2011 IL App (1st) 092856-U

FIFTH DIVISION
September 2, 2011

Nos. 1-09-2856 & 1-09-3059
Consolidated

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.
	)	
v.	)	Nos. 08 CR 5210
	)	08 CR 17873
	)	
WILLIAM JOHNSON,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBride delivered the judgment of the court.
Justices Cahill and R.E. Gordon concurred in the judgment.

O R D E R

Held: Defendant was not denied effective assistance of counsel by the absence of a motion to suppress; defendant's convictions did not violate the one-act, one-crime doctrine; the trial court's judgment was affirmed.

¶ 1 Following a consolidated bench trial, defendant William Johnson was convicted of aggravated battery with a firearm and unlawful use of a weapon (UUW) by a felon under indictment number 08 CR 17873, and UUW by a felon under indictment number 08 CR 5210. The court sentenced defendant to concurrent prison terms of 13, 7, and 7 years, respectively. On

appeal, defendant contends that he was not provided effective assistance of counsel where his trial attorney failed to file a motion to suppress the gun recovered in his car. In the alternative, defendant contends that his convictions for aggravated battery with a firearm and UUW by a felon under indictment number 08 CR 17873 arose from the same physical act, and thus his conviction for UUW by a felon must be vacated. We affirm.

¶ 2 The evidence at trial showed that at about 3:40 p.m. on February 17, 2008, Dion Johnson, Sr. (Dion Sr.) drove to a relative's house at 1648 West Maypole Avenue in Chicago and parked across the street from the residence. Shortly thereafter, Dion Johnson, Jr. (Dion Jr.) parked his car near the same house on Maypole Avenue and exited. A man drove up in a black Ford Taurus and asked Dion Jr. if he knew someone named "Dion." Dion Jr. responded negatively, and went into the house. Both Dion Sr. and Ralph Taylor observed Dion Jr. and the driver of the Taurus conversing. The driver of the Taurus also approached Devin Wardlow, Dion Jr.'s cousin, and Jimmy Williams, and asked them if they knew "Dion." Wardlow and Williams responded negatively. Subsequently, Wardlow, Dion Jr., Dontae Denny, and Thomas Norman all left the house on Maypole Avenue. While they were standing on the porch, someone approached the men. Wardlow exclaimed, "[h]e got a gun," and the man who approached the group shot at them. Everyone on the porch ran back inside the house to avoid getting shot, but Dion Jr. was hit twice in the legs.

¶ 3 Moments before the shooting, Shannon Mandeldove, a witness not involved in the incident who was driving on Lake Street, saw a black Ford Taurus parked on Lake Street. When Mandeldove heard gunshots, he looked in his rearview mirror and saw a man running towards the Taurus. Mandeldove followed the man as he fled in the Taurus, called the police, and gave the dispatcher a description of the vehicle, the license plate number, and details regarding where the car was headed.

¶ 4 At about 4:36 a.m. on February 23, 2008, police observed defendant disobey a stop sign while driving a black Ford Taurus and pulled the vehicle over. Although not known to the officers at that particular time the Ford Taurus defendant was driving had the same license plate number as the Taurus identified during the shooting incident on February 17. After defendant's vehicle was curbed by police, defendant got out of the vehicle and started walking away. When police called defendant back to the car, he obeyed. According to Officer Robert Roth, there was a passenger inside the Taurus who remained in the vehicle. His partner, Officer Christopher Barajas, however, did not remember a passenger inside the Taurus. After defendant told Barajas that he did not have a driver's license, Barajas handcuffed defendant and performed a pat-down search on him, which revealed a nine millimeter magazine loaded with live ammunition. Roth ordered the passenger to exit the vehicle, and he performed a search of the vehicle. The search resulted in the recovery of a loaded nine millimeter firearm.

¶ 5 According to police, defendant waived his *Miranda* rights and made various statements. Defendant allegedly told Officer Roth that he was carrying a gun for protection because he was recently robbed. When speaking with Detective Robert Goerlich, defendant denied any involvement in the shooting, stated that he spent Valentine's Day weekend at a hotel in the suburbs with his girlfriend, Tatiana Junious, and declared that he stayed at Junious' home for the remainder of February 17, 2008. Defendant also allegedly told Officer Roland Rios that on February 14, 2008, on West Maypole Avenue, he was robbed of a leather jacket and his child's shoes. He was angry about the robbery and went back into the area a few days later for revenge. Defendant approached a few black men and asked them if they knew "Dion." After the men indicated that they did not know "Dion," defendant went around the block, parked his vehicle on Lake Street, and fired on the same individuals he had just approached. There are no written statements of what defendant allegedly told police about the incident.

¶ 6 Dion Sr. and Wardlow positively identified defendant. Although Dion Sr. did not tell police that he saw defendant's photo in an array shown to Dion Jr., he later identified defendant in a line-up as the man he saw approach Dion Jr. after Dion Jr. parked his car. Although Wardlow was unable to identify anyone in a photo array, he subsequently identified defendant in a line-up as the person he saw driving a black Ford Taurus, as well as the person who shot at him and Dion Jr.

¶ 7 The parties stipulated that all 10 nine millimeter cartridges found at the scene of the shooting were fired from the same gun found in the black Ford Taurus defendant was driving when police detained him. The parties further stipulated that defendant was previously convicted of possession of a controlled substance with intent to deliver.

¶ 8 Richard Lewis, the cousin of defendant's girlfriend Junious, testified for the defense that defendant gave him a ride at about 3:30 a.m. on February 23, 2008. The police arrived after defendant parked the car in order to urinate outside. The police told Lewis to exit the car, searched him and defendant, and then transported them to the police station. Lewis did not see police remove a gun from the vehicle.

¶ 9 Junious testified that she owned a black Ford Taurus that she allowed several people to drive, including defendant. According to Junious, she and defendant spent the weekend of February 15 together in Downer's Grove, Illinois. They arrived at her home in Chicago on February 17 at about 3:15 p.m. Junious stated that defendant left in her car later that evening, but was unsure of the exact time.

¶ 10 Defendant testified that he left Junious' home at about 7:30 p.m. on February 17th, and denied being involved in the shooting of Dion Jr., or confessing to it.

¶ 11 Following trial, defendant was found guilty of aggravated battery with a firearm and UUW by a felon under indictment number 08 CR 17873, and UUW by a felon under

indictment number 08 CR 5210. The trial court found that, with regard to indictment number 08 CR 5210, the testimony of the officers was credible whereas defendant and Lewis' versions of the events were incredible. In regard to indictment number 08 CR 17873, the trial court found the individuals on the porch, including the victim and the victim's father, credible. The court noted that, standing alone, the identifications would have been insufficient to convict defendant. However, the court indicated that the totality of the evidence proved defendant guilty beyond a reasonable doubt.

¶ 12 On appeal, defendant contends that his trial counsel was ineffective for failing to file a motion to suppress the firearm recovered in his car under *Arizona v. Gant*, 556 U.S._, _ 129 S. Ct. 1710, 1719 (2009), which held that the search of the defendant's car following an arrest for driving on a suspended license was not justified as a search incident to arrest. Defendant maintains that there was a high probability that the motion to suppress the firearm would have succeeded under *Gant*, and a reasonable probability that he would not have been convicted if the recovered firearm was not admitted into evidence.

¶ 13 The State contends that defendant's reliance on *Gant* is misplaced because the case at bar is factually distinguishable from *Gant*. The State maintains the search of the vehicle in question was not incident to a lawful arrest, but was compelled by safety concerns. Without considering whether the search of defendant's vehicle was incident to a lawful arrest, we agree that safety concerns by themselves were a valid reason for the search.

¶ 14 A defendant arguing ineffective assistance of counsel must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *People v. Enis*, 194 Ill. 2d 361, 376 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). We review *de novo* the legal question of whether counsel was ineffective. *People v. Bew*, 228 Ill. 2d 122, 127 (2008).

¶ 15 In order to establish prejudice from the failure to file a motion to suppress, the defendant must show that a reasonable probability exists that: (1) the motion would have been granted, and (2) that the outcome of the trial would have been different had the evidence been suppressed. *Bew*, 228 Ill. 2d at 128-29. Generally, "trial counsel's failure to file a motion does not establish incompetent representation, especially when that motion would be futile." *People v. Wilson*, 164 Ill. 2d 436, 454 (1994).

¶ 16 In *Gant*, 556 U.S._, _ 129 S. Ct. at 1715, the defendant was arrested for driving on a suspended license, and, after placing him in a patrol car, the police searched his car and recovered cocaine. After the defendant's motion to suppress the evidence was denied, he was convicted of drug offenses. The Supreme Court held that police may only search a vehicle incident to an occupant's arrest where (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe that evidence relevant to the crime of arrest may be in the vehicle. *Gant*, 556 U.S._, _ 129 S. Ct. at 1719. Based on this holding, the Supreme Court found that the search of the defendant's car was not justified as a search incident to arrest because the defendant had been handcuffed and placed in a police car before the search, and the search of the passenger compartment could not have yielded evidence of the subject crime, *i.e.*, driving with a suspended license.

¶ 17 Unlike *Gant*, the present defendant immediately walked away from the car after he had been pulled over for running a stop sign. A magazine loaded with live ammunition was recovered from a pat-down search of defendant while a second person was still in the car as a passenger. The live ammunition on defendant in conjunction with another person in the car posed a great risk to the officers' safety.

¶ 18 We also find distinguishable the facts in *People v. Bridgewater*, 235 Ill. 2d 85, 95-96 (2009), where the Illinois Supreme Court affirmed the trial court's order granting the

defendant's motion to suppress the items (an ammunition clip and a handgun) recovered in his car because the search occurred after the defendant had been handcuffed and placed in a police car, and the police arrested him for obstructing a peace officer, not for a weapons offense. Unlike the facts in *Bridgewater*, defendant here was not locked in a police car when the police searched his car and the search came after defendant was found carrying a loaded magazine on his person while a passenger was still in the car.

¶ 19 Additionally, we find distinguishable the facts in *People v. Colyar*, 407 Ill. App. 3d 294 (2010), *appeal allowed*, No. 111835 (May 25, 2011), where the bullets and gun found in a car were suppressed. In *Colyar*, police approached a car occupied by three men and saw a bullet in plain view on the center console. The police ordered the three men out of the car, handcuffed them and detained them in the front of the car. A search of defendant revealed a bullet in his pants pocket. The police then searched the car and recovered ammunition in a plastic bag from the console and a handgun. *Colyar*, 407 Ill. App. 3d at 295-96. This court affirmed the suppression of the bullets and gun (*Colyar*, 407 Ill. App. 3d at 310), reasoning, in pertinent part, that neither the bullet seen in plain view on the car's console nor the bullet found in the defendant's pants pocket justified the search of the car because the possession of ammunition is not an offense if the person has a valid FOID card (*Colyar*, 407 Ill. App. 3d at 305).

¶ 20 Contrary to the facts and characterizations in *Colyar*, the instant case presented the police with an immediate need to protect against the danger that a readily accessible gun was in the car. As recognized in *Gant*, a police officer can search the passenger compartment of a car "when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons'." *Gant*, 129 S. Ct. at 1721, quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Furthermore, the validity of a protective

sweep search as in *Long* remains unaffected by *Gant*. See *Gant*, 129 S. Ct. at 1721 (distinguishing *Long*). Here, defendant initially attempted to flee after the police pulled him over for disobeying a stop sign. Defendant indicated he did not possess anything he "wasn't suppose[d] to have." One officer (Barajas) then found a magazine loaded with live ammunition in defendant's pocket at the same time another officer (Roth) saw a passenger in the subject car. Under the exigent circumstances, the police were justified in searching defendant's vehicle.

¶ 21 For all the foregoing reasons, we find that there is not a reasonable probability that a motion to suppress the gun would have succeeded. Accordingly, defendant's ineffective assistance of counsel claims necessarily fails.

¶ 22 Defendant next maintains that this court should vacate his conviction for UUW by a felon under indictment number 08 CR 17873 because it violates the one-act, one-crime rule. Defendant specifically maintains that the possession of the firearm required to prove the UUW by a felon charge arose from the same physical act (shooting Dion Jr.) that was required to prove the aggravated battery with a firearm charge.

¶ 23 Defendant concedes that he waived this issue for review because he did not object to the multiple convictions at trial or include the issue in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, we will review this issue under the plain error doctrine. See *People v. Lee*, 213 Ill. 2d 218, 226 (2004).

¶ 24 The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). In applying the rule, a court must first determine whether a defendant's conduct consisted of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). An "act" is an overt or outward manifestation that will support a different offense. *King*, 66 Ill. 2d at 566. Whether a conviction must be

vacated under the one-act, one-crime rule is a question of law reviewed *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 25 Here, the record shows that defendant's conduct consisted of multiple, distinct acts. Defendant drove to 1648 West Maypole Avenue, parked his girlfriend's vehicle, shot Dion Jr. with a firearm, and then fled the scene with the firearm. All of the nine millimeter cartridges found at the scene were fired from the gun recovered in defendant's possession a few days later. Therefore, the State presented sufficient evidence that defendant committed multiple acts where he transported the firearm to the scene of the shooting, fired the gun, and then transported it from the scene. See *People v. Dawson*, 403 Ill. App. 3d 499, 513 (2010) (finding transporting a weapon in a vehicle and discharging a weapon two distinct acts).

¶ 26 Moreover, the indictment under number 08 CR 17873 charged defendant with multiple acts for aggravated battery with a firearm and UUW by a felon. The indictment specifically stated that defendant committed the offense of aggravated battery with a firearm when he "knowingly caused any injury to Dion Johnson by means of discharging a firearm." The State alleged in a separate count that defendant committed UUW by a felon when he "knowingly possessed on or about his person any firearm." The State did not refer to the same facts when alleging the two offenses, and thus two separate convictions for distinct acts were properly entered.

¶ 27 In reaching this conclusion, we find *People v. Crespo*, 203 Ill. 2d 335 (2001) and *Ball v. United States*, 470 U.S. 856 (1985), relied on by defendant, distinguishable from this case. In *Crespo*, 203 Ill. 2d at 345, the court reversed the defendant's multiple convictions where the indictment did not show that the State intended to treat the defendant's conduct as multiple acts. In *Ball*, 470 U.S. at 862, the Supreme Court determined that Congress did not intend to subject felons to two convictions where proof of illegal receipt of a firearm necessarily includes proof of

illegal possession of that weapon. Here, however, defendant's convictions arose from separate acts, *i.e.*, shooting Dion Jr. and transporting the firearm, and the State charged defendant's offenses as separate distinct acts.

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 29 Affirmed.