

No. 1-12-0621

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois.
)	
)	
)	No. 10 CR 40001
v.)	
)	
SAHIL GARG,)	Honorable
)	Noreen Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held:* While defendant's conviction under the AUUW statute for carrying a weapon that was uncased, loaded and immediately accessible violated his constitutional rights to bear arms, his conviction for carrying a weapon without an FOID card did not. Testimony that defendant took the gun from his pocket before placing it in a beer case was sufficient to support that conviction, and defendant's right to effective assistance of counsel was not violated by counsel's failure to call witnesses whose

testimony would not have changed the outcome of the trial.

¶ 2 Following a bench trial, defendant Sahil Garg was found guilty of two counts of aggravated unlawful use of a weapon (AUUW), then sentenced to 30 months of probation and 240 hours of community service. On appeal, defendant contends that the State failed to prove him guilty of AUUW beyond a reasonable doubt, that he was denied his right to effective assistance of trial counsel, and that the sections of the statute under which he was convicted are unconstitutional.

¶ 3 BACKGROUND

¶ 4 The record shows that defendant was charged with three counts of AUUW, namely: count 1 for carrying a firearm outside his own abode or place of business when "the firearm was uncased, loaded and immediately accessible" to him at the time of the offense; count 2 for carrying a firearm outside his own abode or place of business when "he had not been issued a currently valid firearm owner's identification card;" and count 3, relating to possession of a firearm and gang membership. Those charges were brought in conjunction with an incident that occurred on December 28, 2009, in Franklin Park, Illinois.

¶ 5 At trial, Franklin Park police officer Daniel Velazquez testified that just before 8 pm on the evening in question, he responded to a radio call from an Officer Lazcano about "two suspicious subjects walking around" near 3014 Ruth Avenue. At that time, both officers were in uniform driving marked police vehicles. According to Officer Velazques, he was told by Officer Lazcano via sideband that one of the subjects had "separated" and was walking toward the west side of an alley that ran parallel to Ruth Avenue. Officer Velazques testified that he turned off

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his headlights, and upon entering the alley, he observed defendant from 15 feet away emerge into the alley from between two buildings at 3014 and 3010 Ruth Avenue. The officer described that area as "well-lit," and stated that he saw defendant reach into his left pocket with his left hand and pull out what he thought at that time was a white sock. Officer Velazquez then saw defendant lean over and place the object inside a Corona beer case.

¶ 6 According to Officer Velazquez, defendant then stood up, turned to his left, and after seeing the police officer, defendant took off running eastbound, back through the gangway from which he had entered the alley. The officer exited his vehicle and chased defendant through the gangway onto Ruth, where he caught and handcuffed defendant. Officer Velazquez left defendant with Officer Lazcano and returned to the Corona box approximately two or three minutes after he initially observed defendant place a white sock-like object inside it. The officer further stated that when he examined the beer case, he found a white glove inside it, which contained a black-handled silver revolver with all five cylinders loaded with .22 long rifle cartridges. He removed the bullets from the gun and later put the gun back inside the glove, and the glove back in the box so that evidence pictures could be taken. Officer Velazquez attested that the Corona box was otherwise empty, he did not see any other individuals present in the vicinity of the box, and there were no other white, cloth-like objects in the area. Upon further investigation, Officer Velazquez learned that defendant lived in Carol Stream, Illinois, and that he did not have a valid firearm owner's identification (FOID) card.

¶ 7 On cross-examination, the officer acknowledged that he saw a can of beer next to the Corona box, and that the can was collected into evidence. He explained, however, that it was an

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evidence technician named Officer Schultz, who "mistakenly put [the beer can] into evidence thinking for some reason the defendant had been drinking beer." When asked whether Officer Schultz "said that the defendant had been drinking beer," Officer Velazquez answered that he did not, and stated that Officer Schultz may have placed the beer can into evidence because "it was next to the box." Officer Velazquez further stated that he did not see defendant drinking beer out of the box. The defense introduced a picture which showed a beer can next to the box, where it was found.

¶ 8 The State further introduced into evidence pictures of the Corona box as it was found, as well as the actual white glove, the revolver that was found inside it, and the cartridges recovered from the gun. It also introduced a copy of a document from the Illinois State police which showed that defendant had not been issued a valid FOID card. When the State attempted to introduce a mug shot of defendant, defense counsel objected, but when the trial court sustained it, counsel stated that it had not been his objection. Once the State rested its case-in-chief, defendant moved for a directed finding on all three counts, which the court denied as to counts 1 and 2, and granted as to count 3, which, as noted above, was for AUUW relating to gang activity.

¶ 9 Defendant testified on his own behalf that in the evening in question, his girlfriend dropped him off at 3022 Ruth Avenue, where he believed that his friend Ricky lived. After he knocked on the door, a woman answered and informed defendant that Ricky no longer lived there. Defendant testified that he called his girlfriend on his cellular phone, and when she did not answer, he opened a can of beer that he had in his pocket and began to drink it. Approximately two or three minutes after opening the can of beer, defendant saw a police vehicle coming toward

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him about 20 yards away, at which point he threw the can toward the car and ran away.

Defendant explained that he ran after seeing the officer because he was drinking alcohol from an open can, which he threw away because he was scared. After falling on ice on the sidewalk, defendant stood up and was later detained by the officer who had chased him on foot. Defendant testified that the officer "jumped on top of [him]," and "slammed [his] face onto the cement."

When the officer asked defendant why he had run, defendant told him about his open beer.

Defendant stated that he threw the can away and ran as soon as he saw the police car, and denied putting anything in a Corona beer case.

¶ 10 It appears that at the end of his testimony, defense counsel asked for a moment to speak to defendant, and the court told him that he could not consult with his client while he was on the witness stand. Defense counsel stated that he wanted to ensure there was nothing else to cover.

¶ 11 On cross-examination, defendant stated that he suffered a small cut on his forehead when the officer who detained him "slammed" his face on the ground, and that he was later instructed to wash the dried blood off his face in his jail cell. While defendant pointed to the right side of his head on his mug shot to show the site of his injury, he later indicated his left side when describing the cut. Furthermore, while defendant initially stated that he had not been in Franklin Park for two to three years before the night of the incident, he later acknowledged that he did not know for sure.

¶ 12 Defendant then attempted to call a forensic scientist, Cynthia Prus, who had been initially subpoenaed by the State, but later dismissed. The parties stipulated that no fingerprints were found on the gun, the cartridges, or the beer can recovered from the scene. Defense counsel

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stated that he would like to ask the witness why there were no fingerprints on the gun, but the court reminded him that just before trial, he indicated that he was ready to proceed, meaning that all his witnesses were present. When asked if he wanted a continuance to bring the witness, defense counsel declined it.

¶ 13 After closing arguments, the trial court found defendant guilty on counts 1 and 2 of AUUW, which, as noted above, corresponded to defendant's act of carrying a firearm immediately accessible to him, and for doing so without a FOID card. In doing so, the court stated that if defendant had thrown the beer can towards the officer after seeing him, as defendant had testified, the can would have to go about 50 feet, past a staircase, for it to land next to the Corona box. The court also noted that if defendant could recognize a police car from that distance, it is reasonable to believe that the officer could see that defendant had some kind of white object in his hand.

¶ 14 Defendant then filed a motion to reconsider the trial court's ruling under different counsel, in which he argued, *inter alia*, that his trial counsel was ineffective for failing to call Officer Schultz as a witness and to introduce his report. According to defendant, Officer Schultz' report, which stated that "RO put a beer can that the offender had been drinking into evidence," corroborated defendant's testimony and impeached Officer Velazquez. Defendant further argued that his trial counsel was ineffective for waiving a preliminary hearing. The trial court denied the motion, finding that defendant's testimony had not been credible, that the incident report would not have made much of a difference, and that defendant would have been admonished about waiving a preliminary hearing.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant contends that he was not proved guilty of AUUW beyond a reasonable doubt, and that his conviction under the AUUW statute, which criminalizes the possession of a firearm outside of one's home, is void because the Seventh Circuit Court of Appeals found the statute unconstitutional in *Moore v. Madigan*, 702 F. 3d 933 (2012). Alternatively, as he did at the court below, defendant again contends that he was denied his right to effective assistance of counsel.

¶ 17 We note that nonconstitutional issues should generally be considered first, and that we should consider constitutional issues only when necessary for the resolution of the case. *Coram v. State*, 2013 IL 113867, ¶ 56. However, after the parties in this appeal filed their briefs, our supreme court issued its opinion in *People v. Aguilar*, 2012 IL 112116, which was modified on December 19, 2013, and squarely resolves the constitutional question presented in this case and therefore disposes of one of the issues before us. See, e.g., *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 11 (first addressing the constitutionality of the AUUW statute in a case where the briefs were filed before *Aguilar* was issued, because if the statute had been facially unconstitutional, the ultimate outcome would be to vacate defendant's conviction).

¶ 18 In *Aguilar*, 2013 IL 112116, ¶ 22, our supreme court held that section 24–1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (Code) (720 ILCS 5/24–1.6(a)(1), (a)(3)(A) (West 2010)), which criminalizes the act of carrying a firearm which was immediately accessible at the time of the offense, is unconstitutional on its face. In doing so, our supreme court found persuasive the reasoning in *Moore v. Madigan*, 702 F. 3d 933 (7th Cir. 2012), in which the

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United States Court of Appeals for the Seventh Circuit reasoned that the second amendment guarantees not only the right to "keep" arms, but also the right to "bear" them, which are two distinct rights. *Aguilar*, 2013 IL 112116, ¶ 19. The court in *Aguilar* further agreed with the conclusion reached in *Moore*, that "[t]he Supreme Court has decided that the [second] amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Aguilar*, 2013 IL 112116, ¶ 19 (quoting *Moore*, 702 F. 3d at 942). Accordingly, we conclude that defendant's conviction on count 1, for carrying a firearm that was immediately accessible at the time of the offense, under section 24-1.6 (a)(1), (a)(3)(A) of the Code, cannot stand, and we reverse it.

¶ 19 Nevertheless, that is not the end of our inquiry, since the trial court also found defendant guilty on count 2 of AUUW, based on his possession of a firearm without a valid FOID card, based on section 24-1.6(a)(1), (a)(3)(C) of the Code. As this court has recently held in *Henderson*, 2013 IL App (1st) 113294 ¶¶ 13-23, section 24-1.6(a)(1), (a)(3)(C) was not affected by the decision in *Aguilar*, and is not facially unconstitutional. In doing so, the court found that the section was severable from the section struck in *Aguilar* because subsections (a)(1) and (a)(2), combined with the factor in subsection (a)(3)(C), which set forth the elements of carrying a firearm without an FOID card, can stand independently from subsection (a)(3)(A), which is only one of several factors that could have substantiated the offense of AUUW. *Id.* at ¶ 22. Since the removal of section (a)(3)(A) by *Aguilar* "undermines neither the completeness or executability of the remaining subsections," it cannot be concluded that it is "so intertwined with the rest of the statute that the legislature intended the statute to stand or fall as a whole." *Id.*

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[internal quotation marks omitted]. Further, in finding that subsection (a)(3)(C) is not facially unconstitutional, this court then noted that our supreme court in *Aguilar* stated that it " 'in no way [said] that such a right [to bear arms] is unlimited or is not subject to meaningful regulation,' " which is consistent with the United States Supreme Court decision in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008), and the Seventh Circuit's decision in *Moore*, both of which explicitly stated that the second amendment would not preclude laws imposing conditions on the purchase of firearms. *Id.* at ¶ 24.

¶ 20 In this case, defendant did not receive a sentence on count 2, which was merged with count 1 under the one-act-one-crime rule. Under these circumstances, we have the authority to remand the cause for sentencing on defendant's count 2 conviction under Illinois Supreme Court Rule 615(b)(2), which allows a reviewing court to "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken." See *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982).

¶ 21 Defendant, nevertheless, contends that this cause should be reversed outright in its entirety because the State failed to prove him guilty of AUUW under either count because the evidence was insufficient to establish beyond a reasonable doubt that he was in possession of a firearm. He maintains that there was no physical evidence that he touched the weapon found in the Corona box, and that even assuming that he placed the gloved weapon in the box as Officer Velazquez described, he lacked the requisite possession of it when he was detained.

¶ 22 In assessing the sufficiency of the evidence, we determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the

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essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight of their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). Accordingly, this court will not substitute its judgment for that of the trier of fact in analyzing the weight of the evidence or the credibility of the witnesses, or set aside a criminal conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt as to defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 224.

¶ 23 In order to prove defendant guilty of AUUW under count 2 of this case, the State was required to establish that defendant carried or possessed a firearm on or about his person, and had not been issued a valid FOID card. 720 ILCS 24-1.6(a)(1), (a)(3)(C) (West 2010). As noted above, defendant does not dispute that he did not have a valid FOID, but argues only that the evidence was insufficient to show that he had the requisite possession of a firearm. However, it is well established that actual possession can be " 'proved by testimony which shows [that the] defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it and throwing it away.' " *People v. Love*, 404 Ill. App. 3d 784, 788 (2010) (quoting *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987)); see also *People v. Marin*, 342 Ill. App. 3d 716, 730 (2003) (finding that testimony that defendant dropped his gun and ran was sufficient to support a conviction of AUUW, even though defendant did not have the gun when arrested).

¶ 24 Here, Officer Velazquez testified that he saw defendant take out a white object from his pocket and place it in a Corona box, and when the officer returned to that location, he found a

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gun wrapped in a white cloth glove inside that case. The officer did not see any other white cloth objects in that vicinity, or any other individuals near the Corona box. Further, the trial court correctly noted that the lack of fingerprints on the gun is not conclusive evidence that defendant did not handle it, especially since the weapon was wrapped in a glove when he placed it in the Corona box. Although defendant testified that he had been drinking the beer that was found next to the box, and that Officer Schultz' report, introduced in his postjudgment motion, corroborated his testimony, the trial court found defendant's testimony incredible because if he had thrown the can of beer in the manner described, it would have unlikely landed next to the Corona box.

Moreover, the parties do not dispute that Officer Schultz was not present when Officer Velazquez observed defendant place the white object in the Corona box, and Officer Velazquez explained that Officer Schultz may have believed that defendant had been drinking out of the beer can in question because it was found next to the box. Under these circumstances, we conclude that Officer Velazquez' testimony was sufficient to allow a reasonable trier of fact to reasonably infer that defendant had the requisite physical possession of the firearm found in the Corona box when he removed it from his pocket and placed it in the case.

¶ 25 Defendant next contends, however, that his conviction on count 2 should be remanded not only for sentencing, but also for a new trial, because he was denied his right to effective assistance of counsel based on his trial attorney's waiver of a preliminary hearing, as well as his failure to subpoena Prus on his own or ask for a continuance so he could call Officer Schultz to testify. Defendant further contends that his trial counsel was ineffective in failing to object to evidence pictures and to Officer Velazquez' testimony that another officer told him that there

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were two suspects in the area. In addition, defendant cites counsel's attempt to introduce defendant's W-2s and to consult with defendant while the latter was on the witness stand, and further claims that counsel failed to properly prepare defendant for cross-examination.

Defendant also argues that while counsel objected to questions about defendant's prior interactions with Franklin Park police, he failed to properly bar the State's use of such evidence, and was overall unprepared.

¶ 26 To prevail on a claim of ineffective assistance of counsel, defendant must show that his attorney's performance fell below an objective standard of reasonableness, and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052, 2064 (1984). Defendant's failure to establish either prong of this test is fatal to his claim (*People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994)), and, thus, a reviewing court need not determine whether defense counsel's performance was reasonable before examining whether defendant suffered prejudice as a result of the alleged deficiency (*Strickland*, 466 U.S. at 697).

To establish prejudice, defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). In this respect, we observe that a reasonable probability of a different result is not the mere possibility of a different result. *Id.* at 220.

¶ 27 Here, while defendant contends that when his trial counsel waived his right to a preliminary hearing, he missed the opportunity to obtain "vital information" about the State's case against defendant, defendant fails to specify what information he would have learned at that hearing that he did not learn through discovery. Similarly, although defendant maintains that

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Prus could have provided an explanation as to why there were no fingerprints on the gun, defendant does not attempt to discuss how it may have affected the outcome of the case since the trial court correctly found that the lack of fingerprints on the weapon was inconclusive.

Likewise, with respect to Officer Schultz, defendant argues that his explanation as to why he wrote in his report that "RO put a beer can that defendant was drinking into evidence" would have impeached Officer Velazquez, who testified that he never saw defendant drinking beer. However, it is undisputed that Officer Schultz was not present at the time of the offense and would not have witnessed defendant drinking that beer, and Officer Velazquez did, during his testimony, explain that Officer Schultz was mistaken in his assumption, which he likely made because the can was next to the Corona box. Furthermore, Officer Velazquez merely testified that he did not personally see defendant drink beer, and any testimony related to why Officer Schultz believed that defendant had been drinking that beer would be unrelated to his offense.

¶ 28 Moreover, had defense counsel objected to Officer Velazquez' testimony that Officer Lazcano told him of the two suspects in the area, such objection would have been groundless because, contrary to defendant's argument, it was introduced only to show why Officer Velazquez drove to the alley, and therefore, not hearsay. Similarly, defense counsel would not have grounds to object to pictures of the Corona box containing the gun inside the glove.

Although Officer Velazquez acknowledged that he had placed the gun back into the glove and the box after handling it himself, defense counsel cross-examined officer, thereby establishing the actions that took place before the photos were taken. Further, although defendant claims that counsel failed to articulate the relevancy of the placement of the beer can next to the box, he

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offers no such explanation now either. While defendant also questions his trial counsel's strategy in asking Officer Velazquez what defendant said when first confronted about the gun, the State's objection to that question was sustained.

¶ 29 Defendant's claim that his counsel was ineffective in failing to bar the State's use of defendant's prior interactions with the Franklin Park police, and later stating to the court that he was not objecting to the introduction of defendant's mug shot, is similarly unpersuasive. As the State correctly notes, the evidence of such interactions were only relevant to count 3, which was related to defendant's alleged gang affiliation, and as noted above, the court entered a directed verdict on that count in favor of defendant. In fact, although defendant told the court that an objection that he raised was not about the mug shot, the court still sustained it.

¶ 30 Similarly, while consulting with defendant while he was on the witness stand may have been improper, the court moved on quickly. While defendant now claims that counsel did not prepare him to answer questions about the friend he was visiting that day, the record indicates that he answered to them coherently, and different responses would unlikely change the outcome of the case.

¶ 31 Therefore, defendant did not suffer prejudice from defense counsel's decisions because he has not shown a reasonable probability that if defense counsel had called Schultz and Prus and not made the other decisions which defendant challenges, the trial court would not have found him guilty beyond a reasonable doubt. *Strickland*, 466 U.S. at 695. Since defendant did not satisfy the second prong of the *Strickland* test, we need not decide whether defense counsel's performance was unreasonable under the first prong.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we reverse defendant's conviction on count 1, under section 24-1.6(a)(1), (a)(3)(A), which is unconstitutional on its face, and remand for resentencing his conviction on count 2, under section 24-1.6(a)(1), (a)(3)(C), which is unaffected by our supreme court's decision in *Aguilar* (*Henderson*, 2013 IL App (1st) 113294, ¶36).

¶ 34 Reversed in part, remanded in part.