

2011 IL App (1st) 100266-U

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Third Division
November 16, 2011

No. 1-10-0266

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.)	08 CR 19131
)	
DWAYNE WEEMS,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

- ¶ 1 *HELD:* When the State presents only hearsay evidence to prove an element of the crime charged, the failure to object to the evidence shows ineffective assistance of counsel.
- ¶ 2 Following a bench trial, the trial court found the defendant, Dwayne Weems, guilty of aggravated unlawful use of a weapon (AUUW). On appeal, Weems points out that only hearsay evidence, to which his attorney did not object, supported the finding that he did not

reside on the property where police said they saw him holding a gun. He asks this court to reverse the conviction due to insufficiency of the evidence and because the AUUW statute violates the second amendment of the Constitution of the United States. If this court finds the evidence sufficient and the statute constitutional, he asks the court to remand for a retrial either because the trial court committed plain error when it based the conviction on hearsay, or because his counsel provided ineffective assistance when he failed to object to the hearsay. We reverse the conviction and remand for a retrial due to the ineffective assistance of counsel.

¶ 3

BACKGROUND

¶ 4

On July 11, 2008, Eveny Gunn went to Dwayne Billingsley's home. Outside the home, she talked with a number of persons from the neighborhood, including Weems. Billingsley got into a fight with Joshua Hines. When Hines's friend, Darrell Jones, pulled out a gun, Gunn called police and Billingsley left. Police arrived and one officer told the men to come over to the gate around Billingsley's property. A policeman picked up a gun from the porch step. The police arrested Weems.

¶ 5

Prosecutors charged Weems with six counts of AUUW. In the first three counts, prosecutors alleged that Weems carried a firearm when he was not in his own abode; in the last three counts, they charged that Weems carried the firearm on a public way. For counts one and four, prosecutors added that the firearm was loaded and accessible; for counts two and five, the prosecutors added that Weems had no firearm owner's identification card; and for counts three and six, they added that Weems was under 21 years old.

¶ 6 At the trial, held in November 2009, Sergeant John Sanchez testified that he and several other police officers responded to Gunn's call. He saw Weems sitting on a porch, and he told Weems to stand up. Sanchez testified that he saw Weems drop a gun onto the step. Sanchez picked up the gun and arrested Weems. Police found the gun loaded. The prosecution elicited this further testimony:

"Q Now, did you determine whether the Defendant lived at that address?

A Yes. The officers found his address not to be that address that he lived at.

Q Actually upon arrest, it was determined that he had lived at
3457 West 84th Place?

A Yes ma'am, I believe it's true."

¶ 7 Sanchez also testified that at the time of the arrest, Weems was not yet 21 years old. On cross-examination, Sanchez admitted that Weems made no statements to him. The State rested.

¶ 8 Gunn testified that she saw Jones put the gun on the step where police found it. She told police at the scene that the gun belonged to Jones. Gunn did not see Weems with the gun.

¶ 9 Billingsley testified about the fight. Cross examination included the following testimony:

"Q And did Dwayne live at your house?

A Yes, he was staying there.

* * *

Q Is he still living with you?

A No.

Q When did he move out?

A July – I want to say between December and January."

¶ 10 Weems testified that he sat on the back porch, not the front porch where most of the visitors gathered, when police arrived. The first officer to arrive told the men gathered outside to come to the gate, but Weems stayed on the back porch. After searching some of the men, an officer noticed Weems and told him to join the others at the gate. As Weems walked down the steps, an officer picked up a gun from the bottom step. Weems had not noticed the gun before the officer picked it up. Weems did not testify about where he lived at the time of the incident.

¶ 11 The trial court found Gunn, Weems and Billingsley not credible and Sanchez credible, so the court found Weems guilty on four counts of AUUW. The court found that Weems was under 21, and he possessed the loaded, accessible gun on a public street, not at his home. The court held that the State failed to present any evidence about a firearm owner's identification card. Thus, the court found Weems guilty on counts one, three, four and six, but not guilty on the two firearm owner's identification card counts, counts two and five.

¶ 12 The trial court denied Weems's motion for a new trial. According to the presentence investigation report, Weems had not graduated from high school and he had no job. Defense counsel did not seek to correct the report. In mitigation, counsel said Weems had a high

school diploma and a job in the roofing business. The court sentenced Weems to one year in prison, on count one, for carrying a loaded weapon not at his home. The court entered no sentence on counts three, four and six, despite its finding of guilt on those counts. Weems now appeals.

¶ 13

ANALYSIS

¶ 14

On appeal, Weems argues that this court should reverse his conviction without remand on two separate grounds: the prosecution failed to prove the crime charged, and the AUUW statute violates the second amendment of the United States Constitution. In the alternative, if we reject both of his arguments for outright reversal, Weems asks us to reverse the conviction and remand for a new trial because he received ineffective assistance of counsel.

¶ 15

Sufficiency of the Evidence

¶ 16

Weems argues first that the evidence does not prove that he committed AUUW, because the State did not prove that Weems was not on his own land or in his own abode when he had the gun. We will not reverse a conviction for insufficient evidence if any rational trier of fact could find that the State proved all the elements of the crime beyond a reasonable doubt. *People v. Davison*, 233 Ill. 2d 30, 43 (2009).

¶ 17

To prove the AUUW charged in count one, the count on which the court entered judgment, the State needed to show that Weems (1) carried on or about his person (2) a loaded and accessible firearm (3) when he was not "on his or her land or in his or her abode." 720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) (West 2008).

¶ 18 Weems does not contest evidence that police found the gun loaded and accessible. Neither does he appeal on the basis of the trial court's credibility determination, which supports the finding that Weems held the gun. He argues only that the evidence does not show that he was away from home when police found him with the gun. Sanchez testified that "officers found [the] address [of the incident] not to be that address that he lived at." While this testimony is hearsay (see *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990)), the court may treat such evidence as probative when the defendant fails to object. *People v. Akis*, 63 Ill. 2d 296, 299 (1976).

¶ 19 Weems points out that Sanchez testified, somewhat equivocally, that he "believe[d] it's true" that Weems lived at 3457 West 84th Place. However, the State need not prove where Weems lived to obtain a conviction. The State needed to prove only that Weems did not live at Billingsley's home. Sanchez did not equivocate when he related the hearsay evidence that Weems did not live at Billingsley's home. The evidence sufficiently supports the conviction entered on count one.

¶ 20 **Constitutionality of AUUW**

¶ 21 Weems also asks this court to reverse the judgment here because the AUUW statute violates the second amendment of the Constitution of the United States. U.S. Const., amend. II. This division held that the AUUW statute does not violate the second amendment. *People v. Aguilar*, 408 Ill. App. 3d 136, 146 (2011), *pet. for leave to appeal allowed*, No. 112116 (Ill. May 25, 2011). We find Weems's arguments here effectively indistinguishable from the arguments we rejected in *Aguilar*. Following *Aguilar*, we find that the purported

720 ILCS 5/24-1.6 (a)(1) (West 2008). To prove Weems guilty on counts three or six, the State needed to prove that Weems was under 21 years of age at the time of the incident. We cannot see any strategic purpose for counsel's failure to object to the hearsay evidence the State used to prove two of the elements of the crimes charged. See *McMillin*, 352 Ill. App. 3d at 344-46. The court sentenced Weems on count one, one of the counts proven in part by hearsay evidence. Thus counsel committed unprofessional errors that prejudiced Weems.

¶ 26 Counsel also unprofessionally permitted the court to find Weems guilty of possessing a gun on a public way when no evidence showed that Weems left Billingsley's private property with the gun. The State concedes that it did not prove that Weems had the gun on a public way. Defense counsel never mentioned the absence of evidence on this element at trial and counsel did not raise the issue in the motion for new trial he filed after the court found Weems guilty and before the court imposed its sentence. And the failure to correct the presentence investigation report appears to serve no strategic purpose.

¶ 27 Because counsel committed unprofessional errors that allowed the court to find Weems guilty and impose sentence on him for AUUW, when only hearsay evidence supported a finding that the State proved one of the essential elements of the crime, we reverse the conviction and remand for a new trial.

¶ 28 Double Jeopardy

¶ 29 The trial court found Weems not guilty on counts two and five, concerning lack of a firearm owner's identification card, so the State cannot resurrect those counts on remand. *Burks v. United States*, 437 U.S.1, 7 (1978). The State concedes that it did not present

sufficient evidence to prove that Weems had the gun on a public way, so double jeopardy principles forbid further prosecution on counts four and six. See *People v. Taylor*, 76 Ill. 2d 289, 309 (1979). Only hearsay evidence supports the convictions on counts one and three, but that evidence suffices to permit retrial on those counts. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995).

¶ 30

CONCLUSION

¶ 31

The prosecution presented sufficient evidence to support Weems's conviction for possessing a loaded, accessible gun when he was not on his property and when he was not yet 21 years old. However, the evidence does not sufficiently support the convictions for possessing a gun on a public way. Defense counsel provided ineffective assistance, especially in that counsel failed to object to hearsay evidence used to prove an element of the crime for which the court imposed sentence. Therefore, we reverse the judgment entered on count one of the charges, and remand for retrial limited to the charges that Weems possessed a gun that was loaded and accessible when he was not in his abode or on his property, and that he possessed a gun when he was under 21 years old and not in his abode or on his property.

¶ 32

Reversed and remanded.