet and uncovered a silver revolver under some clothing. Banas notified Prochaska, who photographed and removed the firearm from the closet. On cross-examination, Banas noted that defendant told Prochaska that he was holding the firearm for his cousin, Anderson. Defendant "gave a head nod" towards the closet to indicate the location of the firearm. Banas also found male clothing in the closet.

¶ 10 John Stefanski testified that he also participated in the search. He entered the bedroom after defendant had been handcuffed. Stefanski overheard Prochaska explain to defendant that

the officers were executing a search warrant for a handgun. Stefanski noted that defendant was “very cooperative and offered that[] \*\*\* there was a handgun in the residence and he was able to show that to Officer Prochaska.”

¶ 11 Defendant testified that he was paroled on May 20, 2009. He was previously an inmate in the DOC for a possession of a controlled substance conviction. On the date of the search, he did not live at 104 Walden Road. Instead, he lived with his girlfriend. Defendant had not changed his address with the parole department. The day before the search, defendant spent the night at 104 Walden Road because he had been recording music. Defendant owned a recording studio at that address with his cousin, and between five and seven people recorded music daily at 104 Walden Road.

¶ 12 On the date of the search, defendant heard a knock, and someone announced "Joliet police." Defendant got out of bed and was met by two police officers who placed him in handcuffs, escorted him to the living room, sat him on the couch, and threw a search warrant next to him. Thereafter, the police transported defendant to the police station. Defendant never saw Prochaska, and he never learned why the police were present until he got to the police station. Defendant denied making a statement to the police at the scene. The day after the search, defendant made out an affidavit that his address was 104 Walden Road. Defendant explained that he listed the searched address because he thought it was required since it was the address listed in the computer system. Defendant maintained that he was not living at that address on the date of the search.

¶ 13 On cross-examination, defendant admitted that he had testified at an earlier proceeding in which he was asked if he had stayed at 104 Walden Road on the night of March 10 into the

morning of March 11, 2010. Defendant responded to that question "No, I didn't." Defendant did not recall making this statement and maintained that he had stayed at 104 Walden Road on the night of March 10, 2010.

¶ 14 The jury found defendant guilty of unlawful use of a weapon by a felon, and the trial court sentenced defendant to eight years' imprisonment. Defendant appeals.

¶ 15

## ANALYSIS

¶ 16

### I. Sufficiency of the Evidence

¶ 17 Defendant argues that the State did not prove his guilt of unlawful use of a weapon by a felon beyond a reasonable doubt because his unrebutted testimony indicated that he denied knowing about the gun in the closet and many people had access to the bedroom and could have placed the gun in the closet. Defendant further disputes that he knowingly exercised control over the weapon.

¶ 18 When presented with a challenge to the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187 (2006). Instead, we must determine, after viewing the evidence in the light most favorable to the prosecution, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011).

¶ 19 To convict a defendant of unlawful use of a weapon by a felon, the State must prove beyond a reasonable doubt that defendant: (1) knowingly possessed a firearm; and (2) had previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010); *People v. Vasquez*, 368 Ill. App. 3d 241 (2006). Possession of a weapon may be actual or constructive. *People v. Brown*, 327 Ill. App. 3d 816 (2002). Where the possession is constructive, the State must

establish defendant's knowledge of the presence of the weapon and his immediate and exclusive control over the area where it was found. *People v. Nesbit*, 398 Ill. App. 3d 200 (2010). A defendant's knowledge of the presence of a firearm within his possession may be inferred from circumstantial evidence. *Brown*, 327 Ill. App. 3d 816.

¶ 20 In the instant case, defendant was clearly proved guilty beyond a reasonable doubt. The revolver was found in a bedroom which contained many of defendant's personal items as well as male clothing. Another resident admitted that defendant stayed there five to seven nights per week. Three officers testified that defendant acknowledged that there was a firearm in the northwest corner bedroom. Defendant also directed the officers to the closet where a silver revolver was discovered. Although defendant denied making a statement to the police, his testimony was both discredited by impeachment evidence and contradicted by the testimony of the three officers. Finally, defendant's statement to the police that he was holding the firearm for Anderson indicated that he intended to exercise control over it. Viewing the evidence in the light most favorable to the prosecution, we conclude that defendant was proved guilty beyond a reasonable doubt of unlawful use of a weapon by a felon.

¶ 21

## II. Assistance of Counsel

¶ 22 Alternatively, defendant argues that he was deprived of his right to the effective assistance of trial counsel. Defendant contends that counsel should have filed a motion to suppress his statement to the police regarding the firearm in the bedroom closet because he was in custody and questioned without *Miranda* warnings.

¶ 23 We apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether defendant received ineffective assistance of counsel. *People v. Patterson*,

217 Ill. 2d 407 (2005). To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. 668; *Patterson*, 217 Ill. 2d 407.

¶ 24 To establish prejudice resulting from the failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted; and (2) the outcome of the trial would have been different had the evidence been suppressed. *Patterson*, 217 Ill. 2d 407. "The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile." *Id.* at 438.

¶ 25 Here, there is no indication that a motion to suppress would have been successful. Generally, a law enforcement officer must warn a suspect before a custodial interrogation that: he has the right to remain silent; anything he says can be used against him in a court of law; he has the right to have an attorney present; and if he cannot afford an attorney, one will be appointed for him before questioning if he so desires. *People v. Hunt*, 2012 IL 111089. These warnings protect a suspect's fifth amendment privilege against compelled self-incrimination from the " 'inherently compelling pressures' of custodial interrogation." *Hunt*, 2012 IL 111089, ¶ 23 (quoting *Miranda*, 384 U.S. at 467). A custodial interrogation occurs "when a reasonable person in the suspect's position would consider herself 'in custody' and is presented with a question 'reasonably likely to elicit an incriminating response.'" *People v. Harris*, 2012 IL App (1st) 100678, ¶ 52 (quoting 725 ILCS 5/103-2.1(a) (West 2008)).

¶ 26 In the instant case, defendant was not subjected to a custodial interrogation. Prochaska testified that he informed defendant of the grounds for the search warrant and defendant

acknowledged that there was a firearm in the house. Three officers testified that defendant indicated where the firearm was located. None of these officers stated that they asked defendant where the gun was located prior to his making the admission or that they questioned defendant at the scene. Defendant, for his part, denied making a statement. Under these facts, it cannot be reasonably inferred that defendant was subject to questioning that would have required a *Miranda* warning, and therefore a motion to suppress evidence would have been unsuccessful. Also, the problem with defendant testifying in support of a motion to suppress a statement that he denies giving seems obvious. Trial counsel was not ineffective for failing to file a motion to suppress evidence which had no chance of success.

¶ 27

#### CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.