2011 IL APP (1st) 091494-U

FIRST DIVISION
December 5, 2011

No. 1-09-1494



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| | ) | |
| v. | ) | No. 07 CR 950 |
| | ) | |
| | ) | |
| EDWIN BROWN, | ) | Honorable |
| | ) | William G. Lacy, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**O R D E R**

***Held***: The State's evidence was sufficient to prove beyond a reasonable doubt that defendant "knowingly" possessed the firearms recovered in this case. The statute governing the offense of unlawful use of a weapon by a felon (UUW), as applied to defendant, did not violate his Second Amendment right to bear arms. And defendant's trial counsel was not ineffective for failing to file a motion to quash the search warrant and suppress evidence.

¶ 1 Following a bench trial, defendant Edwin Brown was convicted of unlawful use of a weapon by a felon (UUW) (720 ILCS 5/24-1.1(a) (West 2004)) and was sentenced as a Class X offender to six years' imprisonment. Defendant contends on appeal that: (1) the State's evidence was insufficient to prove beyond a reasonable doubt that he "knowingly" possessed the firearms recovered in this case; (2) the UUW statute is unconstitutional as applied to him because it unduly restricts his right to bear arms in his home for self-defense under the Second Amendment to the United States Constitution; and (3) his trial counsel was ineffective for failing to file a motion to quash the search warrant and suppress evidence. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 The following evidence was presented at trial. On December 13, 2006, at approximately 12:34 a.m., Chicago police executed a search warrant of a one-level, single-family home located at 9320 S. Paxton Avenue, Chicago, Illinois. Police officer Shawn Whelan knocked on the front door of the house but received no response. The officer and his partners then made a forced entry into the home.

¶ 4 Officer Whelan, who testified that he was the first officer to enter the house, stated that he followed defendant as he ran from a front bedroom towards the back door of the house. Defendant was wearing pants and a leather jacket. Officers detained defendant in the kitchen.

¶ 5 Officers also found another man in the house, later identified as defendant's uncle. He was in a bedroom off the kitchen and was wearing underwear and a robe. Also in the house was a woman, later identified as defendant's sister. She was in a basement apartment. All of the

parties were detained in the kitchen.

¶ 6 Officer Whelan showed defendant the search warrant, read him his *Miranda* rights, and then asked him if there was anything illegal in the house. According to Officer Whelan, defendant responded that on a dresser were three handguns that he kept for "house safety."

¶ 7 Officer Whelan went to the front bedroom where he recovered three handguns, two of which were loaded, sitting in plain view on top of a dresser. He also claimed to have recovered the following additional items from the bedroom: 100.2 grams of cocaine, 754.5 grams of cannabis, 17 ecstasy pills, $10,584.00 in cash, three electronic scales, defendant's checkbook, a City of Chicago parking ticket notice bearing defendant's name, and various items of clothing. Defendant was arrested and charged with armed violence, UUW, and possession of ecstasy, marijuana, and cocaine with intent to deliver.

¶ 8 The parties stipulated to the chain of custody of the physical evidence. The State also entered into evidence a certified copy of defendant's conviction in 1997 for possession of a controlled substance (between 15 to 100 grams of cocaine) for which he received eight years in boot camp.

¶ 9 At the close of the State's case-in-chief, the trial court granted defendant's motion for a directed finding as to the armed violence counts. Defendant testified on his own behalf and also called his sister, Shennell Wilson, as a witness in his defense.

¶ 10 Wilson testified that she lived in the subject house with defendant and their uncle. There were three bedrooms in the home. She claimed that she lived in a bedroom in the basement, defendant lived in a bedroom in the back of the house near the kitchen, and their uncle occupied

the front bedroom.

¶ 11 Wilson testified that at the time of the search, she was in her bedroom in the basement. She heard noises, went to the stairs, and saw police officers who ordered her to come upstairs and then brought her to the kitchen. She saw that defendant was wearing a coat, jeans, shoes, and a hat. She testified that defendant had a job at a bakery and left for work in the early morning.

¶ 12 Wilson stated that when the officers asked defendant where the guns were, he replied that he did not know what they were talking about. The officers responded that they were trying to help defendant so he needed to help them.

¶ 13 On cross-examination, Wilson acknowledged that she only saw the officers recover the drugs, money and other paraphernalia from the front bedroom, but did not see them recover the handguns. She testified that the recovered items came from her uncle's bedroom, who at the time of the search was sick with cancer and had been out of the hospital for three weeks. Wilson testified that she no longer talked to her uncle and did not know where he was at the time of the trial.

¶ 14 Defendant testified there were four bedrooms in the house, three upstairs and one downstairs. He claimed that his uncle lived in the front bedroom, his cousin lived in the middle bedroom, and he lived in the bedroom at the back of the house near the kitchen. Defendant claimed he did not hear the police knock. He stated that when the officers entered his home he did not run from them. He testified that he was in the kitchen and had just prepared himself a shake before leaving for work at the bakery.

¶ 15 Defendant denied telling officers there were guns in the front bedroom and testified that he did not know that guns, drugs, or money were in the bedroom. He stated that the items recovered in the bedroom did not belong to him. Defendant testified that he did not believe that his checkbook or parking ticket notice had been in the front bedroom. He claimed that he attempted to contact his uncle to testify, but was unsuccessful.

¶ 16 On cross-examination, defendant testified that he was not aware if his uncle was selling illegal drugs. Defendant stated that he believed his uncle was in the front bedroom when the police forced their way into the house.

¶ 17 The trial court determined there was conflicting evidence regarding which of the bedrooms belonged to defendant. The court acquitted defendant of the narcotics charges after it concluded that the physical evidence recovered from the front bedroom was not sufficient enough to prove beyond a reasonable doubt that the bedroom belonged to the defendant. The court however convicted defendant of UUW, after it determined that Officer Whelan credibly testified that the defendant admitted to possessing three handguns for the protection of his house.

¶ 18 After the trial court denied defendant's motion for a new trial he was sentenced as a Class X offender to six years' imprisonment. On June 22, 2009, we allowed defendant to file a late notice of appeal.

¶ 19 ANALYSIS

¶ 20 Defendant first contends that the State's evidence was insufficient to prove beyond a reasonable doubt that he "knowingly" possessed the recovered firearms. We must disagree.

¶ 21 When reviewing a challenge to the sufficiency of the evidence, the relevant question is

whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004). To sustain a conviction for unlawful use of a weapon by a felon, the State must prove beyond a reasonable doubt that the defendant knowingly possessed a prohibited firearm and that he had a prior felony conviction. 720 ILCS 5/24-1.1(a) (West 2006); *People v. Rasmussen*, 233 Ill. App. 3d 352, 369-70, 598 N.E.2d 1368 (1992).

¶ 22 In a possession case, because the element of knowledge is rarely susceptible to direct proof (*People v. Sanchez*, 292 Ill. App. 3d 763, 771, 686 N.E.2d 367 (1997)), actual possession need not be demonstrated in order to uphold a conviction if constructive possession can be inferred from the facts. *People v. Ray*, 232 Ill. App. 3d 459, 462, 597 N.E.2d 756 (1992). Where a prohibited firearm or illegal drugs are found on the premises rather than on defendant, the State must prove that defendant had control of the premises in order to permit the inference that he had knowledge and control over the illegal items. *Ray*, 232 Ill. App. 3d at 462; *People v. Adams*, 242 Ill. App. 3d 830, 832, 610 N.E.2d 763 (1993). Knowledge and possession are questions of fact to be resolved by the trier of fact whose findings will not be disturbed on review unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of guilt. *People v. Luckett*, 273 Ill. App. 3d 1023, 1033, 652 N.E.2d 1342 (1995); *People v. Butler*, 242 Ill. App. 3d 731, 733, 611 N.E.2d 603 (1993).

¶ 23 The central issue here was whether defendant had constructive possession of the handguns. The trial court determined that this issue turned on the credibility of the witnesses

and that Officer Whelan's testimony was more credible than defendant's testimony. We defer to the trial court as the finder of fact on matters of witness credibility, the weight to be accorded testimony, and the reasonable inferences to be drawn from the evidence. *People v. Daniel*, 311 Ill. App. 3d 276, 282, 723 N.E.2d 1279 (2000).

¶ 24 Officer Whelan testified that when he showed defendant the search warrant, read him his *Miranda* rights, and then asked him if there was anything illegal in the house, defendant responded that on a dresser there were three handguns that he kept for "house safety." The officer testified that the weapons were found sitting in plain view on top of a dresser in the same room he saw defendant running from when officers entered the home to execute the search warrant. Officer Whelan's testimony, viewed in a light most favorable to the State, was sufficient to show that defendant had constructive possession of the handguns discovered in the front bedroom, so as to support his conviction for unlawful use of a weapon by a felon.

¶ 25 Defendant next contends that the UUW statute is unconstitutional as applied to him because it unduly restricts his right to bear arms in his home for self-defense under the Second Amendment to United States Constitution.[1] Again, we must disagree.

¶ 26 Whether a statute is constitutional is a question of law to be reviewed *de novo*. *People v. Morgan*, 203 Ill.2d 470, 486, 786 N.E.2d 994 (2003). Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute has the burden of overcoming this

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[1] The second amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II.

presumption. *People v. Cornelius*, 213 Ill. 2d 178, 189, 821 N.E.2d 288 (2004).

¶ 27 In 2008, the United States Supreme Court struck down an ordinance from the District of Columbia that prohibited the possession of handguns in the home, declaring that the second amendment protects the right to possess a handgun in the home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). In *dicta*, the Court made clear that its decision "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 571, 128 S. Ct. at 2786, 171 L. Ed. 2d at 646.

¶ 28 Two years later, the United States Supreme Court held that the fourteenth amendment due process clause incorporated the second amendment right recognized in *Heller*. *McDonald v. City of Chicago*, _____ U.S. _____, 130 S. Ct. 3020, 3050, 177 L. Ed. 2d 894, 929 (2010).

¶ 29 Our court has applied the *Heller* dicta to uphold the constitutionality of the Illinois UUW. See *People v. Davis*, 408 Ill. App. 3d 747, 750, 947 N.E.2d 813 (2011). In *Davis*, the court reasoned that the Illinois UUW served the legitimate State interest in protecting the public from the dangers posed when convicted felons possess firearms. *Davis*, 408 Ill. App. 3d at 750.

¶ 30 We see no basis to depart from the reasoning set forth in *Davis*. Therefore, we must reject defendant's as-applied challenge to the constitutionality of the Illinois UUW.

¶ 31 Finally, we reject defendant's contention that his trial counsel was ineffective for failing to file a motion to quash the search warrant and suppress evidence.[2] In determining whether a

[2] Defendant's complaint here is probably better characterized as an alleged failure of counsel to proceed on a previously filed motion to quash arrest and suppress evidence since the

defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984).

¶ 32 To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S.

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record does not indicate that the motion filed by defendant's prior counsel was ever litigated or withdrawn.

Prior to trial, a private attorney, Stuart Goldberg, appeared on behalf of defendant. Defense counsel filed a motion to quash arrest and for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The State filed a response to the motion. Before the motion could be ruled upon, Goldberg appeared before the court stating that defendant had filed a complaint against him with the Attorney Registration and Disciplinary Commission (ARDC). The court continued the case to give defense counsel and defendant an opportunity to determine if the issue could be resolved.

At the next court date, Goldberg withdrew from the case after informing the court that the issue could not be resolved. On September 28, 2007, private counsel, David Wiener appeared on behalf of defendant. The record does not indicate what occurred with defendant's motion.

Ct. at 2064; *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889 (2005). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069; *People v. Colon*, 225 Ill. 2d 125, 135, 866 N.E.2d 207 (2007).

¶ 33 The decision of whether to file a motion to suppress evidence in a criminal case is generally viewed as one of trial strategy having no bearing on the competency of counsel. *People v. Davidson*, 196 Ill. App. 3d 634, 638, 554 N.E.2d 444 (1990); *People v. Little*, 322 Ill. App. 3d 607, 611, 750 N.E.2d 745 (2001). Therefore, "[i]n order to establish prejudice resulting from 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 at 438.

¶ 34 Defendant argues that there is a reasonable probability the trial court would have granted a motion to quash the search warrant and suppress evidence if defense counsel had filed the motion, because the complaint for the search warrant was based on uncorroborated allegations from an unidentified informant with no prior reliability. We must disagree.

¶ 35 Illinois courts employ a "totality of the circumstances" test, as enunciated in *Illinois v. Gates*, 462 U.S. 213 , 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), for determining the existence of probable cause for the issuance of a search warrant. See *People v. Sutherland*, 223 Ill. 2d 187, 229 n. 3, 860 N.E.2d 178 (2006); *People v. Phillips*, 265 Ill. App. 3d 438, 447, 637 N.E.2d 715 (1994). Here, when looking at the totality of the circumstances presented to the issuing judge, we find that there was sufficient evidence to establish probable cause to issue the search warrant

for the one-level, single-family house located at 9320 S. Paxton Avenue, Chicago, Illinois.

¶ 36 In this case, the confidential informant, identified only as J. Doe, appeared in court before the judge issuing the search warrant. Where an informant appears before the issuing judge and is available for questioning, these are indicia of reliability, because the judge then has the opportunity to personally observe the demeanor of the informant and assess the informant's credibility. See *People v. Smith*, 372 Ill. App. 3d 179, 183-84, 865 N.E.2d 502 (2007); *Phillips*, 265 Ill. App. 3d at 448.

¶ 37 The warrant was also based on J. Doe's personal observations. According to the complaint, J. Doe accompanied Officer Whelan to 9320 S. Paxton and identified the house as the same one where he had gone to purchase cocaine from defendant earlier that day. Officer Whelan produced a computer generated photograph of defendant from the police database. J. Doe identified defendant in the photograph as the same man who had sold him cocaine earlier that day as well as on prior occasions.

¶ 38 J. Doe told Officer Whelan that on December 12, 2006, he went to 9320 S. Paxton Avenue, and purchased cocaine from a man matching defendant's description and that he used the cocaine that same day. When an informant admits to using an illegal substance, this bolsters his reliability. See *Smith*, 372 Ill. App. 3d at 184 (confidential informant's reliability bolstered where he admitted purchasing and using cocaine).

¶ 39 Here, the record supported the judge's finding of probable cause to issue the search warrant and therefore defense counsel's failure to file a motion to quash the warrant and suppress evidence did not amount to ineffective assistance because there was no reasonable probability

the motion would have been granted.

¶ 40 Accordingly, we affirm the judgment of the trial court.

¶ 41 Affirmed.