

2012 IL App (1st) 110667-U

SECOND DIVISION
September 18, 2012

No. 1-11-0667

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.)	No. 09 CR 11652
)	
RAYMOND ZEIGLER,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for being an armed habitual criminal is affirmed where the evidence was sufficient to allow the trial court to find that defendant had constructive possession of the gun recovered from the alley, and the armed habitual criminal statute does not violate the *ex post facto* clauses of the United States and Illinois constitutions.

¶ 2 Following a bench trial, defendant Raymond Zeigler was convicted of being an armed habitual criminal and was sentenced to 12 years' imprisonment. On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt because the evidence did not establish that he had possession of the gun police recovered 30 to 40 feet away from him in an

alley. Defendant also contends the armed habitual criminal statute, as applied to him, violates the *ex post facto* clauses of the United States and Illinois constitutions because both of his qualifying convictions occurred prior to the effective date of the statute. We affirm.

¶ 3 Defendant was charged with armed robbery, being an armed habitual criminal, aggravated unlawful restraint, two counts of unlawful use of a weapon by a felon, and four counts of aggravated unlawful use of a weapon. At trial, Gianni Ferrell testified that about 2 a.m. on June 4, 2009, he was at the corner of Cicero Avenue and Flournoy Street walking to the train station when defendant approached him and grabbed his arm. Ferrell hit defendant's arm and asked what he was doing. Defendant tried to get Ferrell to enter an alley, but Ferrell refused. Defendant then told Ferrell to give him anything he had. Ferrell responded that he only had a cell phone and a bus card. Defendant pointed a gun at Ferrell's face, grabbed Ferrell's Motorola cell phone, and walked away. Defendant's gun was small and black with a brown handle. No one else was in the area at the time of this incident.

¶ 4 A few minutes later, Ferrell waved down two police officers in a vehicle. Ferrell pointed out defendant, who had walked half a block up the street, to the police. The police arrested defendant, and during a show-up, Ferrell identified defendant as the man who had taken his cell phone. Ferrell's cell phone was subsequently returned to him at the police station.

¶ 5 Chicago police officer Julio Ruiz testified that he was driving his police vehicle on Cicero Avenue with his partner, Officer Tyrone Gamble, when Ferrell waved them down and said he had just been robbed of his cell phone by a guy with a black "deuce deuce." Officer Ruiz explained that "deuce deuce" is slang for a .22-caliber gun. Ferrell pointed down the street at defendant and told police "[t]hat's that guy over there." The officers approached defendant as he was walking on Flournoy Street. Officer Gamble grabbed defendant, put him against a fence, and searched him. Officer Gamble then told Officer Ruiz that he saw defendant motioning his

hand towards the alley while he was walking. Officer Ruiz went to the alley, which opened onto Flournoy Street, and found a .22-caliber gun and a Motorola cell phone matching Ferrell's description lying next to each other. The gun and phone were recovered approximately 30 to 40 feet from the location where defendant was detained. The gun was a black .22-caliber Beretta, fully loaded with six bullets in the clip and one in the chamber. Ferrell identified the phone as his. Officer Ruiz then showed him the gun, and Ferrell replied "[t]hat's the gun that he had." During a show-up, Ferrell identified defendant, stating "[t]hat's the guy." Officer Ruiz acknowledged that when he first saw defendant walking on Flournoy Street, he did not see anything in defendant's hands. Neither the gun nor the cell phone were analyzed for fingerprints.

¶ 6 Chicago police officer Tyrone Gamble testified that Ferrell approached the officers in their car and said he had been robbed of his cell phone at gunpoint, then pointed out defendant as the offender. When defendant saw the police car, he continued walking on Flournoy Street, and Officer Gamble saw defendant "toss something." Officer Gamble then got out of the police car, grabbed defendant, and told Officer Ruiz that defendant dropped something by the alley. Officer Ruiz went to that alley and recovered a black handgun and a cell phone from the same area where Officer Gamble saw defendant drop "something." Officer Gamble testified that the only people in the area at this time were the two officers, Ferrell and defendant.

¶ 7 The parties stipulated that defendant had prior convictions for armed robbery under case number 99-CR-25044, and aggravated discharge of a firearm under case number 94-CR-1920.

¶ 8 The trial court summarized the evidence, noting the police detained defendant and "found a gun and some other property nearby." The court explained that it was not certain about the exact nature of what occurred between defendant and Ferrell, and therefore, gave defendant the benefit of the doubt. Accordingly, the court acquitted defendant of the charges of armed robbery and unlawful restraint. The court expressly stated it believed defendant "was in possession of the

gun that was found right near him." On that basis, the trial court found defendant guilty of being an armed habitual criminal, and the unlawful use of a weapon charges. The court merged all of the charges into the armed habitual criminal offense, and sentenced defendant to a term of 12 years' imprisonment.

¶ 9 On appeal, defendant first contends the State failed to prove him guilty beyond a reasonable doubt of being an armed habitual criminal because the evidence did not establish that he had possession of the gun police recovered 30 to 40 feet away from him in an alley. Defendant argues the police never saw him in possession of the gun, and merely saw him drop an unknown item to the ground prior to his arrest. Defendant further argues that he did not have control over the area of the alley where the gun was recovered, and therefore, the trial court could not infer that he had constructive possession of the gun.

¶ 10 When defendant argues the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). This standard applies whether the evidence is direct or circumstantial. *Id.* at 281. A criminal conviction will not be reversed based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). In a bench trial, the trial court, sitting as the trier of fact, is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). In weighing the evidence, the fact finder is not required to disregard the inferences that naturally flow from the evidence. *Jackson*, 232 Ill. 2d at 281. This court is prohibited from substituting its

judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *Id.* at 280-81.

¶ 11 To sustain a conviction for being an armed habitual criminal in this case, the State was required to prove that defendant possessed any firearm, and that he had two or more prior convictions for any of the felonies enumerated in the statute. 720 ILCS 5/24-1.7 (West 2008); *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010). Here, it is undisputed that defendant's prior convictions for armed robbery and aggravated discharge of a firearm are included in the statute's list of felonies that satisfy this element of the offense. Therefore, the only element at issue is whether defendant had constructive possession of the gun recovered from the alley.

¶ 12 Where defendant is not found in actual physical possession of the gun, the State must establish that he had constructive possession of the weapon. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Constructive possession exists where defendant had knowledge of the presence of the firearm and had immediate and exclusive control over the location where the gun was found. *Id.* Constructive possession may be inferred from the evidence by the trier of fact and is often established by entirely circumstantial evidence. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Knowledge can be established by evidence of defendant's acts or conduct, from which it can be inferred that he knew the gun existed in the location where it was found. *Spencer*, 2012 IL App (1st) 102094, ¶17. Such conduct includes the gestures or movements made by defendant that suggest an effort to conceal the firearm. *Nesbit*, 398 Ill. App. 3d at 209.

¶ 13 Here, we find the evidence was sufficient to allow the trial court to infer that defendant knowingly possessed the handgun recovered from the alley. Ferrell testified that defendant held a small black gun with a brown handle pointed at Ferrell's face, grabbed Ferrell's Motorola cell phone, and walked away. A few minutes later, Ferrell told police that he had been robbed of his cell phone by a guy with a black "deuce deuce," which meant a .22-caliber gun, and pointed

down the street identifying defendant as the gunman. Officer Gamble testified that he saw defendant "toss something" as he walked down Flournoy Street, and told Officer Ruiz that defendant dropped something by the alley. Officer Ruiz then went to that alley, which opened onto Flournoy Street, and from the same area where Officer Gamble saw defendant drop something, he found a fully loaded black .22-caliber gun and a Motorola cell phone lying next to each other on the ground. The gun and cell phone were recovered just 30 to 40 feet from the spot where defendant was detained. Ferrell identified the gun recovered from the alley as the same gun defendant pointed at his face. Ferrell also identified the phone recovered from the alley as his phone, and identified defendant as the offender. Ferrell and Officer Gamble both testified that no one else was in the area at the time of this incident.

¶ 14 Sitting as the trier of fact, it was the trial court's responsibility to weigh this evidence and draw reasonable inferences from the evidence. The trial court expressly stated that it believed defendant "was in possession of the gun that was found right near him." Defendant's conduct of tossing something as he walked past the alley suggests he was attempting to conceal or dispose of the gun and cell phone prior to being stopped by the police. Based on this conduct, the court was able to infer that defendant had knowledge of the gun recovered from the alley. Furthermore, the testimony from both Ferrell and Officer Gamble that no one else was in the area at the time of this incident allowed the trial court to infer that defendant had immediate and exclusive control over that area of the alley at this specific point in time. The evidence that the gun and Ferrell's cell phone were recovered together, and just 30 to 40 feet from the spot where defendant was detained, also supported the inference that defendant possessed that gun as the court could reasonably find that defendant tossed the items together as he walked past the alley. In addition, Ferrell's identification of the gun recovered from the alley as the same gun used by defendant further supported the trial court's finding that defendant had constructive possession of that gun.

Accordingly, we find the State presented sufficient evidence to allow the trial court to conclude that defendant had constructive possession of the gun and was proven guilty of being an armed habitual criminal, and we have no basis to disturb that determination.

¶ 15 Defendant next contends that the armed habitual criminal statute, as applied to him, violates the *ex post facto* clauses of the United States and Illinois constitutions because both of his qualifying prior convictions, which are an element of the offense, occurred before the effective date of the statute. The armed habitual criminal statute became effective August 2, 2005. 720 ILCS 5/24-1.7 (West 2008). Defendant's prior convictions are for a 1999 armed robbery, and a 1994 aggravated discharge of a firearm. Defendant claims he is being punished for conduct which predated the existence of the statute.

¶ 16 Defendant acknowledges that this court has previously rejected the same argument he raises here. See *People v. Coleman*, 409 Ill. App. 3d 869, 879-80 (2011); *People v. Adams*, 404 Ill. App. 3d 405, 413 (2010); *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009); *People v. Leonard*, 391 Ill. App. 3d 926, 931-32 (2009). See also *People v. Ross*, 407 Ill. App. 3d 931, 943-45 (2011); *People v. Robbin Davis*, 405 Ill. App. 3d 585, 596 (2010). He argues, however, that these decisions should not be followed because our supreme court's decision in *People v. Dunigan*, 165 Ill. 2d 235 (1995), dictates a different result. In *Dunigan*, the court held that the Habitual Criminal Act (the Act) (720 ILCS 5/33B-1 *et seq.* (West 2008)) did not violate *ex post facto* principles because the defendant's prior convictions were only used to enhance the sentence for his most recent offense. *Dunigan*, 165 Ill. 2d at 240-43. The court found that the Act does not punish a defendant again for his prior convictions, and noted that the prior convictions are not elements of the most recent felony offense. *Id.* at 242.

¶ 17 Numerous cases have considered and rejected the exact argument defendant presents here, finding that *Dunigan* does not change this court's previous conclusion that, under the armed

habitual criminal statute, defendant is not being punished again for his prior convictions, but instead, is being punished only for his new offense; thus, the statute does not violate *ex post facto* principles. See *People v. Black*, 2012 IL App (1st) 110055, ¶¶ 20-22; *People v. Tolentino*, 409 Ill. App. 3d 598, 608-09 (2011); *Coleman*, 409 Ill. App. 3d at 879-80; *People v. Fred Davis*, 408 Ill. App. 3d 747, 751-52 (2011); *People v. Thomas*, 407 Ill. App. 3d 136, 141-42 (2011); *Bailey*, 396 Ill. App. 3d at 464; *Leonard*, 391 Ill. App. 3d at 932. We decline to depart from our earlier decisions and find that the armed habitual criminal statute does not violate the *ex post facto* clauses of our federal or state constitutions.

¶ 18 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.